

Public guideline: Conflict of interest

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Notice

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This national Engineers Canada paper was prepared by the Canadian Engineering Qualifications Board (CEQB) and provides guidance to regulators in consultation with them. Readers are encouraged to consult their regulators' related engineering acts, regulations, and bylaws in conjunction with this Engineers Canada paper.

About Engineers Canada

Engineers Canada is the national organization of the provincial and territorial associations that regulate the practice of engineering in Canada and license the country's 295,000 members of the engineering profession.

About the Canadian Engineering Qualifications Board

CEQB is a committee of the Engineers Canada Board and is a volunteer-based organization that provides national leadership and recommendations to regulators on the practice of engineering in Canada. CEQB develops guidelines and Engineers Canada papers for regulators and the public that enable the assessment of engineering qualifications, facilitate the mobility of engineers, and foster excellence in engineering practice and regulation.

About Equity, Diversity, and Inclusion

By its nature, engineering is a collaborative profession. Engineers collaborate with individuals from diverse backgrounds to fulfil their duties, tasks, and professional responsibilities. Although we collectively hold the responsibility of culture change, engineers are not expected to tackle these issues independently. Engineers can, and are encouraged to, seek out the expertise of Equity, Diversity, and Inclusion (EDI) professionals, as well as individuals who have expertise in culture change and justice.

1 Introduction

Engineers must be aware of conflicts of interest and how to avoid or manage them. This Model Guide will introduce seven key types of interests and three important aspects of conflicts that can arise and that the professional needs to be aware of in their work and engineering practice. The seven key types of interest introduced are;

- »individual/personal;
- »client;
- »professional;
- »employer;
- »organizational;
- »profession;
- »public;
- »recipients of engineering services; and
- »owners and relevant authorities.

The three important aspects of conflict introduced are:

- »actual;
- »potential; and
- »perceived.

Avoiding actual, potential, and perceived conflicts of interest is fundamental to ensuring the highest levels of integrity and public trust.

This guide was developed to help individual engineers manage their practice with respect to conflicts of interest. It includes an expanded definition of conflicts of interest and information on how to recognize, avoid and manage them. It concludes with examples illustrating some of the types of conflicts of interest that engineers may face .

2 Conflict of interest

The introduction listed seven interests and three conflicts that will now be explored. It must be remembered that although the focus of this document is on the engineer/client conflict of interest, the conflict may trigger a number of other consequences resulting in conflicts with the other five interests such as professional, employer, organizational, the profession or primarily the public.

The Engineers Canada Code of Ethics states that engineers must “Act as faithful agents of their clients or employers, maintain confidentiality, and avoid conflicts of interest;” As professionals, engineers must act to maintain the trust of each client individually and of the public collectively. When conflicts of interest exist and are not properly managed, they lead the public to question the honesty and trustworthiness of engineers. The appearance of a conflict of interest is as detrimental to the profession’s honour, dignity, and credibility as is a real conflict of interest. In addition, serious mismanagement of conflicts of interest can lead to findings of professional misconduct. For this reason, all potential conflicts of interest must be properly declared and managed.

Conflicts of interest are not restricted to individuals only. Organizational conflicts of interest may also exist. For example, if a company provides two different services to a client that have conflicting interests or appear objectionable, such as supplying manufacturing parts and participating on a selection committee comparing parts manufacturers, then an organizational conflict of interest exists. In the same way that individuals must guard against conflicts of interest, organizations should also have procedures to identify, avoid, and manage them.

The secondary interests may not be wrong *per se*, but they can raise public doubts and suspicions about the integrity and impartiality of professionals. Conflicts of interest become objectionable when the secondary interests are believed to have influence over the decisions regarding the primary interests. The “conflict” in a conflict of interest exists whether or not the engineer is actually influenced by the secondary interest. It exists if the circumstances are reasonably believed to create a risk that actions may be unduly influenced by secondary interests.

Conflicts of interest arise when there is an actual or perceived risk that an engineer’s actions for one client or the public interest will be materially and adversely affected by another client’s interest or by a personal interest. [1]

Potential conflicts of interest often arise in situations where engineers:

- »work for more than one client on the same project or interrelated projects;
- »leave organizations to join a competitor, or start their own firms;
- »participate in bid selection where family members are bidding;
- »are involved in hiring decisions regarding family members; or
- »own personal property or have business interests that may be affected by their work.

3 How to manage conflicts of interest

The requirements for successfully managing conflicts of interest are quite basic: be aware of obligations, exercise good judgment, and effectively communicate and document the decisions made and actions taken when dealing with conflicts of interest. [2] Although all engineers would prefer to avoid all conflicts of interest, it is likely that some will arise. In those cases, it is important to have an effective procedure for managing them.

The first step is to have a procedure to look for and recognize conflicts of interest. These 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. [3]

Therefore, each new potential client or work activity should be considered from a conflict of interest point of view. Individuals and organizations should have processes in place to facilitate this. The first series of questions to ask is:

- »Who is the client?
- »What am I being asked to do?
- »Who could be affected by this work?

With this information, it is now possible to ask more detailed questions:

- »Are there current clients whose interests are related or in conflict?
- »Is there current or past work that is related or in conflict?
- »Are there personal or family ties to the client or anyone affected by the client's work?

When answering these questions, it is important to look at them from different perspectives: from the client's perspective, from the public's perspective, from the perspective of other clients, and from the perspective of the organization overall.

Some questions that can help identify a personal conflict of interest include:

- »What is the client's interest?
- »What is my interest?
- »Will maximizing my interest negatively affect the client's interest?
- »Will I always be able to place the interests of my client first?
- »Is there potential for a falling out with the client in connection with the matter?

Every time that a potential conflict is identified, the engineer must then consider it in greater detail to determine if the conflict could lead to a substantial risk that the duty of due diligence owed to the client would be affected. The specific questions to examine are:

- »What type of potential conflict exists?
- »Is there a risk of disclosing or misusing confidential information that is either already in-house or that would be obtained through the new client?
- »Is there a risk of this work being undermined or being inconsistent with any other work (and vice versa)?
- »Would the personal interest of any individual or of the organization as a whole affect the performance of this new work?

Once the answers to these questions are known, then it is possible to decide how to act. There are four possible actions that can be taken:

1. Proceed with the work. After analysis, if the engineer and organization agree that there is no potential conflict of interest, the work can proceed. It is wise to document this decision and the information that was considered in arriving at this conclusion.
2. Proceed with the work and erect any necessary confidentiality screens. This could be, for example, between the manufacturing and consulting arms of a company. Note that this course of action is only suitable for professional/professional conflicts. It is not possible to effectively create confidentiality screens in personal situations (e.g. when a spouse is evaluating their partner's bid).
3. Proceed with the work after having informed the client(s) (both new and existing, if applicable) and obtained consent. This is often the simplest and most effective way to deal with potential conflicts of interest. Talk to all parties about the identified circumstances that could lead them to question the engineer's judgment. In most cases, there will either be no perceived conflict (i.e. the parties are willing to accept the situation) or steps can be taken to eliminate the possibility of one occurring. [4] By obtaining the agreement of all interested parties that there is no conflict of interest, engineers reduce the possibility of litigation and charges of professional misconduct. If agreement cannot be found, engineers have no option but to withdraw their services, thereby avoiding an embarrassing investment in services by clients and eliminating the possibility of costly litigation. [5] In either case, the process should be documented; from the engineer's analysis to the conclusion.
4. Do not proceed with the work. In some circumstances it will be clear that a conflict would likely arise if the work were undertaken. In these cases it is best to not accept the work. Engineers owe a duty of due diligence to their clients and to the public, and if this cannot be provided, the work should be declined or not continued.

Where the decision is made to continue with work (cases 1, 2 and 3) it is important to remain attentive to any changes in the work that would have affected the original decision. It may be necessary to re-analyze the potential for a conflict of interest as the work proceeds.

It is critical for engineers to have clear principles to apply and rules to follow when they assess whether or not a conflict exists. Assessing possible conflicts of interest should be a regular part of the practice of

engineering.

4 Examples

The following examples illustrate some of the conflicts of interest that engineers may face when providing engineering services or products. All examples are drawn from PEO's "Professional Engineering Practice" guideline of January 2012.

Case A

[6]

Engineers can most often become involved in conflicts of interest when they are confronted with the possibility of working for more than one client on the same project.

For example, a land owner hires an engineer to carry out a planning study regarding the development of a piece of land. The engineer prepares the report, time passes, and the developer does not request or need any further information from the engineer. The engineer is paid for all the work done. The municipality in which the development exists is in need of an engineering opinion that involves, among other things, this same land. It therefore contacts the engineer who prepared the report for the developer because of the engineer's expertise in the type of work and previous experience with the municipality. The engineer is now faced with the problem of possibly working for two different parties, each of whom is involved with the same issue. What should the engineer do?

Before accepting an assignment from the second party, the engineer must recognize there is a potential conflict of interest. A prudent engineer will explain to the municipality's representative that a report was prepared for one of the land developers. The municipality might well deem this to be a conflict and select another engineer for the assignment, thereby ending the potential conflict. Alternatively, the municipality could decide there is no conflict and be willing to continue with the engineer. However, this does not resolve the engineer's potential conflict, because the developer, who is the first client, is not party to this decision. The engineer should advise the municipality that the assignment will be accepted only if the developer agrees in writing that there is no conflict. Once that written agreement is obtained, the second assignment can be accepted. If no waiver is provided, the municipality may agree to retain the engineer generally but obtain a different one for this specific land owner.

Case B

[7]

In some circumstances, an engineer might be requested by one client to provide expert opinion against another client for whom the engineer had regularly provided services in the past. The dispute does not involve any services provided previously by the engineer, but is simply a case of one client retaining the engineer on a matter that involves another previous client on the other side. The engineer has no previous knowledge of the issue. Clearly, there is no conflict of interest in this example, but there is an important business decision for the engineer to deal with.

Case C

[8]

This case illustrates a conflict of interest that might occur in circumstances involving a situation in which engineers are privy to privileged or confidential information.

Engineering firm ABC is retained to investigate the collapse of a large warehouse on behalf of the contractor who constructed it. A senior engineer employed by ABC is assigned to this project to work closely with the contractor's lawyer and chief engineer. The owners of the warehouse also retain an engineering expert through their lawyer. This engineer is employed by XYZ Engineering and works closely with the owner's lawyer and building manager.

During litigation investigations, ABC's senior engineer is assisted by a junior engineer who carries out calculations, reviews drawings, and accompanies the senior engineer at the occasional meeting with the contractor's lawyer and chief engineer. Both experts prepare reports, and litigation drags out for a considerable time. ABC's junior engineer is assigned to several other projects in the interim, and years pass without any further participation on the warehouse collapse.

Eventually, the junior engineer leaves ABC and is hired by XYZ to work in the bridge design department. The

contractor's lawyer learns that XYZ has the junior engineer on staff. The contractor's lawyer applies to the court seeking a declaration that the firm XYZ is ineligible to continue to act for the owners because it is now in possession of the contractor's privileged and confidential information through the junior engineer who worked on the case for the contractor.

The Supreme Court of Canada concluded that such a situation constitutes a conflict of interest in certain instances involving law firms; it has been suggested that engineering firms could be exposed to the same conditions. For instance, even though the junior engineer in this example was never assigned to the warehouse case by new employer XYZ, there is a strong presumption that confidences are shared among engineers; to the courts, this could be enough to create the appearance of a conflict of interest.

This situation is difficult to prepare for, yet can potentially be very damaging to the engineering firm's client, since years of effort could be devalued. This would leave the client very vulnerable as the trial date approached. To avoid problems, XYZ should either obtain the agreement of ABC and its relevant clients or set up at the time of hiring a formal, efficient and measured administrative separation of the junior engineer from all information and discussions on the matter. Legal advice should be sought.

Case D

[9]

Engineers are often active outside their particular engineering activities, serving with charitable groups, boards of directors, political parties, etc. From time to time, while participating in one of these non-engineering groups, circumstances will put engineers in positions where they might be required to participate in selecting or appointing an engineer to provide engineering services to the non-engineering group. This could put engineers working with the non-engineering group in a conflict of interest if their own engineering firm is in competition for this assignment. Engineers should recognize this conflict and refuse to participate in the selection process, after explaining the circumstances to the group they are serving.

Case E

[10]

Engineer M works in company XYZ that develops and sells products and services to a wide variety of customers. Friend N runs ABC Services, a small company that sells a specialized product very different from those produced by XYZ. Engineer M has ideas for improving the product sold by ABC Services and offers to assist N. Engineer M develops the design on her own time using resources made available at ABC Services by N.

Because the product is not a competitor for those sold by XYZ and M is not using XYZ resources, M's work on the product does not directly conflict with her obligations to her employer. However, it is best practice, and is legislated in some jurisdictions, for engineer M to notify her employer about these "moonlighting" activities. This is necessary so the employer can be advised of circumstances that might appear to be a conflict if discovered in the future. The best course of action is to make all parties aware of the situation at once and allow the parties the opportunity to be assured that a conflict does not exist.

5 Definitions

Client: A client generally means a person, including a public officer, corporation, association or other organization or entity, either public or private, who is rendered services by a service provider, or who consults a service provider with an intention of obtaining services from him/her.

Conflict of Interest: Conflicts of interest are real, perceived or potential situations in which the judgments and actions of individuals, institutions or other entities could be affected because of multiple or competing interests. Such competing interests can make it difficult for someone to fulfill his or her duties impartially. A reasonable perception of a conflict of interest is where a fair minded person, properly informed as to the nature of the interests held by the decision maker, might reasonably perceive that the decision maker might be influenced in the performance of his or her official duties and responsibilities. A conflict of interest exists even if no unethical or improper act results from it. A conflict of interest can create an appearance of impropriety that can undermine confidence in the person, the organization he or she represents or the profession.

Employer: An employer is a person or entity who hires another to perform a service under an express or implied agreement and has control, or the right to control, over the manner and means of performing the services.

Individual: An individual is a single human being, as distinguished from a group.

Organization: Organization means “a corporation, trust, estate, partnership, cooperative, association, or government entity or instrumentality.”

Personal/professional conflicts: A personal/professional conflict exists where the engineer’s personal interests conflict with their professional ones (for example, where the value of your own personal property is influenced by engineering work that you do).

Primary interest: This interest refers to the principal goals of the profession or activity. In this case, it is the duty of engineers to protect the public interest in the first place and to serve their clients with due diligence.

Profession: A vocation requiring knowledge of some department of learning or science.

Professional engineer: A person who is registered as a professional member in one of the twelve provincial or territorial regulators.

Professional/professional conflicts: Professional/professional conflicts are where the interests of one client conflict with another client, or where the engineer acts in two different roles for the same client (e.g. preparing bid documents and then bidding on the job).

Public: The definition of public is the whole body politic, or the aggregate of the citizens of a state, nation, or municipality. Public also can mean the community at large, without reference to the geographical limits of any corporation like a city, town, or county; the people.

Secondary interest: This interest could include things such as personal financial gain, the desire for professional advancement, the wish to help family and friends, the desire to secure future contracts, or the wish to advance a second client’s interest.

6 References

Buttigieg, Bryan J. and Thomson, Miller. “Conflict of Interest: consulting engineering need to be vigilant”. Canadian Consulting Engineer, March 2004.

PEO, Professional Engineering Practice, January 2012.

Federation of Law Societies of Canada, Report on Conflicts of Interest, November 21, 2011.

Canadian Bar Association, Task Force on Conflicts of Interest.

OIQ, “Would you be able to recognize a conflict of interest?” from PLAN, March 2011, page 42.

[1] FLSC, http://www.flsc.ca/_documents/Conflicts-of-Interest-Report-Nov-2011.pdf

[2] All content in this section is thanks to the Canadian Bar Association (CBA), Conflicts of Interest Toolkit, and in particular the analysis framework at http://www.cba.org/cba/groups/pdf/conflicts_analysis_framework.pdf

[3] Buttigieg, Bryan J. and Thomson, Miller. “Conflict of Interest: consulting engineers need to be vigilant”. Canadian Consulting Engineer, March 2004.

[4] PEO, Professional Engineering Practice, January 2012.

[5] PEO, ibid

[6] PEO, ibid

[7] PEO, ibid

[8] PEO, ibid

[9] PEO, ibid

[10] PEO, ibid