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Ethical Dilemmas for Construction Attorneys: Where the Ethical Choice and Legal Standards Diverge

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I. **INTRODUCTION**

*Ethics is knowing the difference between what you have a right to do and what is right to do.*

--Potter Stewart

Ethics is defined as: (1) a guiding philosophy; (2) a consciousness of moral importance; (3) the discipline dealing with what is good and bad and with moral duty and obligation; (4) a set of moral principles; and (5) the principles of conduct governing an individual or a group.\(^1\) Business ethics is defined as the study and examination of moral and social responsibility in relation to business practices and decision making processes in business.

A code of professional ethics generally appears when members of an “occupation” organize themselves into a “profession.”\(^2\) Such codes serve to “prescribe how professionals are to pursue their common ideal, so that each may do the best she can at minimal cost to herself and those she cares about” and to “protect each professional from certain pressures (for example, the pressure to cut corners to save money) by making it reasonably likely (and more likely than otherwise) that most other members of the profession will *not* take advantage of her good conduct.”\(^3\)

Though many laws are based on unethical behavior, not every unethical act is illegal. This paper addresses the intersection of the law and professional ethics, and aims to help legal professionals working in the construction industry to navigate their various ethical duties and obligations, and to understand how those duties are impacted by the obligations of their clients, particularly with respect to fiduciary duties and conflicts of interest.

II. **ETHICAL OBLIGATIONS OF LAWYERS**
For lawyers, the sources and ramifications of ethical obligations are clear. The relationship between lawyer and client is well recognized as a fiduciary relationship and the governing ethical standards are presented in legally binding regulations with significant consequences.

a. Sources of Ethical Standards for Lawyers

The American Bar Association adopts and publishes professional standards of legal ethics and professional responsibility that serve as models for the regulatory law governing the legal profession. Though the Model Rules are merely guidelines and hold no legally enforceable weight, they serve as a basis upon which individual states can build their governing standards. The Association’s Standing Committee on Ethics and Professional Responsibility is responsible for interpreting the professional standards of the Association, recommending amendments and clarifications, and issuing opinions interpreting the Model Rules.

The Model Rules suggest a wide range of ethical duties for the legal profession, including two, in particular, that will be the focus of this paper – the duty to avoid conflicts of interest between current, former, and prospective clients, and the fiduciary responsibilities of a lawyer to his or her clients. For example, the model rules require that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest” such as when the representation of one client would be directly adverse to another, or when there is a significant risk that the representation of one or more clients will be “materially limited” by the lawyers obligations to a another client, a former client, a third person or by the personal interest of the lawyer. Despite a conflict, however, the rules will allow an attorney to continue representation if the lawyer reasonably believes she can provide competent and diligent representation, and obtains the informed, written consent of each affected client.
Each state bar association implements its own standards of ethics and professional responsibility. The details of the individual rules vary on a state by state basis, but lawyers are generally obligated to act as fiduciaries to their clients, to protect client confidences, to avoid conflicts of interest, and to maintain standards of diligence and competence.

The treatment of conflicts is one of the primary areas of distinction in the professional codes governing the conduct of lawyers from state to state. For example, a California lawyer may not represent a client in a matter where the client’s interest potentially conflicts with the interests of another client without the informed written consent of the client, whereas in New York, a lawyer is only limited when there is a significant risk that the lawyer’s professional judgment would be affected or if the representation would involve the lawyer representing differing interests. Texas handles conflicts similarly to New York and the Model Rules, adding provisions to protect former clients by preventing lawyers from accepting work on a matter adverse to the former client’s interests that questions the validity of the lawyer’s previous work, or would involve a violation of the former client’s confidences.

No matter the state, however, a lawyer’s code of ethics is often prescribed by the state legislature, courts, or, such as in the case of California, the state bar. The rules and obligations of the profession are generally straightforward, though their application may raise a number of questions under the myriad of factual scenarios that might arise. Across the board, lawyers know that they are fiduciaries to their clients, and understand the breadth of duties that that relationship imposes upon their representation.

Lawyers are also required by the Model Rules and state ethical codes to provide competent representation to clients. Competent representation is defined under the model rules to require “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the
representation.” Several state ethical codes, including California, New York and Texas, further require that to comply with the duty of competence a lawyer cannot handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. These standards are intended to protect the public as well as the image of the profession. A lawyer’s failure to adhere to them can result in sanctions and even disbarment.

III. ETHICAL OBLIGATIONS OF DESIGN PROFESSIONALS AND CONTRACTORS

Unlike lawyers, the vast majority of construction and design professionals do not enjoy the same clear-cut standards of ethical responsibilities. Generally, construction and design professionals owe their clients a professional duty of care, requiring them to perform their services with the same level of reasonable skill and care utilized by their industry peers. Beyond this, however, the standard becomes much more opaque. A recent Engineering News Record (ENR) article proves that unethical behavior can lead to illegal activity and arrest warrants. The owner of a firm competing for public-private partnerships, Bleu Network, oversold its capabilities and is now facing charges of fraud, unpaid wages and failure to provide workers’ compensation coverage for its employees.

a. Sources of Ethics Standards

For state-licensed construction professionals, such as engineers, architects, and in some cases, other classifications of contractors, each state maintains its own licensing board and codified ethical regulations, which often carry the force of law. Professional societies for both licensed and unlicensed professionals also publish and, in some cases, enforce their own ethical codes. As outlined below, these obligations and the consequences of their violation vary greatly by source and profession.
i. Ethical Responsibilities of Engineers

Engineers, as licensed professionals, are subject to the codified licensing regulations of the state(s) in which they are licensed. For example, California law imposes a “Code of Professional Conduct” on the public and private practice of licensed engineers.\textsuperscript{12} The included regulations require engineers (1) to comply with laws applicable to a project, (2) to disclose conflicts of interest,\textsuperscript{13} (3) to maintain information received in his or her professional capacity in confidence, (4) to refrain from misrepresenting his or her qualifications, affiliations, and scope of responsibility, and (5) to express only those opinions which are based in fact, experience or accepted engineering principles.\textsuperscript{14}

New York law prohibits engineers from “having a substantial financial interest, without the knowledge and approval of the client or employer, in any products or in the bids or earnings of any contractor, manufacturer or supplier on work for which the professional has responsibility,” or participating as a member, advisor, employee or government body in actions or deliberations regarding his or her services to be provided.\textsuperscript{15} In Texas, the conduct of engineers is governed by the Texas Engineering Practice Act.\textsuperscript{16} This Act similarly requires licensed engineers to be objective and truthful, maintain client confidences, and act as “faithful agents of their employers or clients, and mandates he or she “shall disclose a possible conflict of interest to a potential or current client or employer upon discovery of the possible conflict.”\textsuperscript{17} Unlike California, an engineer licensed in Texas or New York may only accept such employment if the potential conflict has been disclosed, in writing, to all affected parties, and the client or employer has confirmed knowledge of the conflict in writing.\textsuperscript{18}

Violations of such regulatory codes are considered “unprofessional conduct” and are grounds for disciplinary action by the relevant governing board.\textsuperscript{19} The prescribed punishment
ranges from public reproof to revocation of the state license after a hearing before the licensing board.\textsuperscript{20}

Further, members of professional societies, such as the American Society of Civil Engineers (ASCE) and the National Society of Professional Engineers (NSPE), may also be held to the ethical standards set by these organizations. For example, though there is no codified law imposing a fiduciary relationship between engineer and client or dictating the appropriate ethical response to a conflict of interest that arises in the course of an engineer’s work, the ASCE Code of Ethics requires that engineers “shall act in professional matters for each employer or client as faithful agents or trustees, and shall avoid conflicts of interest.”\textsuperscript{21} That code requires member engineers to “avoid all known or potential conflicts of interest” and to promptly notify their clients of associations, interests or circumstances that might affect their judgment or the quality of their services.\textsuperscript{22} The same code forbids engineers from accepting payment from more than one party for services on the same project, from soliciting gratuities, and from using confidential information received as a result of their position for personal gain if the action is adverse to the interest of their client, employer or the public.\textsuperscript{23} The code goes so far as to require the member engineer to advise his or her employer or client if, in their professional opinion, they believe a project will not be successful.\textsuperscript{24}

Though these rules carry no legal force, under ASCE bylaws, all ASCE members are required to comply with the ASCE Code of Ethics, and to report any observed violations.\textsuperscript{25} If a complaint of a violation is found to have merit, such that disciplinary action is appropriate, the Committee on Professional Conduct will forward its recommendations to the Board of Directors or Executive Committee for a hearing.\textsuperscript{26}
The National Society of Professional Engineers (NSPE) also publishes a Code of Ethics, which suggests that “[e]ngineers must perform under a standard of professional behavior that requires adherence to the highest principles of ethical conduct.” The code is made up of six canons: “Engineers, in the fulfillment of their professional duties, shall: (1) Hold paramount the safety, health, and welfare of the public; (2) Perform services only in areas of their competence; (3) Issue public statements only in an objective and truthful manner; (4) Act for each employer or client as faithful agents or trustees; (5) Avoid deceptive acts, and (6) Conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.” Though there is no clear enforcement procedure in place for the NSPE Code of Ethics, members are encouraged to submit anonymous factual dilemmas to the Society’s Board of Ethical Review, which publishes written opinions interpreting the facts in light of the Code.

ii. Ethical Responsibilities of Architects

Like engineers, licensed architects are also subject to state promulgated professional conduct regulations and may be involved in professional groups that publish additional ethical guidelines. Under the California Rule of Professional Conduct for architecture professionals, architects must (1) be competent, (2) abstain from willful misconduct, (3) disclose, in writing, any conflicts of interest substantial enough to influence his or her judgment, and if the client or employer objects, offer to terminate such interest or give up the project, (4) accurately represent his or her qualifications to prospective or existing clients or employers, and (5) obtain written informed consent of the client before materially changing the scope or objective of the client.

In New York, architects are held to the same standards as mentioned above with respect to engineers. They must disclose any “substantial financial interest … in any products or in the
bids or earnings of any contractor, manufacturer or supplier on work for which the professional has responsibility” and obtain the approval of their client or employer, and must not share fees with any person other than an employee, partner, associate, or subcontractor or consultant, or accept compensation from more than one party for services on the same project without fully disclosing the circumstances.\textsuperscript{32} Texas’s state code of professional conduct for architects requires that architects be competent and honest.\textsuperscript{33} Further, Texas architects must promptly disclose any conflicts of interest which “might reasonably appear to influence the Architect’s judgment in connection with the performance of a professional service and thereby jeopardize an interest of the Architect’s current or prospective client or employer.”\textsuperscript{34}

Again, like engineers, violations of these state promulgated professional standards may lead to professional discipline, including suspension or revocation of the architect’s license.\textsuperscript{35}

There are also a number of professional organizations that publish their own “codes of conduct” directed towards construction professionals. For example, the American Institute of Architects (AIA) provides the “Code of Ethics and Professional Conduct,” the contents of which it defines as “broad principles of conduct” and “specific goals toward which members should aspire.”\textsuperscript{36} The Code also includes “rules of conduct,” violations of which are subject to disciplinary action by the AIA.\textsuperscript{37} The rules include obligations (1) to undertake a project only when qualified, (2) to obtain client consent before materially altering the scope or objectives of a project, (3) to obtain fully informed consent from “all those who rely on the [architect]’s judgment” before rendering services when the architect’s professional judgment could be affected by responsibilities to another project or person, or by the architect’s own personal interest, (4) to abstain from recklessly or intentionally misleading a client as to expected results that can be achieved through use of the architect’s services, misrepresenting or misleading facts about their
professional qualifications, and knowingly making false statements of material fact, and (5) to keep confidential information that could adversely affect their client. The above rules are enforced by AIA, the repercussions for which may include penalties such as admonition, censure, suspension of membership, and termination of membership.

iii. Ethical Responsibilities of Contractors

Though some particular state agencies (such as state departments of transportation or education) that hire general contractors have published codes of ethics for use in connection with public construction jobs, no states have promulgated broader standards of professional conduct or ethics for general contractors.

Nonetheless, professional organizations of general contractors and subcontractors maintain their own professional standards of conduct. For example, the American Institute of Constructors (AIC) asks all members to commit to the AIC Constructor Code of Ethics, which requires constructors to “[1] have full regard to the public interest in fulfilling his or her responsibilities . . . [2] not engage in any deceptive practice, or in any practice which creates an unfair advantage for the Constructor or another. . . [3] not maliciously or recklessly injure or attempt to injure, whether directly or indirectly, the professional reputation of others. . . [4] ensure that when providing a service which includes advice, such advice shall be fair and unbiased. . . [5] not divulge to any person, firm, or company, information of a confidential nature acquired during the course of professional activities. . . [6] carry out responsibilities in accordance with current professional practice, so far as it lies within his or her power. . . and [7] keep informed of new thought and development in the construction process appropriate to the type and level of his or her responsibilities and [ ] support research and the educational processes associated with the
construction profession.” A violation of the AIC ethics code may result in termination or suspension of the constructor’s AIC membership.

Likewise, the Associated Builders and Contractors, Inc. (ABC) adopted a Code of Ethics for its members. Like the AIC, ABC requires that its members strive to observe the following principles in the conduct of their businesses: [1] Maintain a standard of performance that meets the owner’s expectations and fulfills the contractor’s obligations; [2] Quote only realistic prices and completion dates and perform accordingly; [3] Cooperate to the fullest extent with the architect and/or engineer, and other agents of the owner toward fulfillment of a common goal; [4] Solicit quotations only from firms with whom they are willing to do business; [5] Make all payments promptly within the terms of the contract; [6] Observe and foster the highest standards of safety and working conditions; [7] Establish realistic wage schedules for employees commensurate with their ability and their industry so that they may enjoy the dignity to which they are entitled; and, [8] Actively participate in the training of skilled craft professionals for the future welfare of the Merit Shop industry.

In addition, the ABC requires that those in its leadership positions commit to a Conflict of Interest policy. ABC’s Conflict of Interest policy requires that the leaders of the association maintain transparency in their dealings with service providers, vendors, competitors, and other leaders of the association when such dealings may conflict with their role as leaders of ABC. ABC defines a conflict of interest as any transaction or relationship that presents a conflict between an individual’s obligations to ABC and the individual’s personal, business, or other interests. So the leadership of ABC shall not act, in their leadership capacity, in ways that: (1) cause them to benefit financially from a decision they make, including indirect benefits such as to family members or businesses with which they are closely associated, or (2) otherwise raise questions about their
loyalty to ABC. In any matters where there might be a conflict between the interests of the leader and of ABC [and the group on which (s)he serves], the leader should disclose this possible conflict to the group on which (s)/he serves and recuse her/himself from voting on such matters. Furthermore, should any person, volunteer or staff, serving on such a group be aware of a potential conflict of interest that a leader fails to disclose, (s)/he must raise the issue to the attention of the entire group.  

IV. DIVERGENCE IN THE ETHICAL OBLIGATIONS OF CONSTRUCTION LAWYERS AND THEIR PROFESSIONAL CLIENTS

Many unethical acts are not illegal. For example, variations of the practice of “bid shopping” may raise ethical issues for general contractors and subcontractors, while the practice is not illegal in most states.  

Despite guidance from state regulatory authorities and professional organizations, the standards of professional ethics imposed on construction professionals are still murky. As lawyers consulting in the business decisions of construction professionals, it is important to be conscious of these obligations and how they differ from the obligations of the lawyer herself.

a. Example #1: Fiduciary Duties

It is well established that lawyers carry a fiduciary obligation to their clients as a matter of law. They are universally obligated to uphold the corresponding duties of care and loyalty by communicating regularly with their clients, performing services competently, maintaining client confidences, and avoiding conflicts of interest. Differently, and as discussed above, it is generally recognized that construction professionals owe a professional duty of care, such that they must act with the same level of skill and care as a reasonably competent professional peer would under the circumstances. However, if and when this obligation rises to a heightened duty of care or loyalty is not clear.
Construction professionals, and their lawyers, can take some level of comfort in the fact that courts are unlikely to infer fiduciary relationships upon parties to commercial contracts. A handful of jurisdictions have found that the relationships between construction and design professionals and their clients are fiduciary as a matter of law—however, this legal presumption is far from universal. Nonetheless, given the standard for defining the creation of fiduciary relationships may be factually dependent or subjectively applied, there is a risk that seemingly ordinary business transactions could give rise to fiduciary obligations.

A number of jurisdictions have recognized that fiduciary relationships can be created through the presence of specific facts that give rise to a level of trust and confidence beyond a typical arm’s length transaction. Whether a relationship between a construction professional and a client rises to the level of a fiduciary relationship may depend on a number of factors, including (1) the language of the contract between the parties, (2) the degree of discretion and control that the professional maintains over the project, (3) the discrepancy of sophistication between the parties, and (4) the presence of a relationship of trust predating the agreement between the parties.

For example, some courts have inferred a fiduciary relationship where the contract between the parties included a boilerplate provision stating that “[t]he Contractor accepts the relationship of trust and confidence established by this agreement . . . ,” while other courts have held that such standard contractual language is not “specifically negotiated” is insufficient to create a fiduciary duty absent the other factors outlined above. The other factual circumstances outlined above also play a crucial role in the determination of whether a relationship is fiduciary. The more discretion or control the construction professional has with respect to the project and the wider the gap in sophistication and depth of knowledge between the parties, the more likely the court is to infer a fiduciary relationship into the agreement. Finally, if the parties were previously engaged
in a relationship of trust or confidence, prior to the negotiation of the current agreement, the courts are, similarly, more likely to infer a higher standard of care – and the absence of any of these factors tends toward the opposite conclusion.

HYPOTHETICAL #1

The client, who owns a large apartment building located on an earthquake fault line in a major city, receives the detailed report of an engineer to the effect that the building structure is inadequate to withstand even a modest earthquake. An event of this character at the location involved occurs approximately every six years. When the quake occurs, it is extremely likely that the building will collapse with substantial loss of life. The client asks the lawyer for advice about his options. The lawyer advises the client that no current law requires the owner to report the danger to public authorities, warns the client of potential civil liability if the building collapses, and recommends that the client take prompt steps to inform tenants and reconstruct the building. The client, concluding that the costs of rebuilding are too great, decides to do nothing and directs the engineer and the lawyer to remain silent.

1. Can the lawyer keep the report confidential? Must the lawyer publically reveal the report’s findings?

2. Can the engineer keep the report confidential? Must the engineer publically reveal the report’s findings if the client chooses not to do so?

HYPOTHETICAL #1 ALTERNATE SCENARIO:

The tenants sue the client. The client employs an expert witness in structural engineering whose investigation finds additional structural defects not mentioned in the tenants’ lawsuit or the previous engineering report. Does the expert witness have the ability to keep his report confidential because of the ongoing litigation?
The above hypothetical (and alternate scenario) is taken from a text that explores the ethics of professional secrecy that Professor Robert Westley uses while teaching a Legal Profession course at Tulane University Law School. The hypothetical is offered as an illustration of the shortcomings of the ethical standards governing client confidentiality prior to the Ethics 2000 Commission amendments to Model Rule 1.6. The permissive exceptions to the duty of confidentiality now include the following:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm;\textsuperscript{53}

\ldots

Prior to the Ethics 2000 Commission amendments to Model Rule 1.6, disclosure would not be permitted in the building collapse situation because the rule required a criminal act by the client that threatens deadly harm.\textsuperscript{54} In Hypothetical #1 there is no action taken by the client at all. Moreover, the previous rule also required that the threat be “imminent,” which is also not present in the building collapse hypothetical.

The revised exceptions to confidentiality in the ethical rules governing the legal profession take away part of the focus from the potential impact on the attorney-client relationship and instead place the focus on the obligation of legal professionals to preserve and protect human life. Recommendations for change were premised on the belief that an incremental sacrifice of professional secrecy for the sake of public safety would not unduly impair the willingness of clients to confide information to their lawyers, nor severely diminish client trust in situations where lawyers inform their clients that disclosure is desirable or contemplated.

Even though the broadening of disclosure exceptions within the confidentiality rule is justly viewed as incremental since disclosure under the Model Rules is in every case permissive
and not mandatory,\textsuperscript{55} for many in the legal profession any sacrifice in professional secrecy is greeted with resistance and suspicion. Today all states and the District of Columbia permit or require a lawyer to reveal confidential client information to prevent a client’s criminal act when it is likely to result in death or substantial bodily harm. Moreover, the vast majority of jurisdictions have made disclosure mandatory when a lawyer has knowledge of a client’s ongoing crime or fraud and when further representation would assist or further the ongoing crime or fraud. Even in jurisdictions where disclosure remains permissive or is not permitted, the lawyer is nevertheless required to withdraw from representation of the criminal or fraudulent client.\textsuperscript{56}

Perhaps insufficiently considered in the movement toward reform of the ethical rules governing the legal profession is how those rules might interact with the obligations governing other professionals who work alongside lawyers as members of an organization, or impact professionals who may themselves become a lawyer’s clients. For instance, in the building collapse hypothetical we are not told sufficient facts to determine whether the architectural engineer’s report is subject to attorney-client privilege. Nevertheless, the report is clearly entitled to be treated by the lawyer as a confidential client communication under the Model Rules. If it is privileged in addition to being confidential, then the lawyer should probably not disclose the findings in the report unless the client gives informed consent, or failure to do so constitutes a crime or fraud by his client. If the report is only confidential but not privileged, then the lawyer would be permitted to disclose the findings even if the client objects, and even if the architect who wrote the report is under an obligation to the client to maintain confidentiality. Just as the architect could have no legal obligation to disclose the report and an ethical obligation to maintain confidentiality, the opposite could also be true. In other words, the architect might have a legal or ethical obligation to disclose, while the lawyer for the same client has a legal and ethical obligation
to maintain attorney-client privilege. In the latter scenario, a collision is almost inevitable: despite the lawyer’s assertion of privilege, confidentiality will certainly still be sacrificed.  

Most licensed engineers are legally required to protect the safety, health, property, and welfare of the public, notwithstanding directives given by their clients. In Louisiana, this engineer would be required in this situation to (1) clearly point out the consequences to the client of non-disclosure and (2) notify the proper authority of any observed conditions which endanger public safety, health, property and welfare.  

b. Example #2: Accepting Gifts and Amenities – Conflicts of Interest

One of the most challenging and interesting areas of ethical reasoning involving deciding where to draw the line between permissible and impermissible actions. Deciding when to accept a gift or amenity illustrates this challenge.

We all are fully cognizant that bribery in order to secure a contract or favorable amendment to an existing contract is illegal. But are there shades of gray in the context of what constitutes a bribe? For example, most people would agree that “People should not steal.” Breaking into a contractor’s equipment yard and stealing copper pipe and electrical cable is a clear violation of the principle. In contrast however, picking up a dollar bill on the street when no one is around would not be considered theft. Additionally, most people wouldn’t say that an engineer was guilty of theft because he used some management procedures and cost control spreadsheets that he had previously developed while working for a previous employer.

HYPOTHETICAL #2

Wendy was named the department manager of a large chemical plant in charge of designing and building a new chemical process unit. Wendy’s responsibilities include: forming the process unit staff, reviewing the outside engineering firm’s construction documents to assure that the plant
was designed to be safe, operable and maintainable and to commission and start-up the plant after construction.

During Wendy’s previous experience, she noticed a new type of valve and valve operator could be used in place of the more common gate valve and its operators. In every reported case, the new valve was less expensive and often gave a tighter shut off than the commonly used gate valve. Wendy convinced the engineering firm to add even more of the new type of valve and operators into the design resulting in an improvement in safety, as more flows could be shut off more quickly without chance of leakage or by-pass in an emergency.

CASE 1:

After a large number of valves had been specified and purchased, the valve salesman (Tom) visits Wendy and gives her a plastic pen with the name of Tom’s company stamped in gold. The pen is worth about $5.

1. Should Wendy accept the pen?

CASE 2:

After a large number of valves have been specified and procured, Tom offers to sponsor Wendy for membership in the local country club. Wendy is an avid golfer and has wanted to be a member of the club for some time, but has not found a sponsor. Sponsorship allows a prospective member access to apply for membership privileges. Sponsorship does not have a monetary value and does not guarantee membership in the country club.

1. Should Wendy accept Tom’s offer of sponsorship?

CASE 3:

After a large number of valves have been specified and procured, Tom invites Wendy to a seminar on the valves and a manufacturing plant tour in South America. There will be
opportunities for fishing and other recreation. Wendy’s company would have to pay for
transportation, but Tom’s company will cover all of the expenses in South America. Wendy is
sure that her manager will authorize the travel if asked, but other officers in the firm when placed
in equivalent positions, have denied such requests.

1. Should Wendy ask her manager for the authorization to take the trip?

CASE 4:

After a large number of valves have been specified and procured, Tom invites Wendy on
a fishing trip to South America covering all expenses. Wendy is sure that her manager will
authorize the travel if asked, but other officers in the firm when placed in equivalent positions,
have denied such requests.

1. Should Wendy ask her manager for the authorization to take the trip?

CASE 5:

Before Wendy’s decision to recommend any type of valve, Tom visits and offers Wendy a
fishing trip to South America if Wendy will recommend Tom’s valves. Tom’s valves are the safest
and least expensive valves.

1. What should Wendy do?

CASE 6:

Before Wendy’s decision to recommend any type of valve, Tom visits and offers Wendy a
fishing trip to South America if Wendy will recommend Tom’s valves. Tom’s valves are less safe
and more expensive than any other type of valves.

1. What should Wendy do?

VARIATION ON HYPOTHETICAL #2:
After the plant is constructed, Wendy and Tom become very good friends and socialize on many occasions at professional trade shows. They and their spouses visit each other in their homes and go fishing together on each other’s boats. Even after Wendy leaves the plant for a new job, she remains good friends with Tom.

Wendy is then invited to fly in Tom’s plane to Mexico for a vacation. Wendy never did anything to help Tom and his company, other than the initial recommendation of the valves.

1. Should Wendy accept the invitation to Mexico?

If Wendy is a licensed engineer, then she will be subject to rules regarding conflicts of interest regarding the solicitation or acceptance of gifts or gratuities. If Wendy is a licensed engineer in Louisiana, Wendy’s decisions would be measured by the following:

Licensees shall not solicit or accept, directly or indirectly, benefits of any substantial nature or significant gratuity, from any supplier of materials or equipment, or from contractors, their agents, servants or employees or from any other party dealing with the client or employer of the licensee in connection with any project on which the licensee is performing or has contracted to perform engineering or land surveying services.59

Evaluating Wendy’s decisions using the above language should allow her to accept the pen as it could not be viewed as a “significant gratuity” from Tom. However, accepting of the offer for sponsorship could be looked upon as acceptance of a benefit of a substantial nature even though it does not have a monetary value and is only an offer to be introduced. Accepting such an offer could affect Wendy’s independent judgment and could be perceived by her employer and others on the project to be a conflict of interest. Should Wendy disclose the offer to her manager? Would that be enough to accept it?

Naturally, we would all believe that the trips to South America would be a benefit of a substantial nature or a significant gratuity and require that Wendy decline the offers.
Finally, Wendy is no longer in a position with the plant to be in a conflict of interest with the acceptance of the trip to Mexico. Further she is now a long term mutual friend outside of the business world with Tom.

If Wendy is not an engineer, her behavior regarding the decisions to accept the various gifts would be judged by her employer’s code of ethical conduct, if one existed.

The Model Rules prohibit both concurrent conflicts of interest and successive conflicts of interest. Concurrent conflicts relate to situations in which (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. Conflicts of this nature under some circumstances may be waived if the lawyer is able to obtain the informed consent of all who are affected. Successive conflicts relate to the use of confidential information gained in a prior attorney-client relationship in a manner that is materially adverse to a former client. If there is a substantial relationship between the prior representation and a newly contemplated representation, the lawyer must obtain the informed consent of the former client. The existence of a potential conflict of interest will not automatically disqualify a lawyer from accepting representation of a client due to the possibility of waiver gained through informed consent. However, where it is determined that a particular conflict is both actual and cannot be waived, further representation is prohibited by the rules of ethics.

Whether a conflict may be waived or consented to by a client depends on the circumstances. When it comes to this area, the Model Rules and their comments provide general guidelines and examples, but few bright line prescriptions. The question in each case is whether the interests of multiple clients can be sufficiently reconciled to avoid adversity, to maintain loyalty to each client.
individually, and to carry out the representation without impairment of the lawyer’s ability to pursue the objectives and maintain the confidences of all parties in the common representation. There is one bright line rule, however, applicable to all representations by a lawyer: a lawyer may not limit the scope of representation so as to exclude the lawyer’s obligation to provide competent representation. It is also prohibited to for a lawyer to provide financial assistance to a client in connection with pending or contemplated litigation except for advances of court costs and litigation expenses, which need not be repaid when a lawyer is representing an indigent. On the other hand, a lawyer may accept a gift from a client if the transaction seems fair and does not raise a presumption of undue influence exerted by the lawyer over the client.

Although lawyers are now permitted to advertise their services, lawyers are not allowed to give anything of value to a person for recommending the lawyer’s services except under narrowly defined circumstances. A lawyer may pay the reasonable cost of advertisements, pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service, purchase a law practice, and enter into a reciprocal referral agreement with another lawyer or non-lawyer that is not exclusive and the existence and nature of which the client is informed. All marketing of services by lawyers is subject to the rule that such marketing may be neither false nor misleading and does entail the use of solicitations that are considered oppressive, abusive, or involve high pressure tactics.

c. Example #3: Conflicts of Interest

For lawyers, the potential for conflict typically arises in two instances – when the private interests of the lawyer conflict with his or her fiduciary duty to the client, or when the lawyer’s duties to a current, former or prospective client conflicts with his duties to another. Though the specific requirements vary from state-to-state, an attorney’s duty of loyalty to his clients always
includes a duty to avoid conflicts of interest. Generally, and under the Model Rules, a lawyer may not represent a client whose interests are materially adverse to another client, and may not conduct business transactions with clients to his benefit, unless he first receives the informed, written consent of any affected client.

In the construction context, conflicts of law generally do not refer to conflicts between two people, but instead to a situation where a professional’s personal interests conflicts with their professional interests and responsibilities. As outlined above, not all construction and design professionals enjoy guidance as to their obligations in avoiding conflicts of interest that do not rise to the level of illegality under some other source of law. For most professionals, disclosure of potential conflict is enough, however some states require that clients or employers either confirm knowledge of or actively approve continued work in light of the conflict.

d. Example #4 – Use of Disadvantaged Firm after Learning of Impropriety

Many construction projects, including federally or other government funded projects, require the use of a specific percentage of disadvantaged business enterprises on the project. Generally, the purpose of such requirement is to provide a level playing field for small, minority and woman-owned businesses and to allow for equal competition among various businesses in a non-discriminatory manner. In Texas, the purpose is to encourage and effectively promote the utilization of such disadvantaged businesses by all state agencies and to promote full and equal business opportunities for all businesses in state contracting in accordance with the goals based on the State of Texas Disparity Study. Disadvantaged businesses are “for-profit small businesses, that (1) are majority-owned and controlled by individuals that are deemed socially and economically disadvantaged; (2) are existing businesses that meet the size standards (based on average annual revenue) promulgated by the Small Business Administration; and (3) are
independent businesses.” Generally speaking, the disadvantaged business must be at least fifty-one percent (51%) owned, capitalized and controlled by a member of the identified disadvantaged group. In addition to ownership, the member of the identified group must be primarily responsible for the management and daily operations of the company.

HYPOTHETICAL #4:

Engineer A is a principal in a large consulting engineering firm specializing in civil and structural engineering. Engineer A’s firm does a large percentage of public work. Engineer A is frequently encouraged by representatives of those agencies to consider retaining the services of small, minority, or women-owned design firms as sub-consultants to the firm, particularly on public projects.

For about a year, Engineer A’s firm retained the services of Engineer B’s firm, a disadvantaged firm of the type described above, on several public and private projects. Engineer A’s firm has received much good press and other public relation benefits from retaining Engineer B’s firm. The work of Engineer B’s firm is adequate but not of a high quality. In addition, Engineer B suddenly begins charging Engineer A much higher fees in recent months, particularly after an article appeared in the local newspaper that was very complementary of Engineer A’s efforts to retain disadvantaged firms. Engineer A negotiates with Engineer B in an effort to improve the quality and relative value of Engineer B’s services. The negotiations fail and Engineer A terminate his relationship with Engineer B. Engineer B had provided engineering services to Engineer A on an ongoing public project prior to the termination.

Was it ethical for Engineer A to terminate Engineer B?

Hypothetical Number 4 is based on an actual case before the NSPE’s board of ethical review. In Case Number 92-9, the NSPE’s board of ethical review found that while the
establishment of voluntary targets or goals of retaining disadvantaged firm was not inconsistent with the Code of Ethics, the unilateral escalation of Engineer B’s fees and other charges was ethically lacking.\textsuperscript{78} The NSPE board of review also found that Engineer B had an obligation to negotiate future increases in fees and charges.\textsuperscript{79} However, the board of review did not review any of the contracts between Engineer A and Engineer B to cast judgment on the legal issues between the parties.\textsuperscript{80}

V. CONCLUSION

\textit{If ethics are poor at the top, that behavior is copied down through the organization.}

--Robert Noyce

As outlined above, the law governing the conduct of construction and design professionals may not always provide an answer sufficient to resolve every ethical dilemma that a construction professional may encounter in their practice. Legal professionals must be prepared to navigate and discuss these issues with their clients, and distinguish between business decisions and legal conflicts.

\begin{enumerate}
\item\textsuperscript{1} Dictionary.com
\item\textsuperscript{3} \textit{Id.} at 154 (emphasis in original).
\item ABA Model Rules of Professional Conduct 1.7(a).
\item ABA Model Rules of Professional Conduct 1.7(b).
\item In the interest of comprehensive brevity, this paper will include analysis of the laws of three states – California, New York, and Texas – but acknowledges that this does not represent a comprehensive survey of the laws of the fifty states.
\item Cal. Rules of Prof’l Conduct, Rule 3-310; NY CLS Rules Prof Conduct R 1.7, 1.9.
\end{enumerate}
Specifically, with respect to conflicts, the Code provides that “(1) If a licensee provides professional services for two or more clients on a project or related projects, the licensee shall disclose in writing to those clients and property owners or their authorized representatives his or her relationship to those clients. (2) If a licensee has a business association or a financial interest which may influence his or her judgment in connection with the performance of professional services, the licensee shall fully disclose in writing to his or her client(s) or employer(s) the nature of the business association or the financial interest. (3) A licensee shall not solicit or accept payments, rebates, refunds, or commissions, whether in the form of money or otherwise, from contractors or suppliers of material, systems, or equipment in return for specifying their products to a client or employer of the licensee. (4) A licensee, while engaged by a governmental agency as an officer, employee, appointee, agent, or consultant of that agency shall not engage in a professional engineering business or activity that may be subject to that licensee's direct or indirect control, inspection, review, audit, or enforcement on behalf of that agency, unless the circumstances are disclosed to and approved by that agency in writing prior to such engagement.”

14 Id. at 475(b).
15 Id. at 475(a)-(e).
16 N.Y. Comp. Codes R. & Regs. tit. 8, § 29.3.
18 Id. at §§ 137.57(c), 137.61, 137.63(b)(4). “A conflict of interest exists when an engineer accepts employment when a reasonable probability exists that the engineer's own financial, business, property, or personal interests may affect any professional judgment, decisions, or practices exercised on behalf of the client or employer.”
19 See e.g. Cal. Bus. Prof. Code § 6775(g); Cal. Code Regs. tit. 16, § 419; Tex. Occ. Code § 1001.452(a); 22 Tex. Admin. Code § 139.1, et seq.
20 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.

28 Id.

29 Id.


31 N.Y. Comp. Codes R. & Regs. tit. 8, § 29.3.

32 Id. at § 29.3(a)(5).

33 22 Tex. Admin. Code § 1.142, et seq.

34 Id. at § 1.145.


37 Id.

38 Id.

39 Id.


41 Licensing boards for certification under specific specialties (plumbing, electrical work, etc.) may provide further ethical guidelines.


44 Id.


46 Smoot v. Lund, 369 P.2d 933, 936 (Utah 1962) (“[A lawyer’s] fiduciary duty is of the highest order and he must not represent interests adverse to those of the client. It is also true that because of his professional responsibility and the confidence and trust which his client may legitimately repose in him, he must adhere to a high standard of honesty, integrity and good faith in dealing with his client. He is not permitted to take advantage of his position or superior knowledge to impose upon the client; nor to conceal facts or law, nor in any way deceive him without being held responsible therefor.”).

Vikell Investors Pac. v. Hampden, 946 P.2d 589, 596 (Colo. App. 1997) (Though an engineering-client relationship itself does not trigger a fiduciary duty, “[a] fiduciary relationship generally arises when one party has a high degree of control over the property or subject matter of another, when the benefiting party places a high level of trust and confidence in the fiduciary to look out for the beneficiary's best interest, or when one party relies on another's high degree of expertise in an area.”).


Biller Assocs. V. Peterken, 269 Conn. 716, 723-24 (2004) (refusing to find a fiduciary relationship when the parties were dealing at arm’s length and lacked “a relationship of dominance and dependence, or the parties were not engaged in a relationship of special trust and confidence.”).


Vikell Investors Pac., 946 P.2d at 597 (declining to find a fiduciary relationship when an engineer had no practical control over the client’s project and when no prior relationship of trust existed.).

ABA Model Rules of Professional Conduct R. 1.6


See, e.g. Cal. Rules of Prof'l Conduct, Rule 3-700; Tex. Disc. R. Prof. Conduct Rule 1.15.

Vikell Investors Pac., 946 P.2d at 597 (declining to find a fiduciary relationship when an engineer had no practical control over the client’s project and when no prior relationship of trust existed.).
58 La. Reg. Tit. 46, Part LXI, § 2503 (B).
59 La. Reg. Tit. 46, Part LXI, § 2507 (D).
61 ABA Model Rules of Professional Conduct R. 1.7.
64 ABA Model Rules of Professional Conduct R. 1.8(e).
65 ABA Model Rules of Professional Conduct R. 1.8, cmt. 6.
66 ABA Model Rules of Professional Conduct R. 7.2(b).
67 Id.
69 ABA Model Rules of Professional Conduct R. 1.7 and comments to R. 1.7.
70 ABA Model Rules of Professional Conduct R. 1.7.
71 Compare Cal. Code Regs. Tit. 16, § 475(b) with N.Y. Comp. Codes. R. & Regs. tit. 8 §29.3.
74 https://www.natlawreview.com/article/using-your-disadvantaged-business-to-your-advantage
75 Id.; See also, 49 C.F.R § 26.5.
76 Id. See, e.g., 49 C.F.R. § 26.5.
78 Id.
79 Id.
80 Id.