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DESIGN PROFESSIONALS' CONFLICTS OF INTERESTS

By: Eric O. Pempus, FAIA, Esq., NCARB
DesignPro Insurance Group

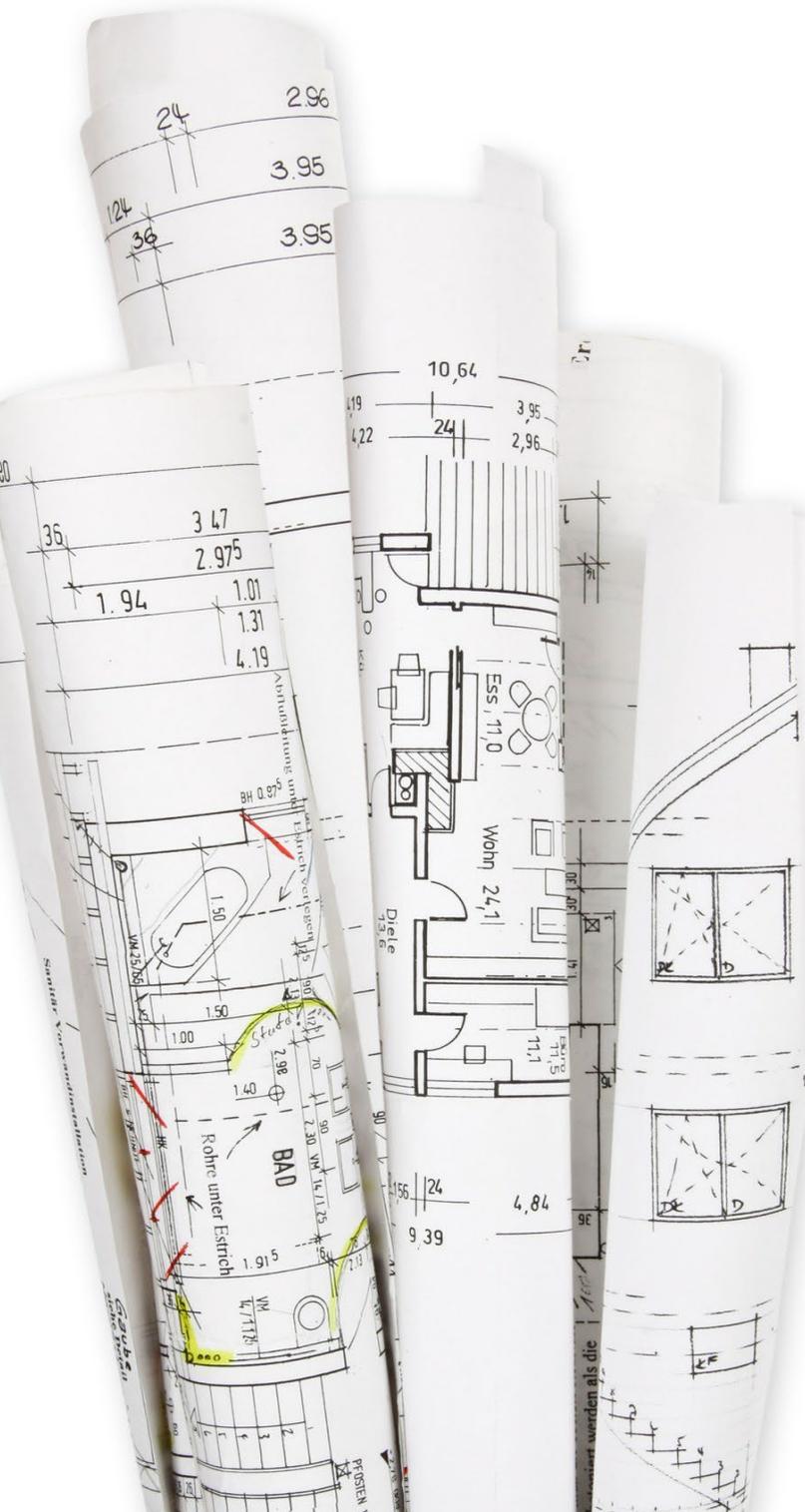
Three “Rules of Thumb” regarding conflicts of interest for design professionals.

- 1.) Engineers and architects (E/As) cannot have two clients on the same project.
- 2.) E/As “should avoid even the appearance of impropriety” in their actions and practices. (This is a universal conflict interest and ethical precept beyond just E/As).
- 3.) Disclose all conflicts in writing immediately, if it is already present.

Typically, a conflict of interest occurs when an individual's personal interests—family, friendships, financial, or social factors could compromise a person's judgment, decisions, or actions. Conflicts of interest are a clash that most often occurs between requirements and interests. Various types of conflicts of interest can occur because of the nature of relationships versus rules of organizations. This is a situation in which the concerns or aims of two different parties are incompatible.

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Thus, conflict of interests should be avoided, but when avoidance is not possible or at least not reasonable, the conflict must be fully disclosed to all appropriate parties, and their consent must be won before an E/A can proceed. And, the disclosure and the consent must be in writing. A verbal “ok” is insufficient. So important is this topic, that all professional associations contain prohibitions in E/As’ codes of ethics and professional conduct, when they find themselves in such a conflict.

GUIDANCE FOR DESIGN PROFESSIONALS



Code of Ethics for Engineers

II. Rules of Practice

4. Engineers shall act for each employer or client as faithful agents or trustees.

- a. Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.

III. Professional Obligations

5. Engineers shall not be influenced in their professional duties by conflicting interests.

- a. Engineers shall not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.
- b. Engineers shall not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with clients or employers of the engineer in connection with work for which the engineer is responsible.



2020 Code of Ethics and Professional Conduct

FROM THE OFFICE OF GENERAL COUNSEL

E.S. 3.2 Conflict of Interest:

Members should avoid conflicts of interest in their professional practices and fully disclose all unavoidable conflicts as they arise.

Rule 3.201 A Member shall not render professional services if the Member’s professional judgment could be affected by responsibilities to another project or person, or by the Member’s own interests, unless all those who rely on the Member’s judgment consent after full disclosure.

Commentary: This rule is intended to embrace the full range of situations that may present a Member with a conflict between his interests or responsibilities and the interest of others. Those who are entitled to disclosure may include a client, owner, employer, contractor, or others who rely on or are affected by the Member’s professional decisions. A Member who cannot appropriately communicate about a conflict directly with an affected person must take steps to ensure that disclosure is made by other means.

Not only in codes of ethics and professional conduct, but conflicts of interests is addressed also in model agreements such as the American Institute of Architects’ (AIA) Standard Form of Agreement

Between Owner & Architect B101 (2017). “Except with the Owner's knowledge and consent, the Architect shall not engage in any activity, or accept any employment, interest or contribution that would reasonably appear to compromise the Architect's professional judgment with respect to this Project.”

EXAMPLES OF CONFLICTS OF INTEREST SITUATIONS

Case in point, an E/A in a conflict of interest situation, is as follows:

An E/A's construction documents were sent out to selected general contractors to provide a bid on a particular project. A manufacture representative for a construction product is able to review the specifications from the general contractors, and finds that the manufacturer representative's product is not in the E/A's specifications.

As it turns out, the manufacturer's rep's product is not in the E/A's typical specifications that is used on almost all construction projects that are designed by the E/A (called the office's "Master Specs"). The manufacturer's rep invites himself into the E/A's office, and is allowed the opportunity to present the benefits of his product. As a result, the E/A puts the manufacturer rep's product for use for future projects in the office Master Specs.

And as an exchange for the opportunity, the E/A allows the manufacturer rep's product to be included into the instant project, in an exchange for a "thank you" gift to the E/A.

Even if the manufacturer rep's product is substantially equal to the other alternate products that were specified by the E/A, the E/A should avoid even the appearance of impropriety in its actions and practices and, **at the very least**, not accept the "thank you" gift.

However, every situation is different. The National Society of Professional Engineers' Board of Ethical Review, has numerous cases relating to conflicts of interests.

Case Number: 19-4 (2019)

Conflicts of interest present some of the thorniest ethical issues for engineers because the practice of engineering, by its very nature, involves relations with parties often with conflicting interests. Professional engineers are often faced with conflicts of interest in their professional practice.

Case Number: 85-6 (1985)

Engineer was retained by the state to perform certain feasibility studies relating to a possible highway spur. The state was considering the possibility of constructing the highway spur through an area that was adjacent to a residential community in which Engineer's property was located. After learning of the proposed location for the spur, Engineer disclosed to the state the fact that his residential property might be affected by the new spur and fully disclosed the potential conflict with the state. The state did not object to Engineer performing the work and Engineer proceeded with his feasibility study and ultimately recommended that the spur be constructed.

The American Institute of Architects' (AIA) National Ethics Counsel (NEC) determined (*Decision 93-5: Conflict of Interest—Pursuing Zoning Change for Client's Property Located Adjacent to Architects' Property, under the AIA Code of Ethics in effect in 1993*) where:

The Council found no violation of R. 3.202 of the Code of Ethics and Professional Conduct by a member whose client was aware that member owned property across the street from the client's property, and who retained architect to pursue a zoning change which would benefit both owners.

R. 3.202 If members have any business association, direct or indirect financial interest, or other interest which could be substantial enough to influence their judgment in connection with their performance of professional services, the members shall fully disclose to their clients or employers the nature of the business association, financial interest, or other interest, and if the clients or employers object to such association, financial interest, or other interest, the members will either terminate such association or interest or give up the commission or employment.

The evidence was clear that the client knew about the architect's ownership of the adjacent parcel of land and retained his services anyway. The evidence was also clear that the client continued to use the architect's services even after the rezoning hearing, in which the architect presented his proposal for use of his own property. The architect did not pursue his own project until the work he had agreed to perform for the client was completed, and many months had gone by with no word from the client. On this set of facts, the NEC concluded that the architect met all obligations under R. 3.202.

CONCLUSION

The question regarding the Master Specification example is—using professional judgment, should the E/A allow the manufacturer rep's product into the instant project during the bid period (a common practice is to modify construction documents before bids are opened)?

If I was the E/A's specification writer, I would avoid even the appearance of impropriety because the manufacture rep offered a bribe. But, it would be another professional judgement to allow manufacturer rep's product into the office's typical Master Specifications that is used on future construction projects that are designed by the E/A.

The bottom line, if the interest is enough to influence the E/A's judgment, the E/A should fully disclose it in writing to their client (thus creating a paper or email trail).

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 17 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 35 years. As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

Disclaimer: *The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.*

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“Ohio Land Use Law & Eminent Domain for Building Professionals”

February 24, 2022

12:15 – 1:15 pm:

Local Land Use Ordinances and Enforcement in Ohio

1:15 – 2:15 pm:

Obtaining and Objecting to Land Use Determinations



“Empowering Your Ethics in a Changing Architectural Culture”

May 25, 2022

12:00 – 1:00 pm

AIA Cleveland, Columbus & Cincinnati Lunch & Learn Webinar, I HSW Pending

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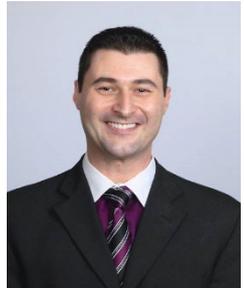
Brad Bush, CPCU, AU
Principal
brad.designproins@wichert.com



Eric Pempus
FAIA, Esq., NCARB
Risk Manager
eric.designproins@wichert.com



Tracey Heise
Account Manager
tracey.designproins@wichert.com



Chuck Petretti
Account Executive
chuck.petretti@wichert.com



Roger Perry
Account Executive
roger.designproins@wichert.com



Tracy Combs
Risk Manager & Loss Control Specialist
tracy@wichert.com