

– CONFLICT OF INTEREST GUIDELINE



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1.0 INTRODUCTION

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Practitioners must be aware of conflicts of interest and how to avoid or manage them. This guideline, which was adapted by Engineers Geoscientists Manitoba from the model guideline prepared by Engineers Canada in 2014, will introduce key types of interests and important aspects of conflicts that can arise and that the professional needs to be aware of in their work and engineering or geoscientific practice.

The Code of Ethics states that practitioners must “act as faithful agents of their clients or employers, maintain confidentiality and avoid conflicts of interest, but, where such conflict arises, fully disclose the circumstances without delay to the employer or client.”

The three important aspects of conflict introduced are:

- actual;
- potential; and
- perceived.

The key types of interest introduced are:

- individual/personal;
- client;
- organizational; and

Other types of interest can include:

- professional;
- employer;
- profession;
- public;
- recipients of engineering services; and
- owners and relevant authorities.

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 practitioners 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 practitioners may face.

2.0 CONFLICT OF INTEREST

2.1 PRIMARY AND SECONDARY INTERESTS

Conflicts of interest arise in situations where the judgment and actions of individuals or institutions could be affected by multiple or competing interests.

The primary interest of professional engineers and geoscientists is to protect the public interest and serve clients with due diligence. A conflict arises when secondary interests compete with primary interest and potentially create bias in decision making. Secondary interests include things such as the desire for personal financial gain, professional advancement, and helping family and friends.

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 the practitioner 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.

2.2 TYPES OF INTEREST

The types of interest most common for practitioners are personal, client, and organizational, however these conflicts may trigger other consequences resulting in conflicts with other interests. The Code of Ethics states that practitioners must “act as faithful agents of their clients or employers, maintain confidentiality and avoid conflicts of interest, but, where such conflict arises, fully disclose the circumstances without delay to the employer or client.” As professionals, practitioners 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 practitioners. 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, real, potential, or perceived, 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.

Client conflicts of interest can also exist where a client's interest conflicts with a practitioner's professional one. An example of this could be where a practitioner is working for more than one client on the same project. Caution must be exercised by the practitioner in these situations to avoid a conflict of interest.

Conflicts of interest may arise in situations where practitioners:

- 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
- Influence the inspection of work done by you or by an outside company with whom you are associated

2.3 ASPECTS OF CONFLICT

There are three aspects of conflict: actual, potential, and perceived.

Actual conflicts of interest are conflicts that exist at the present time. When actual conflicts are not properly managed, they lead to the public questioning the honesty and trustworthiness of practitioners and can lead to findings of misconduct.

Potential conflicts of interest occur when there is a reasonable possibility of an actual conflict coming into play. All potential conflicts of interest must be properly declared and managed.

Perceived conflicts of interest are those which could be seen to exist due to the circumstances. The appearance of perceived conflicts is as detrimental to the profession's honour, dignity, and credibility as is actual conflict of interest.



2.4 OBLIGATION TO DISCLOSE AND DUTY TO REPORT

Practitioners must act in good faith and conduct themselves with equity, fairness, courtesy, and integrity, in an honourable and ethical manner. They must uphold the values of truth, honesty, and trustworthiness. Conflicts of interest may arise regardless of practitioners' intentions, and these must be recognized, avoided and managed. Practitioners have an obligation to fully disclose their conflicts of interest.

In addition to this, practitioners have a duty to report illegal and unethical practices by practitioners or others to senior decision makers, regulators and/or other appropriate agencies. This can include situations where conflicts of interest exist.

If a practitioner is involved in a conflict of interest situation, they must assess whether they have a duty to report the conflict. Practitioners should also consult their workplace policies regarding conflicts of interest. If a practitioner is aware of a conflict of interest situation in which they aren't directly involved, they are encouraged to inform the parties involved and to make them aware of their obligations. The practitioner should also advise them of the duty to report and encourage the parties involved to report, if necessary.

Although the practitioner who has a conflict of interest holds the greatest responsibility to manage it, the practitioner that identifies the conflict of interest situation should determine what follow-up is required to ensure they meet their own obligations with respect to the code of ethics and the duty to report.



2.5 HONORARIA, GIFTS, AND OTHER BENEFITS

Practitioners must be able to use their judgement to determine whether it is appropriate or unethical to give or accept gifts, honoraria, and other benefits. Before giving or accepting honoraria, gifts, and/or other benefits, practitioners should consider the following aspects:

- their relationship with the individuals/entities;
- the cultural context of these offerings;
- the frequency of these offerings;
- the monetary value of these offerings;
- their employer's policies (recognizing these will differ between different organizations); and,
- the appropriateness of these offerings.
 - What is the reason for these offerings?
 - Are these offerings consistent with what is typically given in similar situations?
 - Is there an expectation for reciprocity, favours, or compensation in exchange for these offerings?

For example, while it may be appropriate to provide an honorarium to a Community Representative for presenting opening remarks at the beginning of a community consultation meeting (and within cultural norms), it may not be appropriate to do so if there is an expectation from the engineering firm or client organization that the Community Representative will subsequently influence others in the community to support a contentious project. Practitioners should assess the appropriateness of the honorarium by considering the above aspects and determining whether there are any expectations for reciprocity, favours, or compensation in exchange for providing the honorarium.

3.0 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 interest¹. Although all practitioners 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 identifying and managing them.

It is critical for practitioners to have clear principles to apply and rules to follow when they assess whether a conflict exists. Assessing possible conflicts of interest should be a regular part of practice.

The first step is 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 developing².

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 practitioner 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

¹ 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

² Buttigieg, Bryan J. and Thomson, Miller. "Conflict of Interest: consulting engineers need to be vigilant". Canadian Consulting Engineer, March 2004.

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 practitioner 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 practitioner'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 occurring³.

By obtaining the agreement of all interested parties that there is no conflict of interest, practitioners reduce the possibility of litigation and charges of professional misconduct. If agreement cannot be found, practitioners have no option but to withdraw their services, thereby avoiding an embarrassing investment in services by clients and eliminating the possibility of costly litigation. In either case, the process should be documented; from the practitioner'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. Practitioners 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 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.

³ PEO, Professional Engineering Practice, January 2012.

⁴ PEO, *ibid*

4.0 EXAMPLES

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

4.1 CASE A

Practitioners 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 a practitioner to carry out a planning study regarding the development of a piece of land. The practitioner prepares the report, time passes, and the developer does not request or need any further information from the practitioner. The practitioner is paid for all the work done. The municipality in which the development exists is in need of an opinion that involves, among other things, this same land. It therefore contacts the practitioner who prepared the report for the developer because of the practitioner's expertise in the type of work and previous experience with the municipality. The practitioner 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 practitioner do?

Before accepting an assignment from the second party, the practitioner must recognize there is a potential conflict of interest. A prudent practitioner 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 practitioner for the assignment, thereby ending the potential conflict. Alternatively, the municipality could decide there is no conflict and be willing to continue with the practitioner. However, this does not resolve the practitioner's potential conflict, because the developer, who is the first client, is not party to this decision. The practitioner 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 practitioner generally but obtain a different one for this specific land owner.

4.2 CASE B

In some circumstances, a practitioner might be requested by one client to provide expert opinion against another client for whom the practitioner had regularly provided services in the past. The dispute does not involve any services provided previously by the practitioner, but is simply a case of one client retaining the practitioner on a matter that involves another previous client on the other side. The practitioner 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 practitioner to deal with. **4.2 CASE**

4.3 CASE C

This case illustrates a conflict of interest that might occur in circumstances involving a situation in which practitioners 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.

4.4 CASE D

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

4.5 CASE E

Ms. 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. Ms. M has ideas for improving the product sold by ABC Services and offers to assist N. Ms. 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 Ms. M is not using XYZ resources, Ms. 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 Ms. 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.



5.0 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 them.

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 their 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 their 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 they represent 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 interest conflicts with their professional ones (for example, where the value of their own personal property is influenced by professional work that they do).

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

PROFESSIONAL/PROFESSIONAL CONFLICTS: Professional/professional conflicts are where the interests of one client conflict with another client, or where the practitioner acts in two different roles for the same client (for example, 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.

6.0 REFERENCES

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