

# Washington University Journal of Law & Policy

---

Volume 31 *Access to Justice: The Promise and Pitfalls of Social Problem Solving through the Courts and Legal Academy*

---

2009

## Public Interest, Professional Bargains: Ethical Conflicts Between Lawyers and Professional Engineers

Elizabeth J. Hubertz  
*Washington University School of Law*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy](https://openscholarship.wustl.edu/law_journal_law_policy)



Part of the [Law and Society Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Elizabeth J. Hubertz, *Public Interest, Professional Bargains: Ethical Conflicts Between Lawyers and Professional Engineers*, 31 WASH. U. J. L. & POL'Y 083 (2009),  
[https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol31/iss1/6](https://openscholarship.wustl.edu/law_journal_law_policy/vol31/iss1/6)

This Essay is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

## Public Interest, Professional Bargains: Ethical Conflicts between Lawyers and Professional Engineers

Elizabeth J. Hubertz\*

Most environmental law problems are embedded in complex and technical factual contexts. Hence, environmental lawyers come to expect that at some point it will be necessary to consult with one or more non-lawyer experts about, for example, the habitat of an endangered plant species, the modeling of a mixing zone at a water pollution discharge point, the best available control technology for an industrial air emission process, or the consequences of elevated lead levels in children.

Environmental experts come from many fields, including biology, geosciences, ecology, chemistry, engineering, social science, and economics. Each discipline has its own set of norms, practices, ethics, guidelines, and procedures, which differ from those of the legal profession. Wherever the disciplines intersect, there is a potential for disagreement. This Article examines one such set of potential clashes—the conflict between a lawyer’s duties of loyalty and confidentiality, and the engineer’s paramount duty to the public health, safety, and welfare. All lawyers and a subset of engineers—licensed professional engineers—are bound by codes of ethics that carry professional consequences.<sup>1</sup> What might be a difference in opinion over the bounds of the duty owed by each professional to the client could become a career-threatening disciplinary violation for one of the participants, unless the ethical differences can be resolved.

---

\* Clinic Attorney, Washington University School of Law. The author thanks the following for their generous support and helpful comments: Robert R. Kuehn, Maxine I. Lipeles, Frances E. Martin, Peter W. Goode, James R. Noel, and Pamela L. Summers. A draft of this Article was presented at the Clinical Law Review Writer’s Workshop at New York University School of Law in October 2008.

1. See *infra* notes 6–9 regarding the licensing of lawyers and notes 12–13 regarding the licensing of engineers.

The potential for these conflicts increases as the professionals work more closely with each other.

This Article first describes the nature of each profession's ethical code as expressed in terms of its relationship with those outside of the profession. Using emblematic ethical problems from each field, the Article then explores the potential conflicts between those codes in the areas of client confidentiality and duties to the public. Finally, the Article examines several strategies for managing conflicts when lawyers and professional engineers work together.

#### INTRODUCTION

Lawyers and engineers are subject to different sets of professional norms, which are regulated through a variety of enforcement mechanisms, ranging from the clearly structured to the relatively informal. For example, both lawyers and engineers can be sued civilly for negligent performance of their professional duties and held liable to third parties for the injuries caused by their actions.<sup>2</sup> Lawyers and engineers also may find their professional conduct prescribed by statute. For example, an engineer—defined by federal environmental law as a “person in charge of a facility from which a hazardous substance is released”—has a statutorily imposed duty to report any hazardous discharge to the “appropriate” federal agency or face criminal sanctions.<sup>3</sup>

Lawyers and professional engineers also are subject to ethical rules that govern their professions. These ethical rules include elements of both professional competence<sup>4</sup> and morality,<sup>5</sup> and usually

---

2. Chapter Four of the Restatement (Third) of the Law Governing Lawyers summarizes the “circumstances and extent to which lawyers are liable in damages and subject to other civil remedies.” *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* ch. 4 intro. note (2000). *See also* *Bernstein v. Oppenheim & Co.*, 554 N.Y.S.2d 487, 489–90 (App. Div. 1990) (discussing attorney negligence in professional malpractice action); *Carter v. Deitz*, 556 So. 2d 842, 843, 861–63 (La. Ct. App. 1990) (discussing elements of professional negligence claim against engineering firm that recommended against the installation of a median barrier on the Greater New Orleans Bridge).

3. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603(b)(3) (2006).

4. Unethical conduct does not automatically lead to civil liability, although there is some overlap. A negligent act can lead to both civil liability and professional discipline. For example, an engineering firm and two engineers who helped design and construct the skywalks at the

are contained in regulatory codes adopted by states or state agencies. Violations of these ethical codes have professional consequences instead of, and in some cases in addition to, monetary or penal consequences.

All lawyers face a formal set of professional ethical rules; entry into the legal profession is strictly controlled.<sup>6</sup> Lawyers are licensed in every state, and the unauthorized practice of law (“UPL”) is universally prohibited.<sup>7</sup> Ethical rules are codified and enforced by a state or quasi-state body, usually the highest court in the state.<sup>8</sup> Lawyers engaging in unethical conduct face a range of sanctions depending on the severity of the infraction, up to and including the loss of their licenses to practice law.<sup>9</sup>

---

Kansas City Hyatt Regency Hotel lost their licenses after two skywalks collapsed and killed 114 people. *Duncan v. Mo. Bd. for Architects, Prof'l Eng'rs and Land Surveyors*, 744 S.W.2d 524 (Mo. Ct. App. 1988). The engineering firm was also sued civilly for its allegedly negligent role in the design and construction. *In re Federal Skywalk Cases*, No. 81-0945-A-CV-W-5, 1982 U.S. Dist. LEXIS 10116, at \*40 (W.D. Mo. Jan. 4, 1983) (listing defendants). *See also* 68 Op. Cal. Att'y Gen. 250 (1985), No. 85-208, 1985 Cal. AG LEXIS 14, \*2-3 (Sept. 17, 1985) (discussing duty to warn as violation of registered civil engineer's ethical rules and as duty in tort).

5. Professional rules clearly contain a moral element—nearly all codes require honesty in dealings with others, for example—but do not attempt to define all professional relations morally, and in some cases may impose duties that run contrary to the lawyer's personal morality. *See, e.g.*, Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 902 (1996) (noting tension between rule-based ethical codes and virtue-based decision making); Timothy W. Floyd, *Realism, Responsibility, and the Good Lawyer: Niebuhrian Perspectives on Legal Ethics*, 67 NOTRE DAME L. REV. 587, 587-88 (1992) (noting conflict between a lawyer's duty to “further a client's lawful interests” and the common good).

6. According to the ABA's website: “In order to obtain a license to practice law, almost all law school graduates must apply for bar admission through a state board of bar examiners.” ABA Bar Admissions Basic Overview, <http://www.abanet.org/legaled/baradmissions/basicoverview.html> (last visited Oct. 14, 2009). Before becoming licensed, a lawyer must have obtained an “acceptable educational credential . . . from a law school that meets educational standards” and must pass a state-administered bar examination. *Id.* In addition to these basic competence requirements, lawyers must also demonstrate their character and fitness to become a member of the state bar. *Id.*

7. “Today, every state and the District of Columbia prohibits UPL.” Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 722 (2007).

8. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000) (discussing origin and current status of lawyer professional codes).

9. For example, a lawyer who is found to have violated the Georgia Rules of Professional Conduct is subject to sanctions ranging from the relatively mild “formal admonition,” a sanction which does not affect the ability to practice law, to “disbarment,”

Regulation of engineers is less all-encompassing. Only approximately 33 percent of “engineers”—namely, people performing engineering tasks—are licensed.<sup>10</sup> However, while an unlicensed attorney is prohibited from practicing law, an engineer without a license is not barred from working as an engineer.<sup>11</sup> Licensed engineers operate under a regime similar to that of lawyers. They take an examination administered by the state in which they wish to practice, obtain a license from that state, and practice according to a series of rules developed by engineers themselves.<sup>12</sup> Unethical licensed professional engineers, like unethical lawyers, face a range of sanctions from the licensing body, including the loss of their licenses.<sup>13</sup>

Unlicensed engineers may agree voluntarily to abide by a code of ethics. Any engineer, not only a licensed professional engineer, may become a member of a professional engineering society. Many such societies require adherence to a code similar to the professional engineer’s ethical code as a condition of membership.<sup>14</sup> But the only

---

which removes the lawyer “from the practice of law in Georgia.” GA. COMP. R & REGS. 4-102(b)(1), (6) (2008).

10. Doug McGuirt, *The Professional Engineering Century*, PROFESSIONAL ENGINEERING, June 2007, at 25, 29 (noting that the 450,000 licensed professional engineers are about a third of the United States’ nearly 1.5 million engineers, according to the Bureau of Labor Statistics).

11. Some of the reasons that relatively few engineers are licensed, compared to 100 percent of lawyers, are discussed in more detail below. *See infra* Part II.B.1.

12. For example, New Jersey requires engineers to have completed a curriculum consisting of 128 semester hours, 32 of which must be in a “combination of mathematics and basic sciences,” 32 of which must be in engineering sciences, and 16 of which must be in engineering design. N.J. ADMIN. CODE § 13:40-2.8(b)(1) (2006). The would-be licensed professional engineer must pass part “F” of the state’s engineering examination (Fundamentals of Engineering), work four years under the supervision of a licensed professional engineer, and pass part “P” of the state exam (Principles and Practice of Engineering). *Id.* § 2.10(a) (prescribing experience requirements); § 2.5(b) (prescribing examination requirements). *See also* NSPE Licensure—How to Get Licensed, <http://www.nspe.org/Licensure/HowtoGetLicensed/index.html> (last visited Oct. 14, 2009) (describing licensing requirements in general terms).

13. *See* *Duncan v. Mo. Bd. for Architects, Prof’l Eng’rs and Land Surveyors*, 744 S.W.2d 524, 527 (Mo. Ct. App. 1988) (noting availability of range of disciplinary sanctions under Missouri Code, including suspension or revocation of license).

14. For example, the American Society of Mechanical Engineers (“ASME”) publishes a code of ethics for its members, although membership is voluntary and not a prerequisite for practice as a mechanical engineer, just as membership in the American Bar Association is not a prerequisite to practice as a lawyer. ASME members may become licensed professional engineers and subject to the rules and regulations of the states in which they practice, but this

sanction for violation of a professional society's rules is revocation of membership in the society, not the loss of a license or the means of working as an engineer.

What happens when a lawyer works with a licensed professional engineer? Does each professional follow the ethical standards governing his or her respective profession? What happens if the ethical duties required of lawyers diverge from the ethical duties required of professional engineers? One conflict can arise when the lawyer's duty of client confidentiality runs contrary to the professional engineer's duty to hold paramount the public safety, health, and welfare.

What follows is a look at the nature of the competing duties of confidentiality and duty to the public safety, and an analysis of some strategies for managing potential conflicts between the two across several collaborative settings.

## I. PROFESSIONAL BARGAINS

Why do professions like law and engineering have an ethical regime when other occupations do not? One explanation views the professions as making an implied contract with the people and institutions outside of the profession.<sup>15</sup> Under this view, law and engineering exist as professions because they and their members have made a bargain with the public: let us design our own rules and control our own work, and we promise to serve the public in the conduct of our profession.<sup>16</sup> The American Bar Association's

---

license is wholly independent of their membership in ASME. For this reason, codes like ASME's are described as aspirational or normative, rather than regulatory. *See generally* Merry Bullock & Sangeeta Panicker, *Ethics for All: Differences across Scientific Society Codes*, 9 *SCI. & ENGINEERING ETHICS* 159 (2003) (comparing codes of scientific societies, using this terminology).

15. Eliot Freidson is one prominent proponent of this view. *See* ELIOT FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC* 122–23 (2001) (describing that professionals control their own work and justify this independence through service to a larger, socially beneficial role).

16. Stephen F. Barker describes this bargain as a "social contract," which he defines as follows:

[T]he profession agrees to curb its self-interested behavior in certain respects so as to promote ideals of service, while society, in return, allows the profession to take charge

(“ABA”) Committee on Professionalism describes the legal profession as:

An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions: (1) That its practice requires substantial intellectual training and the use of complex judgments; (2) That since clients cannot adequately evaluate the quality of the service, they must trust those they consult; (3) That the client’s trust presupposes that the practitioner’s self-interest is overbalanced by devotion to serving both the client’s interest and the public good; and (4) That the occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client’s trust, and transcend their own self-interest.<sup>17</sup>

Engineers, too, explain their ethical obligations in terms of service to the public. The preamble to the National Society of Professional Engineers’ (“NSPE”) Code of Ethics reads:

Engineering is an important and learned profession. As members of this profession, engineers are expected to exhibit the highest standards of honesty and integrity. Engineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare. Engineers must perform under a standard of professional behavior that requires adherence to the highest principles of ethical conduct.<sup>18</sup>

---

of formulating and administering its own code of behavior, and perhaps even allows it a degree of monopoly control over entry into the profession.

Stephen F. Barker, *What is a Profession?*, 1 PROF. ETHICS 73, 93 (1992).

17. COMM’N ON PROFESSIONALISM, AMERICAN BAR ASS’N, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10–11 (1986) (footnotes omitted).

18. NAT’L SOC’Y OF PROF’L ENG’RS CODE OF ETHICS FOR ENG’RS pmbl. (2007), <http://www.nspe.org/resources/pdfs/Ethics/CodeofEthics/Code-2007-July.pdf> [hereinafter NSPE

The NSPE's website offers a similar note when introducing the Code of Ethics: "Professional engineers take seriously their responsibility—not just for the quality of the jobs they work on—but for the safety and well-being of the public at large."<sup>19</sup> The IEEE (formerly the Institute of Electrical and Electronics Engineers, Inc.), a voluntary engineering society, likewise explains its members' commitment to ethical standards in light of service to the public, as well as the profession:

WE, THE MEMBERS OF THE IEEE, in recognition of the importance of our technologies in affecting the quality of life throughout the world, and in accepting a personal obligation to our profession, its members and the communities we serve, do hereby commit ourselves to the highest ethical and professional conduct . . . .<sup>20</sup>

If, in some sense, both law and engineering have made bargains with society, promising to pursue their professions while keeping in mind the interests of those outside of the profession, what are the terms of the bargains? Both professions promise to serve the public, but each has a different understanding of its required responsibility toward the public good. Conflicts between the professional ethical rules can reflect these different bargains and understandings.

#### *A. The Lawyer's Bargain*

The history of lawyers' codes of ethics is traceable to the oaths of conduct taken by advocates in the courts of thirteenth-century England.<sup>21</sup> In the United States, the ABA has had formal rules of professional ethics since at least 1908.<sup>22</sup> The ABA's current ethical

---

CODE OF ETHICS].

19. NSPE Engineering Ethics, <http://www.nspe.org/Ethics/index.html> (last visited Sept. 15, 2009).

20. IEEE CODE OF ETHICS (2006), [http://www.ieee.org/portal/cms\\_docs/about/CoE\\_poster.pdf](http://www.ieee.org/portal/cms_docs/about/CoE_poster.pdf).

21. See generally Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1390–409 (2004) (describing oaths, statutes, and ethical rules applicable to "professional pleaders" in English courts).

22. Unlike today's ethical codes, the 1908 Canons of Professional Ethics were "admonitions emanating from a merely private organization," and had "no direct legal effect,

rules are the Model Rules of Professional Conduct (“Model Rules”), adopted in 1983 by the ABA House of Delegates. They serve as a model for the states, which bear responsibility for the administration of lawyer ethical discipline.<sup>23</sup> Today, only California’s ethical rules for lawyers do not at least “follow the format” of the Model Rules.<sup>24</sup>

The preamble to the Model Rules describes the legal profession’s “ideals of public service” and the lawyer’s obligation to serve the larger public.<sup>25</sup> Lawyers should “seek improvement of the law,” greater “access to the legal system,” better administration of justice, and increased “quality of service” in legal representation.<sup>26</sup> Lawyers have a responsibility to “cultivate knowledge of the law beyond its use for clients” and to “employ that knowledge in reform of the law . . . .”<sup>27</sup> Lawyers should “further the public’s understanding of and confidence in the rule of law and the justice system” and should be “mindful of deficiencies in the administration of justice.”<sup>28</sup> Lawyers should be aware that many people do not have access to adequate legal counsel and thus should “devote professional time and resources and use civic influence to ensure equal access to our system of justice . . . .”<sup>29</sup>

The benefit of the bargain is most explicitly spelled out in the preamble’s final paragraphs:

---

either in grievance proceedings against lawyer misconduct or in civil actions for legal malpractice.” Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1250 (1991). The 1887 Code of Ethics of the Alabama Bar Association was the first statewide ethical code to be officially adopted. See Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471–72 (1998). The ABA’s 1908 Code was based largely on the 1887 Alabama code. See *id.* at 504–07.

23. MODEL RULES OF PROF’L CONDUCT (2009) [hereinafter MODEL RULES]. Enforcement of the ethical rules, through the discipline of lawyers, is accomplished by an independent agency of the state, which typically is an agency of the state’s supreme court. Charles Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 206 (2002).

24. ABA Ctr. for Prof’l Responsibility, [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html) (last visited Oct. 14, 2009).

25. MODEL RULES pmb1. para. 7.

26. *Id.* para. 6.

27. *Id.*

28. *Id.*

29. *Id.*

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated.

....

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.

....

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.<sup>30</sup>

Lawyers, at least on some abstract level, promise to serve the public; in exchange, lawyers are allowed to maintain professional autonomy and self-governance.

The preamble is followed by specific rules that set forth in more detail the ethical requirements of practicing law. Model Rules 6.1 through 6.5 specifically address "public service."<sup>31</sup> For the most part, these rules are aspirational rather than mandatory, providing for "voluntary" service and allowing, rather than requiring, lawyers to participate in legal services organizations and law reform activities.<sup>32</sup> The Model Rules' only command is found in Rule 6.2, which dictates that lawyers "shall not seek to avoid an appointment by a tribunal to

---

30. *Id.* paras. 11–13.

31. MODEL RULES R. 6.1–6.5.

32. *Id.* at R. 6.1 (Voluntary Pro Bono Publico Service); R. 6.3 (Membership in Legal Services Organizations); R. 6.4 (Law Reform Activities Affecting Client Interests). Model Rule 6.5, Nonprofit and Court-Annexed Limited Legal Services Programs, makes it easier for lawyers who choose to participate in programs that provide short-term legal advice to the public, such as assistance in filling out forms or answering calls at a legal-advice hotline sponsored by the bar association. *See id.* at R. 6.5 cmt. para. 1.

represent a person” unless they have “good cause” to do so.<sup>33</sup> What the preamble giveth, the rules taketh away.<sup>34</sup>

But the preamble offers another vision of public interest besides access to the justice system: the proper administration of justice and the improvement of the law. Lawyers serve the public by serving the system of justice, and by serving their clients, rather than by providing public service directly to members of the public. Viewed this way, the Model Rules that describe a lawyer’s duty to his or her clients,<sup>35</sup> to the courts,<sup>36</sup> and to other parties that he or she may meet while in practice,<sup>37</sup> fulfill the lawyer’s end of the public service bargain. Lawyers serve the public good by being good lawyers.<sup>38</sup>

---

33. *Id.* at R. 6.2 (Accepting Appointments).

34. The advertising rules in Article 7 of the Model Rules can be viewed as describing a lawyer’s duty to benefit—or at least not harm—the general public. *See id.* at R. 7.1 (Communication Concerning a Lawyer’s Services); R. 7.2 (Advertising); R. 7.3 (Direct Contact with Prospective Clients); R. 7.4 (Communication of Fields of Practice and Specialization); R. 7.5 (Firm Names and Letterhead); and R. 7.6 (Political Contributions to Obtain Legal Engagements or Appointments by Judges). The rules are grouped together under the somewhat euphemistic heading “Information about Legal Services.”

35. MODEL RULES R. 1.1 through 1.18 and R. 2.1 deal with the client-lawyer relationship.

36. MODEL RULES R. 3.1 through 3.9, grouped under the “Advocate” heading, concern the lawyer’s duties in litigation and during trial.

37. MODEL RULES 2.3, 2.4, and 4.1 through 4.4 concern a lawyer’s duties to “third persons.”

38. This is not to suggest that there is anything remotely approaching unanimity of opinion among lawyers or scholars on this point. Within the profession, there are many strong critics of the “zealousness” model, under which all other concerns are subordinate to client service. *See, e.g.,* DAVID LUBAN, *LAWYERS AND JUSTICE* (1988); Debra Lyn Bassett, *Redefining the “Public” Profession*, 36 RUTGERS L.J. 721, 768–74 (2005).

There are also many who would argue that service to the public does mean that lawyers owe an ethical duty to increase public access to legal services by offering services for free or at below-market rates, with some arguing that this service should be part of the legal ethical requirements. Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1122–24 (1991) (describing the “professional ideal” of public service, although not the need for mandatory pro bono requirements); Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1365–73 (2007) (discussing history of lawyer’s conceptions of public service and pro bono programs); Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 432 (2003) (arguing that some pro bono contribution is not unreasonable to expect from lawyers in exchange for the privileged status society has bestowed).

As a further caution, the public pronouncements of the bar—including its ethical rules—may or may not reflect the profession’s internal norms. *E.g.,* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989). As Schneyer emphasizes, the bar is by no means monolithic, and it would be a mistake to suggest that there is a single ideology common to the entire bar. *Id.* at 679–80. Nonetheless, lawyers have chosen to enshrine zealotry or diligence—as in Model Rule

In practice, of course, it is not always clear that good lawyering and the public good are aligned. The preamble acknowledges this bluntly: “In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”<sup>39</sup>

It does not take a lot of imagination to come up with a scenario in which the lawyer’s responsibilities to the client conflict with his or her responsibilities to the legal system. One such ethical issue involves the lawyer’s duty to keep client information confidential. The duty of confidentiality is “a fundamental principle in the client-lawyer relationship” and is the basis for “the trust that is the hallmark of the . . . relationship.”<sup>40</sup> Model Rule 1.6 requires lawyers to keep client information confidential: “A lawyer shall not reveal information relating to representation of a client . . .”<sup>41</sup> Lawyers can reveal confidential client information if the client allows it,<sup>42</sup> if the lawyer is ordered to do so,<sup>43</sup> or if the lawyer needs to do so in order to act in his or her self-defense.<sup>44</sup> A lawyer also is allowed to reveal confidential information to protect innocent third parties, but only where the lawyer “reasonably believes” it is necessary “to prevent reasonably certain death or substantial bodily harm,” “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of

---

1.3—but not mandatory pro bono service, in the ethical code that governs their behavior. For better or worse, these are the rules by which lawyers live.

39. MODEL RULES pmb1. para. 9.

40. MODEL RULES R. 1.6. cmt. para. 2. *But cf.* Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 844–50 (2002) (calling belief in lawyers’ virtue a “fiction,” and citing empirical studies).

41. MODEL RULES R. 1.6.

42. More precisely, when the client gives “informed consent” or “impliedly authorize[s]” the lawyer to do so by the nature of the representation. MODEL RULES R. 1.6(a).

43. MODEL RULES R. 1.6(b)(6) (stating that a lawyer may reveal information relating to the representation of a client in order “to comply with other law or a court order”).

44. For example, the lawyer can reveal confidential information in order to seek legal advice about how to proceed ethically. MODEL RULES R. 1.6(b)(4). Also, if a lawyer is sued by the client or called to answer for conduct during the representation, he or she is allowed to use otherwise confidential information. MODEL RULES R. 1.6(b)(5).

another and in furtherance of which the client has used or is using the lawyer's services," or "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services . . . ." <sup>45</sup> In all of these circumstances, the lawyer does not have to reveal the confidential information. In most states, it is not a violation of the Model Rules if the lawyer chooses not to disclose. <sup>46</sup>

At the same time, Model Rule 8, titled "Maintaining the Integrity of the Profession," states that it is "professional misconduct" for a lawyer to "engage in conduct that is prejudicial to the administration of justice," <sup>47</sup> or conduct that involves fraud or deceit, or that is criminal. <sup>48</sup> Model Rule 3, titled "Advocate," gives some idea of what this misconduct might look like. Lawyers cannot "knowingly" make a false statement or fail to correct a false statement made to a "tribunal," or "offer evidence that the lawyer knows to be false." <sup>49</sup> Lawyers also cannot obstruct access to, falsify, nor destroy evidence, or present testimony that is false or the result of bribery. <sup>50</sup> But what happens when a lawyer's duty to keep client information confidential

---

45. MODEL RULES R. 1.6(b)(1)–(3).

46. MODEL RULES R. 1.6 cmt. para. 15 ("A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule."). Having identified this Model Rule as the professional high-water line of client confidentiality, it is important to note that not every state has adopted Model Rule 1.6 verbatim, and that many states have expanded the circumstances in which a lawyer may (or even must) reveal confidential client information. See Susanna Felleman, *Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct*, 95 COLUM. L. REV. 1500, 1507–08 (1995) (calling the lack of uniform adoption of Model Rule 1.6 by each state "[o]ne of the most glaring examples of conflict" among the states' ethical rules); Jason Popp, *The Cost of Attorney-Client Confidentiality in Post 9/11 America*, 20 GEO. J. LEGAL ETHICS 875, 878–80 (2007) (providing the history of the current Model Rule 1.6 and cataloguing its variations by states). Florida's version of the Model Rule *requires* a lawyer to disclose confidential information when the lawyer "reasonably believes necessary . . . to prevent a death or substantial bodily harm to another." FLA. RULES OF PROF'L CONDUCT R. 4-1.6(b)(2) (2008). Similarly, Virginia requires a lawyer to "promptly reveal the intention of a client, as stated by the client, to commit a crime . . ." VA. RULES OF PROF'L CONDUCT R. 1.6(c)(1) (2009).

47. MODEL RULES R. 8.4(d).

48. *Id.* at R. 8.4(c).

49. *Id.* at R. 3.3(a)(1), (3).

50. *Id.* at R. 3.4(a)–(b).

collides with the duty to avoid “conduct prejudicial to the administration of justice”?

A staple of legal ethics education commonly known as the Lake Pleasant Bodies case highlights this conflict.<sup>51</sup> Two lawyers, Frank H. Armani and Francis R. Belge, were appointed to defend Robert F. Garrow, Jr., a man accused of murder.<sup>52</sup> Garrow confessed to the lawyers that he committed the murder. He also confessed that he killed at least three other people and told the lawyers where to find two of the bodies. The lawyers verified Garrow’s story by going to the respective scenes and photographing the bodies. At the time of the lawyers’ expedition, police and family members did not know where the bodies were. The lawyers had to decide whether to honor the ethical rules requiring them to maintain client confidentiality and zealously serve their client’s interests, since his interests emphatically were not served by disclosure, or whether to serve “the administration of justice” and tell the authorities where the bodies were and how they came to know the location.<sup>53</sup>

The lawyers elected to remain silent and proceed with an insanity defense for the client. When the father of one of the victims visited lawyer Armani’s office, asking if he knew anything of his daughter’s whereabouts, Armani lied to him.<sup>54</sup> The bodies eventually were found, but no one was able to connect the bodies to the accused until his trial. At that point, Garrow testified to the three additional killings in support of his insanity defense. The lawyers then admitted at a

---

51. This example is also known as the “Dead Bodies Case” and the “Garrows Dead Bodies Case.” The events took place in Syracuse, New York, during the 1970s and were the subject of many newspaper reports and court proceedings. This scenario (or a variation of it) can be found in a number of standard law school ethics textbooks and hornbooks. *See, e.g.*, GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK & ROGER C. CRAMTON, *THE LAW AND ETHICS OF LAWYERING* 57–59 (3d ed. 1999); ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 221–26 (3d ed. 1989); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, 664–66 (1986). One of the lawyers later wrote a book about his experience, from which some of the facts as described in this Article are taken. TOM ALIBRANDI & FRANK H. ARMANI, *PRIVILEGED INFORMATION* 87–89, 100–03, 148–49, 165–66 (1984).

52. *People v. Belge*, 372 N.Y.S.2d 798 (County Ct. 1975), *aff’d* 376 N.Y.S.2d 771 (App. Div. 1975) and 359 N.E.2d 377, 41 N.Y.2d 60, 390 N.Y.S.2d 867 (1976). Some of the facts are also set forth in *In re Armani*, 371 N.Y.S.2d 563 (County Ct. 1975), and *People v. Garrow*, 379 N.Y.S.2d 185 (Sup. Ct. 1975).

53. MODEL RULES pmb1. para. 6.

54. Mr. Armani regretted this very much, and later asked the father’s forgiveness for “lying to you in my office that day.” ALIBRANDI & ARMANI, *supra* note 51, at 152.

press conference that they had known for months where the bodies were.

Did the lawyers act ethically? Many commentators thought not. As one report put it: “Members of the public were shocked at the apparent callousness of these lawyers, whose conduct was seen as typifying the unhealthy lack of concern of most lawyers with the public interest and with simple decency.”<sup>55</sup> After “[p]ublic indignation reached the fever pitch,”<sup>56</sup> the district attorney indicted attorney Belge for violating state laws requiring a decent burial and notification of authorities upon learning of a death.<sup>57</sup> The court dismissed the charges, finding that Belge had “conducted himself as an officer of the court with all the zeal at his command to protect the constitutional rights of his client.”<sup>58</sup>

Returning to the bargain, Belge and Armani’s experience reveals a split between what we might call popular conceptions of ethics and the lawyer’s conception of ethics. It seems clear that members of the public—including mostly non-lawyers, one would assume—were indignant at the lawyers’ behavior and their seeming disregard for “the public interest.”<sup>59</sup> In contrast, some lawyers and judges found the behavior to be entirely consistent with the public interest and with the lawyers’ core professional duties.<sup>60</sup>

The Lake Pleasant Bodies scenario also illuminates how the lawyers’ ethical code conceives of the lawyer’s bargain with the public. Lawyers as a profession may well have a different conception of the public interest than does the public, at least in a dramatic

---

55. *Belge*, 372 N.Y.S.2d at 801–02.

56. *Id.* at 799.

57. *Id.*

58. *Id.* at 803.

59. *Id.* at 801.

60. *People v. Belge*, 372 N.Y.S.2d 798, 803 (N.Y. Ct. Ct. 1975) (“[I]t is the decision of this court that Francis R. Belge conducted himself as an officer of the court with all the zeal at his command to protect the constitutional rights of his client.”); *In the Matter of Armani*, 371 N.Y.S.2d 563, 563, 566–67 (Hamilton Cty., N.Y. 1975) (“The court is not hesitant to point out that counsel for the defendant devoted extraordinary energy and talent to the defense in this case. . . . Who, indeed, in the legal profession can truly and objectively look back from the comfortable chair of the Monday morning quarterback and say, ‘I would have done thus and so in spite of the ethic of confidentiality which I am sworn to uphold?’ Indeed, who can understand the anguish of having to defend oneself months later against charge of criminal wrongdoing where one has acted in the highest tradition of the legal profession?”).

example like this one. In choosing between duties to “the public”—whether that is conceived as the government, the citizenry, or simply third parties who are not clients—and the duty to a lawyer’s client, at least some lawyers and courts are willing to suggest that the client comes first.<sup>61</sup>

### *B. The Engineer’s Bargain*

The licensed members of the engineering profession are governed by a code of ethics that operates in much the same way as the lawyers’ rules of professional responsibility. Since the 1960s, the NSPE has published its own Code of Ethics, akin to the ABA’s Model Rules of Professional Responsibility.<sup>62</sup> Just as the Model Rules are made enforceable through their adoption by each state’s official bar regulatory organization, the NSPE Code of Ethics is adopted in one form or another by the states that license engineers, usually through incorporation in the regulations that govern licensing.<sup>63</sup>

The NSPE Code of Ethics contains four sections, running from the more abstract preamble and Fundamental Canons to the more detailed and specific Rules of Practice and Professional Obligations. Traces of the engineer’s bargain with the public can be found in each section.

According to the preamble, “[e]ngineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare.”<sup>64</sup> The Fundamental Canons are short rules that

---

61. *Id.*

62. MICHAEL DAVIS, THINKING LIKE AN ENGINEER 46 (1998). The earliest codes appeared around the same time as the 1908 ABA Canons, with the American Institute of Electrical Engineers adopting an ethics code in 1912. *Id.* at 45. Other engineering organizations followed with their own codes shortly thereafter. *Id.* Like the Canons, these codes were not intended to be used in grievances or malpractice actions.

63. In Missouri, for example, professional engineers and engineering interns are regulated by the Board for Architects, Professional Engineers, Professional Land Surveyors, and Landscape Architects, which is part of the Missouri Division of Professional Registration. MO. REV. STAT. § 327 (2000). The Code of Professional Conduct applicable to the professions it regulates can be found at MO. CODE REGS. ANN. tit. 20, § 2030-2.010 (2007). It incorporates the concepts of the NSPE Code, although it does not share its structure.

64. NSPE CODE OF ETHICS pmb1. (2007), <http://www.nspe.org/resources/pdfs/Ethics/>

amplify the themes found in the Preamble. The first of these Canons plainly states the engineer's duty to the public: the engineer "shall hold paramount the safety, health, and welfare of the public."<sup>65</sup> Canon 3 also contains elements of the bargain. It acknowledges the effect an engineer's work has on the larger society and orders engineers to "[i]ssue public statements only in an objective and truthful manner."<sup>66</sup>

The Rules of Practice are more detailed and amplify the themes even further. The first Rule of Practice initially restates the first Canon: "Engineers shall hold paramount the safety, health, and welfare of the public."<sup>67</sup> Its subparts explain what this means. Subpart (a) provides, for example, that "[i]f engineers' judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate."<sup>68</sup> Subpart (b) requires engineers to "approve only those engineering documents that are in conformity with applicable standards."<sup>69</sup> Subpart (f) requires engineers who have "knowledge of any alleged violation of this Code . . . [to] report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required."<sup>70</sup> Engineers also have a separate set of obligations when interacting directly with "the public." They are to "issue public statements only in an objective and truthful manner."<sup>71</sup>

The Professional Obligations likewise are more detailed rules based on the broad principles in the preamble and Fundamental Canons. The second of these is directed specifically at an engineer's responsibilities to the public—"Engineers shall at all times strive to serve the public interest"<sup>72</sup>—with its subparts describing the contours

---

CodeofEthics/Code-2007-July.pdf.

65. *Id.* § I(1).

66. *Id.* § I(3).

67. *Id.* § II(1).

68. *Id.* § II(1)(a).

69. *Id.* § II(1)(b).

70. *Id.* § II(1)(f).

71. *Id.* § III(3).

72. *Id.* § III(2).

of that obligation. Most of these are purely hortatory, including subpart (a), which encourages engineers “to participate in civic affairs; career guidance for youths; and work for the advancement of the safety, health, and well-being of their community.” Subpart (c) encourages engineers “to extend public knowledge and appreciation of engineering and its achievements.”<sup>73</sup>

Other subparts go further than simple encouragement. Subpart (b) is a relatively clear stipulation: “Engineers shall not complete, sign, or seal plans and/or specifications that are not in conformity with applicable engineering standards. If the client or employer insists on such unprofessional conduct, they shall notify the proper authorities and withdraw from further service on the project.”<sup>74</sup> Professional Obligation 3 places a duty on engineers to “avoid all conduct or practice that deceives the public.”<sup>75</sup>

The engineer’s public bargain differs from the lawyer’s. Like lawyers, engineers are not required to provide their services to the public on a pro bono basis, nor are they required to “improve access” to engineering services, though both are encouraged. Unlike lawyers, engineers’ duties to the public are plainly spelled out in their code of ethics. The engineer’s code explicitly describes the duty in both binding and non-binding sections, and explicates that such duty is owed to “the public.”<sup>76</sup> In the Model Rules, the lawyer’s duty to the public is re-conceived as a duty to the administration of justice, and to competent and zealous performance of the lawyer’s role within that system, since a smoothly operating and fair justice system is itself a public good. For an engineer, “the protection of the public health, safety, and welfare in meeting society’s needs is at the center of the Code.”<sup>77</sup>

---

73. *Id.* § III(2)(a), (c). Similarly, subpart (d) encourages engineers to “adhere to the principles of sustainable development in order to protect the environment for future generations.” *Id.* § III(2)(d).

74. *Id.* § III(2)(b).

75. *Id.* § III(3).

76. *See generally* NSPE CODE OF ETHICS (2007).

77. F. A. Kulacki, *The Future Of Callings—An Interdisciplinary Summit on the Public Obligations of Professionals into the Next Millennium: Engineering, Engineers and the Public Good*, 25 WM. MITCHELL L. REV. 157, 167 (1999).

This is true even though engineers, like lawyers, owe a duty of confidentiality to their clients: “Engineers shall not reveal facts, data, or information without the prior consent of the client or employer except as authorized or required by law or this Code.”<sup>78</sup> The Code also describes an overlapping duty regarding confidential information: “Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.”<sup>79</sup> Engineers also owe a duty of loyalty: “Engineers shall act for each employer or client as faithful agents or trustees.”<sup>80</sup>

However, the NSPE’s Board of Ethical Review<sup>81</sup> has interpreted the NSPE Code to provide that the duty regarding the safety of the public may trump considerations of client confidentiality or loyalty. Here is one fact pattern:<sup>82</sup> Engineer A was hired to inspect a sixty-year-old occupied apartment building on behalf of his client, the owner, and to issue a structural report. The engineer and the owner agreed that the report would be confidential. Although Engineer A’s inspection showed that the building was structurally sound, the engineer learned from the owner that the building contained deficiencies in its electrical and mechanical systems in violation of various state codes. Because Engineer A had promised the client confidentiality, the engineer did not report the deficiencies to any third-party authority. The Board found that the failure to report was a violation of the NSPE Code, despite the existence of a confidentiality agreement and despite the provisions of the NSPE Code that require client confidentiality.<sup>83</sup> When the engineer’s knowledge of the

---

78. NSPE CODE OF ETHICS § II(1)(c).

79. *Id.* § III(4).

80. *Id.* § II(4). Engineers’ duty of loyalty is explained in both the Rules of Practice and Professional Obligations sections describing prohibited conflicts of interest. *Id.* §§ II(4)(a)–(d), III(5).

81. According to the NSPE website, the “Board of Ethical Review is a panel of engineering ethics experts” that, among other things, “render[s] impartial opinions pertaining to the interpretation of the NSPE Code of Ethics.” NSPE Board of Ethical Review, <http://www.nspe.org/Ethics/BoardofEthicalReview/index.html> (last visited Oct. 20, 2009).

82. *See* Duty to Report Safety Violations, Case No. 89-07 (NSPE Board of Ethical Review Oct. 17, 1989), <http://www.nspe.org/resources/pdfs/Ethics/EthicsResources/EthicsCaseSearch/1989/BER89-7.pdf>.

83. *Id.* at 4.

situation is incomplete, or when the risk to the public safety, health, and welfare is remote and contingent, especially when there are other methods of lessening the risk besides a report to a third party, an engineer has some degree of discretion about whether to report.<sup>84</sup> The engineer must first pursue internal avenues of recourse with his or her employer or the client,<sup>85</sup> but if those fail and the risk is serious, he or she must disclose the confidential information where necessary to protect the public safety, health, and welfare, even where confidential information is involved.<sup>86</sup>

If the paradigmatic ethical conundrum for lawyers involves the client who confesses, the engineering parallel involves the engineer who learns that an employer's or a client's project will endanger the public. One often-repeated scenario that illustrates this dilemma involves the Challenger space shuttle disaster of 1986.<sup>87</sup> On January 27, 1986, the Space Center was counting down to shuttle liftoff the following morning. Robert Lund, vice president of engineering for Morton Thiokol, had been advised by the engineers he supervised that the launch should be postponed. The engineers, including Lund, were concerned about the O-rings that sealed the segments of the booster rockets. The weather at the launch was expected to be unusually cold for Florida—lower than freezing. The engineers understood that as the temperature decreased, the O-rings were more likely to become less resilient and more likely to erode, causing the booster segments to come apart. The O-rings had never been tested at

---

84. See Public Health and Safety—Warranty Inspections, Case No. 07-03 at 4 (NSPE Board of Ethical Review Apr. 8, 2008), <http://www.nspe.org/resources/pdfs/Ethics/EthicsResources/EthicsCaseSearch/2007/BER%2007-3-FINAL.pdf>.

85. Public Welfare—Design of Medical Equipment, Case No. 08-10 at 3 (NSPE Board of Ethical Review Mar. 27, 2009), <http://www.nspe.org/resources/pdfs/Ethics/EthicsResources/EthicsCaseSearch/2008/BER%2008-10-FINAL.pdf>.

86. See Duty to Report Safety Violations, Case No. 89-07 at 4 (“The obligation of the engineer to refrain from revealing confidential information, data, facts concerning the business affairs of the client without consent of the client is a significant ethical obligation. We further believe that matters of public health and safety must take precedence. The NSPE Code of Ethics [section II.1] is clear on this point.”).

87. DAVIS, *supra* note 62, at 43–60. Engineering ethics textbooks also use this example, as do a number of business and organizational ethics texts and journals. *E.g.*, GAIL D. BAURA, ENGINEERING ETHICS: AN INDUSTRIAL PERSPECTIVE 39–52 (2006); MIKE W. MARTIN & ROLAND SCHINZINGER, INTRODUCTION TO ENGINEERING ETHICS 95–102 (2d ed. McGraw-Hill 2000, 2010).

the expected temperature. Based on the engineers' recommendations, Morton Thiokol told the Space Center to postpone the launch, as it had done before upon engineers' recommendations.

However, the Space Center did not want to delay the launch, as the space shuttle's launch already had been delayed several times. NASA needed the approval of the Morton Thiokol engineers to move forward with the launch. Lund's boss, who was not an engineer, reexamined the evidence and decided that the O-rings would not significantly erode at the expected temperature. All that was needed was approval from engineering. Lund's boss told him that he "needed to take off his engineering hat and put on his management hat."<sup>88</sup> What should an ethical engineer do at this point?

The ethics code offers guidance in thinking through the problem. Because public safety is "paramount," when an engineer's judgment is "overruled under circumstances that endanger life or property," the engineer is supposed to notify his or her employer, the client, and "such other authority as may be appropriate."<sup>89</sup> Engineers also are supposed to inform their "clients or employers when they believe a project will not be successful."<sup>90</sup> They are directed to refuse to "complete, sign, or seal plans and/or specifications that are not in conformity with applicable engineering standards."<sup>91</sup> If the client or employer insists on moving ahead with the project, the engineer "shall notify the proper authorities and withdraw from further service on the project."<sup>92</sup> Weighed against this is the engineer's duty to the client and employer: to serve them faithfully, to keep confidential information confidential, and not to reveal any facts without consent unless necessary.

So what should the Morton Thiokol engineers have done? We know the end of the story. Lund took off his engineering hat and made a management decision to approve the launch.<sup>93</sup> Morton

---

88. DAVIS, *supra* note 62, at 44.

89. NSPE CODE OF ETHICS § II(1)(a).

90. *Id.* § III(1)(b).

91. *Id.* § III(2)(b).

92. *Id.*

93. PRESIDENTIAL COMM'N, REPORT OF THE PRESIDENTIAL COMMISSION ON THE SPACE SHUTTLE CHALLENGER ACCIDENT 94 (1986), [http://www.challenger.org/about/assets/nasa\\_report.pdf](http://www.challenger.org/about/assets/nasa_report.pdf) (quoting transcript of interview with Lund).

Thiokol gave its approval, the launch went forward, the O-rings failed, and the shuttle exploded, killing everyone aboard.<sup>94</sup>

Hearings and investigations followed. There was more than enough blame to go around; popular targets included Morton Thiokol's management structure,<sup>95</sup> NASA's management culture,<sup>96</sup> complacency due to the success of previous missions and misunderstandings of science and engineering by management,<sup>97</sup> engineers wearing a "management hat" instead of an "engineering hat," or some combination of all of these. In hindsight, however, most seem to agree that the ethical thing for the engineers to have done would have been to keep on their engineering hats and do everything in their power to stop the launch.

When considered next to the Lake Pleasant Bodies case, the Challenger scenario illustrates how engineering ethics and legal ethics can differ dramatically. Engineers have made a different bargain with the public than have lawyers. While engineers owe their clients and employers loyalty and confidentiality, these considerations are more easily outweighed by an affirmative duty to "the public"—third parties outside of the engineers' direct employment relationships. If a lawyer can be a good lawyer by keeping confidences, an engineer can be a good engineer by disclosure—by *not* keeping confidences. Further, engineers' duties to the public as described in the code of ethics are more clearly aligned with the public's conception of those same duties than the ethical obligations of lawyers. For example, the public outcry at the Lake Pleasant Bodies lawyers' "callous" behavior and the subsequent indictment suggests that the public expected something different from the lawyers. The opposite is true of the Challenger engineers. After

---

94. DAVIS, *supra* note 62, at 43–44.

95. Russell P. Boisjoly et al., *Roger Boisjoly and the Challenger Disaster: The Ethical Dimensions*, 8 J. BUS. ETHICS 217, 225–28 (1989) (discussing diffusion of personal responsibility); Patricia H. Werhane, *Engineers and Management: The Challenge of the Challenger Incident*, 10 J. BUS. ETHICS 605, 611–12 (1991) (discussing "autocratic" culture in the Wasatch division at Thiokol).

96. See generally Howard S. Schwartz, *On the Psychodynamics of Organizational Disaster: The Case of the Space Shuttle Challenger*, 2 COLUM. J. WORLD BUS. 59 (1987).

97. PRESIDENTIAL COMM'N, REPORT OF THE PRESIDENTIAL COMMISSION ON THE SPACE SHUTTLE CHALLENGER ACCIDENT app. F (discussing widely differing conceptions of risks involved).

all, Lund had to “take off his engineering hat” to reach the point where he could agree to the launch, suggesting that his “engineering hat” constrained him from giving approval.

## II. COLLISIONS OF CODES: LAWYERS AND ENGINEERS WORKING TOGETHER

Because law and engineering have different concepts of their members’ professional roles and different concepts of their professions’ duties to the public, is it ethically possible for lawyers and engineers to work together? If there is a collision of codes, which code, if any, comes out on top? And does it matter whether the lawyers and engineers work together under the same roof or whether their collaboration takes place at a greater distance?

### *A. Disclosure versus Confidentiality: The Nature of the Conflict*

While the interests of clients generally are paramount for lawyers, the safety and welfare of the public is paramount for engineers. As the cases discussed above make clear, one can expect ethical conflict between the two professions, at least in some cases. The Lake Pleasant Bodies and Challenger cases are iconic, but most lawyers and professional engineers will not face these extreme situations even once in a decades-long career. A more mundane example is taken from the comments to Model Rule 1.6. A lawyer represents a company and learns that a company plant accidentally has dumped industrial waste into a stream, in violation of both the company’s permit and state law.<sup>98</sup> The comments suggest that the lawyer would be allowed, but not required, to reveal this information to the authorities under limited circumstances: (1) “if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease,” and (2) “if the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.”<sup>99</sup> The comments leave their corollary unspoken: if the situation falls short of a “present and substantial risk”—if the illness

---

98. MODEL RULES R. 1.6 cmt. para. 6.

99. *Id.*

is neither “life-threatening [n]or debilitating”—or if disclosure would not reduce the number of victims, the lawyer is not ethically permitted to reveal the confidential information under this Rule.<sup>100</sup>

What about the licensed professional engineer working with the lawyer? The engineer’s duty is to “[h]old paramount the safety, health, and welfare of the public.”<sup>101</sup> The NSPE Board of Ethical Review has described the duty thusly: “[W]here an engineer determines that a case may involve a danger to the public safety, the engineer has not merely an ‘ethical right’ but an ‘ethical obligation’ to report the matter to the proper authorities and withdraw from further service on the project.”<sup>102</sup> Thus, it would seem that the engineer’s duty is broader than the lawyer’s. An engineer might have a duty to disclose information to the authorities if the contamination might make people marginally sick, instead of possibly killing them, whereas the lawyer would have to remain silent if he or she learned of the information through the representation of the client.

As a practical matter, not every state has adopted Model Rule 1.6. But even in those states that have changed the Model Rule to allow for or mandate greater disclosure of client confidences, the results would not necessarily differ. In Florida, for example, the lawyer “shall” reveal a client’s confidential information to “prevent a death or substantial bodily harm to another.”<sup>103</sup> However, the Florida rule provides no additional guidance where the spill might cause nearby residents’ hair to fall out, but would not cause “substantial bodily harm.”<sup>104</sup>

Another, more common scenario was presented to the NSPE’s Board of Ethical Review (“BER”). An engineer is hired by a corporation to determine whether the manufacturing waste the corporation plans to discharge into a body of water will cause the

---

100. In some cases, permit holders have a legal duty to report permit violations. The regulations implementing the Clean Water Act provide that all permits contain a condition requiring the permittee to “report any [permit] noncompliance which may endanger health or the environment.” 40 C.F.R. § 122.41(i)(6) (2008).

101. NSPE CODE OF ETHICS § I(1).

102. Whistleblowing City Engineer, Case No. 88-6 (NSPE Board of Ethical Review 1988), available at <http://www.niee.org/cases/78-88/case88-6.htm>.

103. FLA. RULES OF PROF’L CONDUCT R. 4-1.6(b)(2) (2009).

104. *Id.*

water to exceed minimum environmental standards, and to prepare a written report detailing his findings. During the course of his employment, the engineer discovers that the discharge indeed would exceed the limits. When he tells the corporation this fact, his contract with the corporation is terminated before the report is written. The engineer later learns that the state has held a hearing, at which the corporation told the state environmental authority that its discharge meets environmental standards. The BER presumed that a violation of environmental standards was “detrimental to the public health and safety” and thus subject to disclosure by the engineer.<sup>105</sup> The engineer has a duty to inform the authorities after he learns of the hearing.<sup>106</sup>

But what about the lawyer faced with the same situation? The violation of environmental standards would not clearly fall into the “reasonably certain death or substantial bodily harm” exception to the lawyer’s duty of confidentiality.<sup>107</sup> Perhaps only aquatic life would be affected, in which case the lawyer would be compelled to remain silent. This does not end the inquiry, however, as the lawyer may be able to disclose the information through another exception. The Model Rules also allow disclosure to “prevent . . . a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another,” when the client has used the lawyer’s services in the commission of the crime.<sup>108</sup> Some states have broadened this provision considerably; Virginia, for example, *requires* lawyers to “promptly reveal . . . the intention of a client, as stated by the client, to commit a crime . . . .”<sup>109</sup> Other states, like Oregon, permit lawyers to disclose the client’s intention to commit a crime and “the information necessary to prevent the crime.”<sup>110</sup> It

---

105. Public Welfare—Knowledge of Information Damaging to Client’s Interest, Case No. 76-4 (NSPE Board of Ethical Review 1976), <http://www.nspe.org/resources/pdfs/Ethics/EthicsResources/EthicsCaseSearch/1976/BER%2076-4.pdf>. The fact that Engineer A was preparing a “report” rather than the “plans” or “specifications” mentioned in the code was immaterial in the view of the BER, which wrote: “It is basic to the entire concept of a profession that its members will devote their interests to the public welfare, as is made abundantly clear in . . . the code.” *Id.* (citation omitted).

106. *Id.*

107. *See* MODEL RULES R. 1.6(b)(1).

108. *Id.* at R. 1.6(b)(2).

109. VA. RULES OF PROF’L CONDUCT R. 1.6(c)(1) (2009).

110. OR. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2009).

might be possible to squeeze the corporation's polluting discharge into this kind of exception. Is it a "crime" to exceed the permit limits? Not necessarily. Perhaps making a false statement to the state authorities about the discharge counts as a "crime," but the client never announced its intention to make the false statement in advance (although such might be inferred from its firing of Engineer A), so the crime-fraud exception is unavailable to the lawyer. If the false statement already has been made (in the example, Engineer A finds out after the fact that his former client has presented false information at a hearing), the lawyer's disclosure will not prevent a crime.<sup>111</sup>

None of this is to suggest that professional engineers do or should fail to respect their clients' confidences. The NSPE Code requires professional engineers to "notify their employer or client" when their "judgment is overruled under circumstances that endanger life and property,"<sup>112</sup> and the BER has made it clear that notification of "such other authority as may be appropriate" should occur if the employer or client fails to take meaningful action.<sup>113</sup> The BER cases also caution the engineer about jumping to a conclusion that public danger is imminent without being fully aware of the facts or without having the expertise to truly evaluate the situation.<sup>114</sup>

### *B. Strategies for Collaboration: Avoidance, Harmonization, and Containment*

If there is the potential for conflict between the engineer's "paramount" duty to disclose and the lawyer's duty of client confidentiality, does it matter in practice? Answering that question

---

111. Georgia, for example, prohibits lawyers from making use of the crime exception if the "harm or loss" to the victim already has occurred. GA. RULES OF PROF'L CONDUCT 1.6(b)(2) (2009).

112. NSPE CODE OF ETHICS § II(1)(a).

113. See Public Welfare—Design of Medical Equipment, Case No. 08-10 at 3 (NSPE Board of Ethical Review Mar. 27, 2009), <http://www.nspe.org/resources/pdfs/Ethics/EthicsResources/EthicsCaseSearch/2008/BER%20Case%2008-10-FINAL.pdf>. In this case, the Board of Ethical Review discussed the conflict between the duty to hold public health and safety paramount and the duty to faithfully serve one's client or employer, noting that "[o]nly if [internal] efforts do not produce satisfactory results should [the engineer] consider exploring external avenue[s] for action." *Id.*

114. *Id.*

requires an examination of how lawyers collaborate with professionals such as engineers who have extralegal expertise.

Within environmental law, there are three relatively common settings in which lawyers and experts collaborate. The most common type of collaboration is the retention of an expert to consult or testify in litigation. In this setting, the lawyer works at a law firm, non-profit organization, or governmental agency and handles legal matters for a client as they arise. When the lawyer perceives that additional, non-legal expertise is needed, the lawyer engages an expert employed by a separate organization who has no previous relationship with the lawyer's client. The lawyer and expert then work together on the client's behalf, the lawyer providing legal services, and the expert providing extralegal expertise to assist the lawyer.

In some cases, lawyers and experts share the same employer and collaborate more closely on behalf of a shared client. In-house counsel for a corporate permittee or a governmental regulator may draw on the expertise of environmental specialists who are also employed by the corporation or agency. In this situation, the "client" is the mutual employer.

Rarer still is a third type of collaboration in which lawyers and experts share a single employer but serve clients other than that employer. Some nonprofit groups use this model; for example, Earthjustice, a public interest environmental law firm, employs staff scientists and researchers in addition to its lawyers. A number of in-house law school environmental clinics also employ this model.<sup>115</sup> At

---

115. The clinic where the author works, Washington University School of Law's Interdisciplinary Environmental Clinic, is engaged in this third type of collaboration. Duke University's Environmental Law and Policy Clinic is a "joint venture of the Law School and the Nicholas School of the Environment," which offers law students and graduate students the opportunity to work together in teams representing community organizations as they work toward solutions to environmental problems. Duke Law Clinics: Environmental Law and Policy Clinic, <http://www.law.duke.edu/envlawpolicy/index> (last visited Oct. 20, 2009). As part of its Environmental and Land Use Law Program, the University of Florida Levin College of Law sponsors the Conservation Clinic, in which environmental law students and graduate students from conservation-related fields work together on non-litigation-based environmental law and policy problems. See University of Florida Levin College of Law, Conservation Clinic, <http://www.law.ufl.edu/conservation/index.shtml> (last visited Oct. 20, 2009). The interdisciplinary Environmental Protection Clinic is a joint project of Yale Law School and the Yale School of Forestry and Environmental Studies, addressing environmental law and policy problems. See Yale Environmental Protection Clinic, <http://www.law.yale.edu/academics/>

these clinics, teachers and sometimes students from the fields of law, environmental studies, and engineering work in multidisciplinary teams to provide legal and technical services on a pro bono basis to outside clients.<sup>116</sup>

In all three settings, it is possible that the engineer will discover a condition that poses a threat to the public safety, health, or welfare, but which the client wants and expects its lawyers to keep confidential. Consider a variation on the first example given above. A manufacturing plant has accidentally dumped industrial waste into a stream. After consulting with its safety personnel, the company has contacted its outside counsel to undertake crisis management of the incident before news of the spill becomes public.<sup>117</sup> The lawyers then call in an independent environmental engineer to consult with them about the extent of the damage caused by the spill. In this situation, depending on the nature and seriousness of the spill and the wishes of the client, the lawyer and the consulting engineer could find themselves at odds. If the outside lawyers and the consulting engineer worked under the same roof, instead of at two different firms, the potential for conflict would still exist; indeed, it might be more difficult to avoid in this shared-office situation. The same is true if both the lawyer and the professional engineer worked for the permit-

---

EnvironmentalProtectionClinic.asp (last visited Oct. 20, 2009). The University of Ottawa, in partnership with Ecojustice, also operates an interdisciplinary clinic, joining students of law, science, and other disciplines to provide environmental law services. See University of Ottawa, Environmental Law and Policy Clinic, <http://www.commonlaw.uottawa.ca/en/programs/environmental-law/environmental-law-and-policy-clinic.html> (last visited Oct. 20, 2009).

116. This type of collaboration presents its own set of ethical issues. The Model Rules prohibit lawyers from engaging in some forms of joint practice with non-lawyer professionals—what are known as “multidisciplinary practices” (“MDPs”). MODEL RULES R. 5.4. Not every type of joint practice is excluded, however. An organization where a lawyer serves as the head of a multidisciplinary team, either by employing nonlawyers as part of the practice or by retaining nonlawyer professionals from separate firms, is the most clearly acceptable type. See ABA Center for Professional Responsibility, Hypotheticals and Models, <http://www.abanet.org/cpr/mdp/multicomhypos.html> (last visited Oct. 20, 2009); see also Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 224 (2000) (describing ABA models).

117. See Nina Schuyler, *Legal Crisis Management: Law Firms Create Diverse Teams to do the Job*, 2004 SAN FRANCISCO ATT’Y 28 (2004) (noting the emergence of law firm “crisis management” groups who handle press and government inquiries after a client experiences a potentially scandalous or otherwise damaging incident).

holding company, a very common scenario. The corporate employer might want to keep news of the spill undercover, hoping that no one will find out before it can undertake cleanup efforts. Depending on the circumstances, in-house counsel might be able to oblige the request for secrecy, while an in-house engineer might not.

So how do professional engineers and lawyers handle these types of ethical conflicts? The following are three strategies that lessen, even if they do not completely eliminate, the conflict between legal and engineering ethics across the three settings in which the professions are likely to work together, along with a discussion of the positive and negative aspects of each.

#### 1. Avoidance: Hire Engineers Who Are Not Licensed Professional Engineers

Perhaps the most obvious strategy is to avoid the issue altogether. Most engineers are not licensed, and do not need to be in order to lawfully work as engineers. Indeed, for engineers the default rule is “no license”—a significant difference from the legal profession, where an unlicensed lawyer cannot lawfully practice. Why not simply let the majority of engineers—those who are not professional engineers—be involved with lawyers?

Of course in practice it is not that simple. First, certain engineering tasks require the involvement of a professional engineer. According to the NSPE website, only a licensed professional engineer may prepare, sign, seal, and submit engineering plans and drawings to a public authority for approval, or seal certain types of engineering plans and designs for public and private clients.<sup>118</sup> Many state engineering regulators have a similar rule describing which tasks may be performed only by professional engineers.<sup>119</sup> Some state statutes or city ordinances require certain reports and projects to be prepared and supervised by a professional engineer.<sup>120</sup> Engineering

---

118. NSPE Licensure—Why Get Licensed, <http://www.nspe.org/Licensure/WhyGetLicensed/index.html> (last visited Oct. 20, 2009).

119. *See, e.g.*, N.C. GEN. STAT. §§ 89C-3(6), 89C-23 (2007) (defining the “practice of engineering” and prohibiting such practice without a license, respectively).

120. In New York, for example, many “plans, specifications and estimates” for the “construction and maintenance” of municipal government public works projects must be made

statutes and regulations commonly contain lists of persons who are practicing engineering within the meaning of the law, but who are not required to be licensed. For example, engineers who perform engineering work for a company that designs or manufactures a product are not required to have a license, as long as the engineering work is connected with the product's design or manufacture.<sup>121</sup> Engineering firms may themselves be licensed and employ engineers who are not professional engineers.<sup>122</sup> Some engineers employed by public utilities or state and local governments may not need a license.<sup>123</sup> Professors of engineering do not need to be licensed in some states.<sup>124</sup> In other states, specific industries are exempt. For instance, Florida's laws exempt engineers employed by the aerospace industry,<sup>125</sup> and California's laws have an exemption for employees of the communications industry.<sup>126</sup> Branches of engineering may be treated differently, as well. California, for example, singles out civil, mechanical, and electrical engineers in its licensing provisions.<sup>127</sup>

Depending on the circumstances and the jurisdiction in which the practice is located, it might be possible for a lawyer to engage an engineer to perform only those tasks that do not require a licensed engineer. In such a scenario, there would be no license-related barrier to the law-engineering collaboration. Even so, this does not entirely

---

by a professional engineer. N.Y. EDUC. LAW § 7209.3 (McKinney 2001 & Supp. 2009).

121. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-144(C) (2008) (registration requirements do not apply to work done by a manufacturing industry or its employees provided the work is "in connection with or incidental to the products . . . of such . . . manufacturing industry . . ."); VT. STAT. ANN. tit. 26, § 1163(c)(1) (2006) (describing industrial practice exemption); WISC. STAT. ANN. § 443.14(7) (West 2005 & Supp. 2008) (license not required for manufacturers and employees to perform engineering in the design, assembly, sale or installation of their respective products).

122. For example, Missouri's regulations provide that as long as the firm is owned by at least one professional engineer who personally supervises the work of the other engineers and "signs off" on its quality, the firm itself can hold the license. MO. CODE REGS. ANN. tit. 20, § 2030-10.010 (2008) (corporate certificates of authority). *See also* MO. REV. STAT. § 327.191(1) (2000) (requiring no license when employed by person or corporation with certificate of authority).

123. TENN. CODE ANN. § 62-2-103(4) (1997) (engineers employed by municipal electric systems or co-operatives); GA. CODE ANN. § 43-15-29(b)(2) (2008) (exempting U.S. government employees).

124. FLA. STAT. ANN. § 471.0035 (West 2006).

125. *Id.* § 471.003(j).

126. CAL. BUS. & PROF. CODE § 6746.1 (West Supp. 2009).

127. *Id.* § 6730.

resolve the problem. The nature of the task the engineer is to perform on behalf of the lawyer's client or the mutual client may require an engineering license, depending on how the "practice of engineering" is defined in the relevant jurisdiction. Further, if the engineer is to provide a written report in connection with litigation or to testify in court, it may be desirable to have the credentials of a licensed professional engineer. Finally, many engineers voluntarily agree to commit themselves to ethical standards through membership in engineering societies or otherwise.

## 2. Harmonization: Serving the Public Interest

The conflict between the lawyer's duty of confidentiality and the engineer's duty to disclose information arises when the best interests of the client differ from or are even contrary to the public safety, health, and welfare. But what if the client's interest is in the public safety, health, and welfare? For a subset of environmental lawyers—public interest lawyers—this is the case.

Like public interest advocates of all stripes, public interest environmental lawyers "promote a common good that extends beyond the narrow economic or sectarian goals of their members or supporters."<sup>128</sup> Thus, when acting as a "private attorney general" under any number of federal environmental statutes,<sup>129</sup> public interest environmental groups "sue not to vindicate their personal rights but to protect the public's interest in a livable environment."<sup>130</sup> In some

---

128. Michael T. Heaney, *Public Interest Advocacy*, in 6 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 614, 614 (William A. Darity, Jr. ed., 2008).

129. See Clean Air Act, 42 U.S.C. § 7604(a) (2006); Clean Water Act, 33 U.S.C. § 1365(a) (2006); Endangered Species Act, 16 U.S.C. § 1540(g) (2006); Resource Conservation Recovery Act, 42 U.S.C. § 6972(a) (2006); Safe Drinking Water Act, 42 U.S.C. § 300j-8(a) (2006); Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9659(a) (2006); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270(a) (2006); Marine Protection, Research, and Sanctuaries Act of 1975 § 105(g), 33 U.S.C. § 1415(g)(1) (2006). Although NEPA does not expressly allow for judicial review, courts have held that judicial review of agency compliance with NEPA is permissible under the APA. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

130. Walter B. Russell, III & Paul Thomas Gregory, Note, *Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 GA. L. REV. 307, 324 (1984). See also Charles C. Steincamp, *Citizenship: A Discussion of Environmental Citizen Suits*, 39 WASHBURN L.J. 72, 72 (1999) (noting contrast between private party citizen suits under federal environmental statutes and "public interest" citizen suits under those same

cases, the public interest encompasses the environment itself; Greenpeace, for example, describes itself as existing “because this fragile earth deserves a voice.”<sup>131</sup> Likewise, the lawyers who represent these groups serve their clients by helping them further “environmental quality and public health”<sup>132</sup>—an inherently public goal.

What does this mean for a law-engineering collaboration? Most public interest environmental lawyers represent or advise public interest environmental groups.<sup>133</sup> In some cases, the lawyers work for a law firm that confines itself to public interest environmental law and works with outside technical experts. Some public interest organizations employ both lawyers and technical experts.<sup>134</sup> The public orientation allows for a law-engineering collaboration with fewer fears of conflicts between the client’s wishes and the engineer’s duty to protect the public safety, health, and welfare. Further, the client’s status as an environmental public interest group means that there are fewer opportunities for conflict between the ethical codes of lawyers and professional engineers. For example, if clients are not permit-holders, the engineers need not fear that they will be ethically compelled to disclose a permit violation or other potential threat to the public health that the client would rather keep secret.

---

statutes). This does not mean that the environmental groups and their members have no personal stake in the suit. Like any other plaintiffs, they are bound by the standing and jurisdictional requirements of Article III.

131. Greenpeace International, <http://www.greenpeace.org/international/> (last visited Oct. 20, 2009). The motto of Earthjustice is: “Because the earth needs a good lawyer.” Earthjustice, <http://www.earthjustice.org/index.html> (last visited Oct. 20, 2009). *Cf.* *Sierra Club v. Morton*, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting) (“Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.”).

132. Deborah Curran, *Reflections on Public Interest Environmental Lawyering in British Columbia*, 67 *ADVOC.* 183, 184–85 (2009) (distinguishing environmental law from public interest environmental law). *See also* John E. Bonine, *Public Interest Environmental Lawyers—Global Examples and Personal Reflections*, 10 *WIDENER L. REV.* 451, 452–53 (2004).

133. *See, e.g.*, Petition for Review, *Natural Res. Def. Council v. EPA*, No. 06-1045 (D.C. Cir. 2009) (Earthjustice attorney David S. Baron representing NRDC and Environmental Defense Fund (“EDF”)); *Env’tl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007) (EDF’s deputy general counsel, Vickie Patton, along with lawyers from Southern Environmental Law Center, represented EDF).

134. Earthjustice, EDF, and NRDC are examples of such organizations.

This solution, of course, is far from perfect. It may work best in a litigation context, where counsel acting as client advocates likely will look for the engineering expert who is least likely to hold an opinion that will run contrary to the client's position in the lawsuit.<sup>135</sup> If the lawyers and engineers are working under the same roof, this necessarily limits the world of clients to those whose views align with both legal and engineering concepts of public interest. When dealing with concepts like "public safety" and "public health," there is always room for even the most closely aligned professionals to differ.

### 3. Containment: Lessons from Law-Social Work Collaborations

Conflicting rules regarding disclosure and confidentiality are not unique to the law-engineering collaboration. In fact, the lawyer-social worker collaboration is the basis for much discussion on this topic.<sup>136</sup> Social workers, like lawyers and professional engineers, are licensed by a state or quasi-state organization and are governed by a code of ethics. Social workers, when acting in their professional capacity, are also required by state statute to report instances of child abuse and neglect, even if the information is learned from a client.<sup>137</sup> If a client of a social worker confesses to abuse or relates that he or she has

---

135. STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 4-7* (3d ed. 2004); David S. Caudill, *Legal Ethics and Scientific Testimony: In Defense of Manufacturing Uncertainty, Deconstructing Expertise and Other Trial Strategies*, 52 *VILL. L. REV.* 953, 955-56 (2007) (discussing the ethics of presenting and attacking expert scientific testimony).

136. See, e.g., Sara R. Benson, *Beyond Protective Orders: Interdisciplinary Domestic Violence Clinics Facilitate Social Change*, 14 *CARDOZO J.L. & GENDER* 1 (2007); Alexis Anderson, Lynn Barenberg & Paul R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 *CLINICAL L. REV.* 659, 711-18 (2007); Maryann Zavez, *The Ethical and Moral Considerations Presented by Lawyer/Social Worker Interdisciplinary Collaborations*, 5 *WHITTIER J. CHILD. & FAM. ADVOC.* 191 (2005); Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice—Encouraging Holistic Advocacy while Protecting Ethical Interests*, 73 *U. COLO. L. REV.* 787 (2002); J. Michael Norwood & Alan Paterson, *Problem-Solving in a Multidisciplinary Environment? Must Ethics Get in the Way of Holistic Services?*, 9 *CLINICAL L. REV.* 337 (2002); Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 *CLINICAL L. REV.* 403 (2001).

137. See Anderson, Barenberg & Tremblay, *supra* note 136, at 692-93 (discussing state mandated reporting statutes).

been abused, the social worker has to report the information as required by the statute.<sup>138</sup> Failure to report can be a crime for which there usually are civil consequences, and which may result in the loss of the social worker's license.<sup>139</sup> A lawyer, upon hearing the same information, does not have to report it, and could be prohibited from doing so.<sup>140</sup> Yet law-social work collaborations, including those at organizations employing both lawyers and social workers, are relatively common.<sup>141</sup> How do they handle the ethical dilemmas?

The most commonly used method appears to be the construction of a confidentiality "wall" designed to "minimize the risk of inadvertent disclosure of client information related to suspected child abuse."<sup>142</sup> The wall involves making sure all staff are aware of the restrictions; creating "shadow files" for the use of the social worker to segregate protected and non-protected materials; training staff and students; monitoring and implementing the procedures; and discussing the social worker's duty to disclose with the client.<sup>143</sup>

The need for a wall may be greater when lawyers share the same office or work under the same employer as social workers, because the risk of inadvertent disclosure is higher. Even when the lawyer

---

138. Engineers and lawyers may also be subject to statutory disclosure requirements under certain environmental statutes. *See, e.g.*, CERCLA § 103(b)(3). A detailed analysis of these statutory obligations is beyond the scope of this article.

139. For example, Missouri's version requires a social worker who "has reasonable cause to suspect that a child has been or may be subjected to abuse or neglect or observes a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect" to *immediately* report to the Children's Division of the Department of Social Services. MO. REV. STAT. § 210.115(1) (2008). Failure to do so is a crime. MO. REV. STAT. § 210.165 (2008). *See also* State v. Brown, 140 S.W.3d 51 (Mo. Sup. Ct. 2004) (holding that sections 210.115 and 210.165 were not unconstitutionally vague and could be the basis for a criminal prosecution).

140. Some states include attorneys among persons who are required to report abuse and neglect, usually making an exception when the information is otherwise privileged. Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 N.M. L. REV. 125, 126–28 (2006) (summarizing and categorizing state statutes).

141. Social workers work with lawyers in legal aid offices, public defenders' offices, elder law practices, and law school clinics. Social workers may be appointed by the court to work with juvenile defendants. *See, e.g.*, Joseph J. Senna, *Social Workers in Public Defender Programs*, 20 SOC. WORK 271 (1975); Christina T. Pierce, Patricia Gleason-Wynn & Marilyn G. Miller, *Social Work and Law: A Model for Implementing Social Services in a Law Office*, 34 J. GERONTOLOGICAL SOC. WORK 61 (2001).

142. St. Joan, *supra* note 136, at 439.

143. *Id.* at 440.

calls in the social worker as a consultant or expert witness, the need for confidentiality exists. In that circumstance, the lawyer might be the sole conduit for the social worker's information about the case and the client's problems,<sup>144</sup> and still would have the responsibility to obtain the client's consent or wall off facts about the client that could trigger the social worker's statutory duty to report.<sup>145</sup>

Assuming that the jurisdiction in which the collaboration occurs allows for it,<sup>146</sup> one might be able to implement a similar system when lawyers and engineers work together at the same firm. At intake, the clients would be informed of differing duties of confidentiality and warned about the ramifications of the engineer's duty to disclose dangers to the public safety, health, and welfare. Perhaps the client would be reminded of the differing duties prior to additional consultations with the engineers. Having the client sign forms reflecting this understanding might also be a possibility. Separate files, including separate computer files, would be maintained so that the engineers would not have access to information that they might be required to report. Employees would be trained and monitored to reduce the chance of inadvertent disclosures, and perhaps also required to indicate in writing that they understand their responsibilities. Undoubtedly, it is a significant undertaking to implement such a system.

There are some real dangers in screening engineers from information that is related to public health and safety. As one group

---

144. Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 469 (1999) (discussing lawyer's provision of information about the case to retained consulting or testifying experts).

145. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-411 (Aug. 30, 1998) (discussing confidentiality when one lawyer consults another lawyer to obtain legal assistance about a problem).

146. Screening of nonlawyers from the rest of the firm where the nonlawyers are subject to mandatory reporting requirements is not specifically addressed by the Model Rules. The ABA recently amended the Model Rules to allow for a law firm's screening of lawyers facing certain types of conflicts, primarily imputed conflicts based upon an attorney's former representation of a client. MODEL RULES R. 1.10(a)(2) (amended Feb. 2009). This enables the firm to continue its representation of a client with a position adverse to a lawyer's former client, even though the lawyer is not allowed to participate personally. The comments to Model Rule 1.10 suggest that nonlawyers similarly should be screened from personal participation. MODEL RULES R. 1.10 cmt. para. 4. Twenty-four states have adopted some type of screening rule. See Your ABA, RE: Report 109, <http://www.abanet.org/media/youraba/200901/article021.html>.

of authors explains, in the law-social work context: “The ‘team’ can never truly collaborate, because the social worker can never know confidently that the lawyers have not held back certain information to protect the client from the social worker’s obligations.”<sup>147</sup> Just as the social worker’s advice or counsel might be compromised because he or she did not know a key fact about a joint client’s situation, so too could the engineer’s advice or calculations be compromised if he or she were unaware of a flaw in a system being evaluated or did not have access to all parameters of a design.<sup>148</sup> This is even more the case if the information held back or walled off is of the sort that the lawyer suspects would trigger the engineering expert’s duty to protect the safety, health, and welfare of the public.

Others take a different approach, arguing that when a social worker has “no separate or preexisting professional relationship with the client whose secrets are at risk” and functions as a member of a “legal team,” the social worker has no duty to report.<sup>149</sup> They conclude that the lawyer’s ethical rules in effect trump the social worker’s statutory duties because the social worker is not serving in the capacity of a social worker toward the lawyer’s client.<sup>150</sup> The social worker’s client is, in essence, the lawyer or the law firm, and the social worker is akin to a “legal assistant” rather than a social worker who is subject to the rules that apply to the profession.<sup>151</sup> The authors reach the same conclusion whether the social worker is an employee of the law firm or serves as a consultant. The key factor

---

147. Anderson, Barenberg & Tremblay, *supra* note 136, at 713.

148. One famous engineering story involves such a missing detail that appeared insignificant in isolation but had a tremendous effect when the system was considered as a whole. The structural engineer who designed the Citicorp building in New York City learned after the fact that the joints on the bracing structure had been bolted, instead of being welded as originally planned. While substituting bolts for welding was within the authority of the subcontractors and not a violation of either the building code or engineering practice, under the building’s unique circumstances, the skyscraper could fail when subject to strong diagonal winds. See Joe Morgenstern, *The Fifty-Nine-Story Crisis*, THE NEW YORKER, May 29, 1995, at 45–53. In keeping with his duty to the public, the engineer in effect blew the whistle on himself, retrofitted the building, strengthened the joints, and averted the possible disaster. *Id.*

149. Anderson, Barenberg & Tremblay, *supra* note 136, at 709.

150. *Id.*

151. *Id.* at 703 (citing State Bar of Nevada Standing Comm. On Ethics and Prof’l Responsibility, Formal Op. 30 (2005)). The authors caution that there is only “limited authority” for this position, and that this authority consists of ethics committee and attorney general opinions, rather than endorsement by trial or appellate courts. *Id.* at 700.

that triggers a duty to report is the existence of a therapeutic relationship with the client, not whether the lawyer and social worker are under the same roof.<sup>152</sup>

Might the same be true for professional engineers working with lawyers? Conceptually, there are some similarities, at least in certain settings. A consulting professional engineer hired to serve as an expert witness for a company defending a product liability suit certainly is a member of the legal team. More likely than not, he or she has no preexisting professional relationship with the defendant. Perhaps the professional engineer serving as an expert could be said to perform the engineer's equivalent of the "non-therapeutic" services a social worker provides when working with a legal team instead of directly with the client.<sup>153</sup>

On closer examination, the differences between the social worker's statutory duty to report child abuse and the professional engineer's ethical duty to the public safety cause the analogy to break down. Most statutes requiring mandatory reporting of child abuse contain lists of the professionals to whom the duty applies, such as doctors, nurses, teachers, police officers, and childcare workers.<sup>154</sup> In nearly every state, lawyers either are excluded from this list of professions or an exception is made for suspected abuse that was learned through the lawyer's communications with the client.<sup>155</sup> By

---

152. *Id.* at 709–14 (analyzing several models of lawyer-social work collaborations).

153. *Id.* at 700–01, 709. Anderson et al. conclude that a social worker who works at a government agency or nonprofit that offers legal services would have a duty to report if the social worker had a therapeutic relationship with the client. *Id.* at 710–13. It follows that an engineer employed by a corporation more likely would have the kind of direct relationship with his or her employer that would not take the engineer out of the traditional engineering role. *Id.* at 710.

154. The Illinois statute, for example, lists at least thirty-eight professions or occupations and a "catch-all" provision for "any other foster parent, homemaker or child care worker." 325 ILL. COMP. STAT. ANN. 5/4 (West 2009).

155. In some cases, it is not clear whether lawyers retain their duty of confidentiality (as when they are not included in the list of professions required to report) but arguably fall under a catch-all provision requiring "all other persons" to make a report. For a summary of state laws mandating reports of child abuse, see Katharyn I. Christian, *Putting Legal Doctrines to the Test: The Inclusion of Attorneys as Mandatory Reporters of Child Abuse*, 32 J. LEGAL PROF. 215, 233–34 (2008) (summarizing statutes as of 2005). More current, but less organized, information about state statutes may be found at the Child Welfare Information Gateway. See CHILD WELFARE INFO. GATEWAY MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS (2008), [http://www.childwelfare.gov/systemwide/laws\\_policies/](http://www.childwelfare.gov/systemwide/laws_policies/)

excluding lawyers from the sweep of these statutes, the legislatures can be said to have made a choice between the lawyer's duty of confidentiality and the social desirability of protecting children by requiring reports of suspected abuse, and to have come down on the side of confidentiality, for good or ill.<sup>156</sup> With that in mind, it is harder "to conclude that a legislature intended that lawyers who hire social workers on staff should, simply because of that fact, suddenly be governed by the reporting duty."<sup>157</sup>

It is not clear that any legislature or ethics committee or court can be said to have weighed the professional engineer's duty to protect the public against the lawyer's duty of confidentiality. The ethics rules for each profession evolved independently; no single body made a determination—even an oblique one—that confidentiality trumps public safety or vice versa. For this reason, it is more difficult to be confident that a lawyer who hires a professional engineer can avoid having the engineer act like an engineer.

#### CONCLUSION

As professionals, lawyers and engineers enjoy the benefits of autonomy and self-regulation. In exchange, they serve the public through the practice of their professions, although the terms of that service may not quite match the public's expectations. These conceptions of public service and duty drive the ethical rules of each profession.

The professional ideals of lawyers and engineers embodied in their ethical regimes may collide when they must work collaboratively. Conflict avoidance, harmonization, and containment are three possible solutions to avoiding the most serious problems that may arise, as this Article suggests.

---

statutes/mandaall.pdf. In those places where lawyers and social workers both have a mandate to report child abuse, the conflict does not arise.

156. See Anderson, Barenberg & Tremblay, *supra* note 136, at 701–02 ("One might debate the wisdom of that exclusion . . . one might cynically wonder whether the exclusion is principled at all . . . [b]ut as a matter of substantive law, the distinction between the professions is unambiguous.").

157. *Id.* at 702.

Professional engineers working with lawyers may be unable to completely remove their “engineering hats,” but this is not necessarily a terrible thing. As one scholar has noted, “[i]f professionals are not able to retain sufficient independence so as to defend their professional integrity in critical decisions, why, ultimately, pay a premium for their skills?”<sup>158</sup> If you hire engineers but ask them to take off their engineering hats, have you really hired engineers? After all, surely one of the many lessons of the Challenger disaster is that non-engineers should pay more attention to the engineer’s judgment.

---

158. See DAVIS, *supra* note 62, at 170 (discussing professional autonomy and observing: “Why hire someone as an engineer for example, if you do not want him to work as engineers typically do?”); Hugh P. Gunz & Sally P. Gunz, *The Lawyer’s Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241, 249 (2002) (examining decision making by in-house lawyers).