CONFLICT OF INTEREST – SERVING TWO CLIENTS

Case No. 02-12

Facts:
Engineer A, a principal in a consulting structural engineering firm, is retained by Owner X to perform an inspection of a garage located on one side of Owner X's building. The garage backs against a steep incline at the rear end of the garage and is maintained by structural supports. Another garage, owned by Owner Y is located on the other side of the garage. Owner X is concerned that the structure is being compromised by defects in Owner Y's garage and directs Engineer A to perform a structural inspection of Owner X's garage. Engineer A performs the inspection and concludes that maintenance failures by Owner Y are causing structural damage to Owner X's garage. Owner X contacts Owner Y and advises Owner Y of the problem. Owner Y hires Engineer B to perform an inspection and Engineer B concludes that the structural problems are not the result of maintenance failures by Owner Y. Thereafter, Engineer A shares his findings with Engineer B, and after conferring, Engineer B agrees with Engineer A's conclusions. Engineer B then recommends that Owner Y hire Engineer A to perform the structural improvements to Owner Y's garage. Engineer A advises Owner X of the request and while Owner X does not oppose Engineer A from proceeding with the work for Owner Y, Owner X expresses concerns that Engineer A could find himself in a conflicted situation should a problem arise. Engineer A proceeds with performing the work for Owner Y.

Question:
Was it ethical for Engineer A to proceed with performing the work for Owner Y?

References:

Section II.4.a.	-	*Code of Ethics:*	*Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.*
Section II.4.b.	-	*Code of Ethics:*	*Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.*
Section III.4.a.	-	*Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a specific project for which the Engineer has gained particular and specialized knowledge.*

Discussion:
Issues involving conflicts of interests have long been one of the most pervasive and some of the thorniest issues faced by engineers. The Board of Ethical Review has had numerous occasions to address issues of conflict of interest, but few involving vague and uncertain ongoing relationships.

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BER Case 91-6 is instructive on the problems with vague and indefinite understandings between a consulting engineer and a client. In this situation, a consulting engineer agrees to provide basic consulting services along with an understanding that the client may request additional services at a later date. Nothing is contained in the agreement concerning work for other clients. Two years following completion of basic services to the client, the consulting engineer is retained by a major industrial corporation which subsequently is deemed by the initial client to be responsible in a dispute over the clean-up of a hazardous waste site. Following the execution of a contract with the corporation, the consulting engineer is contacted by the former client and is asked to provide consulting services per the original understanding with the initial client in connection with the specific hazardous waste site of the major industrial corporation which is now a client of the consulting engineer. The consulting engineer informs the initial client that the performance of such services would constitute a conflict of interest and declines to perform the services requested. Four Board members concluded it was unethical for the consulting engineer to perform services for the industrial corporation without prior approval of the initial client and three Board members dissented with the opinion that the agreement for future additional services, with no exercise in two years, was too vague and uncertain to be binding.

The discussion of BER Case 91-6 cites BER Case 87-3 where the Board considered facts involving a county that employed individuals to perform building inspections in the country. Dissatisfied with the services provided by in-house inspectors, and as part of an effort to "contract-out" certain county functions, the county decided to retain a private consulting engineering firm to perform building inspections. The county selected and retained an engineer to perform the work. One of the engineer's responsibilities was to inspect a building project developed by a client of the engineer. The client was a company for which she had regularly performed services in the past. Although the engineer did not provide any services in connection with the building project in question, the engineer and the client anticipated that they would continue to work together in the future. In contract negotiations with the county, the engineer disclosed the relationship with the client, and it became a matter of official record. In finding that it would not be unethical for the engineer to perform building inspection services for the county in connection with the project developed by the client, the Board, considering earlier BER cases, noted that unlike other cases, the facts did not deal with a situation where an engineer was being retained as a paid advocate for a particular position or point of view on a pending matter in direct conflict with the engineering opinions of her county client. Nor was the Board faced with a situation where the timing of the retainer raises questions of impropriety. Rather, in BER Case 87-3, the engineer was being asked to perform basic inspection services in connection with a building with which she has never previously been involved but which was developed by a former and possibly future client. While the Board noted that the engineer had a professional obligation under NSPE Code Sections II.4 and II.4.a. to disclose her relationship with the client to the county, the Board did not believe it would be necessary for her to decline to perform the inspection services. To prohibit the engineer from providing building inspection services would be an unrealistic intrusion into her practice and would inhibit the county from utilizing a flexible method of delivering services consistent with the public health and safety.

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Turning to the present case, the facts do not indicate that Engineer A is on a retainer to Owner X, nor does Engineer A have any specific ongoing tasks for Owner X. The interests of both Owner X and Owner Y are served by Engineer A implementing the proposed maintenance. It would be unduly burdensome for Owner Y to have to retain a third engineer to independently design a fix to the problem, and Owner Y might be reluctant to do so. Despite vague concerns, Owner X does not object. Engineer A could further assure the absence of conflicts of interest between the Owners by obtaining an agreement for sharing information by the two Owners. It should be noted that the potential conflict of interest is not between the engineer and either of the Owners, but would be between the interests of the Owners over a common structure to their garages. Both Owners are fully informed at this time. The projects are sequential, the first being the identification of the defect and the second being implementation of the remedy. The Board affirms the conclusions reached in BER Case Nos. 91-6 and 87-3, that disclosure is sufficient to insure that it is ethical for Engineer A to proceed with performing the work for Owner Y. The Board assumes that Engineer A's relationship with Owner X had been concluded.

Conclusion:
It was ethical for Engineer A to proceed with performing the work for Owner Y

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