Report on a Case by the Board of Ethical Review

Case No. 64-6

Subject: Taking Fee In Corporate Stock
Canon 21-Canons of Ethics; Rule 11-Rules of Professional Conduct; Rule 35-Rules of Professional Conduct.

Facts:
John Johnson, a consulting engineer, was retained by the Waterfront Terminal Corporation, a recently formed marine terminal company, to conduct a feasibility study on the engineering aspects and economic prospects of building wharfs, stevedoring, and warehousing facilities for commercial operations. A definite fee in conformity with the local schedule of fees was agreed upon for the work. Upon completion and submission of the study, Johnson was told by company officials that they planned to proceed with the project on the basis of the favorable feasibility study and wanted Johnson to handle the detailed plans and other engineering features of the work: Being a new venture, however, the company officials said they had limited cash assets and asked if Johnson would take his fee for both the feasibility study and the detailed engineering in the stock of the company. The value of the stock offered Johnson would be the equivalent at present market prices of the normal fee for this type of professional service.

Question: May Johnson ethically take his fee in shares of a newly-formed corporation?

References:
Canons of Ethics-Canon 21 - "He will uphold the principle of appropriate and adequate compensation for those engaged in engineering work, including those in subordinate capacities, as being in the public interest and maintaining the standards of the profession."

Rules of Professional Conduct Rule II-"He will not undertake or agree to perform engineering services on a free basis, except for civic, charitable, religious, or eleemosynary nonprofit organizations when the professional services are advisory in nature."

Rule 35-"He will not under take work at a fee or salary that will not permit professional performance, according to accepted standards of the profession."

Discussion:
By taking stock instead of the usual cash fee, Johnson would be speculating that he might earn a higher fee if the newly-formed company prospered and the value of his shares increased accordingly. By the same token, he would be taking the risk that his eventual fee, when the shares were sold by him, might be less than the usual fee, or even nothing if the venture was a failure.

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Canon 21 contemplates that the fee agreed upon by the engineer will be "appropriate and adequate," but even under the usual arrangements there is no guarantee that the client will be able to pay the fee. Thus, there is always some element of risk, but admittedly a higher risk when doing work for a new commercial enterprise with limited resources.

We do not think that this arrangement of taking a fee in stock is within the contemplation of Rule 11 prohibiting free engineering for commercial ventures. In this case the idea of both parties is that the engineer will be paid; the uncertainty is the amount. And there is nothing in the facts to indicate that Johnson will perform his services at a level other than the accepted standards of the profession, as required by Rule 35.

Although the proposed arrangement is unorthodox, we think that Johnson's decision is dictated by business judgment rather than the restrictions of the Canons. It is beyond our purview to offer advice on business judgment. We only conclude that inasmuch as the proposed arrangement contemplates the payment of an appropriate and adequate fee and does not constitute the offer or performance of free engineering services, it is within Johnson's prerogative to risk a higher or lower eventual fee for his services through payment in stock rather than cash.

Conclusion:
It is not a violation of the Canons of Ethics for an engineer to take his fee in shares of a corporation.

Board of Ethical Review: PHIL T. ELLIOTT, P.E. A. C. KIRKWOOD, P.E. WALDEMAR S. NELSON, P.E. MARVIN C. NICHOLS, P.E. EZRA K. NICHOLSON, P.E. N. O. SAULTER, P.E. L. R. DURKEE, P.E., Chairman

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