Report on a Case by the Board of Ethical Review

Case No. 70-2

Operation of Related Business for Nonprofessional Services

Facts:
Engineer A, engaged in a consulting practice, plans to form a corporation for the purpose of providing system operation and maintenance services on a contractual basis. Engineer A will be the principal stockholder. The primary source of business is expected to be from clients developed through the consulting practice. It is expected that the greatest percentage of work will be the maintenance of systems engineered, specified, and installed under the direction of Engineer A.

Question:
Would the operation of the proposed corporation in the form indicated be a violation of the Code of Ethics?

References:
Code of Ethics-Section 8- "The Engineer will endeavor to avoid a conflict of interest with his employer or client, but when unavoidable, the Engineer shall fully disclose the circumstances to his employer or client."

Section 8(a)-"The Engineer will inform his client or employer of any business connections, interests, or circumstances which may be deemed as influencing his judgment or the quality of his services to his client or employer."

Discussion:
This case is governed by the principles we enunciated in Case No. 69-8, in which we held that "the primary mandate of Section 8 is the injunction that the Engineer shall endeavor to avoid a conflict of interest."

Likewise, in Case No. 69-13 we stated that it is ". . . the duty of the Engineer under the code . . . not only to avoid a clear conflict of interest, when possible, but also to avoid the appearance of impropriety."

Applying those principles to the facts before us, the key is that Engineer A is in a position to avoid a conflict of interest, or the appearance of such a conflict, by not engaging in a business related to his engineering practice. In reaching this result we realize that Engineer A could and presumably would operate the related business with full disclosure to his clients as required by Section 8(a) of the code, but this does not negate the more stringent mandate of Section 8 that he must endeavor to avoid a conflict of interest. A conflict of interest situation is permissible with full disclosure only when it arises after the fact and without the active participation of the engineer to bring it about. As stated in Case No. 69-13, this is a "harsh" rule, but it is justified on the

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premise that the realities of ethical conduct require more than avoidance of an actual conflict of interest; the appearance of a conflict of interest must also be avoided.

The appearance or suspicion of a possible conflict of interest in the facts before us is evident in that Engineer A may be tempted to use a system or facility of less than highest performance, believing that his system operation and maintenance service business would be retained for such service. It may be argued that an ethical engineer would not engage in such nefarious conduct, but the mere suspicion that he might do so is enough to warrant our holding that he must avoid that possibility.

Conclusion*:
The operation of the proposed corporation in the form indicated would be a violation of the Code of Ethics.

Additional Views of Members James D. Maloney and Albert L. Wolfe:
The interpretation of Section 8 by the majority may be proper and justified in relation to an engineer engaged in private practice, but we do not believe it is justified when applied to the design of products. The majority rests its case on the proposition that Engineer A may appear to provide less than the highest quality of design in order that his system operation and maintenance service business might secure business because of his deliberate inferior performance as a design engineer.

The same might be said of the normal industrial practice in many cases in which the same company designs and manufactures a product which may require servicing. It is fairly uniform practice in industry for companies to perform both functions, and thus we cannot accept the logic that this creates a temptation to design an inferior product or system. We believe that Section 8 and Section 8(a) of the code permit this practice in industrial operations. In that situation the customer obviously knows that the same company is performing the design, manufacture, and service. To the argument that there might be some suspicion by the client (customer) that an inferior design was deliberate in order to obtain the service business we reply that it is usually in the best interests of the customer to have necessary servicing performed by the design and manufacturing company which knows best how to service the equipment or product it designed and manufactured, and we further reply that at least in the industrial world there is a control factor - competition - which realistically eliminates deliberate inferior design. A company which engaged in such unethical practices would, by the same token, jeopardize its own interests in creating dissatisfied customers and the loss of their future business. We therefore conclude that the majority opinion is not and should not be held applicable to normal business practices in this area and that it is not unethical for the same or related companies to perform both the design and servicing of systems and products. NOTE: The other members of the BER concur in the additional views.

***Note**-This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This

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BOARD OF ETHICAL REVIEW: Frank H. Bridgers, P.E.; C. C. Hallvik, P.E.; James D. Maloney, P.E.; Sherman Smith, P.E.; Kurt F. Wendt P.E.; Albert L. Wolfe, P.E.; T. C. Cooke, P.E., chairman.

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