Report on a Case by the Board of Ethical Review

Case No. 76-3

Conflict of Interest—Consultant to County Testimony Adverse to County Client

Facts:
Engineer A is a principal in a consulting engineering firm which has been under a retainer arrangement with a county for general advisory services, with particular expertise and advice on water-sewer problems, for many years. The engineering firm had performed extensive engineering services for the county over a long period of time, including the design of major water-sewer facilities. While still on a retainer basis to the county the engineering firm was retained by a development company with the approval of the county officials. The development company filed a petition with the county zoning board to rezone a substantial area of the county for commercial purposes. The county department of public works filed several engineering reports adverse to the zoning petition, recommending denial of the rezoning because the proposed construction would overload available water-sewer facilities. The development company called Engineer A as an expert witness at the zoning hearing. Engineer A testified in support of the rezoning petition.

Question:
Was Engineer A unethical in appearing for the development company while serving as engineering consultant to the county?

References:
Code of Ethics-Section 4(a)-"He shall not issue statements, criticisms, or arguments on matters connected with public policy which are inspired or paid for by private interests, unless he indicates on whose behalf he is making the statement."

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(b)-"When in public service as a member, advisor, or employee of a governmental body or department, an Engineer shall not participate in considerations or actions with respect to services provided by him or his organization in private engineering practice."

Section 12-"The Engineer will not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice or employment of another engineer, nor will he indiscriminately criticize another engineer's work. If he believes that another engineer is guilty of unethical or illegal practice, he shall present such information to the proper authority for action."

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Discussion:

We have cited §4(a) of the code only to recognize that under the stated facts it was apparent to all that Engineer A was allowed to express his criticisms and arguments on the public policy issue on behalf of a private interest in that he did identify that interest as distinct from his advisory role to the county. However, even though he met the thrust and requirements of §4(a), there remains the more basic questions whether he could appear in the capacity of an advocate or critic on behalf of the disclosed private interest.

The facts indicate that Engineer A was a leading authority on the county's water-sewer requirements, having participated for many years on behalf of the county in the development of its water-sewer system. When he now appears before a county public body which has jurisdiction over the same general subject matter on behalf of a party whose position is adverse to that of county staff engineers while at the same time being an advisor to the county he at best gives the appearance of trying to be on both sides of a public policy issue.

This is not to say that Engineer A may not ethically and properly disagree with the county public works engineers on technical engineering issues. Such disagreement, however, while he "wears his hat" as a county advisor should be within the internal relationships of the county. Nor is there any reason to believe that his criticism was "indiscriminate" as barred by §12.

We considered a related situation in Case 74-2, concluding that a part-time consultant arrangement to municipalities by engineers in private practice did not preclude those same engineers from providing normal engineering services to the same municipalities. But they key distinction between that case and the facts before us is that in Case 74-2 the engineers' loyalties were not divided, whereas in the case before us Engineer A is seen to be on both sides of a divided issue.

Section 8 of the code requires an engineer to "endeavor to avoid a conflict of interest." When Engineer A was approached, while still on retainer to the county, by the development company, it should have been quite clear to him that a conflict of interest was inevitable. It would seem that a little interrogation of the development company concerning its plans would have revealed the conflict of interest.

It would be incorrect to accept Engineer A's role as an expert witness in the ordinary sense of that kind of professional service arrangement. Engineer A was doing more than offering his expertise in engineering matters as an aid to a fuller understanding by the zoning board; he was in fact a paid advocate of a private interest in open conflict with the engineering opinions of the county engineers. We believe that the clear purpose of §8(b) is to prevent engineers from being in that type of adversary position when performing services for public bodies.

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Engineer A was not required to agree with the county engineering staff or its reports, or even to support their position at the hearing. If he chose to oppose that position on behalf of an adverse party he could ethically do so by first resigning from his role as advisor to the county.

Conclusion:*
Engineer A was unethical in appearing for the development company while serving as an engineering consultant to the county.

***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 opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

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