Report on a Case by the Board of Ethical Review

Case No. 82-4

Conflict of Interest
Consultant to a Government Body—Member of a Local Authority

Facts:
Engineer A, who is in full-time private practice, is retained by the county as county engineer for a stipulated monthly fee. His duties include reviewing plats and construction drawings to determine whether they meet county requirements, and making recommendations to local developers, county commissions, and the planning and zoning board. In addition, Engineer A is retained by the city as city engineer for a stipulated annual fee. His duties include making recommendations to the city council concerning the approval of completed engineering work. Engineer A also serves as project administrator for the county airport authority and as such is responsible for formulating a plan for the continued development of an airport industrial park. Finally, Engineer A is administrator of the city block grant program, and as such oversees engineering work on various projects. Engineer A has been retained as a consultant by several private firms to help develop city and county project proposals.

Questions:
1. May Engineer A, who serves as city engineer and county engineer for a retainer fee, provide engineering services in a private capacity to the city or county?

2. May Engineer A, who serves as a member of local boards or commissions which sometimes require the services of engineers, provide services through his private firm to those boards and commissions?

3. May Engineer A, who serves as city engineer and county engineer for a retainer fee, provide approval or render judgment on behalf of the city and county relative to projects on which Engineer A has furnished services through a private client?

References:
Code of Ethics - Section II.4.d. - "Engineers in public service as members, advisors, or employees of a governmental body or department shall not participate in decisions with respect to professional services solicited or provided by them or their organizations in private or public engineering practice."

Section II.4.e. - "Engineers shall not solicit or accept a professional contract from a governmental body on which a principal or officer of their organization serves as a member."

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Section III.8.a. - "Engineers in private practice shall not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated."

Discussion:

We have considered cases of this type on a number of occasions. In one, Case 62-7, an engineering consultant had been retained by a county commission to perform all necessary engineering and advisory services. The commission did not have an engineering staff so the engineer acted as the staff for the commission in the preparation of sewage and water studies, the financing of sanitary districts, and the approval of plans submitted by others. The engineer was also retained by a private company to perform engineering design for a development of several thousand housing units which involved extensive contract negotiations between the commission and the developer. We found that the engineer was in a position of passing engineering judgment on behalf of the commission on work or contract arrangements which the engineer performed or in which he participated. This obviously involved the self-interest of the engineer and divided his loyalties. Even if the engineer acted with the best of intentions, he was put into the position of assessing his recommendations to two clients with possibly opposing interests. Given these realities, we concluded that a conflict of interest existed.

More recently in Case 74-2, a case in which a state law required every municipality to retain a municipal engineer with that engineer's firm usually retained for engineering services for capital improvements needed by the municipality, we found that the engineer was not a bona fide "employee" of the municipality but a consultant, thus it was not unethical for him to serve as "municipal engineer" and participate in a consulting firm providing engineering services to the municipality. We reasoned that the public interest was best served by providing to small municipalities the most competent engineering services which they could acquire. It was assumed that the state law was intended to achieve that end.

In all honesty, it is difficult to reconcile these two cases, as the two cases were based in pertinent part on identical language. Both Case 62-7 and Case 74-2 were decided under the previous Code of Ethics, Section 8(b). That Code provision stated: "When in public service as a member, advisor, or employee of a governmental body or department, an engineer shall not participate in consideration of actions with respect to services provided by him or his organization in private engineering practice." (emphasis added) In July 1981, the Code of Ethics was revised and the substituted Section II.4.d. replaced the above emphasized words with ". . . in decisions." We believe this change is significant and particularly relevant to this case.

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Under the facts presented, Engineer A did not actually participate in "decisions" with respect to services solicited or provided by him or his organization in private or public engineering practice but rather reviewed, recommended, formulated, and oversaw plans. Although it is arguable that under the older Code provisions, Engineer A's activities would have constituted a conflict as he may have in fact participated in consideration of actions, it is our view that his activities were within the meaning of the amended Code provisions and did not constitute "decisions" under Section II.4.d. Therefore we conclude that one who serves as both city and county engineer for a retainer fee may provide private engineering consulting services to the city and county.

The question of whether an engineer who serves as a member of local boards or commissions which have some aspect of engineering may provide engineering services through his private firm to the boards and commissions was addressed in Case 75-7. We concluded there that an engineer serving on a commission could ethically provide services to the private owners because the engineer had abstained from the discussion and vote on permit applications. We cautioned, however, that care must be taken that the engineer in such a situation not have taken any action to influence the favorable decision on the permit. In this case, there is nothing to suggest Engineer A had taken any action to influence decisions as administrator of the city block grant program or as project administrator of the county airport authority. Therefore we find under the facts presented that Engineer A may properly provide engineering services through his private firm to the two city and county programs.

Finally, in Case 67-12, we indicated that when an engineer serves as a part-time county engineer and as a private consultant and in the latter capacity submits the plans of a private developer to the county for approval, he should not offer any recommendation for their approval. To do so is a useless act because it is basic to the Code that an engineer will not submit plans or other work which he does not believe represents the best interests of his client. Today we affirm that view. We cannot see how an engineer can wear two hats and still represent the best interest of his client. To do so would constitute a conflict of interest. If the county wishes to obtain a recommendation on the merit of his work, it is our view that it should retain another engineer for review in accordance with Section III.8.a. In our judgment it would be preferable for an engineer to avoid, entirely, situations as described in Question 3.

Conclusions:

Q1. It would be ethical for Engineer A, who serves as city engineer and county engineer for a retainer fee, to provide engineering services in a private capacity to the city or the county.

Q2. It would be ethical for Engineer A, who serves as a member of local boards or commissions which sometimes require the services of engineers, to provide services through his private firm to those boards and commissions.

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Q3. It would be unethical for Engineer A, who serves as city engineer and county engineer for a retainer fee, to provide approval or render judgment on behalf of the city and/or county relative to projects on which Engineer A has furnished services through a private client.

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Board of Ethical Review: Ernest C. James, P.E., Robert H. Perrine, P.E., James L. Polk, P.E., J. Kent Roberts, P.E., Alfred H. Samborn, P.E., F. Wendell Beard, P.E., chairman.

Additional Views:

This case is most interesting and in my opinion I had to vote my attitude based upon the following assumptions:

Since Engineer A was retained:

- By the county, as county engineer for a stipulated monthly fee;
- By the city, as city engineer for a stipulated annual fee;
- By the county airport authority, as project administrator; and
- By the city, as administrator of the city block grant program

I can only assume that Engineer A is serving those governmental agencies in a very sparsely populated area, and that none of those agencies can afford permanent engineering staffs or the privilege of retaining a consultant with adequate compensation to serve that agency with undivided attention. On the basis of that premise, it is important and imperative to temper the purest ideology of an ethical Code with the practical consideration of the day-to-day involvement of Engineer A. If any of those four agencies had the financial capability to employ a consultant at an adequate remuneration for undivided attention, I would have voted differently.

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I liken this situation to any governmental agency having an in-house qualified technical staff to perform the kind of services Engineer A, as a practicing consultant, was asked to perform. For example, if a county had a full-time engineer duly compensated, he would be expected to design a bridge, or do the design for road maintenance and repair, or for a sewer line project with his in-house staff. In that instance, as a fully employed county engineer he would be totally responsible to the county commissioners and the public in general to make sure his plans were adequate, in the best interest of his constituents, and fully responsible as to his professional competency.

Then, by comparison, I believe Engineer A would act in the best interest of the county commissioners and the constituents in his county to provide adequate engineering through his private consulting firm, again for a stipulated and known fee, just as if he were a permanent full-time employee as outlined herein. It is also to be presumed that the county commissioners would only employ Engineer A on the basis that they felt comfortable with him in that position, and were convinced that his engineering judgment was sound and that his qualifications were technically adequate to serve the county as a private consultant in those special instances when he was employed as a private consultant for a specific project over and above his responsibilities under the retainer contract.

The previous decision of BER, in the instance of Case 62-7, involved a set of circumstances where "an engineering consultant had been retained by a county commission to perform *all necessary engineering and advisory services"* (emphasis added). In Case 62-7 it would seem that the BER approved and/or condoned that the engineering consultant could ethically perform all necessary engineering services because this matter was addressed during negotiations at his hiring by the commissioners and therefore BER remained silent on this issue. Nevertheless, BER did, indeed, decree that it was unethical for the engineering consultant *to serve a private client when the plans produced for said private client required approval in his position as county engineer.*

In my opinion, in Case 82-4, Engineer A's employment was negotiated under similar understanding but with different conditions of remuneration.

In regard to Case 74-2 as compared with Case 82-4, I hold that there is great similarity to the conditions of fact and I fully agree that "the public interest was best served by providing to small municipalities the most competent engineering services which they could acquire."

I fully agree with the majority BER decision to Question 1 and Question 2 in our current Case 82-4.

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As in the majority decision of the Board of Ethical Review, I fully concur, in the instance of Engineer A's being employed or retained as a consultant by several private firms to develop city and county project proposals, that Engineer A could not serve the interest of two clients without conflict of interest. For example, it would be his sole responsibility in serving the private firms to develop plans and specifications for the best investment or interest of his private client. Whereas, in review of these particular plans as a county engineer for the county, he might be in the untenable position of waiving minimum requirements against the best interest of the constituents and his employer, the county commissioners. Thus, the distinction has been made between two different situations:

1. Upholding the propriety of an engineer serving a governmental entity in a (private) capacity beyond that called for in an original (retainer) contractual agreement; and

2. Emphasizing the impropriety of an engineer serving a private client, while simultaneously under retainer by a governing body, when the work produced for the private client must be reviewed or approved by said engineer acting in his official capacity as the government's representative.

I fully agree with the majority BER decision for Question 3 in current Case 82-4 as it specifically addresses the question under reference to the Code of Ethics Section II.4.d.; however, I disagree with the majority decision that Question 3 begs a reference to the Code of Ethics Section III.8.a. or supports the penultimate sentence in the last paragraph of the Discussion: "If the county wishes to obtain a recommendation on the merit of his work, it is our view that it should retain another engineer for review in accordance with Section III.8.a."

I do not disagree with the philosophy in regard to the Discussion, but I hold fast to my opinion that Question 3 can be addressed without reference to Section III.8.a. for support of our conclusion. As a matter of fact, the reference to Section III.8.a. and related discussion indeed begs a different question in my opinion.

I concur with previous BER decisions of the similar cases outlined in discussion, and I trust that the profession will not read more into Case 82-4 than has been envisioned by the Board of Ethical Review. *Alfred H. Samborn, P.E.*

Member Jones did not participate in the consideration or decision of this case.

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