Report on a Case by the Board of Ethical Review

Case No. 83-5

Payment of Fee to Landscape Architect Above True Value of Work in Order to Receive Leads

Facts:
A local landscape architect, through a network of contacts, is able to locate engineering projects throughout the state. The landscape architect contacts Engineer A and proposes to refer these clients to Engineer A in return for a fee over and above the value of the landscaping work which the landscape architect would presumably perform on these jobs. Generally, little landscaping work is required on the project. Engineer A accepts the proposal.

Question:
Was it ethical for Engineer A to accept the landscape architect's proposal to refer clients to Engineer A in return for a fee over and above the value of the landscape work which the landscape architect would presumably perform on each of the projects?

References:
Code of Ethics - Section II.4. - "Engineers shall act in professional matters for each employer or client as faithful agents or trustees."

Section II.5. - "Engineers shall avoid improper solicitation of professional employment."

Section II.5.b. - "Engineers shall not offer, give, solicit, or receive, either directly or indirectly, any political contribution in an amount intended to influence the award of a contract by public authority, or which may be reasonably construed by the public of having the effect or intent to influence the award of a contract. They shall not offer any gift, or other valuable consideration in order to secure work. They shall not pay a commission, percentage, or brokerage fee in order to secure work except to a bona fide employee or bona fide established commercial or marketing agencies retained by them."

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Discussion:
The Board has previously decided a case with facts similar to those presented in the instant case. In an earlier decision, Case 62-4, the Board held that it was permissible for an engineering firm to "employ" a non-engineer as a representative of the firm to solicit work, provided that the non-engineer representative did not discuss engineering aspects of a project (including contract negotiations) with a prospective client. The Board noted in that decision that while it was not unethical to compensate the employed representative on a commission basis, that method of competition was undesirable since it could lead to a loss of confidence by the public in the professional nature of engineering services. Later, in Case 77-1 the Board found an ethical violation existed where an engineering firm paid a commission to a commercial marketing firm to secure work for it. The Board distinguished the two cases on the ground that in the former case, the firm had actually "hired" an employee to perform the solicitation function while in the latter case the firm retained an independent, outside firm for marketing purposes. Said the Board: " . . . the important difference to note in the facts before us is that the engineering firm has control over the conduct of an employee, whereas it has little or no control over the conduct of an outside marketing firm which operates on a commercial basis. The danger is thus much enhanced that a commercial marketing firm may more readily in its zeal to earn its compensation engage in conduct which may adversely reflect upon the dignity or honor of the profession."

A year later, in Case 78-7, the Board, faced with a similar set of facts, ruled that an engineering firm may not ethically enter into a marketing agreement with an individual and independent professional engineer on a commission basis. The Board, reviewing both Case 62-4 and Case 77-1, noted then that the Code of Ethics, as amended, contained a prohibition against the payment of commissions of any kind and that the Board was compelled to find that arrangement was impermissible under the Code.

Since the decision in Case 78-7 was rendered, the NSPE Code of Ethics has again been amended and now contains an exception to its prohibition NSPE Board of Ethical Review against the payment of commissions in securing work. That exception appears to allow the payment of commissions in order to secure work to a "bona fide employee," or "bona fide established commercial or marketing agency" retained by an engineering firm. (See Section II.5.b.)

The only question presented to the Board in the instant case is whether the rules as established in earlier BER cases and in the present Code of Ethics would permit an engineer to enter into agreement whereby an independent landscape architect could refer clients to the engineer in return for a fee over and above the actual value of services rendered.

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It is clear that a firm is no longer required, as was the case in Case 62-4, to "hire" a marketing representative as a member of its staff in order for its actions to come within the Code. It is equally clear that if Cases 77-1 and 78-7 were being decided today the results might be different in view of the fact that the Code now permits the payment of commissions to "bona fide commercial or marketing agencies." However, the facts in the instant case are a good deal different from both Case 77-1 and Case 78-7. Unlike Case 77-1 and Case 78-7, there is nothing in this case to indicate that the landscape architect is a "bona fide marketing agency," To the contrary, it appears that the landscape architect is wearing at least two hats and is wearing those hats simultaneously. The landscape architect proposed to act both as a marketing representative for Engineer A and, at the same time, expected to perform services at an inflated rate in connection with the Case 83-5 work that the landscape architect secured for Engineer A. Such conduct does not demonstrate the requisite good faith, integrity of dealing, and honesty implicit in the definition of a "bona fide marketing agency," as required by Sections II.4. and II.5. of the Code.

Conclusion:
It was unethical for Engineer A to accept the proposal by the landscape architect to refer clients to Engineer A in return for a fee over and above the value of the landscape work which the landscape architect would presumably perform on each of the projects.

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

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