Report on a Case by the Board of Ethical Review

Case No. 85-6

Engineer's Disclosure of Potential Conflict of Interest

Facts:
Engineer A is retained by the state to perform certain feasibility studies relating to a possible highway spur. The state is considering the possibility of constructing the highway spur through an area that is adjacent to a residential community in which Engineer A's residence is located. After learning of the proposed location for the spur, Engineer A discloses to the state the fact that his residential property may be affected by the new spur and fully discloses the potential conflict with the state. The state does not object to Engineer A's performing the work. Engineer A proceeds with his feasibility study and ultimately recommends that the spur be constructed. The highway spur is constructed.

Question:
Was it ethical for Engineer A to perform the feasibility study despite the fact that his land may be affected thereby?

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.4.a. - "Engineers shall disclose all known or potential conflicts of interest to their employers or clients by promptly informing them of any business association, interest, or other circumstances which could influence or appear to influence their judgment or the quality of their services."

Discussion:
This Board has noted on numerous occasions that the ethical duty of the engineer in areas of conflict of interest is to inform the client of those business connections or interests that may influence the judgment and quality of the engineering services. Those decisions have been consistent with the provisions of Section II.4.a. of the NSPE Code of Ethics cited above.

While that provision of the Code has been interpreted many times over the years, it is, as are all Code provisions, subject to constant examination and reinterpretation. For any code of ethics to have meaning, it must be a living, breathing document which responds to situations that evolve and develop.

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This Board has generally interpreted that Code provision in a strict manner. In BER Case 69-13, the Board reviewed a situation where an engineer was an officer in an incorporated engineering consulting firm that was engaged primarily in civil engineering projects for clients. Early in the engineer's life, he had acquired a tract of land by inheritance, which was in an area being developed for residential and industrial use. The engineer's firm had been retained to study and recommend a water and sewer system in the general area of his land interest. The question faced by the Board under those facts was, "May the engineer ethically design a water and sewer system in the general area of his land interest?" The Board ruled that the engineer could not ethically design the system under those circumstances.

The Board acknowledged that the question was a difficult one to resolve, pointing to the fact that there was no conflict of interest when the engineer entered his practice but that the conflict developed in the normal course of his practice when it became apparent that his study and recommendation could lead to the location of a water and sewer system that might cause a considerable appreciation in the value of his land depending upon the exact location of certain system elements in proximity to his land. The Board stated that while the engineer must make full disclosure of his personal interest to his client before proceeding with the project, such disclosure was not enough under the Code. Said the Board, "He can avoid such a conflict under these facts either by disposing of his land holdings prior to undertaking the commission or by declining to perform the services if it is not feasible or desirable for him to dispose of his land at the particular time." The Board concluded by saying: "This is a harsh result, but so long as men are in their motivations somewhat 'lower than angels,' it is a necessary conclusion to achieve compliance with both the letter and the spirit of the Code of Ethics. The real test of ethical conduct is not when compliance with the Code comports with the interests of those it is intended to govern, but when compliance is adverse to personal interests."

We agree with much of what was stated in BER Case 69-13 considering the Code then in effect. In its reading of the Code of Ethics, the Board took a strict view of the meaning of the Code provisions then in force, which stated:

"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."

"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."

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It is clear from a reading of BER Case 69-13 that the Board focused its attention on the first clause of Section 8 stating that "The engineer will endeavor to avoid a conflict of interest with his employer or client." Undoubtedly, the Board reasoned that this was the basic obligation of the engineer in this context, and that any qualification of that obligation would dilute the essential meaning and intent of that obligation. Therefore, the Board did not choose to rely upon the remaining provisions contained in Sections 8 and 8(a) in reaching its decision. Instead, the Board determined that under the facts it would not be sufficient for the engineer to make full disclosure of his personal interest to the client in order to properly address the potential conflict-of-interest question.

While the reasoning of the Board in BER Case 69-13 is extremely important in understanding the ethical dimensions of the instant case, the decision becomes less significant in view of the fact that the Code provisions under which the decision was rendered have been crucially altered. (See Code Sections II.4. and II.4.a., the successor provisions to Section 8.)

As one can readily see, the phrase "engineer will endeavor to avoid a conflict of interest with his employer or client. . . " is no longer contained in the applicable Code provision. Clearly, the reason for that omission is certainly not out of a lack of desire within the engineering profession an ethical proscription relating to conflicts of interest. Truly, ethical dilemmas relating to conflicts of interest are some of the most significant issues facing the engineering profession today.

Nevertheless, the provision in the Code relating to conflicts of interest was amended and those changes impact upon the manner in which this Board regards BER Case 69-13 as well as the manner in which the Board interprets the Code. It is evident that had Sections II.4. and II.4.a. been in effect at the time the Board decided BER Case 69-13, the Board may well have reached a different result.

While it is not our role to speculate upon the intent of this significant change in the NSPE Code of Ethics since BER Case 69-13 was rendered, we do think that some expression by this Board in that regard would assist readers in understanding the basis for the change. In no sense should this change be interpreted in any way to suggest a retreat by this Board or the Code of Ethics from a deep concern for dilemmas relating to conflicts of interest. Rather, it is our view that the modifications in the Code reflect recognition of the fact that conflicts of interest emerge in a multitude of degrees and circumstances and that a blanket, unqualified expression prohibiting engineers to avoid all activities that raise the shadow of a conflict of interest is not a workable approach.

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It is often a question of degree as to what does and does not constitute a significant conflict of interest. Obvious and significant conflicts of interest are easily identifiable and should always be avoided. These difficult, multifaceted situations require discussion and consideration as they are complex and sometimes irresolvable. A code should address and provide guidance for these kinds of conflicts of interest. We believe the new Code provisions sought to establish the ethical obligation to engage in dialogue with a client or employer on the difficult questions relating to conflicts of interest. We think that it was for this reason that the Code provisions were altered.

Turning to the facts of the instant case, we are of the view that the ethical obligations contained in Section II.4.a. do not require the engineer to "avoid" any and all situations. that may or may not raise the specter of a conflict of interest. Such an interpretation of the Code would leave engineers with neither any real understanding of the ethical issues nor any guidance as to how to deal with the problem. The basic purpose of a code of ethics is to provide the engineering profession with a better awareness and understanding of ethical issues that impact upon the public. Only through interacting with the public and clients will engineers be able to comprehend the true dimensions of ethical issues. We believe that holds true in the area of conflicts of interest.

We add that the Board assumes that under the facts of this case, the state agency involved has a fully qualified staff which will ultimately review the recommendation of the engineer.

Therefore, we are of the view that Engineer A's discussion with the client prior to performing the services and disclosing the possible conflict of interest came within the ethical guidelines of the Code and was a proper course to take in dealing with the conflict. We are not willing to state as we did in BER Case 69-13 that the engineer can only avoid such a conflict either by "disposing of his land and holdings prior to undertaking the commission or by declining to perform the services if it is not feasible or desirable for him to dispose of his land at the particular time." We do not read the current Code to require such action.

Conclusion:
It was not unethical for Engineer A to perform the feasibility study despite the fact that his land may be affected thereby.

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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