BER Case 89-4

APPROVED BY BER
October 18, 1989

Section II.1.c. - Code of Ethics
Section II.3.a. - Code of Ethics
Section II.4.b. - Code of Ethics
Section III.4.b. - Code of Ethics

CONFLICT OF INTEREST -- CLAIM REVIEW OF CONTRACTOR

FACTS:

Engineer A was retained under contract with a village to perform consulting services consisting of design and construction supervision of a water supply system. The water supply system included a pump station. The general construction was performed by Contractor B.

Two years after substantial completion and continuous operation of the system Contractor B made a claim for additional costs which was rejected by the village. Contractor B instituted a suit, which was dismissed by the court at a very early stage.

In the lawsuit brought by Contractor B against the village, Engineer A was not named, although he was represented by an attorney appointed by his liability insurance company. Thereafter, Contractor B brought a lawsuit against the law firm that represented it in its suit against the village, claiming that the law firm did not properly represent Contractor B.

Engineer A is contacted by the attorney representing the law firm being sued. He is requested to review and verify the facts relative to the professional services rendered to the village. He is also requested to serve as the expert witness for the attorney representing the law firm being sued. Based on this review and other factors, the attorney representing the law firm will advise his client. Engineer A agrees to these requests.

QUESTIONS:

1. Was it ethical for Engineer A to agree to testify to the facts of his consulting services for the village?

2. Was it ethical for Engineer A to agree to serve as an expert witness for the attorney of the law firm being sued?

REFERENCES:

Section II.1.c. -Engineers shall not reveal facts, data or information obtained in a professional capacity without the prior consent of the client or employer except as authorized or required by law or this Code.

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Section II.3.a. -Engineers shall be objective and truthful in professional reports, statements or testimony. They shall include all relevant and pertinent information in such reports, statements or testimony.

Section II.4.b. -Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed to, and agreed to by, all interested parties.

Section III.4.b. -Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client or employer.

DISCUSSION:

Increasingly, the engineering profession finds itself interacting in a consulting capacity with the legal profession. More and more, attorneys involved in both the defense and the prosecution of claims, require the technical expertise of professional engineers skilled in areas of engineering in order to educate the trier of fact about issues being litigated. Because of their highly specialized knowledge of technical issues not understood by the lay public and the legal system, engineers have an important and unique role to play in this area. Engineers also have a responsibility as citizens to testify as to facts within their knowledge.

We recognize that testifying as to the facts of a situation is separate and distinct from rendering opinions as an expert witness. Frequently, in the area of engineers serving as expert witnesses, the issue of conflicts of interest arise. As with all areas of the practice of engineering, there are ethical issues that must be considered. On several occasions, this Board has considered cases involving professional engineers who have served as expert witnesses in which the issue of conflicts of interest has surfaced.

In Case 76-3, an engineer principal under retainer for many years with a county for services on a water project, was then retained by a developer with the approval of county officials. The developer 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 the engineer as an expert witness at the zoning hearing. The engineer testified in support of the rezoning petition. In concluding that the engineer was unethical in appearing for the development company while serving as engineering consultant to the county, the Board noted that when the engineer
was approached by the developer, while still on retainer to the county, it should

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have been quite clear to him that a conflict of interest was inevitable. "It would seem" said the Board, "that a little interrogation of the development company concerning its plans would have revealed the conflict of interest." The Board went further, stating that "it would be incorrect to accept the engineer's role as an expert witness in the ordinary sense of that kind of professional service arrangement." "The engineer", continued the Board, "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."

In Case 82-6, an engineer was retained by the U.S. government to study the causes of a dam failure. Later the engineer was retained by the contractor on the dam project who had filed a claim against the U.S. government for additional compensation. In concluding that it was unethical for the engineer to be retained as an expert witness for the contractor under these circumstances, the Board noted that the facts were similar to those in Case 76-3 with one exception. In Case 82-6 the engineer was paid in full for his services to the government and was free to oppose its position on behalf of an adverse party, while in Case 76-3, the engineer had an ongoing contractual relationship with the county client. However, we noted that since the rendering the opinion in Case 76-3, the language in the Code had become more restrictive and therefore prohibited the engineer's actions in Case 82-6 because the engineer had failed to obtain the consent of his former client before serving as an expert on behalf of the contractor.

Finally, in Case 85-4, a forensic engineer was hired as a consultant by an attorney to provide an engineering and safety analysis report and courtroom testimony in support of a plaintiff in a personal injury case. Following the engineer's review and analysis, the engineer determined that he could not provide an analysis favorable to the plaintiff because the results of the report would have to suggest that the plaintiff and not the defendant was at fault in the case. After, the engineer's services were terminated and his fee paid in full, an attorney representing the defendant in the case sought to retain the engineer to provide an independent and separate engineering and safety analysis report. The engineer agreed to provide the report. In concluding that it was unethical for the engineer to agree to provide a separate engineering and safety analysis report, the Board noted that the mere fact that the engineer ceased performing services for the first attorney would not be an adequate solution to the ethical dilemma at hand. We stated that the engineer, throughout his first analysis, had access to information, documents, etc. that were made available to him by the attorney in a cooperative and mutually beneficial manner. The Board rejected
the proposition that following the termination of a relationship with the attorney, the engineer would "blot out" all of that information from his mind and start from "square one" in performing his engineering and safety analysis report. We commented that in our view the real reason for the attorney's hiring of the engineer was his belief that the engineer would provide a report that would be favorable.

In the present case, we find that Engineer A should not be permitted to provide an expert opinion for the attorney of the law firm being sued. There are circumstances that will arise where confidential information to which Engineer A was privy, as consultant to the city, may come into question during the rendering of his services to the attorney.

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Further, while we find nothing in the Code or in earlier decisions suggesting that Engineer A had an obligation to obtain the consent of his earlier client, the village, before agreeing to serve as an expert witness for the attorney of the law firm being sued, we believe that because the village was originally a client of Engineer A, there is a conflict of interest.

CONCLUSIONS:

1. It was ethical for Engineer A to agree to testify to the facts of his consulting services to the village.

2. It was unethical for Engineer A to agree to serve as an expert witness for the attorney of the law firm being sued.

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