BER Case 89-5

APPROVED BY BER
October 17, 1989

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

CONFLICT OF INTEREST -- CLAIM SERVICES TO CITY

FACTS:

In the early stages of a project, Engineer A, a geophysical engineer, was retained by a construction contractor to make field compaction tests in connection with work to be performed for the city of Downstream. The job specifications stated that the contractor would be responsible for retaining the geophysical engineer with the approval of the city engineer. The frequency of the testing would be determined by the city engineer. During the course of the work, the contractor ran into financial difficulty, alleging that there was excessive testing and that the soil borings did not represent actual conditions, and asked the city for additional funds. Two years later, long after Engineer A's services were completed, the city brought an arbitration action against the contractor. Engineer A was requested by the city to assist the city in developing a claim against the contractor. Engineer A agrees and provides claim review and analysis services for the city.

QUESTION:

Was it unethical for Engineer A to provide claim services to the city?

REFERENCES:

Section I.3. -Engineers, in the fulfillment of their professional duties, shall issue public statements only in an objective and truthful manner.

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.

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Section II.3.c. -Engineers shall issue no statements, criticisms or arguments on technical matters which are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters.

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:

Engineers are an integral part of the design and construction process. In their role as technical professionals, they are frequently called upon to make important judgments concerning the adequacy and the sufficiency of the work being performed by other parties during the design and construction of various facilities. Because of the multitude of parties involved in the design and construction process, engineers often find themselves attempting to "sort out" the many controversies and differences that occur.

As technical experts, engineers attempt to provide the most accurate and truthful information available in order to best serve the public interest. This approach is consistent with Section I.3. of the Code requiring engineers to issue public statements only in an objective and truthful manner. While the importance of this Fundamental Canon cannot be overstated, as with all provisions of the Code, it must be read in the context of the entire Code. As we have noted on numerous occasions, the Code of Ethics should not be viewed as an absolute, but rather, should be read as a series of interwoven concepts which must be balanced among one another.

One of the basic ethical dilemmas contained in the Code relates to the duty to be objective and truthful and the obligation to protect privileged and confidential information of a client. This situation frequently arises when an engineer is called upon to provide testimony as an expert witness or in some other capacity for a party who has an interest which is in conflict with that of the engineer's present or former client. Obviously in circumstances where the engineer is providing testimony under oath, the engineer has an ethical and legal obligation to provide honest, truthful and complete testimony to the best of the engineer's ability. To do otherwise would be to act in violation of both the Code of Ethics and the laws which govern our common law system.

Nevertheless, the fact that an engineer is requested to participate in some capacity in connection with a legal or arbitration proceeding does not necessarily require the engineer to either (1) agree to become involved in that legal proceeding, or (2) divulge factual information which may bear upon the interests of a present or former client.

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These two actions are extremely difficult to distinguish and for that reason, both the Code of Ethics (Section III.4.b.) and this Board (Cases 76-3, 82-6) have taken them together and determined that it would not be appropriate for an engineer, without the consent of all interested parties, to participate in or represent an adversary interest in connection with a specific project or proceeding in which the engineer has gained particular knowledge on behalf of a former client or employee.

Although both earlier cases interpreted the language contained in Section III.4.b. under circumstances in which the engineer was providing direct testimony in court or statements before a governmental entity, we believe the intent of Section III.4.b. is to cover the broad array of circumstances in which an engineer is called upon to provide assistance to another party whose interests are adverse to those of a present or former client of the engineer. In fact, we believe that the assistance and services provided in the instant case, that of "claims review and analysis" may raise more sinister issues, because unlike testimony in open court or at a public hearing, the assistance offered by Engineer A in an arbitration proceeding is not subject to the rules of civil procedure and evidence.

It is occasionally stated that ethical obligations undergo changes with the passage of time and circumstances. In this connection, there may be some question under the facts whether a sufficient time had passed and therefore the level of ethical obligation owed by geophysical Engineer A to the contractor was not of a high nature. While we recognize that under certain circumstances the ethical commitment of the engineer to a former client or a former employer may change, we do not believe under the facts presented in this case that either a sufficient amount of time has passed or that the circumstances have been altered to dilute the ethical obligations owed by Engineer A to his former client, the contractor.

CONCLUSION:

It was unethical for Engineer A to agree to perform claims review and analysis services for the city.

BOARD OF ETHICAL REVIEW

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