BER Case 92-2

APPROVED
November 1, 1992

Section I.3. - Code of Ethics
Section I.5. - Code of Ethics
Section II.3. - Code of Ethics
Section II.5.a. - Code of Ethics
Section III.3.a. - Code of Ethics

ADVERTISING -- MISSTATING CREDENTIALS

FACTS:

Engineer A is an EIT who is employed by a medium-sized consulting engineering firm in a small city. Engineer A has a degree in mechanical engineering and has performed services almost exclusively in the field of mechanical engineering. Engineer A learns that the firm has begun a marketing campaign and in its literature lists Engineer A as an electrical engineer. There are other electrical engineers in the firm. Engineer A alerts the marketing director, also an engineer, to the error in the promotional literature, and the marketing director, indicates that the error will be corrected. However, after a period of six months, the error is not corrected.

QUESTION:

Under the circumstances, what actions, if any, should Engineer A take?

REFERENCES:

Section I.3. -Issue public statements only in an objective and truthful manner.

Section I.5. -Avoid deceptive acts in the solicitation of professional employment.

Section II.3. -Engineers shall issue public statements only in an objective and truthful manner.

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Section II.5.a. -Engineers shall not falsify or permit misrepresentation of their, or their associates', academic or professional qualifications. They shall not misrepresent or exaggerate their degree of responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint venturers or past accomplishments with the intent and purpose of enhancing their qualifications and their work.

Section III.3.a. -Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact necessary to keep statements from being misleading or intended or likely to create an unjustified expectation; statements containing prediction of future success; statements containing an opinion as to the quality of the Engineers' services; or statements intended or likely to attract clients by the use of showmanship, puffery, or self-laudation, including the use of slogans, jingles, or sensational language or format.

DISCUSSION:

Engineers, as with all professionals are admonished to perform professional services only in areas of their competence. As part of the engineer's relations with his client, employer and the general public the engineer has a fundamental obligation to issue public statements in a objective and truthful manner (Code Section I.3.) In addition, where the engineer is seeking professional engagements, the engineer must always take all reasonable steps to avoid misleading and deceptive acts in the solicitation of professional employment.

Taken together, these three basic principles suggest that the in making offers of professional services to clients or potential clients, as well as in communications with employers, engineers have a basic ethical responsibility to take appropriate steps to ensure that such offers avoid language misleading, deceptive and untruthful language. While we freely acknowledge that this is sometimes a difficult line to draw, we believe that the best method of determining whether the line is violated is by reviewing each individual matter on a case-by-case basis. Over the years, the Board of Ethical Review has had the opportunity to review at least two similar cases as the one presently before it. In BER Case 83-1, the Board considered the ethical conduct of an engineer who, as a principal in an engineering firm, terminated an engineer but continued to distribute a previously printed brochure listing the terminated engineer, who stayed on for a period of time as one of his "key employees", and continued to use a previously printed brochure with the terminated engineer's name in it well after the terminated engineer left the firm. The Board considered

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whether it was the "intent and purpose" the engineer to "enhance the firm's qualifications and work" by including the terminated engineer's name in the promotional brochure after the terminated engineer left the firm. The Board found that the facts presented in the case demonstrated that the engineer acted with "intent and purpose" in distributing the misleading brochure. The engineer was aware of the impending termination of the terminated engineer. The engineer had distributed the brochure while the terminated engineer was still employed but had been given notice of the termination. The Board noted that this could easily mislead potential clients into believing that the terminated engineer, highlighted as a "key employee", would be available in the firm for consultation on future projects. Moreover, since the engineer distributed the brochure after the terminated engineer left the firm, the Board concluded that it would be a clear misrepresentation of a pertinent fact with the intent to enhance the firm's qualifications and as such constituted a violation of the Code.

More recently, in BER Case 90-4, a case involving similar issues, an engineer, one of a few engineers in a medium-sized firm with expertise in hydrology, gave two weeks notice of intent to move to another firm. Nevertheless, a principal in the firm continued to distribute a brochure identifying the engineer as an employee of the firm and listed the departing engineer on the firm resume. In finding it was not unethical for the principal to continue to represent the engineer as an employee of the firm under the circumstances described, we distinguished BER Case 90-4 from BER Case 83-1. The Board noted that in BER Case 83-1, the terminated engineer was highlighted in the firm's promotional brochure as a "key employee", Under the totality of the facts and circumstances of the case, it was apparent that the engineer's continued inclusion of the terminated engineer's name in the brochure constituted an overt misrepresentation of an important fact concerning the overall make-up of the firm. However, in BER Case 90-4, there was no suggestion that any of the brochures or other promotional material describe the departing engineer as a "key employee" in the firm. Nor was there any effort or attempt on the part of the firm to highlight the activities or achievements of the departing engineer in the field of hydrology. While the facts revealed that the departing engineer was one of the few engineers in the firm with expertise in the field of hydrology, the departing engineer was not the only engineer in the firm who possessed such expertise. In addition, it appeared that this area of practice did not constitute a significant portion of the services provided by the firm; therefore it seemed to the Board that the inclusion of the name of the departing engineer in the firm's brochure and resume did not constitute a misrepresentation of "pertinent facts".

In addition, in BER Case 90-4, the Board was reluctant to conclude that the actions of the firm and the engineer in including the name of the departing engineer in the firm's brochure and resume demonstrated an intent to "enhance the firm's qualifications and work". Under the facts, there did not appear to be the same motive on the part of the principal engineer or the firm to act in a manner which will materially benefit the firm as was so in BER Case 83-1. In BER Case 90-4, the action by the firm and engineer appear more in the manner of an oversight without malice or intent. While the Board has in the past found that unethical conduct occurred in the absence of intentional actions, the Board did not consider the facts of BER Case 90-4 to be of a nature to make such a finding.

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Significantly, in BER Case 90-4, the Board noted that it was in no way condoning the failure of an engineering firm to correct material (brochures, resumes, etc.) which might have the unintentional effect of misleading clients, potential clients and others. While the Board recognized the realities of firm practice and the logistical problems involved in marketing and promotion, the Board noted it was important for firms to take actions to expeditiously correct any false impressions which might exist. In this regard, the Board indicated that engineering firms that use printed material as part of their marketing efforts should take reasonable steps to assure that such written material is as accurate and up-to-date as possible. In the case of marketing brochures and other similar materials, errata sheets, cover letters, strike-outs and, if necessary, reprints should be employed within a reasonable period of time in order to correct inaccuracies, particularly where a firm has reason to believe that a misunderstanding might occur. Firms that fail to take such measures run the risk of breaching ethical behavior.

We believe that the instant case presents a clear illustration of the last point raised earlier by the Board in BER Case 90-4. Under the facts, the firm's marketing director has been informed by the engineer in question that the firm's marketing brochure contains inaccurate information that could mislead and deceive a client or potential client. Under the reasoning in BER Case 90-4, the marketing director has an ethical obligation to take expeditious action to correct the error. Again, while we recognize basic logistical problems involved in distributing, correcting and reprinting brochures and other promotional material, we believe the marketing director, a professional engineer, has an ethical obligation both to the clients and potential clients as well as to the Engineer A to expeditiously correct the mis-impression which may have been created. As we noted in BER Case 90-4, this could take the form of a simple and inexpensive errata sheet inserted into the brochure.

In closing, while we believe Engineer A has taken an appropriate step in alerting the marketing director to the error in the brochure, we believe that after a period of six months during which the error was not corrected, Engineer A should raise the issue with a principal in the firm. While there is no indication that what has occurred under these facts is anything other than an negligent oversight, continued inaction by the firm in light of actual knowledge of the error could easily raise questions of improper and unethical conduct.

CONCLUSION:

Engineer A should raise the issue of the error with a principal in the firm and note the appropriate requirements under the state board's rules of professional conduct in writing.

BOARD OF ETHICAL REVIEW

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Note: In regard to the question of application of the Code to corporations vis-a-vis real persons, business form or type should not negate nor influence conformance of individuals to the Code. The Code deals with professional services, which services must be performed by real persons. Real persons in turn establish and implement policies within business structures. The Code is clearly written to apply to the Engineer and it is incumbent on a member of NSPE to endeavor to live up to its provisions. This applies to all pertinent sections of the Code.

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