BER Case 93-5

APPROVED
October 21, 1993

Preamble - Code of Ethics
Section II.2. - Code of Ethics
Section III.7.a. - Code of Ethics

CONTINGENCY FEES – DIRECTING SERVICES RE: LITIGATION

FACTS:

Smith is killed as a result of an alleged defective product. Smith's widow, Mrs. Smith, is unable to afford the services of an expert to investigate the technical issues relating to the allegedly defective product. Mrs. Smith contacts Engineer A, a product design specialist who frequently provides forensic engineering and related services. Following a long discussion, Mrs. Smith requests that if it is determined that a legal action should be brought against the manufacturer, that Engineer A act as Mrs. Smith's agent to direct the legal action on her behalf. She requests that Engineer A advise her regarding the selection and retention of an attorney, and oversight of the attorney's general approach to the case. Engineer A would not serve as an expert witness as part of the legal action. Since Mrs. Smith has limited resources, Engineer A, following considerable contemplation and thought, agrees to perform the services on a contingency fee basis, with Engineer A receiving a percentage of the settlement or award.

QUESTION:

Was it ethical for Engineer A to agree to provide the services in question on a contingency fee basis?

REFERENCES:

Preamble -Engineering is an important and learned profession. The members of the profession recognize that their work has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness and equity, and must be dedicated to the protection of the public health, safety and welfare. In the practice of their profession, engineers must perform under a standard of professional behavior which requires adherence to the highest principles of ethical conduct on behalf of the public, clients, employers and the profession.

Section II.2. -Engineers shall perform services only in the areas of their competence.

Section III.7.a. -Engineers shall not request, propose, or accept a professional commission on a contingent basis under circumstances in which their professional judgment may be compromised.

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DISCUSSION:

The past 25 years has seen a dramatic evolution in the manner in which engineers are being called upon to provide professional services. This includes an array of innovative contracting techniques, partnerships and consortia with non-engineering public and private entities as well as other types of arrangements. This Board has from time to time examined the ethical responsibilities of engineers who are called upon to render services in non-traditional arrangements and relationships. As we have indicated in the past, engineers must be open to new and innovative techniques both in the technical and the professional sphere, and at the same time take appropriate and reasonable steps to ensure that their actions and conduct are consistent with the basic principles embodied in the Code of Ethics.

One of the areas that the Board has examined with great frequency involves those relationships where the relationship between the engineer and his client is based upon some contingent event or occurrence. Section III.7.a. of the Code makes it clear that engineers should not request, propose or accept a professional commission on a contingent basis under circumstances in which their professional judgment may be compromised. The Board has interpreted this provision to indicate that a contingent relationship is not per se unethical but only those that may have the effect of compromising the professional judgment of the engineer. The classic example of this would be the situation where the engineer proposes or is requested to perform a "feasibility study" for a client and the engineer's fee is "contingent upon the result that the study will recommend that the project go forward." It would be extremely difficult to disagree that such a contingency may have the effect of compromising the professional judgment of the engineer performing the feasibility study (for further discussion, see BER Case 65-4).

Other examples of cases considered by the Board involve contingencies where the engineer's fee was based upon a savings to a client (BER Case 73-4). There the Board indicated that it was ethical for the engineer to be compensated on that basis, but also recognized that it is conceivable that the engineer could compromise his professional judgment under these facts by being overzealous in seeking means of savings to his client. Nevertheless, the Board concluded that "over-zealousness" can hardly produce a compromise of professional judgment, providing all other interests of the client, such as safety and reliability are protected.

More recently, in BER Case 91-2, the Board ruled that it was unethical for an engineer to agree to an arrangement whereby the engineer would review the work prepared by another engineer and identify errors/omissions contained in the documents in contemplation of a suit for breach of contract with the reviewing engineer's fee dependant upon the ultimate court judgment or settlement. We noted that by finding no errors/omissions in the work, there would be no fee and that this appears to be just the very factors for which Section III.7.a. was intended to guard against.

Turning to this we believe that facts are distinguishable from those faced by the Board in BER Case 91-2. Unlike BER Case 91-2, it appears that Engineer A is being retained as an expert advisor and resource to Mrs. Smith in a variety of areas and is not being retained to provide direct technical assistance in support of Mrs. Smith's claim. We believe the fact that Engineer A will not serve as an expert witness as part of the legal action is significant because it diminishes concern that as an expert witness Engineer A's judgment may be compromised to support Mrs. Smith's legal action.

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While we believe that under the facts, Engineer A's actions were not inconsistent with the Code of Ethics, we caution engineers who undertake the activities as those described. Also, we leave unexamined the issue of whether Engineer A or other engineers requested to provide such services possess the necessary training or expertise to serve in the role described as required by Code Section II.2.a. Further, we would also note that some of the services Engineer A was asked and agreed to perform may indeed go beyond the practice of engineering. We advise that before agreeing to perform such services, engineers should be certain that they exercise exceptional caution that their opinions are not compromised.

We must again reemphasize our concern that any contingency fee basis arrangement must be carefully scrutinized by the engineer to make certain that the engineer's judgment is not compromised. We surmise that many professional engineers within the forensic engineering community would disagree with the advisability of retaining engineers on a contingency fee basis.

CONCLUSION:

Assuming Engineer A made a decision that his judgment would not be compromised by the contingency fee issue, then it was ethical for Engineer A to agree to provide the services in question.

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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