BER Case 93-6

APPROVED
October 21, 1993

Section II.4.a. - Code of Ethics
Section II.4.d. - Code of Ethics

CONFLICT OF INTEREST – PROVIDING VIEWS ON FEASIBILITY OF PROJECT

FACTS:

Engineer A, a professional engineer in private practice, has been retained by Edgetown as town engineer. The Edgetown Planning Board has under review the approval of a project being proposed by ABC Development Enterprises. Engineer A is also being retained by ABC Development Enterprises on a separate project but that project is being constructed in Nearwood, a town in another part of the state. The Nearwood project is unrelated to the project under consideration by Edgetown. Engineer A is expected to offer his views in the capacity of town engineer to the feasibility of ABC's Edgetown project to the Edgetown Planning Board.

QUESTION:

Would it be ethical for Engineer A to develop and report his views on the feasibility study of ABC's Edgetown project to the Edgetown Planning Board?

REFERENCE:

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 judgement or the quality of their services.

Section II.4.d. -Engineers in public service as members, advisors or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to professional services solicited or provided by them or their organizations in private or public engineering practice.

DISCUSSION:

The role of the engineer in private practice who also serves in a capacity as an advisor or engineer to a town or municipality raises unique ethical questions. Among the questions raised include the extent to which the engineer's judgment in his capacity as advisor or town engineer may be affected by interests and concerns that are relate to the engineer's private practice.

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It has been argued by some that it is impossible for the engineer who attempts to serve in both a public and private capacity to compartmentalize his interests and not be influenced by factors that might affect his general business practice or the interests of other clients. Some have suggested that if an engineer agrees to serve as an advisor or city engineer, the engineer's firm must not perform any services either as a consultant to the city itself or any client that performs services for the city.

The Board has over the years considered several case that have raised this issue and involve an interpretation of Section II.4.d. of the Code. For example, BER Case 74-2 involved a state law requiring that every municipality have a municipal engineer whose duties and compensation were to be fixed by municipal ordinance. The duties of the municipal engineer generally consisted of attending meetings of public bodies of the municipality, providing general advice on engineering matters, maintaining tax maps, reviewing site plans and subdivision maps, preparing cost estimates for proposed facilities, handling complaints from citizens on engineering-related problems and advising on the retention of consultants for project requirements. Many of the smaller communities in the state did not have and could not afford full-time municipal engineers or supporting staff personnel for a full-time office. In such instances the smaller communities retained the services of a firm in private practice and appoint a principal of the firm as municipal engineer. The municipal engineer is paid either on a cost-plus basis or a flat monthly retainer, usually a relatively low amount. The Board found that because the engineer was not a bona fide "employee" of the municipality but a consultant called a "municipal engineer", it was not unethical for him to serve as municipal engineer and also participate in the consulting firm and provide engineering services to the same municipality. The Board was persuaded by a belief that the public's interest in providing the most competent engineering services, compliance with state, and continuity of municipal engineering services would be best served by allowing this practice.

BER Case 76-3 involved an engineer who had been under a retainer with a county for general advisory services. While on retainer, the engineer was retained by a developer with approval of county officials. The developer filed a petition with the county board to rezone a substantial area of the county as commercial. The county Department of Public Works filed several engineering reports adverse to the zoning petition, recommending denial of the rezoning because of potential overload to water/sewage facilities. The developer called the engineer as an expert witness at the hearing and he testified in support of the rezoning petition. In ruling that it was unethical for the engineer to appear for the development company while serving as an engineering consultant to the county, the Board noted that he 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 acting as a paid advocate of a private interest in open conflict with the engineering opinions of the county engineers.

Later, in BER Case 87-3, the Board considered a case involving an engineer contracted by a county to inspect a project developed by the engineer's client. Although the engineer had not performed any services in connection with that specific project, the engineer and client anticipated that they would continue to work together in the future. In contract negotiations, the engineer disclosed his relationship with the client to the county. The Board concluded that it would not be unethical for the engineer to perform building inspection services for the county in connection with the project developed by the client. Said the Board, "To prohibit the engineer from providing the building inspection services would be an unrealistic intrusion into her practice and would inhibit the county from utilizing a flexible method of delivering services consistent with the public health and safety.

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We believe that based upon the facts, earlier Board precedent, and a reading of the Code of Ethics, there would not be an ethical violation by Engineer A if he discloses his relationship with ABC Development Enterprises. Although the facts of this case are distinguishable from earlier Board opinions, we believe that there are elements of each that lead us to this result. Our position is based upon a belief that it is desirable to encourage small towns and municipalities to have access to competent engineering services at reasonable cost. In addition, unlike BER Case 76-3, there is nothing under the facts to suggest that Engineer A's views on the Edgetown review will be directly affected by his relationship with ABC Development on the unrelated Nearwood project. Finally, except as is specifically prohibited by the Code of Ethics, as the Board has suggested, it is wholly unrealistic to interpret the Code to encourage engineers in private practice to perform in an advisory or other capacity to governmental bodies and at the same time bar them from performing any services as a consultant to that body. Such a narrow view would make engineer's in private practice hesitant to accept advisory or other roles with public entities and deprive those entities of needed technical expertise.

We agree, however, with the notion that under circumstances as the ones found in this case, the engineer does have an obligation under Section II.4.a. to provide disclosure to the client. Under the facts, without such disclosure, there is a very real possibility that the Edgetown Planning Board would not have learned of Engineer A's relationship with ABC Development Enterprises.

CONCLUSION:

It would not be ethical for Engineer A to develop and report his views on the feasibility study of ABC's Edgetown project to the Edgetown Planning Board unless Engineer A first discloses his relationship with ABC Development Enterprises to both clients.

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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