BER Case 93-9

APPROVED
October 21, 1993

Section II.2.a. - Code of Ethics
Section II.3.a. - Code of Ethics

PROVIDING LITIGATION SUPPORT SERVICES TO ATTORNEY

FACTS:

Engineer A is retained by Attorney H to serve as an expert witness in a case being litigated. As part of the services to be performed, Engineer A is requested by Attorney H to provide "additional assistance" in the drafting of cross-examination questions to be used with other witnesses, analyze arguments of the opposing counsel, assist Attorney H in case strategy for trial, evaluate the credibility of lay witnesses and critique Attorney H's opening and closing arguments. Engineer A has no legal training, but has 10 years of experience in forensic engineering including serving as an expert witness for both the plaintiff and defense bar.

QUESTION:

Would it be ethical for Engineer A to provide all of the services requested by Attorney in the case being litigated?

REFERENCES:

Section II.2.a. -Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved.

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.

DISCUSSION:

A basic principle that must be adhered to in the practice of engineering, is the ethical obligation of the engineer to practice only in his or her area of competence. While a determination of what constitutes "competence" is not always easily defined, certain basic facts are inherent to any consideration of this issue. Among these factors include the education, experience, the field in which the individual is examined, continuing professional development both formal and informal as well as other related factors. No one of these factors is dispositive in determining whether an individual possesses adequate professional competence to perform certain services or functions. Rather, it is a combination of these factors that must generally be examined to determine whether an individual possesses the minimum technical competence to offer or agree to perform certain services for a client.

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The Board has addressed the issue of performing professional services only within the engineer's competence on numerous occasions. In BER Case 68-11, the Board considered a case involving the review of an architect's plans by an engineer in order to "suggest improvements, gain knowledge and assure their compliance with the specified requirements." The Board decided that the engineer was ethically permitted to carry out the review for those aspects of the work that were within his competence. More recently, in BER Case 86-2, the Board reviewed a case involving the signing and sealing of plans not prepared by the engineer. The Board, based upon earlier Board opinions as well as Sections II.2.a., determined that it was unethical for the engineer to seal plans that have not been prepared by him , or which he has not checked and reviewed in detail. In BER Case 87-1, a case involving an application of Section II.2.a. in a different context, the Board considered a case involving an government engineer's acceptance of a new assignment even though he lacked the technical expertise to perform the required duties, the Board found the engineer's acceptance of the assignment consistent with the Code. In distinguishing the case from earlier cases, the Board noted that the other cases involved higher level assignments, including the supervision of individuals and operations for an employer or client, while BER Case 87-1 involved a staff engineer within a government agency who would be reporting to an experienced supervisor.

Turning to the facts of the present case, we believe that Engineer A probably possesses adequate competence to perform the services and activities requested by Attorney H. Many if not most of the services requested by Attorney H are of an advisory or consulting nature and are being rendered to Attorney H to assist Attorney H in serving the interests of his client. We are not uncomfortable with Engineer A performing these services and at the same time maintaining his relative objectivity and impartiality consistent with Section II.3.a. of the Code of Ethics. We recognize the realities of the role of the retained expert witness during judicial proceedings and the fact that experts are generally retained to provide expert testimony in support of the party who retained them. We are not troubled by Engineer A's service as an expert witness and at the same time providing additional assistance to Attorney H (e.g., in the drafting of cross-examination questions to be used with other witnesses, analyzing arguments of the opposing counsel, assisting Attorney H in case strategy for trial, evaluating the credibility of lay witnesses and critiqueing Attorney H's opening and closing arguments). We believe this additional level and type of service does not suggest a kind of involvement that would be prohibited by Section II.3.a. of the Code of Ethics.

CONCLUSION:

It would be ethical for Engineer A to provide the "additional services" requested by Attorney in the case being litigated.

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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