BER Case 94-1

APPROVED
May 9, 1995

Section II.1.c. - Code of Ethics
Section II.3.a. - Code of Ethics
Section II.4. - Code of Ethics
Section II.4.b. - Code of Ethics

CONFLICT OF INTEREST -- ENGINEER RETAINED BY STATE

FACTS:

Engineer A is retained by a developer in the early stages of a project to perform site and engineering studies in connection with a major development project. Later, Engineer A is selected by the state's department of transportation to oversee numerous subconsultants in the preliminary design work for the proposed widening of eight miles of an interstate highway and proposed construction of a new interchange to serve the major development project. That work would be incorporated into the federal environmental impact statement analyzing the road project's effect on traffic and air quality. Engineer A officially informs the state department of transportation of his earlier work for the developer.

QUESTION:

Was it unethical for Engineer A to accept the contract with the state's department of transportation?

REFERENCES:

Section II.1.c. - Engineers shall not reveal facts, data or information obtained in a professional capacity without the prior consent of the client or employer except as authorized or required by law or this Code.

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.

Section II.4. - Engineers shall act in professional matters for each employer or client as faithful agents or trustees.

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Section II.4.b. - Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed to, and agreed to by, all interested parties.

DISCUSSION:

The issue of conflict of interests is one of the most prevalent ethical concerns facing engineering practitioners. Over the years, the Board of Ethical Review has considered numerous cases dealing with the multifaceted issues involved in situations where engineers are faced with conflicts involving clients, employees or other engineers. At one time, the NSPE Code of Ethics for Engineers specifically prohibited engineers from becoming involved in cases or situations where a conflict of interest was present. This was based upon the view that professional engineers must at all times be above reproach and avoid any situation that could be perceived as compromising their professional judgment and integrity as independent professionals. (See BER cases 59-3, 60-5, 62-7, and 63-5 for examples of cases where the Board expressed the view that engineers had a strict obligation to avoid conflicts of interest).

Over time, the Code of Ethics and the Board of Ethical Review have moderated to the point of recognizing that certain types of conflicts of interest are difficult if not impossible to avoid and that the more realistic approach for individual engineers faced with this type of ethical conflict is to fully disclose the nature and extent of the conflict to the appropriate parties involved or impacted by the conflict. This is based upon the view that the parties that are most affected by the conflict and who have the most at stake (e.g., clients, employers, other engineering firms, etc.) are in the best position to determine whether their interests will be compromised by the conflict. While sometimes perceived conflicts of interest are resolved by the parties as a result of full disclosure, in other instances, the conflicts are deeper and require the engineer to disassociate from a specific project.

In recent years, the Board has considered the issue of conflict of interests in various contexts. In BER Case 76-3, an engineer principal under retainer for many years with a county for services on a water project, was then retained by a developer with the approval of county officials. The developer filed a petition with the county zoning board to rezone a substantial area of the county for commercial purposes.

The county department of public works filed several engineering reports adverse to the zoning petition, recommending denial of the rezoning because the proposed construction would overload available water/sewer facilities. The development company called the engineer as an expert witness at the zoning hearing. The engineer testified in support of the rezoning petition.

In concluding that the engineer was unethical in appearing for the development company while serving as engineering consultant to the county, the Board noted that when the engineer was approached by the developer, while still on retainer to the county, it should have been quite clear to him that a conflict of interest was inevitable. "It would seem" said the Board, "that a little

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interrogation of the development company concerning its plans would have revealed the conflict of interest." The Board went further, stating that "it would be incorrect to accept the engineer's role as an expert witness in the ordinary sense of that kind of professional service arrangement." "The engineer", continued the Board, "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 a paid advocate of a private interest in open conflict with the engineering opinions of the county engineers."

In BER Case 82-6, an engineer was retained by the U.S. Government to study the causes of a dam failure. Later the engineer was retained by the contractor on the dam project who had filed a claim against the U.S. Government for additional compensation. In concluding that it was unethical for the engineer to be retained as an expert witness for the contractor under these circumstances, the Board noted that the facts were similar to those in BER Case 76-3 with one exception. In BER Case 82-6 the engineer was paid in full for his services to the government and was free to oppose its position on behalf of an adverse party, while in BER Case 76-3, the engineer had an ongoing contractual relationship with the county client. However, we noted that since rendering the opinion in BER Case 76-3, the language in the Code had become more restrictive and therefore prohibited the engineer's actions in BER Case 82-6 because the engineer had failed to obtain the consent of his former client before serving as an expert on behalf of the contractor.

Finally, in BER Case 85-4, a forensic engineer was hired as a consultant by an attorney to provide an engineering and safety analysis report and courtroom testimony in support of a plaintiff in a personal injury case. Following the engineer's review and analysis, the engineer determined that he could not provide an analysis favorable to the plaintiff because the results of the report would have to suggest that the plaintiff and not the defendant was at fault in the case. After, the engineer's services were terminated and his fee paid in full, an attorney representing the defendant in the case sought to retain the engineer to provide an independent and separate engineering and safety analysis report. The engineer agreed to provide the report.

In concluding that it was unethical for the engineer to agree to provide a separate engineering and safety analysis report, the Board noted that the mere fact that the engineer ceased performing services for the first attorney would not be an adequate solution to the ethical dilemma at hand. We stated that the engineer, throughout his first analysis, had access to information, documents, etc. that were made available to him by the attorney in a cooperative and mutually beneficial manner. The Board rejected the proposition that following the termination of a relationship with the attorney, the engineer would "blot out" all of that information from his mind and start from "square one" in performing his engineering and safety analysis report. We commented that in our view the real reason for the attorney's hiring of the engineer was his belief that the engineer would provide a report that would be favorable.

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Most of the cases cited herein are clear-cut examples of conflicts of interest and suggest circumstances in which the engineer's judgment could be compromised and the quality of the engineer's services may be affected. At the very least, those examples raise the appearance of a conflict of interest. In the present case, we believe that a sufficient distance does not exist between Engineer A's relationship with the developer and Engineer A's relationship with the state department of transportation. The work being performed by Engineer A for the developer was very specific in nature and the work might have some impact on the services he performed for the state. While Engineer A fully complied with his obligations under the Code of Ethics by promptly informing the Department of Transportation of his prior business association, we do not believe that the disclosure of a conflict of interest to all interested parties absolves an engineer of ethical concerns that could arise. There may be some circumstances where a conflict is so serious and the impact so great that disclosure alone would not be sufficient to address all ethical questions involved. Moreover, there may be situations where the conflict may not be viewed as serious to the affected public agency but could raise questions of ethics in the mind of the public. Engineers need to be mindful of the impact that such situations may have upon the dignity and integrity of the profession.

CONCLUSION:

It was unethical for Engineer A to accept the contract with the state's department of transportation.

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