BER Case 94-10

APPROVED
May 9, 1995

Preamble	-	Code of Ethics
Section I.4.	-	Code of Ethics
Section I.5.	-	Code of Ethics
Section II.4.	-	Code of Ethics
Section III.3.a.	-	Code of Ethics
Section III.9.a.	-	Code of Ethics

CONFLICT OF INTEREST -- REGISTRATION -- NOT LICENSED IN STATE

FACTS:

Firm A was interviewed in August, 1984 by the selection committee of County X in State Y for the design of a school in that county. The design was also to be used for a second school. Firm A's proposal, resume and interview team included Engineer B of State Z as their consultant to design the school's wastewater treatment plant. Engineer B's resume included credit for the design and patents of wastewater plant equipment and he had advised Firm A of this. Engineer B made one of the oral presentations and his representations of expertise in small treatment plants was a factor in Firm A's selection that same month.

Firm A completed and submitted in April, 1985 a study outlining several schemes of scope with budgets for the project and was authorized to commence preliminary schematic design. In May, 1985 Firm A submitted a summary of wastewater treatment requirements and characteristics prepared by Engineer B. Initial project preliminary schematic design was submitted to the county in December, 1985. County responded with comments in May, 1986. In July, 1986 Firm A was authorized to proceed and the proposed parameters of the treatment plant were approved by state authorities. Engineer B invoiced Firm A for professional services
rendered in January, 1986 and was paid in February. Engineer B, in correspondence during development of project specifications, again disclosed to Firm A that he was the inventor of certain plant equipment items and expressed "professional interest" in them as the "preferred" items for the design. He further stated "I am not an officer, stockholder, or employee of PQR, Inc. Nor do I receive any patent royalty, or compensation whatsoever from the manufacturer."

Engineer B, licensed in State Z, applied for license in State Y in March, 1986 disclosing investigations in other states of alleged ethical violations and one state revocation of his license to practice. The State Y license was issued in June, 1986. Meanwhile, the State Department of Environmental Regulation permitted the proposed treatment plant as in compliance with state requirements. State Y's definition of the practice of engineering includes ".... consultation, investigation, evaluation, planning and design of .... utilities, structures...."

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It is unlawful in State Y to practice a profession, or to use titles or letters which would infer professional competence, without holding a valid license. Exemption from license requirements is provided for an engineer who is legally qualified in another state"...and files within fifteen days after commencement of such practice an application, with the required fee, for licensure as a professional engineer..."

The specification section prepared by Engineer B specified, without provision for products of other manufacturers, plant equipment that had been designed, developed and patented by Engineer B and now manufactured by PQR, Inc. A section of Firm A's project manual concerning bidding requested that proposed alternatives to specified products be submitted 14 days prior to bid opening.

In February, 1990 contractors bidding on the second school raised questions to county staff about possible connections between Engineer B, PQR, Inc., and Engineer B's son. Subsequently, it was found that PQR, Inc. was wholly owned by Engineer B's spouse, operated by his son as CEO, and that they and Engineer B were all housed in the same building.

QUESTIONS:

1. Was it ethical for Engineer B to provide the described consulting services for the county project in State Y in which he was not licensed as an engineer?

2. Was it ethical for Engineer B to fail to disclose to Firm A the nature of his relationship with PQR, Inc. at the time he was being considered as their consultant?

3. Would it be ethical for Engineer B to exercise approvals of PQR, Inc. submittals and subsequently delivered PQR, Inc. equipment, had he made early full disclosure?

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

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which requires adherence to the highest principles of ethical conduct on behalf of the public, clients, employers and the profession.

Section I.4. - Act in professional matters for each employer or client as faithful agents or trustees.

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

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

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, or statements containing prediction of future success.

Section III.9.a. - Engineers shall conform with state registration laws in the practice of engineering.

DISCUSSION:

The Board recently addressed the issue of offering professional services in a state in which the individual was not licensed, although in a different context. In BER Case 93-2 a professional engineer with expertise in mechanical systems, was a sole practitioner in a small consulting firm in State X and had a business card indicating that he is a professional engineer. He was not licensed in State X but was licensed in State Y. The bulk of his work involved work to be constructed in State Y. A client contacted him to design a project that would be constructed in State X. After completing the work, the client learned that the engineer was not licensed in State X but was licensed in State Y. The engineer had not obtained any authority to perform the services in State X.

As a result, the client was required to have another engineer either redesign the project or carefully review his work before sealing it. The client incurred additional expenses and delay in the construction of the project. In determining it was unethical for the engineer to imply that he was registered in State X and that it was unethical for him to design the project for construction in State X, the Board noted that in recent years, there has been a great deal of interest generated within the engineering community regarding the manner in which engineers in this nation are licensed from state to state.

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The Board has (??) also rendered an opinion interpreting sections of the Code of Ethics that relate to conformance with the engineering registration laws in the practice of engineering and the obligation of engineers to become registered at the earliest date. In BER Case 90-3, the Board considered a case involving a prominent consulting engineer who was registered in states 1, 2, and 3 and who had on other occasion performed forensic engineering services in connection with accident reconstruction.

The engineer was retained by an attorney in state 4 to inspect an accident for the purpose of determining the actual cause of the accident. The engineer was also asked to express a professional opinion during a trial on matters relating to the safety and design of equipment which may have failed, causing the accident. In deciding it was not unethical for the engineer to offer testimony in the manner described, the Board noted that engineers who engage in the practice of engineering or who hold themselves out as engineers to the public have a legal as well as an ethical obligation to make certain that they are professional engineers licensed in accordance with the laws of the state.

While the Board indicated that a determination of this issue must find resolution within each state on a case-by-case basis, depending on the nature of the services provided, the language contained in the state engineering registration law and other considerations. With respect to the narrow issue of an individual serving as a technical expert, the Board pointed out that as a general proposition, it was generally acknowledged that an individual may be qualified as a technical expert by a court without possessing the minimum legal recognition as demonstrated by a professional license.

While in BER Case 90-3, the Board did not specifically address the particular issues involved in this case, the opinion is instructive in that it reinforces the basic and fundamental proposition that engineers who engage in the practice of engineering or who hold themselves out as engineers to the public have a legal as well as an ethical obligation to make certain that they are professional engineers licensed and practicing in accordance with the laws of the state. While the Board concluded in BER Case 90-3 that it was not unethical for an engineer unlicensed in a particular state to serve as an expert witness in that state, we believe a different result is warranted under the facts in this case for a number of reasons.

In BER Case 90-3, we can reasonably assume that the engineer informed the attorney who retained him that he was not licensed in the state in which he is was expected to serve as an expert witness. Therefore, the engineer in BER Case 90-3 appears to have done nothing to have misrepresented his credentials or to have mislead his client (Section III.3.a.) In addition, in BER Case 90-3, the law did not impose an obligation on the engineer to be licensed in the state in which he was expected to testify. Finally, in BER Case 90-3, the engineer's actions did not compromise or jeopardize the interests of the client.

In contrast to the situation in BER Case 90-3, in this instance, Engineer B agreed to serve as a consultant and began to provide engineering services to a client for a project in a state in which he was not licensed. Such actions would be in direct violation of state's engineering licensing law. Fundamental to the ethical responsibilities of professional engineers is to uphold the integrity of the

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engineering licensing laws. All licensed engineers are either aware or are charged with the knowledge of the requirements for engineering licensure in the states in which they seek to practice. The fact that Engineer B sought to and became licensed after the fact may mitigate the circumstances somewhat but do not in any way eliminate the ethical violation of the Preamble and of Section III.9.a. of the Code of Ethics.

On the second point, the Board believe that Engineer B's failure to disclose to Firm A the nature of his relationship with PQR, Inc. at the time he was retained by Firm A to be part of the proposal was clearly a violation of Sections I.5. and III.3.a. the NSPE Code of Ethics. At a minimum, Engineer B's deficiency in prompt disclosure of his relationship to PQR, Inc. resulted in an appearance of impropriety. Engineers have an obligation under the Code to promptly and fully inform an employer or client of any business association, interest, or circumstance which may influence the professional's judgment or the quality of their services. Clearly the fact that Engineer B's spouse was the owner of the manufacturer of the equipment that Engineer B specified in his documents, as well as the proximity of their offices in the same building, (2 may bear discussion), raises the strong potential for an appearance of impropriety. In addition, the fact that Engineer B told Firm A that he is not an officer, stockholder, employee and receives no patent royalty, or compensation from PQR, Inc. may have had the effect of misleading Firm A and others into believing that Engineer B had no direct or indirect links to PQR, Inc. in violation of Section III.3.a.

Finally, we believe that even if Engineer B had made the earlier full disclosure, it would have been unethical for Engineer B to exercise approvals of PQR, Inc. submittals and subsequently delivered PQR, Inc. equipment. The Board noted in BER Case 75-10 (in which the engineer's report recommended the use of broadcast equipment manufactured by the engineer's employer), an engineer may ethically recommend employer-manufactured equipment provide there is full disclosure of all the facts and circumstances to his client.

However, the circumstances differ substantially in this case. The role of an engineer member of an A/E team in evaluating and approving or disapproving equipment submittals is also different. It demands absolute devotion to the best interests of the owner, requiring objective impartiality in its performance. In view of the intertwined interests of Engineer B, his son and his spouse, the Board do not consider it reasonable that Engineer B could be expected to comply with Sections I.4. and II.4. in evaluating such submittals.

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CONCLUSIONS:

1. It was unethical for Engineer B to agree to be part of a proposal in a state in which he was not licensed as a professional engineer.

2. It was unethical for Engineer B to fail to disclose to Firm A the nature of his relationship with PQR, Inc. at the time he was retained by Firm A to be part of the proposal.

3. It would be unethical for Engineer B to exercise approvals of PQR, Inc. submittals and subsequently delivered PQR, Inc. equipment, had he made early full disclosure.

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