BER Case 94-7

APPROVED
May 9, 1995

Preamble	-	Code of Ethics
Section I.4.	-	Code of Ethics
Section II.1.c.	-	Code of Ethics
Section II.3.a.	-	Code of Ethics
Section II.4.	-	Code of Ethics
Section III.3.	-	Code of Ethics
Section III.4.	-	Code of Ethics
Section III.10.	-	Code of Ethics

DISCLOSURE OF CLIENT INFORMATION TO INSURANCE COMPANY

FACTS:

Engineer A was practicing as a consulting engineer, but due to certain disabilities is now receiving benefits under the terms of a replacement income policy issued by a life insurance company. The insurance company, claiming it wants to verify Engineer A's income from Engineer A's firm which is engaged primarily in the field of forensic engineering for purposes of litigation support has requested that Engineer A provide the following written information:

1. The names and contact persons of all the firm's clients since 1984;

2. Copies of all of the firm's contracts/engagement letters, scope of work, work product and supporting documentation with all clients since 1984;

3. Billable hours worked by Engineer A for each client of the firm since 1984;

4. The amount and dates of all invoices and payment of all fees to the firm for engineering services provided to those clients.

QUESTION:

Would it be ethical for Engineer A to provide to the life insurance company the information requested?

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

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.

Section III.3. - Engineers shall avoid all conduct or practice which is likely to discredit the profession or deceive the public.

Section III.4. - Engineers shall not disclose confidential information concerning the business affairs or technical processes of any present or former client or employer without his consent.

Section III.10. - Engineers shall give credit for engineering work to those to whom credit is due, and will recognize the proprietary interests of others.

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DISCUSSION:

At the outset, we would note that the wording of Code Section II.1.c. uses the words "facts, data or information". Among the issues for consideration in this case is whether those words are to be interpreted to include the names of clients, addresses, and other identifying information as well as documents related to the services performed on behalf of those clients.

Over the years, the Board of Ethical has considered numerous cases recognizing the confidentiality of client records in a variety of contexts. In BER Case 82-2, an engineer offered a homeowner inspection service, whereby he undertakes to perform an engineering inspection of residences by prospective purchasers. Following the inspection he rendered a written report to the prospective purchaser. The engineer performed this service for a client (husband and wife) for a fee and prepared a one-page written report, concluding that the residence under consideration was in generally good condition requiring no major repairs, but noting several minor items needing attention.

The engineer submitted his report to the client showing that a carbon copy was sent to the real estate firm handling the sale of the residence. The client objected that such action prejudiced their interests by lessening their bargaining position with the owners of the residence. They also complained that the engineer acted unethically in submitting a copy of the report to any others who had not been a party to the agreement for the inspection services. In considering the case, the Board noted that this was not a case of an engineer allegedly violating the mandate of Section III.4. not to disclose confidential information concerning the business affairs of a client. That provision of the Code necessarily relates to confidential information given the engineer by the client in the course of providing services to the client. Here, however, there was no transmission of confidential information by the client to the engineer. Whether or not the client in that case actually suffered an economic disadvantage by the reduction of its bargaining power in negotiating the price of the residence through the owner having knowledge gained from the inspection report, the same principle should apply in any case where the engineer voluntarily provides a copy of a report commissioned by a client to a party with an actual or potential adverse interest.

We noted that it is a common concept among engineers that their role is to be open and aboveboard and to deal in a straightforward way with the facts of a situation. This basic philosophy is found to a substantial degree throughout the Code, e.g., Sections II.3. and II.3.a. At the same time, Section II.1.c. recognizes the proprietary rights of clients to have exclusive benefit of facts, data, and information obtained by the engineer on behalf of the client. We read into this case an assumption that the engineer acted without thought or consideration of any ulterior motive; that he, as a matter of course, considered it right and proper to make his findings known to all interested parties in order that the parties handle their negotiations for the property with both sides having the same factual data flowing from his services. Thus, although

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the Board exonerated the engineer of substantial or deliberate wrongdoing, he was nevertheless incorrect in not recognizing the confidentiality of his relationship to the client. Even if the damage to the client, if any in fact, was slight, the principle of the right of confidentiality on behalf of the client predominates.

In BER Case 87-2, an engineer agreed to provide consulting services to RMF, Inc., in connection with the development of a new product for manufacture. He developed a preliminary report, which was approved, then developed the design for the product. The engineer and RMF Inc., did not negotiate any terms in their agreement relating to the actual ownership of the design of the product. Neither takes any steps to seek patent protection. When the design reaches the production stage, RMF, Inc., terminated the services of the engineer in accordance with their agreement. Thereafter, the engineer agreed to provide consulting services to SYS, Inc., a competitor of RMF, Inc. As a part of those services, he divulged specific information unique to the product designed for RMF, Inc.

The question presented to the Board was whether it was ethical for the engineer to divulge specific information to SYS, Inc., unique to the product designed earlier by him for RMF, Inc. In analyzing the facts, the Board noted that from its earliest days, it has had to grapple with the meaning of the language contained in Section II.1.c.

The Board noted that BER Case 61-8 involved an engineer who was employed by the ABC Company and assigned by his supervisor to develop processing equipment for the manufacture of certain chemical products. In his previous employment with the XYZ Company, the engineer had participated in the development of similar equipment. The technical information concerning the equipment had not been published in the technical press, or otherwise released. By virtue of his previous involvement in its development, the engineer was familiar with the equipment and the principles of its design. His supervisors in the ABC Company suggested that knowledge of the particular equipment would be useful in developing similar equipment for their use and expected him to make it available to them.

In its decision on BER Case 61-8, the Board noted that most employers of engineers accept the obligation of permitting their engineers to decide for themselves what information they can carry and use from job to job, recognizing the ethical duty of the engineer not to disclose confidential information of a former employer. The Board concluded in 61-8 that inasmuch as the equipment developed for the XYZ Company had not been made known to the public or the industry, it was in the nature of a "trade secret" and the engineer who participated in its development may not ethically use or impart that particular knowledge to another employer without the consent of his former employer. He may, though, ethically apply general knowledge and general engineering principles gained in his former employment to solving the problems of ABC Company. After considering the facts in BER Case 82-2, the Board concluded in 87-2 that the drafters of the Code intended that the obligation to maintain confidentiality applies to the employed engineer as well as the consulting engineer.

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More recently, in BER Case 93-7, an environmental engineer was retained by a major industrial owner to examine certain lands adjacent to an abandoned industrial facility formerly owned and operated by the owner. Owner's attorney, Attorney X requested that as a condition of the retention agreement that the engineer sign a secrecy provision whereby he would agree not to disclose any data, findings, conclusions or other information relating to his examination of the owner's land to any other party unless ordered by a court. The engineer signed the secrecy provision.

In finding that it would be unethical for him to agree not to disclose any of his data, findings, conclusions or other information to any other party unless ordered by a court, the Board noted that the engineer has a duty to maintain the confidence of his client is well established in the context of engineering ethics. The Board indicated that engineers are frequently called upon by their clients to perform services in areas that involve restricted or undisclosed material or information. Sometimes that information is provided by the client or third party on behalf of the client. Other times the information is developed through the efforts of the engineer and the engineer agrees to refrain from making the information public or available to others. Occasionally, the information is developed through the joint efforts of the engineers and others involved in providing services to the client.

The obligation to maintain the confidences of the client is based upon the general view that certain information about the business interests or technical affairs of the client are proprietary in nature or, if disclosed could harm the business interests of the client. As a professional, the engineer has a duty to his client to make reasonable efforts not to intentionally or negligently disclose the information to third parties. In this context, the Board noted that under the Code of Ethics while the engineer has a duty not to reveal facts, data or information obtained in a professional capacity without prior consent of the client or employer, the
engineer's primary obligation is to protect the safety, health, property and welfare to the public. Therefore, in the event that the engineer's obligation of nondisclosure to his client conflicts with his obligation to protect the safety, health, property and welfare to the public, we believe the former obligation must yield.

In support of this position, the Board noted that the first "Fundamental Canon" (Section I.1.) and Rules of Practice (Section II.1.) contained in the Code of Ethics for Engineer requires the engineer to "hold paramount the safety, health and welfare of the public in the performance of professional duties". In the context of BER Case 93-7, the Board concluded that the engineer's decision to sign a secrecy provision whereby he would agree not to disclose any data, findings, conclusions or other information relating to his examination of the owner's land to any other party unless ordered by a court was a breach of his ethical obligation under Section II.1.c. Said the Board, in essence, the engineer agreed to withhold any information in relation to his services in connection with his clients property even if, following the execution of the contract, Engineer learned that certain conditions existed on his clients property that endangered the public health and safety.

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The Board concluded that the words "facts, data or information" do not include the names of clients, addresses, and other identifying information as well as documents related to the services performed on behalf of those clients. Therefore disclosure of the names of clients, addresses as requested by the life insurance company would not necessarily require the prior consent of those clients. Having said that, the Board is of the view that before disclosing such information it is necessary for the engineer to consider a variety of factors. Weighing the factors considered in BER Cases 61-8, 82-2, 87-2, and 93-7 is instructive.

On the face of it, Engineer A would appear to be prejudicing the general interests of his clients by disclosing the information requested by the life insurance company in the manner discussed in BER Case 82-2. Even if Engineer A proposed that the names or other identifying information about the individual clients by blocked out of the material provided to the insurance company, that would not be sufficient to eliminate the ethical concerns.

Similarly, there could be an adverse impact on the business affairs of Engineer A's clients as a result of disclosure to the life insurance company. Moreover, the requested material could involve information of a proprietary nature (e.g., trade secrets) as outlined in BER Cases 61-8 and 87-2. If such material was requested, Engineer A would have an obligation to protect such information for the benefit of his clients.

CONCLUSION:

It would be unethical for Engineer A to provide to the life insurance company the information requested.

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