BER Case 94-9

APPROVED
May 9, 1995

Section II.4.a. - Code of Ethics
Section III.4.b. - Code of Ethics

CONFLICT OF INTEREST -- ACCIDENT RECONSTRUCTION SERVICES

FACTS:

Engineer A, a principal in a private practice firm, is retained orally by the attorney for a litigant involved in a legal action to provide accident reconstruction consultation. The litigant, a plaintiff, is suing a defendant allegedly responsible for a traffic accident. Although Engineer A sends a letter of agreement to plaintiff's attorney, it is never returned signed by plaintiff or his attorney. No additional information is exchanged between Engineer A and plaintiff's attorney. Approximately, two years later, the law firm representing defendant contacts Engineer A and seeks to retain his services in connection with the same legal action. Engineer A, assuming the plaintiff and his attorney have decided to retain the services of another expert, agrees to provide his services to the law firm representing defendant. Later plaintiff's attorney contacts Engineer A with the expectation that Engineer A would provide accident reconstruction consultation per earlier agreement.

QUESTION:

Was it ethical for Engineer to agree to provide his services to the law firm representing the defendant?

REFERENCES:

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

Section III.4.b. - Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client or employer.

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DISCUSSION:

The Board has considered cases somewhat similar to this case to illustrate the types of conflicts of interest that may arise under different facts and circumstances in connection with expert witness services in contemplation of litigation. In BER Case 76-3, an engineer, under a retainer agreement with a county to provide water sewage design and expertise, and general advisory services, entered into a second retainer agreement with a developer with county approval. Thereafter, the developer filed a petition with the zoning board to rezone a substantial area of the county for commercial purposes. The county department filed several engineering reports adverse to the zoning petition, recommending denial of the rezoning because the proposed construction would overload available water sewage facilities. The development company then called the engineer as an expert witness at the zoning hearing. The engineer testified in support of the zoning petition.

There the Board noted that when the engineer appeared before the body which had jurisdiction over the subject matter on behalf of a party whose position was adverse to that of the government while at the same time being an advisor to the government, he at best gave the appearance of trying to be on both sides of a public policy issue. The Board added 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 was doing more than offering his expertise in engineering matters as an aid to a fuller understanding by the tribunal; he was in fact a paid advocate of a private interest in open conflict with the engineering opinions of the government. We noted that although the engineer was not required to agree with the government or even support its position at the hearing, if he chose to oppose that position on behalf of an adverse party, he could ethically do so by first resigning from his role as advisor to the county.

Later in BER Case 82-6 an engineer was retained by the U.S. Government to study the causes of a dam failure. Thereafter he was retained by the contractor on this project, who had filed a claim against the U.S. Government for additional compensation. In determining 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 engineer was paid in full for his services to the government and apparently was no longer retained by the government and was free to oppose its position on behalf of an adverse party. Given the unambiguous language of BER Case 76-3 noted above, it would appear that the engineer could ethically represent the interests of the contractor as an expert witness in its claim against the government for additional compensation. However, there is one important distinction between BER Case 76-3 and BER Case 82-6.

BER Case 76-3 was decided under the 1976 Code of Ethics which made no mention of an engineer's ethical obligation to refrain from representing an adverse interest in a proceeding. In July 1981, the Code of Ethics was revised. Section III.4.b. amended and refined the older Code Section 7 to read: "Engineers shall not, without the consent of all interested parties,

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participate in or represent an adversary interest in connection with a specific project or proceeding in which the engineer has gained a particular specialized knowledge on behalf of a former client or employer."

Under the revised Code section it was clear that the engineer's action was in violation of Section III.4.b. There was nothing in the record to indicate that the engineer was given the consent of his former client, the U.S. Government, to represent the interests of the contractor in its claim against the government for additional compensation. In addition, the Board noted that the expert testimony offered by the engineer in a legal proceeding would constitute "particular, specialized knowledge gained on behalf of a former client or employer." As an expert witness, the engineer would be required to state his opinion based upon his firsthand knowledge and on facts of record. There is a danger that his opinion, based on firsthand knowledge and his understanding of the facts of record, would touch upon privileged, specialized, and confidential knowledge gained while he was retained by the U.S. Government. Indeed, he may be called upon to give an opinion as to the very facts with which he was involved as a consultant with the U.S. Government. There can be no doubt that Section III.4.b. was enacted to prevent engineers from disclosing such information. For those reasons, the Board found that it would be unethical for an engineer who was retained by the U.S. Government to be retained as an expert witness for a contractor who filed a claim against the U.S. Government for additional compensation.

Turning to the facts of the present case, while unlike the facts in BER Cases 76-3 and 82-6, Engineer A was never involved substantively in the accident analysis and was apparent only provided with a general and perfunctory description of the nature of the accident and the issues involved in the case. From the facts, it appears that the only exchange that took place between Engineer A, the attorney and the plaintiff was an agreement by Engineer A to provide the requested services and a written letter agreement prepared by Engineer A which was never signed by either the plaintiff or his attorney. Therefore it is plausible to conclude that since no actual substantive discussion of "particular, specialized knowledge" or facts and circumstances of the case were ever revealed to Engineer A, Engineer A never became privy to any information that could cause a conflict of interest of the types described in BER Cases 76-3 and 82-6 to arise. (See Code Section III.4.b.)

While we may conclude under the circumstances that Engineer A did not have a conflict of interest per se, and that his conduct was ethical, we are not entirely comfortable with his actions and conduct. We believe that before agreeing to being retained by the defendant and his attorney, Engineer A should have provided notice to the plaintiff and his attorney and to inquire of them whether his professional services would be required by them as part of the subject litigation. While we believe the plaintiff and his attorney's apparent inattentiveness in failing to respond to Engineer A's letter of agreement was not proper, because of the delicate nature of the matter at hand and the danger of misperception of Engineer A's actions, we believe that

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Engineer A should not have assumed that the plaintiff and his attorney had sought consulting services elsewhere, but instead made inquiries before agreeing to provide services to the defendant.

CONCLUSION:

It was ethical for Engineer A to agree to provide accident reconstruction services to the law firm representing defendant.

BOARD OF ETHICAL REVIEW

James G. Fuller, P.E.
William W. Middleton, P.E.
Robert L. Nichols, P.E.
William E. Norris, P.E.
Jimmy H. Smith, P.E.

DISSENTING DISCUSSION:

We share many of the reasonings of the Board. However in our opinion, the majority of this Board has given undue weight to Engineer A having been retained orally, to plaintiff's attorney's not having returned Engineer A's letter agreement, and the passage of two years time. We believe that it continues to be customary in many places, where one's word is one's bond, to do business so informally. We believe that Engineer A has an inescapable obligation to ensure that he does not undertake such a new relationship without making certain that he is free and clear of the first. An engineer cannot afford to base his engineering or business decisions upon conjecture. We further believe that this is doubly important in the forensic area where cases may proceed for years and where the court may disqualify an expert for having first had contact with opposing counsel concerning the case.

DISSENTING CONCLUSION:

It was unethical for Engineer A to agree to provide accident reconstruction services to the law firm representing defendant without ensuring that he was free and clear of the plaintiff's attorney.

William A. Cox, Jr., P.E., Chairman
Donald L. Hiatte, P.E.
Jimmy H. Smith, P.E.

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