APPROVED -- 1/17/96

II.4.a. - Code of Ethics: *Engineers shall disclose all known or potential conflicts of interest which could influence or appear to influence their judgment or the quality of their services.*

III.4. - Code of Ethics: *Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*

III.4.a. - Code of Ethics: *Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a specific project for which the Engineer has gained particular and specialized knowledge.*

CONFLICT OF INTEREST
RETURNING RETAINER PRIOR TO ACCEPTING ANOTHER ASSIGNMENT

FACTS:

Engineer A, a forensic engineer, accepts a plaintiff's attorney's retainer and receives selected file documentation from the attorney and subsequently bills the attorney for the work, which includes a review of the case documentation. Because of an undisclosed disagreement between Engineer A and the attorney, Engineer A ceases performing work without delivering a report to the attorney or receiving additional payment for services. Thereafter, Engineer A returns the retainer to attorney and all of the file documentation that the attorney had earlier provided to Engineer A. Several months later, Engineer A is approached by the defense attorneys in the same case, and Engineer A accepts the assignment to function as one of the experts for the defense.

QUESTION:

Was it ethical for Engineer A to accept the assignment to function as one of the experts for the defense under the facts?

DISCUSSION:

Over the years, the Board of Ethical Review has considered a number of cases involving the question of engineers providing and performing forensic engineering services and the ethical issues that arise in that context (see BER Cases 92-5, 82-6, 76-3). These cases have involved such issues as performing such services on the basis of a contingency fee, licensure requirements when serving as an expert witness, the qualifications of the individual who is being considered to perform the expert services, relationships with attorneys, and examining the conflict of interest questions that may arise.

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One of the most common ethical issues that face engineers in their professional lives is the issue of conflicts of interest. At one point in time, engineering codes of ethics, including the NSPE Code of Ethics for Engineers, specifically implored engineers to avoid all conflicts of interest. The basis for this position was that the engineer cannot serve two masters and when faced with a conflict of interest, the engineer must in all cases take steps to remove him or herself from such conflicts. Among the concerns expressed by supporters of this position was that engineers who were involved in conflict of interest situations created a poor image for the engineering profession because the issue raised the appearance of impropriety. However, over time, the engineering profession came to the conclusion that conflicts of interests were an immutable fact of professional engineering practice and that it was virtually impossible for the engineer to, in all cases, remove him or herself from such situations. As a result, Codes were changed and engineers were implored to disclose all known or potential conflicts of interest to their employers or clients, by promptly informing them of any business association, interest or other circumstance which could influence or appear to influence their judgment or the quality of their services. Hand in hand with the issue of conflicts of interest is the obligation of the engineer to not disclose confidential information or represent adversarial interests concerning the business affairs or a particular proceeding involving any present or former client without his or her consent. (See NSPE Code Sections II.4.a., III.4, III.4.a.).

Turning to the facts in the case, we conclude that it would not be ethical for the engineer to accept the assignment in question without the consent of all concerned -- consent that will almost surely be withheld. Under the facts, even though Engineer A has returned the retainer fee and the files back to the plaintiff's attorney who had originally retained him, Engineer A had already reviewed the sensitive material relating to the plaintiff's case and therefore has an obligation to protect the interest of the original client -- the plaintiff. It would not be possible for Engineer A to purge himself of the knowledge of the information he initially received from the plaintiff and therefore he would be damaging the interests of his former client by working on behalf of the defendant.

While there is nothing improper with returning the full retainer fee under the facts, it would be equitable for an engineer to retain a portion of the retainer to cover expenses incurred up to the point of termination of the relationship.

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CONCLUSION:

It was not ethical for Engineer A to accept the assignment to function as one of the experts for the defense under the facts.

BOARD OF ETHICAL REVIEW

James G. Fuller, P.E.
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C. Allen Wortley, P.E. (Observer)

Donald L. Hiatte, P.E., Chairman

***** 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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