REFERENCES:

II.2.c. - Code of Ethics: *Engineers may accept assignments and assume responsibility for coordination of an entire project and sign and seal the engineering documents for the entire project, provided that each technical segment is signed and sealed only by the qualified engineers who prepared the segment.*

II.5.b. - Code of Ethics: *Engineers shall not offer, give, solicit or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect or intent of influencing the awarding of a contract. They shall not offer any gift, or other valuable consideration in order to secure work. They shall not pay a commission, percentage or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.*

III.5.b. - Code of Ethics: *Engineers shall not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with clients or employers of the Engineer in connection with work for which the Engineer is responsible.*

PAYMENT OF REFERRAL FEE FOR BEING SELECTED BY ENGINEER

FACTS:

Engineer A is a licensed professional engineer and owner of a corporation providing engineering services under the laws of the engineer's state. The engineering corporation performs building inspection services for a variety of clients in the public and private sector. The services provided by the engineering corporation generally include the coordination of engineering services involving more than one engineering specialty.

Engineer A is asked by a client to coordinate multidisciplinary services to be provided by several engineering firms. Engineer A proposes to bill the client for the coordination services and Engineer A will also charge each of the engineering firms a "referral fee" for selecting the firms on behalf of the client. Engineer A's coordination and referral charges will be outlined in his agreements with the client and the engineering firms. The agreements will also assign professional liability insurance responsibility to the specific engineering firm providing the services. Engineer A is not providing any services directly to the other engineering firms other than the opportunity to perform the services for the client under the coordination of Engineer A.

QUESTION:

Was it ethical for Engineer A to charge the other engineering firms a "referral fee" under the circumstances described?

DISCUSSION:

Engineers provide a multitude of professional services and in a variety of ways. In addition to their vast technical expertise, professional engineers are frequently called upon by their clients to offer project management, construction management, and other coordination and scheduling services as part of the design, renovation, and maintenance of constructed facilities (see NSPE Code Section II.2.c.). The education and experience of engineers make them uniquely qualified to

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perform these and other services for the benefit of their clients. However, it is important to distinguish the arrangements for the coordination of professional and other services for the benefit of a client and arrangements made between the engineering firm and the firms selected to perform the services being coordinated by the engineer.

The subject of a "referral fee" has been considered by the Board on other occasions. In BER Case No. 86-1, the Board considered two separate factual situations involving the solicitation of work by a business consortium consisting of an engineering firm, architectural firm, construction firm, and financial firm. In one case, to defray consortium expenses for promotion, publicity, overhead, etc., each firm was required to pay to the consortium an entrance fee plus a percentage of income derived from business successfully generated from referrals by other consortium members. In the other case, each firm was required to pay the entrance fee plus a referral fee directly to the consortium firm member which "found" the new business client. In finding the first arrangement to be proper but the second improper, the Board noted that both consortiums were being formed primarily for marketing purposes and represent, in effect, a "pooling" of individual firm marketing capabilities and efforts through an umbrella approach. In this sense, the consortium is quite similar to the joint ventures where one firm learns of a potential project and forms liaisons with other firms having expertise complementary to the others. Marketing efforts are combined to secure the business and fee arrangements are agreed to by all joint venture participants. The first consortium represented a relatively unique approach to marketing. The second consortium involved a referral fee, a portion of which was exchanged between consortium firm members, which constituted a payment for valuable consideration in order to secure work, prohibited by NSPE Code Section II.5.b.

Later, in BER Case No. 92-3, Engineer A, who performed building inspection services, was contacted by IJK, Inc., a firm that referred companies to professional engineers that perform building inspection services. IJK, Inc. and similar companies were involved in assisting relocating employees in the sale and purchase of residences. Typically IJK, Inc. made contact with the client, took an order for a job, and passed the order on to the professional engineer available in the geographic area. Engineer A performed the services, prepared a report, and submitted the report to IJK, Inc. Engineer A invoiced IJK, Inc. for his services at half what he would normally charge to another client for the same services. IJK, Inc. invoiced the client for its services, twice the amount that is charged by Engineer A, a fact later learned by Engineer A. IJK, Inc. had no exclusive contractual or business relationship with Engineer A, and IJK, Inc. possessed no engineering expertise.

In determining that it was unethical for Engineer A to continue association with the referral firm after learning that IJK, Inc. was indicating a fee for Engineer A's services to the IJK, Inc. client that was different from the fee charged by Engineer A, the Board noted that the fact that IJK, Inc. typically makes contact with the employer, takes an order for a job, and passes the order on to the professional engineer available in the geographic area suggests that IJK, Inc. was acting purely as a broker under the facts, and that Engineer A's forbearance of his full fee constitutes payment for valuable consideration in order to secure work, prohibited by NSPE Code Section II.5.b.

In addition, under the facts, it was clear that Engineer A performed all necessary services and prepared the report for the actual client. IJK, Inc. provided no benefit to the client other than simply passing the professional report prepared by Engineer A to the client. IJK, Inc. appeared to be acting purely as a "go-between" and did not appear to be adding any value to the services purchased by clients even though such clients are paying a significant fee for the involvement of IJK, Inc. The Board was particularly disturbed by Engineer A's continued association with IJK, Inc. after learning that IJK, Inc. had indicated a fee for Engineer A's services on the IJK, Inc. invoice to its client that was different from the fee charged by Engineer A. On the face of it, IJK's practice misrepresented Engineer A's actual fee and was judged a deceptive practice.

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Turning to the facts of this case, while there are similarities between this case and Case Nos. 86-1 and 92-3, there also are some differences. For example, unlike the situation in Case No. 92-3, in the present case, Engineer A is providing a service – coordination of services -- for the benefit of the client. In Case No. 92-3, it is clear that IJK acted purely as a "go-between" and did not appear to be adding any value to the services purchased by clients.

Nonetheless, a key point in the present case is that Engineer A appears to be creating an arrangement that would force the other engineering firms to violate NSPE Code Section II.5.b. by requiring those firms to pay a "referral fee," thereby paying what amounts to a commission and offering valuable consideration in order to secure work. It is clear that Engineer A is not a "bona fide employee or bona fide established commercial or marketing agency retained by those firms," but instead is acting as the coordinating engineer for the benefit of a client. Engineer A is being compensated directly for the coordination service by the client and the Board can see no basis to justify Engineer A's requirement of a "referral fee" to be paid by the other engineering firms. There is nothing to indicate any basis for such a payment to Engineer A. In addition to being a violation of NSPE Code Section II.5.b., Engineer A's actions create the appearance of an engineer exerting undue pressure on other engineers in order for the engineers to gain access to work. There also appears to be a not so subtle message being conveyed to the other engineers: Future work for your firm is based upon an understanding that you will pay a referral fee to me." We believe that this amounts to a "kickback," is unethical, and cannot be condoned under the language of the NSPE Code of Ethics.

CONCLUSION:

It was not ethical for Engineer A to charge the other engineering firms a "referral fee" under the circumstances described.

BOARD OF ETHICAL REVIEW
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Each opinion is intended as guidance to individual practicing engineers, students and the public. In regard to the question of application of the NSPE Code of Ethics to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services -- which services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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