REFERENCES:

II.3.a. - Code of Ethics: 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, which should bear the date indicating when it was current.

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.

II.5.a. - Code of Ethics: Engineers shall not falsify their qualifications or permit misrepresentation of their, or their associates' qualifications. They shall not misrepresent or exaggerate their responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint venturers or past accomplishments.

III.3.a. - Code of Ethics: Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.

DUTY TO DISCLOSE DISCIPLINARY COMPLAINT TO CLIENT

FACTS:

Engineer A is retained by Client B to perform design services and provide a Critical Path Method (CPM) schedule for a manufacturing facility. Engineer A prepares the plans and specifications and the CPM schedule.

During the rendering of services to Client B on this project, the state board of professional engineers contacts Engineer A regarding an ethics complaint filed against Engineer A by Client C relating to services provided on a project for Client C that are similar to the services being performed for Client B. Client C alleges that Engineer A lacked the competence to perform the services in question. Engineer A does not believe it is necessary to notify Client B of the pending complaint. Later, through another party, Client B learns of the ethics complaint filed against Engineer A and tells Engineer A that he is upset by the allegations and that Engineer A should have brought the matter to Client B's attention.

QUESTION:

Was it unethical for Engineer A to not report to Client B the ethics complaint filed against Engineer A by Client C?

DISCUSSION:

The obligation of the engineer to be honest and truthful and to avoid acts that might be viewed as misleading and deceptive is clearly stated in various sections of the NSPE Code of Ethics (See NSPE Code Sections II.3.a., II.4.a, II.5.a. and III.3.a.). These include the obligations to be truthful in public statements, act as a faithful agent and trustee in dealings with clients, not falsify or misrepresent their professional qualifications, and avoid the use of statements containing a material misrepresentation of fact.

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The Board has reviewed a number of factual situations over the years relating to the question of misleading clients through the misrepresentation of professional qualifications. For example, in Case No. 83-1, Engineer A worked for Engineer B. Engineer B notified Engineer A that Engineer B was going to terminate Engineer A because of lack of work. Engineer A continued to work for Engineer B for several additional months after the termination notice. During that period, Engineer B distributed a previously printed brochure listing Engineer A as one of Engineer B's key employees, and continued to use the previously printed brochure with Engineer A's name in it well after Engineer B did in fact terminate Engineer A.

The Board ruled that it was not unethical for Engineer B to distribute a previously printed brochure listing Engineer A as a key employee, providing Engineer B apprised the prospective client, during negotiation, of Engineer A's pending termination. The Board also ruled that it was unethical for Engineer B to distribute a brochure listing Engineer A as a key employee after Engineer A's actual termination. Interpreting the meaning of NSPE Code Section II.5.a, we noted that the words "pertinent facts" are those facts that have a clear and decisive relevance to a matter at hand. Another way to characterize pertinent facts is as those that are "relevant and highly significant." We determined whether (1) Engineer B in fact misrepresented "pertinent facts" and (2) whether it was the intent and purpose of Engineer B to "enhance the firm's qualifications and work." We noted that both factors must be present for a violation of NSPE Code Section II.5.a to exist. The Board noted that it is not unusual for an engineering firm that seeks to promote itself for business reasons to include in such a brochure a statement of the firm's experience, its history, and its qualifications, as well as the names and qualifications of the members of the firm. We said that the names of the firm's members are often quite significant to the client selecting the firm. The client may be familiar with an individual member of the firm as represented in the brochure. We concluded that the inclusion of the name of Engineer A in the firm's brochure constituted a misrepresentation of "pertinent facts."

In Case No. 83-1, a second point we considered was whether it was the "intent and purpose" of Engineer B to "enhance the firm's qualifications and work" by including Engineer A's name in the promotional brochure after Engineer A left the firm. The facts presented in the case demonstrated that Engineer B acted with "intent and purpose" in distributing the misleading brochure. Engineer B was well aware of the impending termination of Engineer A, as Engineer B was the very person who terminated Engineer A. Engineer B distributed the brochure while Engineer A was still employed but had been given a notice of termination. The Board noted that this could easily mislead potential clients into believing that Engineer A, noted as a key employee, would be available in the firm for consultation on future projects. Moreover, Engineer B distributed the brochure after Engineer A had left the firm. The Board concluded that this would be a clear misrepresentation of a pertinent fact with the intent to enhance the firm's qualifications, and, as such, constituted a violation of the NSPE Code.

In Case No. 90-4, Engineer X was employed by Firm Y, a medium-sized engineering consulting firm controlled by Engineer Z. Engineer X is one of the few engineers in Firm Y with expertise in hydrology, but the firm's work in the field of hydrology did not constitute a significant percentage of the firm's work. Engineer X, an associate with the firm, gave two weeks notice of her intent to move to another firm. Thereafter, Engineer Z, a principal in Firm Y, continued to distribute a brochure identifying Engineer X as an employee of the firm and list Engineer X on the firm resume. After reviewing the facts, the Board concluded that it was not unethical for Engineer Z to continue to represent Engineer X as an employee of Firm Y under the circumstances described. Considering the earlier cases, the Board noted that the facts in Case No. 90-4, while similar, are different in one important area. In Case No. 83-1, Engineer A was highlighted in the firm's promotional brochure as a "key employee." Under the totality of the facts and circumstances of the case, it was apparent that Engineer B's continued inclusion of Engineer A's name in the brochure constituted an overt misrepresentation of an important fact concerning the overall makeup of the firm.

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The facts in the present case are somewhat different than those involved in BER Case Nos. 83-1 and 90-4, because the earlier cases involved efforts by an engineering firm to enhance the firm's credentials by implying that the firm had a higher level of expertise than it actually had. In contrast, the present case involves a situation that could reflect negatively on Engineer A and his firm. However, the Board does not believe the nature of the information -- whether positive or negative -- is at issue. The issue of greatest importance in each of these cases appears not to be whether a client would be pleased or disappointed with the information, but whether the information communicated (or in the present case not communicated) amounts to an act that misleads or deceives the client.

The Board is of the opinion that while an engineer clearly has an ethical obligation to act as a faithful agent and trustee for the benefit of a client, avoid deceptive acts, be objective and truthful, avoid conflicts, etc., such obligations would not compel an engineer to automatically disclose that a complaint had been filed against the engineer with the state engineering licensure board. A complaint is a mere allegation and does not amount to a finding of fact or conclusion of law. No engineer should be compelled to disclose potentially damaging allegations about his professional practice -- allegations that could be false, baseless, and motivated by some malicious intent. Instead, Engineer A should weigh all factors and, depending upon the nature and seriousness of the charges, take prudent action, which might include providing Client B with appropriate background information.

On this last point, while the Board is not suggesting that Engineer A had an ethical obligation to report to Client B the ethics complaint filed against him by Client C, the Board believes Engineer A should have weighed providing Client B with some limited background information in a dispassionate and nonprejudicial matter for the benefit of all concerned. By doing so, Engineer A would be providing Client B with early notice of the pending matter so that Client B will be able to respond to comments or questions by third parties and would be demonstrating to Client B that Engineer A is acting in a professional and responsible manner and has nothing to hide or fear concerning the complaint.

CONCLUSION:

It was ethical for Engineer A not to report to Client B the ethics complaint filed against Engineer A by Client C.

BOARD OF ETHICAL REVIEW

James G. Fuller, P.E.
William E. Norris, P.E.
Paul E. Pritzker, P.E.
Richard Simberg, P.E.
Jimmy H. Smith, P.E., Ph.D.
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Donald L. Hiatte, P.E., Chairman

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