

Section II.4. - Code of Ethics
Section II.4.a. - Code of Ethics
Section III.1.f. - Code of Ethics

OPERATION OF RELATED BUSINESS FOR NONPROFESSIONAL SERVICES
RECONSIDERATION OF BER CASE 70-2

FACTS:

Engineer A, engaged in a consulting practice, plans to form a corporation for the purpose of providing system operation and maintenance services on a contractual basis. Engineer A will be the principal stockholder. The primary business is expected to be from clients developed through the consulting practice. It is expected that the greatest percentage of work will be the maintenance of systems engineered, specified, and installed under the direction of Engineer A.

QUESTION:

Would the operation of the proposed corporation in the form indicated be a violation of the Code of Ethics?

REFERENCES:

- Section II.4. -Engineers shall act in professional matters for each employer or client as faithful agents or trustees.
- Section II.4.a. -Engineers shall disclose all known or potential conflicts of interest to their employers or clients by promptly informing them of any business association, interest, or other circumstances which could influence or appear to influence their judgment or the quality of their services.
- Section III.1.f. -Engineers shall avoid any act tending to promote their own interest at the expense of the dignity and integrity of the profession.

DISCUSSION:

Since its initial development, the NSPE Code of Ethics has undergone numerous modifications to reflect changes in the manner in which engineers practice their profession as well as economic and social changes which occur within our society and its institutions. As we have stated on several occasions, the Code of Ethics is not intended to be a static document, but rather, should be viewed as a dynamic statement of principles containing basic values and concepts.

One example of this is the recent changes that occurred in Code of Ethics Section III.9. Prior to the 1987 change, that Code provision stated that "Engineers shall accept responsibility for their professional activities." This view reflected the general principle that as professionals, engineers have an obligation to assume responsibility and stand behind their professional services. In the litigious environment of the 1980s however, it became increasingly apparent that it is not feasible for society to expect professional engineers to assume full responsibility for their activities particularly in such complex areas as hazardous waste clean-up and asbestos abatement work. In view of this, the Code of Ethics was modified to acknowledge that, while engineers would continue to be responsible for their professional activities, engineers could seek indemnification for professional services arising out of their practice for other than gross negligence where the engineers' interests cannot otherwise be protected. This modification demonstrates the dynamic nature of the Code and the fact that it is intended to reflect the real world environment in which engineers practice.

The provision of the Code of Ethics applicable to the present case raises a similar set of circumstances. In 1970, Code of Ethics Section 8 stated unequivocally that "The Engineer will endeavor to avoid a conflict of interest with his employer or client, but when unavoidable, the Engineer shall fully disclose the circumstances to his employer or client." We interpreted that provision in BER Cases 69-13 and again in BER Case 70-2 to indicate that the primary mandate of Section 8 was that engineers had an ethical obligation to avoid conflicts of interest or even the appearance of impropriety. We noted in BER Case 70-2 that the engineer was in a position to avoid a conflict of interest or the appearance of such a conflict by not engaging in a business related to his engineering practice. In reaching that result, the Board acknowledged that the engineer could, and presumably would, operate the business with full disclosure as required by Section 8 of the Code, but this would not negate the more stringent mandate of Section 8 that he must endeavor to avoid even the appearance of a conflict of interest. In BER 70-2 the Board indicated that a conflict of interest situation was permissible with full disclosure only when it arises after the fact and without the active participation of the engineer to bring it about. As stated in BER Case 69-13 this was a harsh rule, but it was justified on the premise that the realities of ethical conduct require more than avoidance of an actual conflict of interest; the appearance of a conflict must also be avoided.

In its discussion of BER Case 70-2, the Board noted that the appearance or suspicion of a possible conflict of interest under the facts was evident in that the engineer may be tempted to use a system or facility of less than highest performance, believing that his system operation and maintenance service business would be retained for such service. The Board concluded by stating that "it may be argued that an ethical engineer would not engage in such nefarious conduct, but the mere suspicion that he might do so is enough to warrant our holding that he must avoid that possibility."

Subsequent to the issuance of the Board's opinion in Case 70-2, the NSPE Code of Ethics was restructured and Code Section 8 was amended and became Section II.4.a. A comparison of Section 8 and Section II.4.a. reveals an important modification. The earlier Section 8 clearly articulates a primary mandate for engineers to avoid conflicts of interest or even the appearance of conflicts of interest. In contrast, new Section II.4.a. does not require engineers to avoid conflicts of interest in all cases but instead places the obligation on the engineer to disclose all known conflicts or potential conflicts to their client or employer if the engineer believes that the conflict or potential conflict could influence or appear to influence their professional judgment. This modification in the Code language has a critical bearing on the conclusions in BER Case 70-2. Under the newer Code language, Engineer A's operation of the proposed corporation in the form described would not be a violation of the Code of Ethics if Engineer A provided full disclosure of all known or potential conflicts of interest to all clients developed through Engineer A's consulting practice.

Just as with the changes that were made in Section III.9, we believe that the modifications in former Section 8 reflect a realization that a standard which endeavors to require engineers to "avoid all conflicts of interest or the appearance of impropriety" may be unworkable in today's increasingly complex society. For example, with engineers and engineering firms frequently serving both private and public clients within the same community or geographic locality, engineers are constantly faced with situations that can spawn conflicts or potential conflicts of interest. To assert that, in all cases, engineers must avoid conflicts of interest or the appearance of impropriety provides engineers with no meaningful guidance in their everyday activities. We believe that engineers must be aware of the potential for those circumstances and/or the appearance of impropriety. The engineer must fully disclose such potential conflicts to the client or employer if the engineer believes that such a conflict could influence or appear to influence the engineer's professional judgment.

CONCLUSION:

The operation of the proposed corporation in the form indicated would not be a violation of the Code of Ethics provided Engineer A fully discloses all known or potential conflicts of interest to his employer and clients.

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