

Report on a Case by the Board of Ethical Review

Case No. 80-5

Conflict of Interest—Recommendation of Former Firm

Facts:

Engineer A, principal in ABC Engineers, P.A., a professional association, retires and sells his stock to the professional association. He takes 25% down payment with the balance to be paid over a period of five years.

After retirement, he offers his services to various clients as an advisory consultant, one who is not involved in design or planning, but rather assists them in decision making. One of his responsibilities as advisory consultant is to help clients select a consultant to do the design work. He is involved in the interview of consulting firms and has informed his clients of his previous interest and continuing interest as far as the note receivable with the ABC firm is concerned. He then on the basis of his judgment recommends ABC for the commission to do design work on a project for a public agency and ABC is retained.

Engineer X complains to the client on the basis that Engineer A has continuing financial interest in the ABC firm, because of the installment note arrangement, even though he has no voice in the direction or operation of the firm.

Question:

Is it ethical for Engineer A to be involved in the selection of the ABC firm under these circumstances?

References:

Code of Ethics - Section 3 - "The Engineer will avoid all conduct or practice likely to discredit the profession or deceive the public."

Section 7 - "The Engineer will not disclose confidential information concerning the business affairs or technical processes of any present or former client or employer without his consent."

Section 8 - "The Engineer shall disclose all known or potential conflicts of interest to his employer or client by promptly informing them of any business connections, interests, or other circumstances which could influence his judgment or the quality of his services, or which might reasonably be construed by others as constituting a conflict of interest."

Section 9 - "The Engineer will not accept compensation, financial or otherwise, from more than one interested party for the same service, or for services pertaining to the same work, unless there is full disclosure to and consent of all interested parties."

Discussion:

Taken in its simplest form, there is an economic conflict of interest on the part of Engineer A in recommending retention of his former firm in light of his interest in having the firm receive necessary fees to enable it to make good on its obligations to him. Whether that degree of conflict of interest, however, is barred by the cited code provisions is a somewhat more complex issue.

Taking the cited code provisions in order:

Section 7 turns upon disclosure of "confidential" information concerning the business affairs of the ABC firm. While it is technically true that the ABC firm is neither a former "client" nor a former "employer" of Engineer A, if those were determinative words we would be inclined to apply the intent of the language to this case. However, there is no indication in the facts that Engineer A's judgment in recommending his former firm related to "confidential" information concerning its business affairs. Yet we note that realistically, Engineer A could hardly help being influenced to some degree by his intimate knowledge of the business (and professional) operations of the ABC firm, and would be much less knowledgeable about the business and professional affairs of the competing firm.

Section 8 is basically a disclosure requirement, and we are told that Engineer A has made full disclosure of his prior relationship to the ABC firm to the clients he counsels. But there is another aspect of the wording of 8 which might properly lay the foundation for us to expand its meaning beyond disclosure. After stating the disclosure standard, the language goes on to state, "or which might reasonably be construed by others as constituting a conflict of interest." If we read the word "or" and the following words with that kind of emphasis we might logically conclude that 8 establishes two standards, (1) disclosure and (2) whether others might regard the circumstances as creating a conflict of interest. In that light it is clear from the submitted facts that Engineer X did construe the facts as constituting a conflict of interest. The question would then recur as to whether Engineer X's interpretation was "reasonable" under the stated facts.

Whether or not 8 should be read to cover both points, 3 provides a basis to conclude that in these circumstances where public funds are involved, the Engineer should "avoid" the problem by not making the recommendation to retain the firm in which he has an economic interest. However, we observe that if the work was for a private owner the required ethical standard would not be as severe in terms of the possibility of public suspicion. If the private owner with full knowledge of the facts was satisfied that there was no improper motivation on the part of the engineer, the disclosure standard would be sufficient.

Section 9 is pertinent also to the extent that it raises the question of whether Engineer A would be accepting compensation from more than one interested party for the same project. We believe the answer must be in the affirmative because Engineer A's economic benefit comes from two sources regarding the selection of the ABC firm on his recommendation. He is paid by the client who was advised by him to retain the ABC firm, and he is being paid in part under the installment note from funds received from that client by reason of its selection on his advice. Unlike 8, the language of 9 does not permit the conflict solely on the grounds of full disclosure. It goes on to require "consent of all interested parties."

Is Engineer X an "interested party" within the meaning of 9? In previous cases we held that an architect who was the prime professional and who had retained an engineer for part of the design was an interested party when there was a dispute about the quality of the work performed by the engineer, (Case 68-3). And in Case 68-12 we held that a land developer who had abandoned a project was an interested party. In both of those cases the "interested party" had been directly involved in the project prior to development of the problems which led to the ethical questions. Here, however, Engineer X had no prior involvement in the project itself; his only interest was in seeking the assignment along with other competing firms. On that basis, therefore, we do not interpret "interested party" under these particular circumstances to extend to those who merely seek an assignment as distinguished from those directly involved in a project.

Conclusion:*

It was not ethical for Engineer A to be involved in the selection of the firm under these circumstances.

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