

Report on a Case by the Board of Ethical Review

Case No. 86-1

Improper Solicitation of Work—Business Consortium

Facts:

Case 1—Engineer A has the opportunity to join a business consortium consisting of his engineering firm, an architectural firm, a construction firm, and a financial firm. The general purpose of the consortium is to improve general marketing and business development. To defray consortium expenses for promotion, publicity, overhead, etc., each firm is 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.

Case 2—Engineer B has the opportunity to join a business consortium consisting of his engineering firm, an architectural firm, a construction firm and a financial firm. The general purpose of the consortium is to improve general marketing and business development. To defray consortium expenses for promotion, publicity, overhead, etc, each firm is required to pay, to the consortium, an entrance fee. In addition, Engineer B is required to pay a referral fee directly to the consortium firm member which "finds" the new business client for Engineer B. If Engineer B "finds" a new business client for a member of the consortium, Engineer B will receive a finder's fee.

Questions:

1. Would it be ethical for Engineer A to participate in the consortium?
2. Would it be ethical for Engineer B to participate in the consortium?

References:

Code of Ethics-Section II.4.a.-"Engineers shall disclose all known or potential conflicts of interest to their employers 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 II.4.c.-"Engineers shall not solicit or accept financial or other valuable consideration, directly or indirectly, from contractors, their agents, or other parties in connection with work for employers or clients for which they are responsible."

Section II.5.b.-"Engineers shall not offer, give, solicit or receive, either directly or indirectly, any political contribution in an amount intended to influence the award of a contract by public authority, or which may be reasonably construed by the public of having the effect or intent to influence the award 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."

Discussion:

A "consortium" is generally defined as a business combination established for the benefit of its members. The general structure of such entities varies of course depending upon the nature of the venture, size, and a whole host of factors. However, what is common to almost all such entities is the fact that the members of the entity generally conduct business primarily for the benefit of its members.

The issue presented before the Board in this case is whether an individual engineer may ethically join together with other business and professional groups in an arrangement which would offer incentives to its members for referrals to one another.

Engineering firms must balance a number of factors before seeking association with other firms or business.

Whether such an entity may exist within the bounds of the NSPE Code of Ethics must be determined by a close and careful analysis of the Code and cases interpreting the applicable Code provisions.

Section II.4.a., one of the most often cited provisions, touches upon some of the concerns raised under the facts of this case. Engineers act for the benefit of their clients in rendering their services. Their technical knowledge and experience are relied upon by their clients. Engineers are called upon to render judgments in a variety of areas including recommendations, referrals, and the like. A client should be entitled to expect the best judgment the engineer has to offer. In this regard, the engineer should not be guided by personal gain or private concerns. Like all professionals, the engineer should be free to make the best, most informed and impartial judgment he is capable of making.

In Case 75-10, the Board reviewed a case in which Engineer Doe was employed on a full-time basis by a radio broadcast equipment manufacturer as a sales representative. In addition, Doe performed consulting engineering services to organizations in the radio broadcast field, including analysis of their technical problems and, when required, recommendation of certain radio broadcast equipment as might be needed. Doe's engineering reports to his clients were prepared in a form for filing with the appropriate governmental body having jurisdiction over radio broadcast facilities. In some cases, Doe's engineering reports recommended the use of broadcast equipment manufactured by his employer.

In finding that Doe may ethically provide consulting services as described only if there is full disclosure of all the facts and circumstances to his client, the Board noted that the controlling element in the case was the extent to which Doe's recommendations for equipment manufactured by his employer were justified by the best interests of his client. Said the Board, "It would be too easy to merely conclude that Doe may not recommend the equipment manufactured by his employer in all circumstances. If he truly believed and documented that such equipment was in the best interests of his client he would be ethically and duty bound to so advise."

However, it is unclear from the facts of Case 75-10 whether Doe advised his clients in each case of his connection with the manufacturer of the equipment in order for the client to determine whether Doe's recommendation was influenced by his relationship with the manufacturer. Such disclosure, of course, is one of the crucial elements to Code Section II.4.a.

While the facts of the case at hand appear somewhat different than those of Case 75-10, there do appear to be common threads. Both cases suggest situations in which an engineer's judgment may be influenced by a concern not necessarily consistent with the interests of his client. In Case 75-10, it is suggested that the full disclosure required by Section II.4.a. would suffice to remedy the ethical concern raised. Whether full disclosure of the referral fee in the instant case would be sufficient to dispel the ethical issue question is a different matter.

Obviously, one of the basic differences between Case 75-10 and the instant case is that in the instant case a significant direct financial incentive exists for consortium participants in referring clients to consortium members. Disclosure of this fact to a client to whom one maintains a professional relationship, while required by Section II.4.a., does not relieve the engineer from other Code requirements.

We note Case 81-4 in which Engineers A, B, and C were principals or employees of a consulting engineering firm which did extensive design work for private developers. The engineers were involved in recommending to developers a list of contractors and suppliers to be considered for selection on a bidding list for construction of a project. Usually, the contractors and suppliers recommended by the engineers for the selected bidding list obtained most of the contracts from the developers. Over a period of years the officers of the contractors or suppliers developed a close business and personal relationship with the engineers of the firm.

From time to time at holidays or on birthdays of the engineers with whom they dealt, the contractors and suppliers would give Engineers A, B, and C personal gifts of substantial value, such as house furnishings, recreational equipment, gardening equipment, etc.

In reviewing a series of earlier BER cases, the Board cited Section II.4.c. and noted that the clients of the engineering firm may be led to question whether the recommendation of particular contractors or suppliers is totally unbiased and represents the independent judgment of the consulting firm. The Board concluded that the conduct of the engineering firm was not consistent with the Code of Ethics.

Finally, in Case 83-5, the Board ruled that it was unethical for an engineer to accept the proposal by a landscape architect to refer clients to the engineer in return for a fee over and above the value of the landscape work which the landscape architect would presumably perform on each of the projects.

Citing Code provision II.5.b., the Board noted that there was nothing to indicate that the landscape architect was a "bona fide marketing agency." Said the Board, "To the contrary, it appears that the landscape architect is wearing two hats and is wearing those hats simultaneously. The landscape architect proposed to act both as a marketing representative for Engineer A and at the same time expected to perform services at an inflated rate in connection with the work that the landscape architect secured for Engineer A. Such conduct does not demonstrate the requisite good faith, integrity of dealing, and honesty implicit in the definition of a 'bona fide marketing agency,' as required by the Code."

In the instant cases, both consortiums are 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 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 agreed to by all joint venture participants. The joint venture, in the Board's view, becomes a temporary and less structured form of a consortium widely and successfully practiced within the profession. It can be argued that objectivity can be comprised in the selection of joint venture participants as easily as the potential exists in the facts of the instant case.

The final issues for this Board to resolve are raised in Section II.5.b. First, the consortium represents a relatively unique approach to marketing and only time will serve to establish its credentials as a "bona fide...marketing agency." The Board prefers to defer the final judgment for another day.

Secondly, the matter of a referral fee, a portion of which is exchanged between consortium firm members, constitutes a payment for valuable consideration in order to secure work, as prohibited in Section II.5.b.

Conclusions:

- Q1. Engineer A's participation in the consortium would not be prohibited by the Code.
- Q2. Engineer B's participation in the consortium would be unethical.

**Note:* This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

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