

PROVIDING DESIGN TO CLIENT'S COMPETITOR

Case No. 99-4

Facts:

Engineer A is hired by Developer X to perform design and construction-phase services for a subdivision for Developer X. Per the agreement with Developer X, Engineer A is paid 30% of his fee by Developer X. Engineer A submits the design drawings and plans to the county authorities and permits are issued for the benefit of Developer X. Developer X cannot get financing for the project, and Developer X tells Engineer A that Engineer A should not disclose the contents of the drawings and plans to any unauthorized third party. Developer Y, a client of Engineer A and also a business competitor of Developer X, is interested in the subdivision project. Developer Y has secured financing for the project and approaches Engineer A, requesting that he perform the design on the project and requests that Engineer A provide the design documents for Developer Y's review. Since Engineer A was not paid his entire fee for his completed project design by Developer X, Engineer A agrees to provide the design drawings and plans to Developer Y and agrees to charge Developer Y only for the changes to the original subdivision design drawings and plans.

Questions:

1. Was it ethical for Engineer A to provide a copy of the design drawings and plans to Developer Y?
2. Was it ethical for Engineer A to charge Developer Y for the changes to the original subdivision design drawings and plans?

References:

- Section II.1.c. - Code of Ethics: *Engineers shall not reveal facts, data or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
- Section II.4. - Code of Ethics: *Engineers shall act for each employer or client as faithful agents or trustees.*
- Section II.4.b. - Code of Ethics: *Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.*
- Section III.4.a. - Code of Ethics: *Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a*

specific project for which the Engineer has gained particular and specialized knowledge.

Discussion:

The facts in this case raise a conflict between the obligations of an engineer not to disclose information that is considered confidential by the client and the right to be properly compensated for professional services.

Among the issues left unclear under the facts in this case is any indication of whether Engineer A and Developer X ever had a specific agreement that addressed the issue of ownership of the engineering drawings, plans, and specifications, and whether ownership and possession of those documents remains with the engineer, particularly where the owner fails to completely compensate the engineer for those documents.

In Case 67-3, Engineer X was retained by a municipality to prepare plans and specifications for a comprehensive sanitary sewer program. After approximately 80% of the total project was constructed in subsequent years, Engineer X's contract was terminated and he was paid in full for his services. Ten years later, the municipality retained another engineer to revise and update the plans and specifications prepared by Engineer X. The municipality requested Engineer X to provide it with originals or copies of the plans and specification which Engineer X had in his possession, offering to pay Engineer X the cost of reproduction. Engineer X refused to comply with the request. The original contract was silent as to ownership of the plans and specifications, but did contain a clause stating that: "If the City requires more than six complete sets of final plans, specifications and documents, the Engineers agree to provide any number of additional copies for no more that blueprinting, mimeographing and mailing costs." In finding that Engineer X was ethically obligated to provide the originals or copies of the plans to the municipality, the Board noted that as a general rule in the absence of a contract provision on ownership of plans, the plans and contract documents are the property of the client.

The Client's ownership of plans in the absence of contrary contract provisions was reaffirmed in Case 88-4, where Engineer A was retained by an architect to provide mechanical engineering services in connection with the design of a small office building. Engineer A performed her services, but payment remained in dispute. Subsequently Engineer A refused to provide the owner a record set of plans despite his offer to pay reproduction costs and mediate the dispute. The Board confirmed that the plans were the property of the developer. However they maintained that the owner had the status of a client and that: "It was unethical for Engineer A to refuse to provide the owner with the drawings and to decline owner's offer to attempt to mediate the dispute between Engineer A and the architect."

The obligation of engineers under II.1.c. to "...not reveal facts, data or information without the prior consent of the client.." was the subject of Case 82-2 where "an engineering consultant performed home inspection services for a prospective purchaser of a residence and thereafter disclosed the contents of the report to the real estate firm handling the sale of the residence without the client's consent. The Board reaffirmed the principle of the right of confidentiality on behalf of the client in ruling that the engineer acted unethically.

Although Engineer A may have had some basis for thinking that he was not fully obligated to Developer X, since Developer X only compensated Engineer A for 30% of his professional and other services, we believe that Engineer A's consideration of this issue was at least affected by his ongoing client relationship with Developer Y, a party with whom Engineer A may have felt a sense of loyalty. However, in view of the fact that Developer Y was a competitor of Developer X, Developer X would certainly be justified in believing that Engineer A's actions were in conflict with Engineer A's obligations to Developer X.

While it is true that Engineer A was entitled to full compensation for his design services for Developer X, that alone was not justification for Engineer A to provide the reviewed and approved design drawings to Developer Y. Weighing all of the facts, it is clear to the Board that the fee dispute and Engineer A providing the design drawings to Developer Y are separate and distinct issues that should not have been linked in Engineer A's decision to provide the plans to Developer Y.

It is clear from all of the Code references cited that, without Developer X's consent, Engineer A should not share the plans with another client. The Code is silent about failure of clients to provide agreed compensation and how that would affect their status as clients.

It is the Board's view that before providing the plans to a third party, Engineer A should have made every reasonable effort to resolve his situation with Developer X. In those negotiations, Engineer A could link a settlement of the issue of his fee on the project and consent to use the project plans for other clients.

Given the conclusion that Engineer A should not have taken the action of providing the project drawings to Developer Y, the Board concludes that Engineer A should not have charged Developer Y for the changes made to the drawings. At the same time, the Board notes that had Engineer A been able to negotiate an agreement with Developer X under which Engineer A would be able transfer rights of use to Developer Y, the Board would not be troubled by Engineer A charging Developer Y for the changes made to the

project drawings. Presumably, those changes would involve time and effort on the part of Engineer A for which he would be entitled to compensation by Developer Y.

Conclusions:

1. It was not ethical for Engineer A to provide a copy of the design drawings and plans to Developer Y.
2. It was not ethical for Engineer A to charge Developer Y for the changes to the original subdivision design drawings and plans. However, had Engineer A successfully negotiated an agreement with Developer X on the questions of ownership and possession of the design drawings, it would have been ethical for Engineer A to charge Developer Y for changes to the original subdivision design drawings and plans.

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