

- Section II.1.d. - Code of Ethics
Section II.5.b. - Code of Ethics
Section III.3.a. - Code of Ethics

BROKERAGE OF ENGINEERING SERVICES – BUILDING INSPECTION SERVICES

FACTS:

Engineer A performs building inspection services. Engineer A is contacted by IJK, Inc., a firm that refers companies to professional engineers that perform building inspection services. IJK, Inc. and similar companies are involved in assisting relocating employees in the sale and purchase of residences. Typically IJK, Inc. makes contact with the client, takes an order for a job, and passes the order on to the professional engineer available in the geographic area. Engineer A performs the services, prepares a report and submits the report to IJK, Inc. Engineer A has learned that IJK, Inc. has occasionally made modifications to the report without consulting with the engineer. Engineer A invoices IJK, Inc. for his services at half what he would normally charge to another client for the same services. IJK, Inc. invoices the client for its services, twice the amount that is charged by Engineer A, a fact later learned by Engineer A. IJK, Inc. has no exclusive contractual or business relationship with Engineer A and IJK, Inc. possesses no engineering expertise.

QUESTIONS:

1. Is it ethical for Engineer A to continue association with the referral firm after he learns that IJK, Inc. has a history of changing reports?
2. Is it ethical for Engineer A to continue association with the referral firm after learning that IJK, Inc. is indicating a fee for Engineer A's services to the IJK, Inc. client which is different from the fee charged by Engineer A?

REFERENCES:

Section II.1.d. -Engineers shall not permit the use of their name or firm name nor associate in business ventures with any person or firm which they have reason to believe is engaging in fraudulent or dishonest business or professional practices.

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.

Section III.3.a. -Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact necessary to keep statements from being misleading or intended or likely to create an unjustified expectation; statements containing prediction of future success; statements containing an opinion as to the quality of the Engineers' services; or statements intended or likely to attract clients by the use of showmanship, puffery, or self-laudation, including the use of slogans, jingles, or sensational language or format.

DISCUSSION:

The basic question posed by this case is whether it would be appropriate for an engineer to associate with a brokerage firm, particularly where there is evidence that the broker had made modifications to the report provided by the engineer.

Over the years, the Board of Ethical Review has had opportunities to discuss and offer opinion on the subject of brokering of engineering services. In BER Case 83-5, a local landscape architect, through a network of contacts, was able to locate engineering projects. The landscape architect contacted an engineer and proposed to refer these clients to the engineer in return for a fee over and above the value of the landscaping work which the landscape architect would presumably perform on the jobs. Generally, little landscaping work was required on the projects. In ruling the arrangement was unethical, the Board, referring to Code Section II.5.b., noted that there was nothing to indicate that the landscape architect was a "bona fide marketing agency". Instead, it appeared that the landscape architect was wearing two hats and wearing those hats simultaneously. The landscape architect proposed to act both as a marketing representative for the engineer and, at the same time, expected to perform services at an inflated rate in connection with the work that the landscape architect secured for the engineer. The Board ruled that such conduct did 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.

Later, in BER Case 86-1, the Board considered two separate factual situations involving the solicitation of work by a business consortium consisting of an engineering firm, architectural firm, construction firm and financial firm. In one case, to defray consortium expenses for promotion, publicity, overhead, etc., each firm was 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. In the other case, each firm was required to pay the entrance fee plus a referral fee directly to the consortium firm member which "found" the new business client. In finding the first arrangement to be proper but the second improper, the Board noted that both consortiums were 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 the 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 first consortium represented a relatively unique approach to marketing. The second consortium involved a referral fee, a portion of which was exchanged between consortium firm members, constituted a payment for valuable consideration in order to secure work, prohibited by Code Section II.5.b.

In the instant case, Engineer A's performance of building inspection services under the circumstances appears to be inconsistent with the provisions of the Code of Ethics. Engineer A's involvement with IJK, Inc. appears more in line with the facts in the second set of circumstances described in BER Case 86-1. In view of the fact that IJK, Inc. typically makes contact with the employer, takes an order for a job, and passes the order on to the professional engineer available in the geographic area suggests that IJK, Inc. is acting purely as a broker under the facts and that Engineer A's forbearance of his full fee constitutes payment for valuable consideration in order to secure work, prohibited by Code Section II.5.b. In addition, under the facts, it is clear that Engineer A performs all necessary services and prepares the report for the actual client. IJK, Inc. provides no benefit to the client other than simply passing the professional report prepared by Engineer A to the client. IJK, Inc. appears to be acting purely as a "go-between" and does not appear to be adding any value to the services purchased by clients even though such clients are paying a significant fee for the involvement of IJK, Inc.

We are disturbed by the fact that IJK, Inc. a company without any particular competence or expertise in the performance of building design services may occasionally make modifications to reports without consulting with the engineer. If such changes fall into the latter category, it would appear that IJK, Inc. may be entering the realm of performing engineering services in violation of the law. In this regard, we would especially note that the Code of Ethics (Section II.1.d.) clearly admonishes engineers to avoid allowing their name or the name of their firm to be used in a joint venture where the co-venturer may be engaged in improper business activities and practices. While it is not entirely clear from the facts whether IJK, Inc. is holding itself out to clients as capable of performing engineering services, we would simply give a note of caution that whatever line might exist in connection with the illegal practice of engineering, IJK, Inc. may be coming close to crossing it. If that were the case, Section II.1.d. would certainly provide a clear basis for Engineer A to avoid association with IJK, Inc.

Finally, we are also disturbed if Engineer A continues association with IJK, Inc. after learning that IJK, Inc. is indicating a fee for Engineer A's services on the IJK, Inc. invoice to its client which is different from the fee charged by Engineer A. On the face of it, IJK's practice misrepresents Engineer A's actual fee and is a deceptive practice.

CONCLUSIONS:

1. It was unethical for Engineer A to continue association with the referral firm after he learns that IJK, Inc. has a history of changing reports.

2. It was unethical for Engineer A to continue association with the referral firm after learning that IJK, Inc. is indicating a fee for Engineer A's services to IJK's client which is different from the fee charged by Engineer A.

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Note:In regard to the question of application of the Code to corporations vis-a-vis real persons, business form or type should not negate nor influence conformance of individuals to the Code. The Code deals with professional services, which services must be performed by real persons. Real persons in turn establish and implement policies within business structures. The Code is clearly written to apply to the Engineer and it is incumbent on a member of NSPE to endeavor to live up to its provisions. This applies to all pertinent sections of the Code.