DUTY OF ENGINEER REGARDING INSPECTION OF CLIENT'S WORK INVOLVED IN INSPECTION AND REANALYSIS

Case No. 00-11

Facts:

Engineer A was hired to be the managing agent and to be in responsible charge of engineering for ABC Engineering, a professional design firm (civil), that is owned by Individual X and Individual Y. Individual X was a partner with Engineer B in a land development company that was dissolved. The land development company was not a professional design firm. Engineer B, as a separate entity, had prepared all engineering plans for the land development company. When the land development company dissolved, there were several unfinished projects. ABC Engineering does not want to become involved in finishing the design work that Engineer B had started. Pending business issues remain between Individual X and Engineer B, and Engineer B has indicated that he would not finish the design work until these issues are resolved. Engineer B has threatened to bring litigation against anyone who tries to complete his work.

There is a residential subdivision that was constructed by the dissolved land development company which was designed by Engineer B and owned by an independent party. All approvals of the design and construction have been received except for one pending approval. One of the governing agencies is a sanitary district. The sanitary district has approved the design and has inspected the work. However, before the sanitary sewer can be put into service, the district requires a final inspection. The request for the final inspection has to be made by an inspection engineer by filling out a form and signing it. On the original district permit, Engineer B was designated as the inspection engineer. Engineer B has refused to act on the request for final inspection due to the unresolved business issues with Individual X, even though Engineer B, acting through the separate entity at the time, has been paid. The sanitary district has stated they will accept another inspection engineer making the request for final inspection other than the one listed on the original permit.

During the time this subdivision was under construction, Engineer A worked for an engineering firm that was hired as a consultant by the municipality in which this subdivision was built to inspect the construction of the subdivision. At that time, Engineer A personally inspected and tested the sewer in accordance with the district's standards.

On a different residential subdivision, Engineer B prepared a Floodplain/Floodway Analysis for the re-mapping of a FEMA flood map. The analysis is typically submitted to

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the first review agency. After the first review agency approves the analysis, it is submitted to FEMA for its review. The first review agency issues a review of the analysis and requests that some changes be made. Engineer B has stated he will not make these changes and continue the re-mapping process until the unresolved issues with Individual X are resolved. Engineer B has been paid for the work Engineer B performed on the analysis, and the client has agreed to pay Engineer B to move the process forward and make the requested changes. Engineer A agrees to resubmit the changes, referencing Engineer B's analysis.

Questions:

Question 1: Would it be ethical for Engineer A to perform the final inspection as required by the sanitary district?

Question 2: Would it be ethical for Engineer A to resubmit the analysis with the requested changes if he references Engineer B's analysis?

Question 3: Is it ethical for Engineer B to refuse to perform the final inspection?

Question 4: Is it ethical for Engineer A to perform the remapping services in view of the fact that Engineer B has already been paid?

References:

Section: II.2.b.	-	*Code of Ethics:*	*Engineers shall not affix their signatures to any plans or documents dealing with subject matter in which they lack competence, nor to any plan or document not prepared under their direction and control.*
Section II.2.c.	-	*Code of Ethics:*	*Engineers may accept assignments and assume responsibility for coordination of an entire project and sign and seal the engineering documents for the entire project, provided that each technical segment is signed and sealed only by the qualified engineers who prepared the segment.*
Section II.4.	-	*Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*

Discussion:

A professional engineer renders services through a variety of business associations, be it a sole proprietorship, partnership, business corporation, professional corporation, or other entity. How such a company is structured and how it represents itself may raise ethical issues for professional engineers.

The Board has had occasion to review situations involving innovative business structures and the ethical issues involved in rendering services in this manner. In BER Case No. 86-1, Part 1, Engineer A had 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 was to improve general marketing and business development. To defray consortium expenses for promotion, publicity,

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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 BER Case No. 86-1 Part 2, Engineer B had 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 was to improve general marketing and business development. To defray consortium expenses for promotion, publicity, overhead, etc., each firm was required to pay the consortium an entrance fee. In addition, Engineer B was required to pay a referral fee directly to the consortium firm member that "found" the new business client for Engineer B. If Engineer B "found" a new business client for a member of the consortium, Engineer B would receive a finder's fee. In discussing these situations, and whether it would be ethical for the engineers involved to participate in these arrangements, the Board noted that 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 Board noted that the key issue in the case was 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. The Board noted that engineering firms must balance a number of factors before seeking association with other firms or business and whether such an entity may exist within the bounds of the NSPE Code must be determined by a close and careful analysis of the NSPE Code and cases interpreting the applicable NSPE Code provisions.

In BER Case No. 86-1, the Board focused attention on the fact that engineers act for the benefit of their clients in rendering their services. Their technical knowledge and experience are heavily 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 concluding that Engineer A's actions were ethical and Engineer B's were not, the Board noted that both consortiums are being formed primarily for marketing purposes and represent, in effect, a "pooling" of individual firm marketing capabilities, but that in one case, Engineer B was receiving a "finder's fee" and, therefore, Engineer B's professional judgment could be compromised or at least appear to be compromised.

We think the general ethical principles of BER Case No. 86-1 bear upon the present case. The lessons drawn from BER Case No. 86-1 relate to the great importance of the engineer focusing upon the best interests of the client and the need for the engineer to

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avoid actions that could compromise or appear to compromise judgment. In this connection, under the facts in the present case, the Board is of the view that, assuming from the facts that all of the design and construction work has been paid for by the Owner and there are no remaining or outstanding payment issues in connection with Engineer B's professional services provided to the client, the NSPE Code dictates that the Owner should not be left in the middle of a conflict between the two former partners. The facts do not suggest and, therefore, one can only speculate on whether there was a written agreement between the original land development firm and the Owner. In this connection, such an agreement may have addressed the issue of ownership and reuse of the documents, drawings, plans, specifications, etc. Most well-drafted agreements provide the owner with the right to use the documents on a particular project, particularly, as here, where the engineer has been paid in full for professional services.

Engineer B's actions were clearly a violation of the NSPE Code of Ethics. At the same time, since Engineer A is an employee of one of the former partners of the land development company, by offering to perform the work, Engineer A could potentially inject himself into this dispute which might exacerbate this situation. On balance, the Board is of the view that Engineer A could ethically perform the services described in Questions 1, 2, and 4. However, whether such an action would best serve the interests of the Owner is another issue Engineer A and his employer would be advised to seriously consider. While an alternative that could avoid potentially injecting Engineer A into this dispute is for the Owner (possibly with the ABC Engineering Company's assistance) to find an independent third-party professional engineer who could perform the final inspection on behalf of the owner. This approach would serve the interests of the Owner by providing the Owner with the required approvals and also avoid having Engineer A or Engineer A's employer, ABC Company, being viewed as exacerbating this conflict.

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Conclusions:

Question 1: It would be ethical for Engineer A to perform the final inspection as required by the sanitary district, but consideration should be given to the Owner seeking the services of an independent professional engineer to perform those services.

Question 2: It would be ethical for Engineer A to resubmit the analysis with the requested changes if he references Engineer B's analysis but consideration should be given to the Owner seeking the services of an independent professional engineer to perform those services.

Question 3: It was not ethical for Engineer B to refuse to perform the final inspection.

Question 4: It was ethical for Engineer A to perform the remapping services in view of the fact that Engineer B has already been paid.

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