ASSOCIATING WITH A FIRM NOT AUTHORIZED TO PRACTICE

Case No. 01-8

Facts:

Engineer A is employed by Firm Y in State X. Engineer B, the President of Firm Y, passes away in July 2000. His widow, Widow C, a non-engineer, was the only other named corporate officer in Firm Y. At the time of Engineer B's death, Engineer A is the only other professional engineer in Firm Y. Following discussions with Widow C, Engineer A tries to purchase Firm Y from Widow C. However, negotiations break down and Engineer A decides to start his own firm in October 2000.

Following a period of time, Widow C decides to run the engineering firm, Firm Y. As an "interim measure," Engineer D, a personal friend of the deceased Engineer B, with a separate full-time practice, agrees to advise and help Widow C through a "transition period." A year passes and there is still no professional engineer within the structure of Firm Y who is in responsible charge of engineering work. Firm Y continues to perform engineering services and take on new clients and new work through the limited advice of Engineer D and two graduate engineer employees. Under the laws of State X, a professional engineer employee must be in responsible charge of engineering work performed by an engineering company.

Questions:

Question 1. What are Engineer A and Engineer D's ethical obligations under the described facts?

Question 2. Was it ethical for Engineer D to assist Widow C through an undefined "transition period" and thereafter provide advice to Widow C to permit Firm Y to continue to perform engineering services?

References:

Section I.1.	-	*Code of Ethics:*	*Hold paramount the safety, health and welfare of the public.*
Section II.1.d.	-	*Code of Ethics:*	*Engineers shall not permit the use of their name or associate in business ventures with any person or firm that they believe are engaged in fraudulent or dishonest enterprise.*
Section II.1.e.	-	*Code of Ethics:*	*Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required.*
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.*

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Section II.5.a.	-	*Code of Ethics:*	*Engineers shall not falsify their qualifications or permit misrepresentation of their or their associates' qualifications. They shall not misrepresent or exaggerate their responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint venturers, or past accomplishments.*
Section III.8.a.	-	*Code of Ethics:*	*Engineers shall conform with state registration laws in the practice of engineering.*

Discussion:

Ethical issues relating to the transition of engineering firms at the time of the death or disability of key individuals associated with the firm have not heretofore been an issue considered by the NSPE Board of Ethical Review, and therefore this is a case of first impression for the Board. The issues raised in such cases are often sensitive and require good judgment and discretion regarding the appropriate manner in which to conduct the affairs of the firm during such transitions. Little guidance exists in this area and engineers and engineering firms must carefully navigate the issues and questions that are raised during this period.

Among the key questions for engineers who find themselves involved in such situations include an examination of (1) whether such firms continue to meet all legal and regulatory requirements to continue to lawfully practice; (2) whether the continued engineering activities by the firm is misleading to current or potential clients of the firm, other engineers, as well as to the public; (3) whether an engineer's association with the firm aids or abets in an improper engineering activity; and (4) whether the public health and safety is being protected.

In one of the earliest cases decided by the Board, BER Case No. 61-4, two individuals, Businessman A and Businessman B, neither of whom was a licensed professional engineer, were in the process of forming a firm (partnership) to engage in engineering work (consulting, surveying, and estimating). One of these men, Businessman A, was a graduate engineer who had been in the construction field for many years. Businessman A and Businessman B obtained a job and engaged the services of a licensed engineer, Engineer X, to perform and certify certain phases of the work connected with this particular job. Engineer X was a full-time staff member of a state university and engaged in outside work of this nature only on a spare time basis. Businessman A and Businessman B explained their situation to Engineer X and told Engineer X that as soon as the firm was established, another licensed engineer, Engineer Z, was to be employed on a full-time basis and that Engineer X's services would be required only until that time. During this interim period, Businessman A and Businessman B completed the legal requirements for the formulation of their partnership, the firm was established, an office was rented, and cards were printed to advertise the firm as engaging in civil engineering, surveying, and estimating work. Engineer Z, for some reason, did not go to work for the newly formed company and Engineer X was the only licensed engineer connected with the firm. His employment, however, was still on a part-time basis and because he lived and worked in a city some distance from the firm's place of business, he could exercise no immediate control or direction over the practices and work done by the other members of the new engineering company. Engineer X learned of Engineer Z's decision not to join the new company, but he

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continued his association with it anyway. According to the applicable state law, if a firm engages in the practice of professional engineering in the state, at least one member or employee of the firm must be a licensed professional engineer and all work done by the firm shall be carried on under his immediate responsible direction. In deciding that Engineer X was not ethical to continue his association with the new company after learning that Engineer Z would not be accepting employment, the Board noted that Engineer X was associated with a venture that is of questionable legality and, therefore, he ran afoul of the NSPE Code of Ethics in continuing any type of affiliation or connection with the firm.

The BER also noted that Engineer X may be charged with a violation of the NSPE Code if the firm performed engineering services that endangered the public safety. This violates the Code even though it is not associated with the particular project, inasmuch as there is an implied threat to the public safety in the performance of engineering services by unqualified individuals. The Board said, "It becomes the duty of Engineer X to notify proper authorities that the firm might perform engineering services without the direction of a licensed engineer. Under these conditions the engineering profession is exposed to misrepresentation and misunderstanding and Engineer X must take appropriate action to protect the profession from these conditions." The Board concluded by noting that the NSPE Code requires that licensed engineers avoid any form of association with engineers who do not conform to ethical practices. The Board said, "There is more than sufficient evidence in the facts known to Engineer X to raise a substantial question as to the ethical standards of the firm, to say nothing of its apparent illegal operation."

Some of the fundamental principles discussed in BER Case No. 61-4 are applicable to those in the current case. The Board first acknowledges the need to provide an appropriate transition period to permit a firm to make appropriate changes to its operations and personnel adjustments in order to permit the firm to continue its existence following the death of the firm's principal. However, once a reasonable period of time passes (this period should be measured in days or possibly weeks), the firm must comply with applicable state regulatory and legal requirements which, as noted in BER Case No. 61-4, are in place to help assure that the public health and safety are protected. While some flexibility may be appropriate depending upon the facts and circumstances and applicable state laws, legal and regulatory requirements must be followed as expeditiously as possible. Engineer A was well aware of the background concerning the operation of Firm Y and, therefore, was in a unique position to assist Firm Y in better understanding the issues at stake. In this connection, the Board believes it would have been appropriate for Engineer A to advise Widow C that Firm Y may not be in full compliance with the laws of State X and suggest that Firm Y self-report this fact to the state engineering licensure board. If Widow C refuses to take this action, Engineer A would have an obligation to personally bring this matter to the appropriate authorities (e.g., state engineering licensure board).

The Board clearly has reason to be troubled by the manner in which Firm Y continued to operate, and in particular the manner in which Engineer D's actions permitted a subterfuge under the facts. While at first glance, Engineer D's actions may be viewed as well-meaning and compassionate assistance by a friend to a family in crisis, in actual fact, Engineer D's actions

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took on heightened significance in light of the continued improper activities of Firm Y. Those continued activities had serious implications and possible consequences for Firm Y and its clients, Widow C, the two graduate engineers as well as Engineer D. Engineer D's actions may have placed other parties, as well as the general public, at risk.

The Board would note that, in both cases, BER Cases No. 61-4 and the present case, the facts indicate that the engineers involved permitted other parties to take advantage of and misrepresent what appears to be an initial understanding between the parties and the engineer. Engineers must always be mindful of the importance of protecting their professional reputations, must take all appropriate steps to maintain and control their professional relationships from the outset, must guard against the misuse or manipulation by other parties for gain or profit, and must seek full compliance with applicable state laws and regulations.

Furthermore, the Board observes that state law on the subject of business association practices varies significantly. Most states (58 percent) require business associations that provide professional engineering services to first obtain certificates of authority from the engineering licensure board, and over two-thirds of these jurisdictions (71 percent) require that at least one officer of the business association be a licensed P.E.[1] Thus, it is imperative that engineers know their state's law in this regard. This case also highlights the practical wisdom and necessity for engineers to develop and provide plans for succession in ownership of their firms. Engineer B, the deceased engineer, was in the best position to plan for his Firm's succession. A succession plan not only would have enhanced the likelihood of the firms' operating within the law, but could provide attractive career opportunities for the younger engineers in the firm, and might have averted much pain and difficulty for all parties concerned.

[1] Source: *Analysis of Professional Engineering Licensure Laws*; Section IV: Analysis, "Business Association Practice", National Society of Professional Engineers, 1997.

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Conclusions:

Question 1. Engineer A and Engineer D are ethically obligated to advise Widow C that Firm Y may not be in full compliance with the laws of State X and suggest that Firm Y self-report this fact to the state engineering licensure board. If Widow C refuses to take this action, it would appear that Engineer A and Engineer D would have an obligation to personally bring this matter to the appropriate authorities (e.g., state engineering licensure board).

Question 2. It was ethical for Engineer D to assist Widow C through a limited transition period and provide advice to Widow C, provided it is permissible under state laws and regulations.

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