Misrepresentation – Unlicensed in State in Which Services are Performed

Case No. 06-4

Facts:

Engineer A is retained by an owner to perform a property condition survey for an apartment complex as part of the refinancing of the property. Engineer A visited the site, observed the apartment complex, asked relevant questions, and prepared a property condition report (PCR) that generally met existing and appropriate industry and client standards.

The following week, the owner of the apartment complex contacts Engineer A and sends a blank certification document to Engineer A to complete, sign, and seal so that the owner can use the form to comply with the state's condominium conversion law (under which the property owner is required to disclose the condition of various common items to potential purchasers under seal of a professional engineer licensed in the state).

Engineer A informs the owner that this request is not within the scope of Engineer A's original services. In addition, Engineer A informs the owner that the engineer agreed to perform the services with the assumption that a PE license in the state where the work was being performed was not required. Engineer A is not licensed in the state in which the property is located. However, later Engineer A locates Engineer B, a professional engineer licensed in the subject state who agrees to review Engineer A's report and sign and seal the certification document for a fee.

Questions:

1. Was it ethical for Engineer A to agree to perform the service for the owner?

2. Was it ethical for Engineer B to agree to sign and seal the certification document?

References:

Section I.4.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall act for each employer or client as faithful agents or trustees.*
Section II.2.b.	-	*NSPE 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 III.2.b.	-	*NSPE Code of Ethics:*	*Engineers shall not complete, sign, nor seal plans or specifications that are not in conformity with applicable engineering standards. If the client or employer insists on such unprofessional conduct, they shall notify the proper authorities and withdraw from further service on the project.*

Copyright © 2006 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Section III.8.a. - NSPE Code of Ethics: Engineers shall conform with state registration laws in the practice of engineering.

Discussion:

Fundamental to the practice of professional engineering is compliance with state engineering licensure laws. Of all engineers, licensed professional engineers must be scrupulous in adhering to the specific requirements of engineering licensure, including adherence to the provisions of state laws and regulations.

As noted by the NSPE Board of Ethical Review in BER Case No. 93-2, in recent years, there has been a great deal of interest generated within the engineering community regarding the manner in which engineers in this nation are licensed from state to state. Part of the discussion has involved a desire to simplify comity and reciprocity procedures that often create difficult hurdles for engineers to become licensed in multiple states. While regulators have justified these procedures as a method to screen out incompetent practitioners and maintain standards of practice, others have argued that these procedures have the effect of protecting and preserving engineering markets for those already licensed within the state. However, in recent years, many states have implemented expedited comity procedures to allow for greater interstate practice.

The NSPE Board of Ethical Review has addressed ethical issues relating to engineering licensure on a number of occasions. For example, in BER Case No. 90-3, the board considered a case involving a prominent consulting engineer who was licensed in states 1, 2, and 3, and who had on other occasion performed forensic engineering services in connection with accident reconstruction. The engineer was retained by an attorney in state 4 to prepare a report for the purpose of determining the actual cause of the accident. The engineer was also asked to express a professional opinion during a trial on matters relating to the safety and design of equipment that may have failed, causing the accident. In deciding it was not unethical for the engineer to offer testimony in the manner described, the board noted that engineers who engage in the practice of engineering or who hold themselves out as engineers to the public have a legal, as well as an ethical obligation, to make certain that they are professional engineers licensed in accordance with the laws of the state. While the board indicated that a determination of this issue must find resolution within each state on a case-by-case basis—depending on the nature of the services provided, the language contained in the state engineering licensure law, and other considerations with respect to the narrow issue of an individual serving as a technical expert—the board pointed out that as a general proposition, it was generally acknowledged that an individual may be qualified as a technical expert by a court without possessing the minimum legal recognition as demonstrated by a professional license.

Copyright © 2006 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

In BER Case No. 93-2, Engineer A, a professional engineer with expertise in mechanical systems was a sole practitioner in a small consulting firm in State X and had a business card indicating that he was a professional engineer. Engineer A was not licensed in State X but was licensed in State Y. The bulk of Engineer A's work involved work to be constructed in State Y. Client B contacted Engineer A to design a project that would be constructed in State X. After completing the work, Client B learned that Engineer A was not licensed in State X but was licensed in State Y. Client B was then required to have another engineer either redesign the project or carefully review Engineer A's work before sealing it. As a result, Client B incurred additional expenses and delays in the construction of his project. In deciding that Engineer A's actions were unethical, the board noted that Engineer A's failure to provide timely notice to Client B was a violation of current NSPE Code Section III.3.a. Moreover, under the facts, it appears that a legitimate question existed as to whether Engineer A's representation of himself as a professional engineer in State X was a violation of the engineering licensure laws in State X. Since Client B incurred additional expenses and delays in the construction of his project, Engineer A's actions compromised and jeopardized the interests of the client in violation of NSPE Code Section I.4.

In reviewing the present case, the board is of the opinion that Engineer A correctly assumed that the owner of the property was seeking a general review of the property for which there was no question in Engineer A's mind as to whether Engineer A was required to possess a license to perform those services. Based on this assumption, Engineer A was legally qualified to perform the full scope of those services without limitation in the state in which the services were being offered and performed. Granted, Engineer A has the responsibility to disclose at the outset of the relationship the extent or limitations of Engineer A's authority, particularly where it relates to Engineer A's legal authority to perform the necessary services. In this case, it appears that Engineer A did just that and the work being performed did not meet the definition of engineering practice.

Given that the project consisted of a property condition survey for an apartment complex, that Engineer A asked relevant questions and conscientiously performed the work, and that the condominium certification issue did not arise until after the report was submitted, the board is not convinced that Engineer A would have been obligated to have anticipated the client's need for a certification document for this particular project. Accordingly, when the owner subsequently asked Engineer A to provide the certification, it was appropriate for Engineer A to respond that the requested signature and seal were not within the scope of Engineer A's services and to attempt to assist the owner in obtaining this service.

To this end, Engineer A located Engineer B, a professional engineer licensed in the subject state, who agreed to review Engineer A's report and sign and seal the certification document for a fee. On its face, this suggests the possibility of "plan

Copyright © 2006 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

stamping," which is inconsistent with the NSPE Code of Ethics and the rules of professional conduct of state engineering licensure boards. However, some state boards have provisions that permit, under limited circumstances, successor engineers to follow strict procedures and review engineering drawings and sign and seal those drawings. If such provisions are applicable in the state in question, the board would not find this approach inconsistent with the NSPE Code. If such a practice is not acceptable in the state in question, Engineer B's scope of service to provide certification would need to be sufficiently robust to comply with the state licensure law, and this is work for which the client/owner would be required to pay.

Conclusions:

1. It was ethical for Engineer A to agree to perform the service for the owner.

2. It was not ethical for Engineer B to agree to sign and seal the certification document unless a provision exists under state law to permit successor engineers to follow strict procedures and review engineering drawings and sign and seal those drawings.

Board of Ethical Review:
Robert C. Gibson, P.E., F.NSPE
James D. Lesikar II, Ph.D., P.E., F.NSPE
William D. Lawson, Ph.D., P.E., NSPE
Robert L. Nichols, P.E., F.NSPE
Michael L. Shirley, P.E., NSPE
Eric H. Yamashige, P.E., L.S., F.NSPE
Louis L. Guy Jr., P.E., F.NSPE, Chair

NOTE: The NSPE Board of Ethical Review considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials, and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

Each opinion is intended as guidance to individual practicing engineers, students, and the public. In regard to the question of application of the NSPE Code to engineering organizations (e.g., corporations, partnerships, sole proprietorships, government agencies, and university engineering departments), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services, which must be performed by real persons. Real persons in turn establish and implement policies within business structures.

This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

To obtain additional NSPE opinions, visit www.nspe.org or call 800-417-0348.

Copyright © 2006 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).