Certificate of Merit and Reviewing Work of Another Engineer

Case No. 18-8

Facts:

Engineer A is retained by Local School Development Authority to review the design of a smoke detection system in a school designed by Engineer B. The system has not yet been approved by code officials because the design is deemed incomplete. Engineer A reviews the work of Engineer B on behalf of Local School Development Authority and recommends substantial changes to the design details. Engineer B continues to prepare design documents for the smoke detection system but does not incorporate Engineer A's recommendations into the design. The smoke detection system design is never completed, and the school opening is delayed indefinitely. Local School Development Authority sues Engineer B for negligent design. The state has a requirement that before a lawsuit may be brought against a professional engineer for professional negligence, the attorney filing the lawsuit must consult with a professional engineer and thereafter a certificate of merit must be filed and signed by the professional engineer asserting that, in the professional engineer's opinion, the lawsuit is not frivolous and has merit. The attorney for Local School Development Authority asks Engineer A, who will be called as a fact witness at the trial, to also review the case file and prepare and sign a certificate of merit indicating that, in Engineer A's professional opinion, the case being brought against Engineer B is not frivolous and has merit.

Questions:

1. Would it be ethical for Engineer A to agree to perform the review of Engineer B's work?

2. Would it be ethical for Engineer A to sign the certificate of merit?

NSPE Code of Ethics References:

Section II.1. - *Engineers shall hold paramount the safety, health, and welfare of the public.*

Section II.1.b. - *Engineers shall approve only those engineering documents that are in conformity with applicable standards.*

Section II.3.a. - *Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.*

Section III.4. - *Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*

Section III.7.a. - *Engineers in private practice shall not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated.*

NSPE BER Case References: BER Cases 79-7, 83-8, 85-4

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Discussion:

The review of the work of one engineer by another engineer can sometimes raise complicated ethical issues regarding the relationship between the engineers as well as relationships with clients. The NSPE Code of Ethics addresses this issue in Section III.7.a. by noting that "Engineers in private practice shall not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated." The NSPE BER has considered fact situations involving this provision of the NSPE Code on numerous occasions.

For example, in BER Case 79-7, in which an engineer was asked to inspect mechanical and electrical engineering work performed seven years earlier, the BER concluded that the engineer was not unethical in taking the assignment and in rendering the report to the owner. In that case, the BER noted that the engineer notified the former engineer that the engineer was being retained to perform review and inspection services and that the review would entail a review of the original designs. The BER said: "It may be helpful for future guidance to again point out that the purpose of the NSPE Code language is to provide the engineer whose work is being reviewed by another engineer an opportunity to submit...comments or explanation for...technical decision, thereby enabling the reviewing engineer to have the benefit of a fuller understanding of the technical considerations in the original design in framing...comments or suggestions for the ultimate benefit of the client."

Later, in BER Case 83-8, Engineer A performed design services for a client, and also agreed to perform inspection services during the construction phase of the project. Owing to factors beyond the control of the client, work did not proceed to the construction phase, and, therefore, Engineer A did not perform inspection services. The client paid Engineer A what the client believed constituted just compensation for the design services rendered. Engineer A disagreed with the client's determination, stating that it was arbitrary. After a period of negotiation, Engineer A brought a lawsuit against the client for additional compensation under the terms of the contract. Two years later, while the litigation was pending, the client decided to proceed with the project to completion, contacted Engineer B, and asked Engineer B to review and modify the plans and specifications of the work product developed by Engineer A. Engineer B agreed to perform the services for the client. The BER determined that it was ethical for Engineer B to agree to perform review and modification services for the client while the issue of compensation for Engineer A was being litigated between Engineer A and the client, since in the BER's opinion the relationship between Engineer A and the client had for all practical purposes been terminated.

The present case poses a different set of facts than the two earlier cases, but a relevant common thread is the language in NSPE Code Section III.7.a. Under the circumstances in the present case, the fact that Engineer B was in litigation with Local School Development Authority is an unambiguous indication that the relationship between Engineer B and Local School Development Authority had been effectively terminated. In addition, it is also clear that Engineer B was aware of Engineer A's review of Engineer B's work. Based on these facts, there does not

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appear to be any basis for concluding that Engineer A's actions in reviewing Engineer B's work were unethical.

The issue of whether it would be ethical for Engineer A to sign the certificate of merit raises potential questions of honesty and truthfulness as outlined in NSPE Code Section II.3.a. While the BER is of the view that Engineer A could act in an objective manner in preparing and signing the certificate of merit for the attorney for Local School Development Authority, the fact that Engineer A will also be called as a fact witness at trial could raise potential issues that may easily complicate Engineer A's role as a certifying party and could also affect the interests of Engineer A's client, Local School Development Authority. For that reason, the ethical approach to take would be for Engineer A to recommend an independent professional engineer to review the case and, if appropriate, prepare and sign a certificate of merit indicating that, in the independent professional engineer's opinion, the case being brought against Engineer B was not frivolous and has merit.

Conclusions:

1. It was ethical for Engineer A to agree to perform the review of Engineer B's work.

2. It would not be ethical for Engineer A to sign the certificate of merit since Engineer A will be a fact witness. Engineer A should recommend an independent professional engineer to review the case and, if appropriate, prepare and sign a certificate of merit indicating that, in the independent professional engineer's opinion, the case being brought against Engineer B was not frivolous and has merit.

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