Report on a Case by the Board of Ethical Review

Case No. 71-4

Expert Testimony Report and Redesign by Another Engineer

Facts:
Engineer A designed a facility for a client who, after construction of the project, filed a lawsuit against him claiming 1) that the cost grossly exceeded the preliminary estimate and 2) that there were numerous design errors.

The client terminated the services of Engineer A upon the filing of the lawsuit and retained Engineer B to study the work performed by Engineer A and to testify on the basis of his study as an expert witness at the trial on the client's behalf. Engineer B prepared a report prior to the trial listing many alleged deficiencies in the work of Engineer A-some dealing with overall design philosophy which are matters of judgment and opinion and some alleged factual defects in the design of construction.

Pending trial of the lawsuit the client retained Engineer B to redesign the project in accordance with the findings of his report and to be in general charge of the reconstruction of the facility. The reconstruction will destroy most of the actual physical evidence of the alleged defects prior to the trial.

Questions:
Q1. Is it ethical for Engineer B to offer expert testimony at the trial on a mixture of opinion on design philosophy and alleged factual errors in the design?

Q2. Was it ethical for Engineer B to undertake a contract to redesign and be in charge of reconstruction of the project in view of his critical report and pending testimony at the trial?

References:
Code of Ethics-Section 5-"The Engineer will express an opinion of an engineering subject only when founded on adequate knowledge and honest conviction."

Section 11-"The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods."

Section 12-"The Engineer will not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of another engineer, nor will he indiscriminately criticize another engineer's work in public. If he believes that another engineer is guilty of unethical or illegal practice, he shall present such information to the proper authority for action."

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Discussion:

Before dealing with the primary issues in this case, we dispose of the collateral question raised by the statement of facts that the reconstruction of the facility will destroy most of the actual physical evidence of the alleged defects prior to the trial. This is a matter of legal procedure, and the attorneys for Engineer A may take steps to prevent prejudice to their client through the use of affidavits of actual conditions before reconstruction starts, depositions of prospective witnesses, stipulations by the parties, the use of certified photographs, plans and other documents, and, if necessary, the use of restraining orders to prevent the reconstruction before vital physical evidence is destroyed.

In Case 63-6, dealing with language in the *Canons of Ethics* similar to that in the Code of Ethics as cited above, we noted that "there may ... be honest differences of opinion among equally qualified engineers on the interpretation of the known physical facts." We cannot, therefore, fault Engineer B for preparing a report critical of the work of Engineer A when retained to do just that by the client. However, if Engineer B's criticism of the design philosophy of Engineer A is merely a difference of opinion as to application of another valid solution he is outside of his right of ethical criticism. That type of criticism must be considered "indiscriminate" and is not ethically permissible under Section 12. Engineer B should offer his testimony and opinion at the trial only on the alleged physical defects in the work of Engineer A.

The facts do not tell us the extent to which Engineer B may have actively solicited the contract with the client to redesign the project, or whether the client took the sole initiative in seeking out the services of Engineer B. In the absence of such facts and for the purpose of this case, we shall assume that Engineer B did not obtain his assignment by criticizing Engineer A before being retained or by improper or questionable methods. Nor do we find anything in the code which could reasonably be construed to say that Engineer B may not proceed with his redesign work while the question of Engineer A's alleged negligence remains unresolved.

If a client is dissatisfied with the design work of an engineer to the extent of filing a lawsuit, it would be unreasonable to expect him to suspend the project until the lawsuit was settled, which might take several years. To proceed with his project he requires the services of another engineer, and he is entitled to obtain such services.

We might ponder the wisdom of Engineer B agreeing to handle the redesign and reconstruction after he has developed a critical report of the work of the previous engineer and while the validity of his critical report is pending trial and judgment by a judge or jury. To do so Engineer B exposes himself to suspicion that his criticism was prompted by the expectation that he would achieve an economic benefit by being selected to perform the redesign. And in retaining Engineer B for the redesign the client may impair the acceptance of the forthcoming critical expert testimony of Engineer B.

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Despite these pragmatic considerations of the choices made by Engineer B and the client, we cannot support any finding of unethical conduct on the part of Engineer B in agreeing to undertake the redesign.

Conclusion*:

Q1. It would be ethical for Engineer B to offer expert testimony at the trial on alleged factual errors in the design by Engineer A, but it would be unethical for Engineer B to offer opinion on the design philosophy (merely a difference of opinion as to application of another valid solution) of Engineer A.

Q2. It was ethical for Engineer B to undertake a contract to redesign and be in charge of reconstruction of the project prior to his testimony at the trial.

***Note**-This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

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