Report on a Case by the Board of Ethical Review

Case No. 72-6

Providing Services to Ultimate Client

Facts:
Richard Roe, a registered engineer employed by a firm which designs and constructs chemical plants, was retained by John Jones, a registered engineer engaged in the construction business, to prepare structural calculations for a 2000-square-foot residence. Jones had been hired by the owner to design and build the residence. The agreement between Jones and Roe was that the latter would receive half his fee when he completed the calculations and the balance after the building permit was issued. After the calculations were finished and minor modifications made in them and in the drawings as required by the local building department, and the first payment was made to Roe, as agreed, from funds paid by the owner to Jones, the owner called Roe and said he had cancelled the contract with Jones over a disagreement on price, selection of materials, and higher costs than anticipated for the residence. The owner said he had had the drawings revised by another party and had retained another contractor to build the residence. However, construction could not start until the building permit was issued and the owner asked Roe to furnish signed copies of his calculations and to review and sign the drawings as they had been altered to reflect the changes required by the building department. Roe complied with this request and the owner paid him the balance of the fee due under the original agreement with Jones. The building permit was issued and construction commenced, with Roe providing inspection services for the substructure and superstructure. Jones has alleged that Roe was unethical by accepting remuneration from another party for services rendered under the original agreement with him.

Question:
Was Roe unethical in undertaking to complete the engineering work directly for the owner under the circumstances stated?

References:
Code of Ethics-Section 1(d)-He will not accept outside employment to the detriment of his regular work or interest, or without the consent of his employer.

Section 10-The Engineer will not accept compensation, financial or otherwise, from more than one interested party for the same service. or for services pertaining to the same work, unless there is full disclosure to and consent of all interested parties.

Section 11(a)-The Engineer will not attempt to supplant another engineer in a particular employment after becoming aware that definite steps have been taken toward the other's employment.

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Section 11(e)-While in a salaried position, he will accept part-time engineering work only at a salary or fee not less than that recognized as standard in the area.

Section 12(a)-An Engineer in private practice will 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.

Discussion:
We first dispose of what we consider to be tangential issues before turning to the primary question, which we construe to be the application of Section 10 to this set of facts.

Section 1(d) would apply to Roe only if it were shown that his work for Jones and subsequently for the owner interfered or conflicted with his regular work for his employer. In the absence of such a showing and on the basis of a totally different kind of project involved, we do not think it was necessary for Roe to seek the consent of his employer, assuming, as we do, that Roe's activities for Jones and subsequently for the owner were not of such extent to adversely affect the performance of his regular duties.

We further assume that there is no charge or basis for imposition of Section 11(a). We have repeatedly held that there is not an act of unethical supplanting where the client retains a new engineer after having terminated his contract with the original engineer. Nor is there any charge or showing that Roe's fee arrangement was less than that recognized as standard in the area for similar type of services. And Section 12(a) recognizes that one engineer may review the work of another engineer for the same client if the engineer whose work is being reviewed no longer has a contractual arrangement with the client. That is the case here. We would add, however, that whereas Section 12(a) refers to an engineer in private practice its command would apply here if otherwise applicable regardless of the fact that Roe was not in private practice on a full-time basis. For the purpose of his activity under the conditions indicated and for this purpose of this case he would be regarded as being in private practice within the meaning of Section 12(a).

We turn then to the main issue- whether Roe could ethically proceed with the work for the owner in the absence of consent from Jones. It is clear that Roe accepted compensation from the owner for that portion of the work for which Roe had not been paid. It is not clear whether there had been full disclosure to Jones prior to the performance of Roe's services directly to the owner, but there is no doubt that Jones did not give his consent to the arrangement inasmuch as he now contends that Roe was unethical for completing the work needed to obtain the building permit.

In Case 68-3, the majority ruled that the engineer who had been retained by the architect could not ethically accept a contract with the owner. In that case the architect had not been terminated by the owner and he felt that he had the responsibility to correct the problem that the owner wanted to retain the engineer to correct. In the present case Jones' contract was terminated by the owner.

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In Case 68-12, the engineer designed the utilities for a developer and was compensated for his services by the developer. The project was cancelled due to litigation between the developer and the property owner. We ruled it would be unethical for the engineer to sell his plans to the owner or another developer, since the engineer would be performing service pertaining to the same work without consent of the party that paid his initial fee. In the present case. Roe is not being paid twice for the same service, but is being paid for a subsequent service so that the owner can complete his house.

In Case 67-3, even though decided under a substantially different set of circumstances, we held out the general principle that the primary duty of an engineer is to look to the ultimate interests of the client, rather than to rely on contractual technicalities which would be detrimental to the interests of the client. In the case before us, Jones was the original client of Roe, but his beneficial client was the owner. If Roe could not ethically furnish the services needed to obtain the building permit the owner would have been required to start anew with an engineer to prepare the necessary calculations and drawings, thereby delaying the start of his project as well as incurring additional costs.

We do not think that this result is consistent with the intent and purpose of Section 10, and we therefore believe that when Section 10 refers to an "interested party" it does not apply to a party who is involved in furnishing services to the ultimate client and who fails to complete those services for the ultimate client, whether or not the failure to complete those services was or was not his fault. That issue as between Jones and the owner can be resolved through usual procedures; in the interim an engineer who was involved in helping the owner achieve his objective through performance of services to the prime contractor may complete his services for the benefit of the owner under the conditions established in this case.

Conclusion*:
Roe was not unethical in undertaking to complete the engineering work directly for the owner under the circumstances stated.

***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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