Report on a Case by the Board of Ethical Review

Case No. 83-6

Reviewing Work Of Another Where Former Engineer Is in Litigation With Client

Facts:
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 does not proceed to the construction phase, and therefore, Engineer A does not perform inspection services. The client pays Engineer A what the client believes constitutes just compensation for the design services rendered. Engineer A disagrees with the client's determination, stating it is arbitrary. After a period of negotiation, Engineer A brings a suit against the client for additional compensation under the terms of the contract.

Two years later while the litigation is pending, the client decides to proceed with the project to completion, contacts Engineer B and asks Engineer B to review and modify the plans and specifications of the work product developed by Engineer A. Engineer B agrees to perform the services for the client.

Question:
Was it 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?

Reference:
Code of Ethics - Section III.8.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."

Discussion:
The facts of this case are similar to a recent case decided by the Board. In Case 79-7, where an engineer was asked to inspect mechanical and electrical engineering work performed seven years earlier, the Board concluded that the engineer was not unethical in taking the assignment and in rendering the report to the owner. In that case, the Board 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 Board said: "It may be helpful for future guidance to again point out that the purpose of Section 12(a) (now Section III.8.a.) 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." Since the decision by the Board in Case 79-7, the Code of Ethics has been amended in several aspects. However, Section 12(a) of the predecessor Code was carried over verbatim to

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the new Code as Section III.8.a. Therefore, we have no trouble in concluding that Case 79-7 is still a proper interpretation of the Code.

However, as is apparent from a reading of the facts in the instant case, unlike Case 79-7, Engineer B did not give Engineer A notice of the fact that Engineer B would be retained to perform review and inspection services for the client. In addition, there is nothing to indicate in the facts that Engineer A knew or had any reason to know that Engineer B agreed to perform those services for the client. Therefore, in order to decide if Engineer B's actions conformed to the Code of Ethics, the Board must determine that Engineer A's connection with the client's work had been terminated.

Aside from any contractual obligations which may remain between the owner and the engineer, which may be settled by mutual agreement or as here by recourse to legal proceedings, it has long been held that the owner has a right to terminate the services of the engineer at the owner's pleasure. The Code of Ethics makes it absolutely clear that the engineer is to act as a faithful agent or trustee in dealings with the client and as such serves at the full discretion of the client. Even should the owner's decision be based upon whim, caprice, or unsound motivation, it does not alter the owner's right to have the engineer of choice. (See BER Case 59-2.) Nevertheless, there is also little doubt that an engineer is entitled to just compensation for services rendered and engineers have an ethical obligation to see to it that in competing with other engineers, their actions do not in any way impede or interfere with the ability of another engineer to be justly compensated.

Under the facts presented in this case it is arguable that the actions of Engineer B, in agreeing to perform services for the client, may have interfered with Engineer A's ability to perform under the terms of the agreement that Engineer A negotiated with the client. For example, had Engineer B not agreed to perform the services as described above, Engineer A may have been able to negotiate a settlement in his dispute with the client using future inspection and other services as a "bargaining chip" in the negotiations. In addition, it is possible that a court could require the owner to specifically perform the terms of the original contract between owner and Engineer A. However, such an argument is highly speculative and probably does not accurately reflect the realities of the situation. In most, if not all cases such as here, once a client is sued by an engineer, the relationship is irreparably damaged and no chance exists for a reconciliation. The relationship between the owner and the engineer is founded upon trust and loyalty and once the parties enter into litigation, each naturally views the other as an adversary. Therefore, it is the view of the Board that Engineer B's agreement to perform services for the client did not constitute unfair competition with Engineer A or interfere with Engineer A's ability to be justly compensated.

Nevertheless, a question still remains which must be addressed: Had Engineer A's connection with the client in fact been terminated? Litigation, although a proceeding intended to settle pending claims, must be considered evidence of the termination of a relationship. Were it to be viewed otherwise, both engineer and client would be considered to have an ongoing relationship long after the possibility of any reconciliation

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had expired. Based upon the above discussion, there is little doubt that such a termination had occurred.

Although some uncertainty exists as a result of the litigation between Engineer A and the owner, the Board feels compelled to discuss the issues presented in the most realistic light possible. Certainly a possibility always exists that an owner may rekindle his relationship with an engineer with which he formerly dealt. But a severance must be found at some point so that another engineer interested in performing services for a client may ethically proceed. We are convinced that litigation is clear enough severance and therefore find that Engineer B acted ethically when he agreed to perform review and modification services for the client even though Engineer A was engaged in litigation with the client.

The Board wishes to emphasize the point raised in Case 79-7. Although Section III.8.a. of the Code no longer requires one engineer to notify another engineer that he will be reviewing the second engineer's work, once the other engineer's relationship with the client is terminated, we think that such notice would be good professional practice. If the other engineer is willing to cooperate, we think such cooperation is advisable and should be encouraged.

Conclusion:*
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.

*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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