REVIEWING AND REDESIGNING THE WORK OF ANOTHER ENGINEER

Case No. 99-10

Facts:

Engineer A is retained by Client E, a local board of education, to investigate a recently constructed building project that is expected to result in litigation due to alleged design defects by Engineer B and its sub-consultants. At Client E's request, Engineer A prepares a deficiency evaluation report for Client E without contacting Engineer B, who has not been terminated, and Engineer A is paid for the report. The report advises Client E on how to reconstruct the alleged deficiencies that Engineer A alleges to have taken place. Engineer A is then requested by Client E to serve as an expert witness prior to and during the litigation against Engineer B and its sub-consultants. Later, Client E requests Engineer A to submit a proposal for the correction of the alleged design defects by Engineer B. Engineer A agrees to submit a proposal.

Questions:

1. Was it ethical for Engineer A, without notifying Engineer B, to submit the design deficiency report?

2. Was it ethical for Engineer A to then submit a proposal to correct the alleged design defects by Engineer B?

References:

Section II.4.a.	-	*Code of Ethics:*	*Engineers shall disclose all known or potential conflicts of interest which could influence or appear to influence their judgment or the quality of their services.*
Section III.6.a.	-	*Code of Ethics:*	*Engineers shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised.*
Section III.7.a.	-	*Code of Ethics:*	*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:

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The Board has considered cases involving reviewing the work of another engineer and liability issues in the past. BER Case No. 91-2 involved a Client, a non-engineer who retained Engineer A (a consulting engineer) to perform certain design services in connection with a wastewater treatment facility. Engineer A performed the design services, and the Client reviewed the documents prepared by Engineer A. Following review, Client made the judgment that the documents prepared by Engineer A contained errors and omissions. Client terminated his relationship with Engineer A. Client then contacted Engineer B and proposed an arrangement whereby Engineer B would review the work prepared by Engineer A and identify errors and omissions contained in the documents in contemplation of a suit for breach of contract. Engineer B's fee was dependent upon the ultimate court judgment or settlement made with Engineer A. Engineer B accepted the assignment under the terms proposed by Client. The Board of Ethical Review followed the reasoning in early BER Case Nos. 65-4 and 66-11 and ruled that the actions were not ethical. The Board concluded that Engineer B was being placed in a position of identifying errors and omissions in Engineer A's work in order to pressure Engineer A into a settlement which would result in a fee for Engineer B. By finding no errors and omissions in Engineer A's work, there would be no fee. These circumstances appear to be just the very factors for which NSPE Code Section III.7.a. was intended to guard against. The Board noted that it would be difficult to imagine a clearer set of circumstances involving a contingent fee arrangement, in which an engineer's professional judgment could risk becoming compromised.

While the facts and circumstances in the present case are somewhat different than those in the earlier cited cases, the Board is not entirely comfortable with the sequence of events and the actions of Engineer A in connection with Engineer A's preparation of the deficiency report relating to the project, as well as follow-up services to Client E. As a general rule, engineers should 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 Code Section III.7.a. is intended to protect the interests of Client E and other similarly situated clients by requiring the subsequent engineer (Engineer A) to make contact with the original engineer (Engineer B) and inquire the reasoning and rationale for original engineer's design decisions in connection with the project. This provision is designed to stimulate discussion in pursuit of the best solution for the client, encourage greater cooperation and mutual respect among engineering peers, and avoid the quick move toward an adversarial posture among the parties. In some cases the subsequent engineer may find that the original engineer may be reluctant to communicate his reasoning and rationale to the subsequent engineer, particularly in view of the possibility or in this case the probability of litigation. Nevertheless, the subsequent engineer has an affirmative obligation under the NSPE Code to, at a minimum, provide appropriate notice to the original engineer of the subsequent engineer's review of the work. On that basis, it is the Board's view that Engineer A

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had an obligation to at least communicate with Engineer B prior to submitting the deficiency report to Client E.

Regarding Engineer A's submitting a proposal to correct the alleged design defects by Engineer B, we believe the analysis of this issue is much the same as the analysis of Engineer A preparing the deficiency evaluation report. Having not provided adequate notice to Engineer B, Engineer A did not have the benefit of the input from Engineer B concerning the original design. While it may have appeared clear to Engineer A that defects existed and that additional design work would be necessary for the benefit of the client, there may have been additional approaches that might have surfaced in Engineer A's discussion with Engineer B that could have benefited Client E. For example, in light of the possibility of litigation, Engineer B might have been willing to provide a portion of the corrected work under Engineer A's review in exchange for an agreement on the part of Client E not to pursue a lawsuit against Engineer B and his subconsultants. However, by taking the actions he did, Engineer A may have effectively foreclosed the possibility of a mutually beneficial resolution of this matter.

Conclusions:

1. It was not ethical for Engineer A to submit the design deficiency report without notifying Engineer B who had not been terminated.

2. Since Engineer A did not notify Engineer B, it was not ethical for Engineer A to submit a proposal to correct the alleged design defects by Engineer B.

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