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(Review and Reconsideration of BER Case No. 97-12)

Case No. 99-13

Facts:

Engineer A is employed by SPQ Engineering, an engineering firm in private practice involved in the design of bridges and other structures. As part of its services, SPQ Engineering uses a CAD software design product under a licensing agreement with a vendor. Under the terms of the licensing agreement, SPQ Engineering is not permitted to use the software at more than one workstation without paying a higher licensing fee. SPQ Engineering ignores this restriction and uses the software at a number of employee workstations. Engineer A becomes aware of this practice and calls a "hotline" publicized in a technical publication and reports his employer's activities.

Question:

Was it ethical for Engineer A to report his employer's apparent violation of the licensing agreement on the "hotline" without first discussing his concerns with his employer?

References*:*

Section I.6.	-	*Code of Ethics:*	*Conduct themselves honorably, responsibly, ethically and lawfully so as to enhance the honor, reputation and usefulness of the profession.*
Section II.1.c.	-	*Code of Ethics:*	*Engineers shall not reveal facts, data or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
Section II.1.d.	-	*Code of Ethics:*	*Engineers shall not permit the use of their name or associate in business ventures with any person or firm which they believe is engaged in fraudulent or dishonest enterprise.*
Section II.1.e.	-	*Code of Ethics:*	*Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required.*
Section II.4.	-	*Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section III.1.	-	*Code of Ethics:*	*Engineers shall be guided in all their relations by the highest standards of honesty and integrity.*
Section III.9.	-	*Code of Ethics:*	*Engineers shall give credit for engineering work to those to whom credit is due, and will recognize the proprietary interests of others.*

Discussion:

When this case was originally decided in 1997 (See BER Case No. 97-12), it was determined that it was not ethical for Engineer A to report his employer's apparent

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violation of the licensing agreement on the "hotline" without first discussing his concerns with his employer. Citing earlier NSPE Board of Ethical decisions, the Board determined that the facts and circumstances were not of a character that involve any danger -- direct or indirect -- to the public health and safety. Instead, the facts and circumstances related to matters of a legal nature and do not relate to engineering judgment or expertise. The Board noted that NSPE Code Section II.4. places a basic obligation on engineers to be faithful agents and trustees in professional matters with their employers. The Board also noted that it was troubled that Engineer A did not consider other less adversarial and surreptitious alternatives. For example, Engineer A could have first discussed this matter with his employer, pointing out the possible damages that the violation posed to SPQ Engineering, and suggesting that SPQ Engineering confer with its legal counsel before continuing its current actions. Instead, Engineer A took a course of action that could cause significant damage to SPQ Engineering and ultimately to Engineer A himself. The Board was inclined to wonder about the motivation for Engineer A's actions without his first exploring other less adversarial and surreptitious alternatives -- in view of the lack of any direct danger to the public health and safety. While, in the context of the facts of this case, the Board could not conclude that this provision compels Engineer A to ignore an apparent violation of the law and the NSPE Code (See NSPE Code Section III.9.), the Board concluded that Engineer A could have easily exercised far greater judgment and professional discretion before taking action. Therefore, it was the Board's opinion that A's action in reporting his employer's apparent violation, without first pursuing alternative actions open to him, was in conflict with the Code of Ethics.

Engineer A has an obligation to pursue this matter with SPQ Engineering. If a satisfactory ethical resolution cannot be reached, he is obligated to report the violation to the vendor. In addition, he should reconsider (under Code Section II.1.d.) his further association with a firm which has shown itself engaged in fraudulent and dishonest enterprise.

The Board also noted that the facts and circumstances involved in this case are probably most analogous to earlier Board of Ethical Review cases dealing with the issue of whistleblowing (See BER Case Nos. 82-5 and 88-6). The Board noted its belief that those two cases were instructive and relevant to the matter presently before the Board, for at least two significant reasons: First, the two cases drew a clear distinction between those matters that involve possible apparent improprieties and those that involve a probable or imminent danger to the public health and safety. Although not stated directly in either earlier case, adding further support to this basic principle is the fact that the language in NSPE Code Section II.1.e. is within the "Rule of Practice" section specifically relating to the engineer's paramount obligation to protect the public health and safety. Second, the circumstances involved in both BER Case Nos. 82-5 and 88-6 appear to involve situations where the engineers have at least made an effort

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to exhaust all internal mechanisms before contemplating taking action by reporting the dangers to the proper authorities.

Following issuing its ruling in BER Case 97-12, the Board of Ethical Review has had cause to review its decision. Among the causes for review include comments expressed by others who have concluded that the opinion could be read to suggest that engineers may ethically tolerate unlawful actions by their employers or their clients. Others have noted BER Case No. 97-12 suggests that an engineer that brings unlawful actions to the appropriate authorities would be acting unethically. Additional comments noted that the opinion did not recognize the possibility of retribution by the employer against the engineer and also did not condemn or criticize the employer for its improper actions and bad conduct. While the present members of the NSPE Board of Ethical Review do not construe BER Case No. 97-12 to indicate those conclusions, the Board wishes to clarify its intent in rendering its opinion under the facts. The Board believes its intent was to recognize the right and the obligation of the engineer to report such violations as appropriate. At the same time, the Board continues to believe that as a professional, an engineer should always exercise judgment and discretion when confronting a situation such as the one presented under the facts. Depending upon all of the facts and circumstances, an engineer should take reasonable steps to exhaust all appropriate alternatives before taking an extreme action, such as reporting an employer or a client for their actions, particularly where such actions do not appear to result in physical harm or danger to the public health or safety. At the same time, engineering managers acting for an employer who knowingly act in an unlawful manner or who take retaliatory actions against another engineer who brings such matters to their attention are ignoring the basic principles contained in the NSPE Code of Ethics and are acting unethically.

Conclusion:
It was not ethical for Engineer A to report his employer's apparent violation of the licensing agreement on the "hotline" without first discussing his concerns with his employer. Engineering firms acting through engineering managers who willfully ignore licensing agreement restrictions are in violation of the NSPE Code of Ethics.

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context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

Each opinion is intended as guidance to individual practicing engineers, students and the public. In regard to the question of application of the NSPE Code to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services -- which services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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