

Objectivity and Truthfulness—Previously Encountered Site Conditions

Case No. 16-8

Facts:

Engineer A is contacted by Client B, seeking Engineer A's services as part of the design of a new facility for Client B. Following discussions with Client B regarding the scope of work to be performed by Engineer A and after Engineer A's preliminary investigation and inspection of the site, the preparation of a preliminary estimate of the amount of time it would take to complete the assignment, Engineer A advises Client B that the work could be completed within 150 hours under a "best-case scenario." At the time of these discussions, Engineer A knew that a similar nearby facility in which Engineer A was involved in for another client, Client C, encountered unanticipated site conditions that resulted in significant additional time for Engineer A to complete the final design. The previously encountered site conditions ultimately resulted in Engineer A significantly exceeding his original estimate and, as a result, additional costs to Client C. Engineer A did not disclose to Client B the circumstances involved in the unanticipated site conditions that resulted in significant additional time for Engineer A to complete the final design for Client C.

Question:

Was it unethical for Engineer A to fail to disclose to Client B the unanticipated site conditions that resulted in significant additional time for Engineer A to complete the final design for Client C?

NSPE Code of Ethics References:

- Section II.3. - Engineers shall issue public statements only in an objective and truthful manner.*
- Section II.3.a. - Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.*
- Section II.4. - Engineers shall act for each employer or client as faithful agents or trustees.*
- Section II.5. - Engineers shall avoid deceptive acts.*
- Section III.1.b. - Engineers shall advise their clients or employers when they believe a project will not be successful.*
- Section III.3.a. - Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.*

NSPE BER Case References: 79-6; 83-1

Discussion:

A professional engineer has an obligation to act as a faithful agent and trustee to a client in the performance of professional services. This involves general candor and honesty in written and oral communications to the fullest extent possible. How far this obligation extends to clients and potential clients has been the subject of many NSPE Board of Ethical Review opinions over the years.

For example, in an early BER Case 79-6, Engineer A published an advertisement in the classified section of a daily newspaper under the heading, “Business Services,” which read in full: “Consulting Engineer for Industry. Can reduce present process heating fuel consumption by 30% to 70% while doubling capacity in same floor space. For more information contact Engineer A, telephone 123-456-7890.” In finding that it was unethical for Engineer A to use this advertisement, the Board noted that it is apparent that Engineer A could not honestly make a factual statement about the savings to be expected by clients attracted by his advertisement, not even knowing who those clients might be, or the nature of their facilities. The ostensible purpose of such a broad and sweeping claim of savings must be to attract inquiries, presumably to be followed by a proper technical analysis of the client’s problem or need. That analysis might or might not support the basis for savings to be achieved by retaining the services of Engineer A.

Later, in BER Case 83-1, Engineer A worked for Engineer B. Engineer B notified Engineer A that Engineer B was going to terminate Engineer A because of lack of work. Engineer A continued to work for Engineer B for several additional months after the termination notice. During that period, Engineer B distributed a previously printed brochure listing Engineer A as one of Engineer B’s key employees and continued to use the previously printed brochure with Engineer A’s name in it well after Engineer B did in fact terminate Engineer A. The Board ruled that it was not unethical for Engineer B to distribute a previously printed brochure listing Engineer A as a key employee providing Engineer B apprised the prospective client during negotiation of Engineer A’s pending termination. The Board also ruled that it was unethical for Engineer B to distribute a brochure listing Engineer A as a key employee after Engineer A’s actual termination.

Interpreting the meaning of Section II.5.a, the Board at the time noted that the words “pertinent facts” are those facts that have a clear and decisive relevance to a matter at hand. Another way to characterize pertinent facts is as those that are “relevant and highly significant.” At the time, the Board examined whether (1) Engineer B in fact misrepresented “pertinent facts” and (2) whether it was the intent and purpose of Engineer B to “enhance the firm’s qualifications and work.” The Board noted that both factors must be present for a violation of Section II.5.a to exist. The Board added that it is not unusual for an engineering firm that seeks to promote itself for business reasons to include in such a brochure a statement of the firm’s experience, history, and qualifications, as well as the names and qualifications of the members of the firm. The Board said that the names of the firm’s members are often quite significant to the client selecting the firm. The client may be familiar with an individual member of the firm, as represented in the brochure. The Board concluded that the inclusion of the name of Engineer A in the firm’s brochure constituted a misrepresentation of “pertinent facts.”

Under the facts in the present case and based on the Board’s reasoning in BER Case Nos. 79-6 and 83-1, it is this Board’s view that Engineer A’s failure to disclose what can best be characterized as “relevant and highly significant” facts that Engineer B clearly had within his possession was unethical. While this Board cannot know what Client B’s reaction or response would have been to Engineer A’s full disclosure of the unanticipated site conditions that resulted in significant additional time for Engineer A to complete the final design for Client C, it is clear that such information would be important to Client B in making a decision. Client B may have decided to simply proceed with the project with appropriate budget adjustments, modify the scope of services, seek the services of another professional engineer, or pursue some other alternative course of action. However, it was Engineer A’s responsibility to place all of the relevant and highly significant facts before Client B in order for Client B to make an informed decision. In addition, the fact that Engineer A couched his response with the phrase under a “best-case scenario” does not constitute sufficient notice to Client B regarding the possibility that the 150-hour projection would be exceeded. In fact, that statement may have been intended as a means of providing “cover” to Engineer A if the project encountered unanticipated site conditions—particularly considering that Engineer A was fully aware of a similar situation with Client C. Engineer A’s failure to share that information with Client B suggests an intent to withhold information that would have benefitted Client B.

Conclusion:

It was unethical for Engineer A to fail to disclose to Client B the previously encountered site conditions that resulted in significant additional time for Engineer A to complete the final design for Client C.

Board of Ethical Review:

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