

Contracts—Fiduciary Duty

Case No. 18-12

Facts:

Engineer A is a professional engineer in private practice and is negotiating a contract with Client X for the design and construction of a building. Client X places a provision in the contract that states: “Engineer A shall act as a fiduciary on behalf of Client X in the performance of engineering services for the benefit of the client.” A fiduciary is a person who is required to act for the benefit of another (here, Client X) on all matters. The fiduciary owes the other party the duties of good faith, trust, confidence, and candor in all matters within the scope of the relationship.

Question:

Would it be ethical for Engineer A to agree to a contractual provision to act as a fiduciary on behalf of Client X?

NSPE Code of Ethics References:

- Preamble* - *Engineering is an important and learned profession. As members of this profession, engineers are expected to exhibit the highest standards of honesty and integrity. Engineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare. Engineers must perform under a standard of professional behavior that requires adherence to the highest principles of ethical conduct.*
- Section I.4.* - *Engineers, in the fulfillment of their professional duties, shall act for each employer or client as faithful agents or trustees.*
- Section II.4.* - *Engineers shall act for each employer or client as faithful agents or trustees.*
- Section III.8.* - *Engineers shall accept personal responsibility for their professional activities, provided, however, that engineers may seek indemnification for services arising out of their practice for other than gross negligence, where the engineer’s interests cannot otherwise be protected.*

NSPE BER Case References: 93-8, 96-12

Discussion:

As professionals, licensed professional engineers are expected to perform at a level that meets the professional standard of care. This standard is generally expressed as “the exercise of such care, skill, and diligence as other professional engineers ordinarily exercise under like circumstances in the same geographic area.”

In past cases, the NSPE Board of Ethical Review has examined the professional standards to which professional engineers are generally held. For example, in BER Case No. 93-8, Engineer A required a broad indemnification provision in Engineer A’s agreements, where Engineer A provided pollution-related services. Under the agreement, the client was required to “indemnify and hold harmless Engineer A for any damages or legal costs (including attorney fees) arising from

Engineer A's negligence in the performance of pollution-related services." Engineer A had inserted the indemnification provision during the early 1980s at the time of the "liability crisis" because of the unavailability of pollution-related insurance coverage, but since that time the insurance industry had reentered the pollution insurance market and provided limited pollution coverage for an additional premium. In deciding that Engineer A's actions in BER Case No. 93-8 were unethical, the BER noted that since the change in Section III.8. of the NSPE Code of Ethics, the professional liability insurance market had changed significantly and that most major professional liability insurers in the US today had reentered the A/E professional liability insurance market. Additionally, many insurers offered some type of limited coverage for both pollution and asbestos-related services. For these reasons, consistent with the intent of NSPE Code Section III.8. and the intent of the changes made to NSPE Code Section III.8. during the height of the "liability crisis," the BER concluded that there was a need to further amplify the extent to which engineers should appropriately avail themselves of the scope of NSPE Code Section III.8. In the BER's view, NSPE Code Section III.8. should be read in the context of indemnification to mean that an engineer has an obligation to accept responsibility for professional activities and, where appropriate, obtain professional liability or other protection for the benefit of the engineer's client to the extent that such professional liability or other protection are available either in the market or in other spheres. In reaching this conclusion, the BER specifically noted that the cost and scope of professional liability insurance continued to be prohibitive for some practitioners and that the failure to obtain professional liability insurance is not in any sense a breach of ethics. However, the BER noted that where such protections are reasonably available and affordable to the engineer to guard the interests of both the client and the engineer, barring special or additional circumstances, the engineer has an ethical obligation to obtain such protection and not seek indemnification from the client for ordinary negligence. Among the reasons for the BER's decision in BER Case No. 93-8 was its clear concern over Engineer A's reflexive use of an indemnification provision without any apparent regard or examination as to whether his interests could otherwise be protected as stated in the NSPE Code Section III.8.

Later in BER Case 96-12, Engineer A performed hazardous waste remediation services for his clients. In drafting the contractual agreement that he used with his clients, Engineer A determined that he must include an indemnification provision whereby the client shall be required to "indemnify and hold harmless Engineer A for any damages or legal costs (including attorney fees) arising from the performance of the hazardous waste remediation services." Engineer A's agreement, however, also included exclusionary language to the effect that the indemnification would not apply to losses resulting from Engineer A's "willful misconduct or sole negligence." Engineer A concluded that he was compelled to incorporate the indemnification provision into the agreement after carefully surveying and analyzing the hazardous waste insurance market and determining that the hazardous waste liability insurance coverage available at the time was inadequate to protect himself and his firm. In deciding that it was ethical for Engineer A to include in his contractual agreement with his clients a provision whereby the client is required to "indemnify and hold harmless Engineer A for any damages or legal costs (including attorney fees) arising from the performance of the hazardous waste remediation services," the BER noted that Engineer A acted reasonably and ethically because Engineer A carefully evaluated the facts

and circumstances involved and determined that the inclusion of the indemnification provision was the only reasonable means of protecting Engineer A's and Engineer A's firm's interests. In addition, the BER determined that under the facts and circumstances in the case, it was reasonable to expect the client to retain an appropriate level of liability exposure.

Turning to the facts in the present case, it is this BER's view that the previously cited cases illustrate the difficult professional liability issues faced by professional engineers in rendering professional services and the importance of establishing reasonable standards that both protect the client and the professional engineer. In this case, Client X is seeking to impose upon Engineer A a contractual provision that would establish fiduciary responsibility and liability upon Engineer A. Under the fiduciary liability standard, a standard higher than the professional standard of care normally imposed upon a professional engineer, Engineer A would be required to place the interests of the client ahead of the interests of other parties. Generally, a fiduciary is a person who is required to act for the benefit of another (here, Client X) on all matters. The fiduciary owes the other party the duties of good faith, trust, confidence, and candor in all matters within the scope of the relationship. While on its face, these obligations reflect some of the existing obligations stated in the NSPE Code of Ethics in Sections I.4. and II.4., unlike a provision in a contract document, those NSPE Code provisions cannot be read standing alone, separate and apart from all other provisions of the NSPE Code of Ethics, but instead must be read in the context of the remaining provisions of the NSPE Code of Ethics. As this BER case has stated and in other BER opinions on other occasions, the specific language of the NSPE Code of Ethics cannot be read in isolation, but instead must be understood in the broad context and in reconciliation with the entire NSPE Code of Ethics.

The concept of a fiduciary duty raises at least two significant issues in the context of professional engineering practice. First, a fiduciary duty imposes a higher standard of practice upon a professional engineer, a standard that exceeds what is legally required by the common law. This higher standard could expose a professional engineer to greater personal and professional liability and the engineer's employer to greater professional liability. Such liability exposure may not be covered under conventional professional liability insurance policies designed to cover professional engineers, placing both the individual engineer and the employer at heightened risk. Second, a fiduciary duty could require the professional engineer to place the client's interests and concerns above all others—and potentially interfere with the professional engineer's primary ethical obligation to hold paramount the public health, safety, and welfare. As an example, the fiduciary duty could create a conflict under which a professional engineer's fiduciary obligation to a client to maintain confidentiality could interfere with the professional engineer's paramount duty to report a situation that could endanger the public health and safety. In addition, the fiduciary responsibility could interfere with the engineer's contractual role as the impartial initial arbitrator of disputes between the client and the contractor. For the reasons stated, the BER has concerns regarding the advisability of a professional engineer agreeing to a fiduciary standard due to the potential for muddying professional liability and ethical issues.

In closing, the BER would strongly urge that any professional engineer agreeing to a fiduciary duty and fiduciary liability should do so with the full knowledge of their employer and with appropriate advice from legal and insurance counsel.

Conclusion:

While the BER cannot say that entering into such an agreement is on its face a breach of engineering ethics, at a minimum, a professional engineer agreeing to a fiduciary liability standard must clearly communicate to any other contracting party (here, Client X) that Engineer A's paramount obligation is to protect the public health and safety. The engineer should negotiate additional language in the agreement recognizing this fundamental ethical obligation.

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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 of Ethics to engineering organizations (e.g., corporations, partnerships, sole proprietorships, government agencies, and university engineering departments), the specific business form or type should not negate nor detract from the conformance of individuals to the Code. The NSPE Code deals with professional services, which must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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