

Misrepresentation—Obligation to Report/Impact on Client

Case No. 18-3

Facts:

Engineer A, a licensed professional and forensic engineer, is hired by Attorney B to serve as an expert witness during a civil trial on behalf of Party C. Prior to the trial, Engineer A learns that Engineer D will be called by Attorney E to serve as the opposing expert on behalf of Party F. Engineer A reviews Engineer D's credentials and discovers that Engineer D is misrepresenting himself as a licensed professional engineer on his business website, stationery, signatures, etc. Engineer A advises Attorney B of Engineer D's misrepresentation. Subsequently, when Engineer D is deposed, it becomes clear that he was never licensed in any state or territory. Just prior to a follow-up deposition of Engineer D a few months later, Engineer A notices that Engineer D is no longer representing himself as a professional engineer on his business website, stationery, signatures, etc.

Engineer A confers with Attorney B regarding the possibility of reporting Engineer D's earlier misrepresentation to the state licensing authorities. Attorney B asks that Engineer A not report Engineer D's actions until the legal proceedings are complete because doing so could potentially harm the interests of Party C. Specifically, Attorney B explains that reporting the matter would appear that Engineer A was making an "unwarranted and uncalled for" attack on Engineer D merely to weaken Engineer D's effectiveness as an opposing expert, which could potentially backfire on Client C. In addition, Attorney B explains that he believes that the case will probably go to trial and that this misrepresentation will be exposed during Attorney B's cross-examination of Engineer D, which will place his misrepresentation before the court.

Question:

What action should Engineer A take in connection with Engineer D's misrepresentation as a licensed professional engineer?

NSPE Code of Ethics References:

- 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.1.e.* - *Engineers shall not aid or abet the unlawful practice of engineering by a person or firm.*
- Section II.1.f.* - *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.* - *Engineers shall act for each employer or client as faithful agents or trustees.*

- Section II.5.a. - *Engineers shall not falsify their qualifications or permit misrepresentation of their or their associates' qualifications. They shall not misrepresent or exaggerate their responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint venturers, or past accomplishments.*
- Section III.3.a. - *Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.*
- Section III.7. - *Engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of other engineers. Engineers who believe others are guilty of unethical or illegal practice shall present such information to the proper authority for action.*

NSPE BER Case References: 90-3, 90-4, 93-2, 91-9, 06-4, 15-2

Discussion:

Fundamental to the practice of professional engineering is compliance with state engineering licensure laws. Licensed professional engineers must be scrupulous in adhering to the specific requirements of engineering licensure, including adherence to the provisions of state laws and regulations.

As noted by the NSPE Board of Ethical Review in BER Case No. 93-2, there is a great deal of interest within the engineering community regarding the manner in which engineers in this country are licensed from state to state. Part of the discussion has involved a desire to simplify comity procedures that often create difficult hurdles for engineers to become licensed in multiple states. While regulators have justified these procedures as a method to screen out incompetent practitioners and maintain standards of practice, others have argued that the procedures have the effect of protecting and preserving engineering markets for those already licensed within the state. However, in recent years, many states have implemented expedited comity procedures to allow for greater interstate practice.

The NSPE Board of Ethical Review has addressed ethical issues relating to engineering licensure on a number of occasions. For example, in BER Case No. 90-3, the BER considered a case involving a prominent consulting engineer who was licensed in states 1, 2, and 3, and who had on other occasions performed forensic engineering services in connection with accident reconstruction. The engineer was retained by an attorney in state 4 to prepare a report to determine the actual cause of the accident. The engineer was also asked to express a professional opinion during a trial on matters relating to the safety and design of equipment that may have failed, causing the accident. In deciding that it was not unethical for the engineer to offer testimony in the manner described, the BER noted that engineers who engage in the practice of engineering or who hold themselves out as engineers to the public have a legal, as well as an ethical, obligation to make certain that they are professional engineers licensed in accordance with the laws of the state. While the BER indicated that a determination of this issue must find resolution within each state on a case-by-case basis—depending on the nature of the services provided, the language contained in the state engineering licensure law, and other

considerations with respect to the narrow issue of an individual serving as a technical expert—the BER pointed out that, as a general proposition, it was generally acknowledged that a non-licensed individual may be qualified as a technical expert by a court without possessing the minimum legal recognition as demonstrated by a professional license.

In BER Case No. 93-2, Engineer A, a professional engineer with expertise in mechanical systems, was a sole practitioner in a small consulting firm in State X and had a business card indicating that he was a professional engineer. Engineer A was not licensed in State X but was licensed in State Y. The bulk of Engineer A's work involved work to be constructed in State Y. Client B contacted Engineer A to design a project that would be constructed in State X. After the work was completed, Client B learned that Engineer A was not licensed in State X but was licensed in State Y. Client B was then required to have another engineer either redesign the project or carefully review Engineer A's work before sealing it. As a result, Client B incurred additional expenses and delays in the construction of his project. In deciding that Engineer A's actions were unethical, the BER noted that Engineer A's failure to provide timely notice to Client B was a violation of the NSPE Code of Ethics Section III.3.a. Moreover, under the facts, it appeared that a legitimate question existed as to whether Engineer A's representation of himself as a professional engineer in State X was a violation of the engineering licensure laws in the state. Since Client B incurred additional expenses and delays in the construction of his project, Engineer A's actions compromised and jeopardized the interests of the client in violation of NSPE Code Section I.4.

Turning to the facts in the present case, the issues here require a balancing of the multiple considerations at stake in this matter regarding Engineer A's obligation to report violations of the state engineering licensing law as well as Engineer A's duty of loyalty to both Attorney B and Client C. As with many ethical issues, there must be a consideration of the practical implications of taking immediate action as opposed to delaying action in light of pending events. To paraphrase the Hippocratic Oath, an ethical oath subscribed to by physicians, the duty of every professional is first, to do no harm. In the context of the present case, in view of the fact that there does not appear to be an imminent harm in Engineer A's failure to take immediate action in reporting Engineer D's misrepresentation to state authorities, it is the BER's view that it would be appropriate in serving the best interests of Engineer A's client to refrain from reporting the misrepresentation to the state authorities since the violation has been resolved. While the BER takes seriously Engineer D's misrepresentation, a balance must be struck between the multiple considerations.

Conclusion:

It would be appropriate in serving the interests of Engineer A's client to refrain from reporting the misrepresentation to the state authorities since the violation has been resolved.

Board of Ethical Review:

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