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| Section II.2.a. | - Code of Ethics |
| Section II.3.b. | - Code of Ethics |
| Section III.9.a. | - Code of Ethics |

EXPERT TESTIMONY IN STATE WHERE NOT REGISTERED

FACTS:

Engineer A, a prominent consulting engineer who is registered in states 1, 2 and 3 and who has on one other occasion performed forensic engineering services in connection with accident reconstruction, is retained by an attorney in state 4 to inspect an accident for the purpose of determining the actual cause of the accident. Engineer A is also asked to express a professional opinion during a trial on matters relating to the safety and design of equipment which may have failed, causing the accident.

QUESTION:

Is it unethical for Engineer A who is not registered in state 4 to offer testimony in state 4 in the manner described?

REFERENCES:

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| Section II.2.a. | -Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved. |
| Section II.3.b. | -Engineers may express publicly a professional opinion on technical subjects only when that opinion is founded upon adequate knowledge of the facts and competence in the subject matter. |
| Section III.9.a. | -Engineers shall conform with state registration laws in the practice of engineering. |

DISCUSSION:

The field of forensic engineering has experienced a period of exceptional growth in recent years. Groups such as the National Academy of Forensic Engineers have attempted to promote professionalism and ethics among forensic engineers practicing throughout the United States. Groups such as the Association of Engineering Firms Practicing in the Geosciences have been instrumental in developing "Recommended Practices for Design Professionals Engaged as Experts in the Resolution of Construction Industry Disputes." The efforts of these and other groups have brought a significant amount of attention to the critical role that forensic engineers play in society and the important ethical considerations involved.

The Board has had occasion to consider cases involving the practice of engineering by forensic engineers. In case BER Case 71-4, Engineer X designed a facility for a client who, after construction of the project, filed a lawsuit against him claiming that the cost grossly exceeded the preliminary estimate and that there were numerous design errors. The client terminated the services of Engineer X upon the filing of the lawsuit and retained Engineer Y to study the work performed by Engineer X and to testify on the basis of his study as an expert witness at the trial on the client's behalf. Engineer Y prepared a report prior to the trial listing many alleged deficiencies in the work of Engineer X -- some dealing with overall design philosophy which are matters of judgment and opinion and others alleging factual defects in the design and construction.

The Board found that it would be ethical for Engineer Y to offer expert testimony at trial on alleged factual errors in the design by Engineer X, but that it would be unethical for Engineer Y to offer opinion on the design philosophy (merely a difference of opinion as to application of another valid solution) of Engineer X.

We continue to believe this distinction is an important one for all engineers to keep in mind. We interpret the facts in this case to be in accord with this principle.

Another basic principle which all engineers must acknowledge is the responsibility to limit one's practice to one's area of competence. This point was recently illustrated in BER Case 89-1. In that case, a professional engineer with a degree in mechanical engineering had worked 20 years for various design firms including several years with a major architectural firm. While the engineer took no course work in architecture during her undergraduate years, she gained a significant amount of knowledge about the practice of architecture as a result of her working in the mechanical engineering area with architects in private practice and managing various design projects. The engineer established her own engineering firm which employed no architects. Thereafter a developer asked the engineer to serve as the prime professional contract holder for the design of an office building complex. The engineer agreed and retained other engineers to perform the structural and electrical design, but did not retain an architect to perform the architectural design aspects of the work. Instead, the engineer performed those design services personally, drawing upon the knowledge gained while practicing alongside architects.

The Board found that it was ethical for the engineer to serve as the prime professional contract holder for the design of an office building stating:

"The obligation of engineers to perform services only in their area of competence is one of the most fundamental obligations owed by engineers. Like other professionals, engineers are educated, trained, tested and gain experience in a variety of highly technical areas."

The Board, citing BER Case 87-1 also went on to note:

"It is universally accepted that it is unprofessional for an engineer to attempt to practice in a field of engineering in which the engineer is not proficient. Most state engineering registration statutes or rules of professional conduct emphasize that conviction." (It should also be noted that in BER Case 89-1, the Board found it was unethical for the engineer to provide architectural services beyond those which were incidental for the design of an office building).

This point is also reinforced by the language of the Code of Ethics in Section II.2.a. It would seem therefore, that at a bare minimum, in order for an individual to properly engage in practice in a particular technical area, that individual must be able to clearly demonstrate a minimum level of competence to perform the required tasks.

Having said this, it is also basic that in order for an individual who possesses technical competence to properly perform professional services to make certain that those services are being performed in accordance with the laws of the state in which they are being performed.

Certainly, 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. Likewise it would seem that forensic engineers have an obligation to adhere to the laws in the state in which they are seeking to practice.

The fundamental question to be addressed in this case appears to be whether Engineer A acted improperly by providing professional services in state 4, a state in which Engineer A was not licensed. It appears that there are two basic issues which this Board needs to address to resolve this issue: (1) whether Engineer A's actions were consistent with the law; and (2) whether Engineer A's actions were ethical.

These questions must find resolution within each state on a case-by-case basis, depending upon the nature of the services provided, the language contained in the state registration law, and other considerations. Nevertheless, as a general proposition, it is generally acknowledged that an individual may be qualified as a technical expert by a court without possessing the minimum legal recognition as demonstrated by a professional license. Both state and federal courts adhere to this rule, and thus it would appear that unless a particular state licensing law prohibited individuals from performing services as an expert, there would not be any legal impediment to prevent an unlicensed individual from functioning as an expert. This being the case, it would appear that Engineer A's failure to be licensed in state 4 would not cause his actions in testifying in state 4 to be illegal.

Regardless of the legal question, we believe that where an individual offers testimony as an engineering expert, that individual has a professional obligation to demonstrate a minimum level of competence as required by the engineering registration laws. Those laws, which are intended to promote and protect the public health and safety, serve as a legal bench mark for engineers to demonstrate their professional competence in the field of engineering.

In the instant case, Engineer A met that standard by being registered in three other states. We believe it would be a hardship to require an engineer to be registered in all 50 states in order to serve as an expert in those states.

We would also add as a comment that while the legal system may not require an engineering expert to be licensed as a professional engineer in order to be qualified as an expert, in actuality, the legal system does recognize the importance of being licensed in another very crucial manner. During the litigation process, an individual who is not licensed in any state will undoubtedly be placed in the awkward position of having to explain why he or she has not met the minimum legal bench mark established under state law.

CONCLUSION:

It was not unethical for Engineer A who is not registered in state 4 to offer testimony in state 4 in the manner described.

Note: This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

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