



Advertising – Use of Technical Information by Contractor

Case No. 15-3

Facts:

Contractor X, who is a professional engineer, retains Engineer A to assist in residential foundation design. Engineer A is asked to design and seal the footing for basement walls and designs a spread footing to support the basement walls, which Engineer A believes is the appropriate design. Contractor X reviews the design and rejects it, instructing Engineer A to include 10-foot piles under the footings. Engineer A advises Contractor X that the 10-foot piles would provide an overly conservative foundation for the structure. Contractor X insists that Engineer A's design include the 10-foot piles under the footings. Engineer A later learns that Contractor X's insistence on including the 10-foot piles was because Contractor X wished to advertise the enhanced structural support in his marketing material.

Questions:

1. Was it ethical for Contractor X, a professional engineer, to insist on including the 10-foot piles under the footings?
2. Would it be ethical for Contractor X to advertise the enhanced structural support in his marketing material?

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.3.b. – Engineers may express publicly technical opinions that are founded upon knowledge of the facts and competence in the subject matter.

Section II.4.a. – Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.

Section III.3.a – Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.

BER Case References: 03-11; 64-8**Discussion:**

When engaged in promotional efforts, professional engineers have an obligation to engage in truthful and non-deceptive communications.

As the NSPE Board of Ethical Review noted in BER Case 03-11, professional advertising and the appropriate conduct related to advertising have long been issues within the field of engineering ethics. Throughout the history of the NSPE Board of Ethical Review, the BER has had occasion to decide a wide variety of cases relating to these issues. It is important to note at the outset, however, that as a general matter the NSPE Code of Ethics or other restrictions on non-deceptive advertising have been found to be unlawful by the United States Supreme Court and federal enforcement agencies. Therefore, it is clear that this Board may only pass judgment on advertising that is clearly deemed to be non-truthful or at the very least misleading and deceptive on its face.

As noted, while the issue of advertising has long been a subject of this Board, many if not most of this Board's opinions relating to advertising were decided under an earlier version of the NSPE Code of Ethics, which at the time deemed as unethical certain types of advertising determined to be unprofessional, including "self-laudatory comments." An example of such language was in the early BER Case 64-8, in which an engineering firm inserted in a magazine that circulated primarily to business subscribers a full-page advertisement, consisting of text and one simple illustration intended to depict savings in capital costs that could be accomplished by retention of an engineering firm.

The text of the advertisement emphasized through bold-faced, large type that there are two phases in the design of a process or a manufacturing facility during which professional consulting engineering, available from competent firms, can save substantial amounts of money: 1. when the project is conceived and is ready for planning and preliminary design, and 2. when detailed plans and specifications for construction are started. The text concluded with a further statement on savings to the client: "Quality design and engineering on a professional basis can save large amounts of capital funds for Clients.*" The asterisk points to a footnote in six-point type: "This applies whether [name of firm] does all the preliminary phase or reviews plans already developed by a company's own engineering staff." At the bottom of the full-page advertisement appeared the name and address of the firm in large type, and a partial list of clients in somewhat smaller type.

The engineering firm reprinted the advertisement in a format consisting of the cover of the issue of the magazine in which the advertisement appeared, the advertisement as originally published in the magazine, and the following statement on the facing page: "At [name of firm] we supply the basic services described in our advertisement in a special way. Our meticulous attention to detail from start to finish of a project has resulted in direct capital savings to our clients. Innovations in design which we have developed have

resulted in greater efficiency and production than was originally expected. We are prepared to discuss some typical projects with you and to explore how you, too, might use our professional and engineering services advantageously and profitably.”

In deciding that the advertisement by the engineering firm in its original form and the reprint containing the added objectionable statements were unethical, the Board noted that language of the additional quoted statement by the firm in the reprint of the advertisement was not in accord with the mandate of the NSPE Code of Ethics because it was self-laudatory in tone and implied superiority by the use of “our meticulous attention to detail” and “innovations in design which we have developed.” The Board also noted that the first paragraph of the additional statement was also objectionable in that it stated that the firm supplied services “in a special way.” The Board also noted that this type of language was not only self-laudatory, but also tended to reflect unfavorably on the dignity and honor of the profession.

We cite this early case to illustrate the dramatic changes that have occurred within the field of engineering since the Board’s rendering of its opinion in BER Case 64-8. In addition to changes in the legal landscape that render earlier NSPE Code of Ethics language and BER opinions invalid, many other changes have occurred within the field of engineering that would raise significant questions regarding the propriety of such earlier BER opinions. Engineering practice has become much more commercial, competitive, and market-driven, with marketing, sales, and advertising playing an increasingly more important part. With the increasing globalization of engineering practice and the heightened use of technology to deliver engineering services, it can be anticipated that those trends will continue for some time. It is clear that earlier notions about the propriety of advertising have become somewhat outdated and not in keeping with the current times. The Board recognizes its continuing role in carefully evaluating situations involving non-truthful or misleading and deceptive advertising claims and notes that these judgements will need to be made on a case-by-case basis—following a careful evaluation of all of the facts and circumstances.

More recently, in BER Case 03-11, Engineer A served as a principal at Topp-Flyte Engineering, a medium-sized engineering firm in South Northville, a medium-sized town. Engineers at the firm have received professional recognition by several South Northville engineering and technical organizations in the past year and in previous years. Recently Engineer A’s firm ran the following ad in a local newspaper:

“It says a lot when South Northville engineers recognize three members of one engineering firm in one year. It says even more when the same firm’s engineers are recognized for 18 years running. If you need engineering services, call the engineers other engineers have called the best: Topp-Flyte Engineers, the best in engineering...”

In deciding that it would be ethical for Engineer A's firm, Topp-Flyte Engineering, to run the advertisement in a local paper, the Board was not convinced that there was any basis to believe that the claims made by Engineer A and Topp-Flyte Engineering involved non-truthful or misleading and deceptive advertising claims as the Board understands the terms and as they have been interpreted as a matter of law. There is nothing in the NSPE Code of Ethics that prohibits "self-laudatory" advertising as in the past. Moreover, based on the facts that (a) Topp-Flyte Engineering had earned recognition for its achievements for many years, and (b) there was no indication that its statements were factually incorrect, the Board could not conclude that anything in the Topp-Flyte advertisement constituted non-truthful or misleading and deceptive advertising claims.

Looking at the facts in the present case, although the Board believes that Contractor X, a professional engineer, was attempting to use technical information to overstate the benefits of the 10-foot piles, the Board does not believe that Contractor X's actions reach the point of being unethical. While the 10-foot piles would provide additional unneeded support for the structure, nothing in Contractor X's actions would appear to in any way endanger the public health and safety or compromise the structural integrity of the residential property. Having said that, the Board is of the opinion that Contractor X should not overstate the benefits of the 10-foot piles, but instead indicate that they are intended for additional support and nothing more.

Conclusions:

1. It was not unethical for Contractor X, a professional engineer, to insist on including the 10-foot piles under the footings in order to provide a more conservative foundation design.
2. It would be ethical for Contractor X to advertise his enhanced structural support in his marketing material. To avoid misleading and deceptive advertising, Contractor X should not misrepresent the benefits of the foundation design in his marketing material.

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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 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 NSPE Code. The 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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