

Public Health and Safety – Warranty Inspections

Case No. 07-3

Facts:

Engineer A is retained by a warranty company to perform warranty inspections on manufactured building claims filed against a manufactured building company.

Engineer A is asked to inspect a building for the company relating to a claim by Owner A regarding certain mechanical and electrical issues. During the course of the inspection, Engineer A investigates the mechanical and electrical issues but also separately discovers that the building plans prepared by a manufactured building employed engineer indicate that the building was built in 2002 with a roof load requirement of 40 lbs. psf. However, Engineer A is aware that the local code requirements were changed in 2000 with load requirements of 80 lbs. psf because of local snow conditions. The engineering drawings were submitted to a local code official in 2002 and they were approved with the 40 lbs. psf included. Engineer A advises the warranty company and the manufactured building company, and neither believe anything is necessary.

With winter approaching in the coming months, Engineer A is concerned about the potential danger of a heavy snow causing a roof collapse to the building occupants.

Question:

What is Engineer A's obligation under the circumstances?

References:

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| Section I.1 | - | NSPE Code of Ethics: | <i>Engineers, in the fulfillment of their professional duties, shall hold paramount the safety, health, and welfare of the public.</i> |
| Section II.1.a. | - | NSPE Code of Ethics: | <i>If engineers' judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate.</i> |
| Section II.1.c. | - | NSPE Code of Ethics: | <i>Engineers shall not reveal facts, data, or information without the prior consent of the client or employer except as authorized or required by law or this Code.</i> |
| Section II.1.f. | - | NSPE Code of Ethics: | <i>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.</i> |
| Section II.4. | - | NSPE Code of Ethics: | <i>Engineers shall act for each employer or client as faithful agents or trustees.</i> |

Discussion:

The issue of engineers discovering potentially dangerous or improper conditions during the course of performing their professional services is an issue that this Board has addressed on more than one occasion. This situation poses a classic ethical dilemma involving the duty of confidentiality and loyalty to a client or other party versus the obligation to protect the public health and safety. While in virtually every circumstance, the obligation to the public overrides other obligations, the risk of an imminent versus a less immediate danger is also a practical factor to be considered.

An example of the basic dilemma is illustrated in BER Case No. 89-7. There, Engineer A was retained to investigate the structural integrity of a 60-year-old occupied apartment building, which his client was planning to sell. Under the terms of the agreement with the client, the structural report written by Engineer A was to remain confidential. In addition, the client made it clear to Engineer A that the building was being sold “as is,” and he was not planning to take any remedial action to repair or renovate any system within the building prior to its sale. Engineer A performed several structural tests on the building and determined that the building was structurally sound. However, during the course of providing services, the client confided in Engineer A and informed him that the building contained deficiencies in the electrical and mechanical systems, which violated applicable codes and standards. While Engineer A was not an electrical or mechanical engineer, he did realize those deficiencies could cause injury to the occupants of the building and so informed the client. In his report, Engineer A made a brief mention of his conversation with the client concerning the deficiencies. However, in view of the terms of the agreement, Engineer A did not report the safety violations to any third party. In determining that it was unethical for Engineer A not to report the safety violations to the appropriate public authorities, the Board of Ethical Review first noted that the facts presented raised a conflict between two basic ethical obligations of an engineer: The obligation of the engineer to be faithful to the client and not to disclose confidential information concerning the business affairs of a client without that client’s consent and the obligation of the engineer to hold paramount the public health and safety. In its review, the Board noted that NSPE Code Section III.4 can be clearly understood to mean that an engineer has an ethical obligation not to disclose confidential information concerning the business affairs of any present client without the consent of that client. That provision makes no specific exception to the language. For example, the drafters of the Code could have provided exceptional circumstances, where such confidential information could be disclosed by the engineer; however, no such provisions have been included.

However, after noting the significance of NSPE Code Section III.4, the Board stated: “We believe under the facts, Code Section II.1.c. should be read in conjunction with Code Section II.1.a. The latter section refers to the primary obligation of the engineer to protect the safety, health, property, and welfare of the public. The obligation of the engineer to refrain from revealing confidential information, data, and facts concerning the business affairs of the client without consent of the client is a significant ethical

obligation. We further believe that matters of public health and safety must take precedence. The NSPE Code of Ethics is clear on this point. Code Section I.1. employs the word 'paramount' to describe the obligation of the engineer with respect to the public health and safety." Said the Board, "We believe Engineer A could have taken other steps to address the situation, not the least of which was his paramount professional obligation to notify the appropriate authority if his professional judgment is overruled under circumstances where the safety of the public is endangered. Instead, Engineer A, like the engineer in BER Case No. 84-5, 'went along' and proceeded with the work on behalf of the client. In that case, the engineer recommended to a client that a full-time, on-site project representative be hired for the project because of the potentially dangerous nature of implementing the design during the construction phase. When the client indicated to the engineer that the project would be too costly if such a representative were hired, the engineer acceded to the client's wishes and proceeded with the work. This was not ethical under the NSPE Code."

In an earlier case, BER Case No. 88-6, Engineer A was employed as the city engineer/director of Public Works. She found that a municipal sewage plant lacked the capacity to handle the waste from several large industrial food processing plants. Engineer A revealed this to her supervisor, the City Administrator, who ordered Engineer A to discuss the problems only with him and warned her that her job was in danger if she disobeyed. She privately brought the problem up with other city officials. Engineer A was later notified by the administrator that she was being removed from responsibility for the entire sanitary system and the chain of command. A letter was sent by the administrator instructing Technician B that he was to take responsible charge of the sanitary system and report directly to the City Administrator. Although Engineer A had already gone beyond her immediate superior by discussing the matter with other city officials and had been relieved of responsibility for the operation, the Board maintained that Engineer A had a further responsibility to report a matter endangering the public safety and health to other proper authorities.

While the Board noted earlier that the NSPE Code makes no direct exception to the language contained in Code Section III.4., as we have stated on numerous occasions, no section of the Code should be read in a vacuum or independent of the other provisions of the Code. NSPE Code Section II.1.c. provides additional guidance in this case, making it clear that the Engineer A has an ethical obligation to refrain from disclosing information which she acquired during the course of providing professional services to the client unless first obtaining the client's consent to disclose. Importantly, however, this section also includes a relevant exception that allows the engineer to disclose information acquired during the course of providing professional services to the client if such disclosure is authorized or required by law or by the Code. In other words, if the engineer has a legal or ethical responsibility to disclose the information in question, the engineer is released from the obligation to maintain confidentiality.

Turning to the facts in the present case, it is clear that the obligation to protect the public health and safety takes precedence and overrides other considerations in most cases. We say "in most cases" because this Board can conceive of at least some circumstances in which the risk the public health and safety may be somewhat marginal or remote and therefore other ethical considerations may be viewed in a different light. For example, while the present case raises the possibility of a significant risk to the public health and safety, it does illustrate that sometimes the risk may not be immediate or imminent and therefore other factors may come into play. Certainly, the need to address the risk to the public can never be ignored or delayed unreasonably. However, where a risk is more remote, the engineer's ethical obligations might take on different dimensions. For example, under the facts in the present case, since the risk was not immediate, Engineer A may have had an opportunity to explore a variety of different approaches (e.g., give the building manufacturing company the opportunity to contact the local code enforcement authorities and only if the building manufacturing company does not act within a reasonable period of time, take further action including personally contacting the building code enforcement authorities, and if necessary, contacting appropriate state building officials).

Finally, the Board also notes that since the relevant source documents discovered by Engineer A are public records, this matter does not involve the revealing of confidential information.

Conclusion:

It would be ethical for Engineer A to first give the building manufacturing company the opportunity to contact the local code enforcement authorities and only if the building manufacturing company does not act within a reasonable period of time, take further action including personally contacting the building code enforcement authorities, and if necessary, contacting appropriate state building officials.

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