

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 97-F-13

Date Issued: December 10, 1997

Requested by: Edwin W.F. Dyer III, Special Assistant Attorney General, North Dakota State Board of Registration for Professional Engineers and Land Surveyors

- QUESTIONS PRESENTED -

I.

Whether a partnership, corporation, or limited liability company, other than a professional corporation or professional limited liability company, (non-professional firm) is engaged in the "practice of engineering" when it contracts with a registered engineer who is not an officer or employee of the firm to perform engineering work.

II.

Whether the "practice of engineering" by a registered engineer as an agent of a non-professional firm must by definition be performed under the supervision of a "person in responsible charge" who is also a registered engineer and is an officer or employee of the firm.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a non-professional firm is not engaged in the "practice of engineering" when it contracts with a registered engineer to perform engineering work, as long as any agreement between the firm and a third party merely indicates that the firm has agreed to provide, furnish or obtain the work for the third party rather than perform the work itself and the firm does not interfere with the independent professional judgment of the registered engineer actually performing the work.

II.

It is my opinion that a registered engineer can engage in the "practice of engineering" as an agent of a non-professional firm without being supervised by an officer or employee of the firm who is a registered engineer, as long as no officer or employee of the firm

exercises "direct control and personal supervision" over the engineer's work and the firm has been issued a certificate of authorization.

- ANALYSES -

I.

The question presented involves the practice of engineering by a registered engineer under a contract with a partnership, corporation, or limited liability company, other than a professional corporation or professional limited liability company (non-professional firm). Generally, the firm obtains the engineering work to fulfill its obligations to a third party under a separate contract.

The right to "practice or offer to practice professional engineering" in North Dakota by non-professional firms is governed by N.D.C.C. § 43-19.1-27(3), which provides in relevant part:

[T]he practice of or offer to practice professional engineering or land surveying as defined in this chapter, by individual engineers or land surveyors registered under this chapter either through or as an officer, employee, or agent of a partnership or corporation, or by a partnership or a corporation or limited liability company, other than a professional corporation or professional limited liability company, through individual engineers or land surveyors registered under this chapter, is permitted in this state provided:

- a. All officers, managers, employees, and agents of such a partnership, corporation, or limited liability company who will perform the practice of engineering or of land surveying within this state for such partnership, corporation, or limited liability company are registered under this chapter;
- b. Each person in responsible charge of the activities of any such partnership, corporation, or limited liability company, which activities constitute the practice of professional engineering and land surveying, is a professional engineer or land surveyor registered in this state or a person authorized to practice professional engineering or land surveying as provided in this chapter;

c. Such partnership, corporation, or limited liability company has been issued a certificate of authorization by the board as provided by subsection 4 . . . .

(Emphasis added). This statute authorizes officers, employees and other agents of a non-professional firm under certain circumstances to practice engineering on behalf of the firm even if the firm is owned and operated by persons other than registered engineers.

Whether a person is an independent contractor, agent, or employee of a non-professional firm is ultimately a question of fact on which I cannot issue an opinion. However, the relationship of the parties to a contract is not controlled by their own characterization, but instead is based in large part on the degree of control one party exercises over the other. Fleck v. Jacques Seed Co., 445 N.W.2d 649 (N.D. 1989); Restatement (Second) of Agency, § 2 cmt. b (1958). A professional is generally engaged as an independent contractor, but an independent contractor may be an agent. Restatement (Second) of Agency, § 2 cmt. b.

N.D.C.C. § 43-19.1-27 applies only to firms and individuals engaging or offering to engage in the "practice of engineering."

"Practice of engineering and practice of professional engineering" means any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work . . . . A person must be construed to practice or offer to practice engineering, within the meaning and intent of this chapter, . . . who holds himself out as able to perform, or who does perform any engineering service or work or any other service which is recognized as engineering, for a valuable consideration for others including the public at large . . . .

N.D.C.C. § 43-19.1-02(7). This definition applies to the work that is performed, not necessarily the work a person or firm has contractually agreed to provide, furnish or obtain. Thus, before determining whether N.D.C.C. § 43-19.1-27(3) requires a firm or individual to be registered, one must determine whether a firm or individual is engaged in the "practice of engineering" if it enters

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into a contract requiring engineering work and subsequently obtains the work from a registered engineer.

Courts in New York have recently addressed this question. "That a contractor engages the services of a licensed professional to perform a portion of the services covered by the contract does not convert that contract into one for the performance of those services." SKR Design Group v. Yonehama, Inc., 660 N.Y.S.2d 119, 122 (N.Y. App. Div. 1997), (citing Charlebois v. J.M. Weller Associates, Inc., 535 N.Y.S.2d 356 (N.Y. 1988)). A Texas appellate court has reached the same result, concluding that there is "a vast difference between a contract to 'furnish' services and a contract to 'perform' the same services." Seaview Hospital, Inc. v. Medicenters of America, Inc., 570 S.W.2d 35, 39 (Tex App. 1978). A contract between the firm and the third-party need not specify the professional who will perform the work, as long as the firm itself does not agree to perform and does not actually perform any work for which it is not registered. SKR Design Group, 660 N.Y.S.2d at 121-22. The court in Charlebois also found it significant that the engineer actually performing the work was independent from unlicensed oversight of the work by the firm. 535 N.Y.S.2d at 360.

These decisions and the statutes applied therein are consistent with the North Dakota statutes quoted above regulating the "practice of engineering." Therefore, it is my opinion that a non-professional firm is not engaged in the "practice of engineering" when it contracts with a registered engineer to perform engineering work, as long as any agreement between the firm and a third party merely indicates that the firm has agreed to provide, furnish or obtain the work for the third party rather than perform the work itself and the firm does not interfere with the independent professional judgment of the registered engineer actually performing the work.

## II.

Assuming a firm is performing engineering work through its officers, employees or agents, and not simply obtaining the work from an independent contractor exercising independent professional judgment as a registered engineer, the next question is whether N.D.C.C. § 43-19.1-27 requires anyone to be registered under N.D.C.C. ch. 43-19.1 in addition to the engineer actually performing the work as an agent of the firm. N.D.C.C. § 43-19.1-27(3) requires that "[e]ach person in responsible charge" of the engineering practices of the firm be registered or otherwise authorized to practice engineering in North Dakota. "Responsible charge" is defined in N.D.C.C. § 43-19.1-02(9) to mean "direct control and personal supervision of

engineering or surveying work." The question presented mainly involves whether, when the person performing engineering work is an outside agent of the firm rather than an employee, there must always be an officer or employee of the firm "in responsible charge" of the agent and who must necessarily also be registered as an engineer.

First, N.D.C.C. § 43-19.1-27(3) does not distinguish between employees of a non-professional firm and agents of the firm who are not employees. The relationship between employer and employee is another form of principal-agent relationship. Restatement (Second) of Agency § 2. Statutes are interpreted to avoid absurd or ludicrous results. County of Stutsman v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985). It would be an absurd result to conclude that the Legislature intended to require supervision by a "person in responsible charge" for agents who are not employees of the firm but not for agents who are employees of the firm. The potential for undue interference with an engineer's independent professional judgment, and subsequent need for freedom from the control of the firm, is much greater when the engineer is an employee whose actions are subject to the direct and total control of the employer rather than an agent whose relationship with the firm is set by contract. Thus, there is no basis to conclude that an officer or employee of the firm "in responsible charge" is required when the work is performed by an agent who is not an employee, but is not required when the work is performed by an employee of the firm.

Second, by requiring registration of persons "in responsible charge" of an engineer's work for a non-professional firm, the Legislature clearly intended to protect an engineer's work product from changes or influence by a non-registered, unqualified person. However, there is nothing in the statute suggesting that the agent must perform the engineering work under the direct control or personal supervision of an officer or employee of the firm. The statute merely requires that a person "in responsible charge" of the engineer, if any, must also be a registered engineer. Thus, unless another statute or rule of law requires otherwise, a non-professional firm is not required to have an officer or employee "in responsible charge" of any registered engineer acting as its agent.

It may be argued that, as a general rule, an agent's authority to perform professional services on behalf of the principal cannot be any greater than the principal's authority to perform those services itself. However, even if generally true, this rule does not apply to the authority given to non-professional firms under N.D.C.C. § 43-19.1-27(3). Unlike the authority given in subsection two of N.D.C.C. § 43-19.1-27 for professional engineering firms formed and

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registered to practice engineering, the entire purpose of subsection three is to allow officers, employees and other agents of a non-professional firm to perform acts which the firm as principal would otherwise be precluded from performing.

Statutes are to be interpreted to give meaning to every part. County of Stutsman, 371 N.W.2d at 325. It would render meaningless the additional authority for non-professional firms in N.D.C.C. § 43-19.1-27(3) to conclude that, although not directly required to be registered, the firm must necessarily be registered because its employees or other agents cannot exercise more authority than the firm possesses as principal. Therefore, it is my opinion that N.D.C.C. § 43-19.1-27(3) authorizes employees and other agents to perform engineering work on behalf of a firm which the firm itself is not authorized to perform.

In conclusion, any officer or employee "in responsible charge" of an agent performing engineering work must also be a registered engineer. However, it is my opinion that a registered engineer can engage in the "practice of engineering" as an agent of a non-professional firm without being supervised by an officer or employee of the firm who is a registered engineer, as long as no officer or employee of the firm exercises "direct control and personal supervision" over the engineer's work and the firm has been issued a certificate of authorization.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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