EXPERT WITNESS: AGREEMENT TO REFUSE TO TESTIFY

Case No. 00-7

Facts:
Company A is involved in the manufacturing of consumer products including certain industrial tools. Engineer B has performed research and has experience in the design and manufacture of these specialized industrial tools. Engineer B is now an engineering faculty member at a private university. Engineer B also has an independent consulting engineering practice. Company A contacts Engineer B and requests that Engineer B agree to a consulting contract whose sole purpose is to prevent Engineer B from speaking out in public or testifying in any future litigation involving industrial tools manufactured by Company A.

Question:
Would it be ethical for Engineer B to agree to a consulting contract (with Company A) for the sole purpose of preventing Engineer B from speaking out in public or testifying in any future litigation involving industrial tools manufactured by Company A?

References:

Section II.1. - Code of Ethics: Engineers shall hold paramount the safety, health and welfare of the public.

Section III.2. - Code of Ethics: Engineers shall at all times strive to serve the public interest.

Discussion:
There are various provisions in the NSPE Code of Ethics that at times result in competing ethical values. Among the more prominent competing values relates to the ethical obligation of the engineer to maintain the confidentiality of information provided to the engineer by the engineer's client or derived as a result of the professional services rendered by the engineer. There are occasions where this basic and straightforward ethical responsibility conflicts with the duty of the engineer to hold paramount the public health and safety.

In the past, the NSPE Board of Ethical Review has had occasions to consider conflicting provisions of the NSPE Code and the resulting obligations of the engineer. In BER Case No. 96-8, the Board discussed these questions in some detail in the context of a confidentiality agreement in connection with a peer review program. In that case, the Board of Ethical Review noted that one of the hallmarks of engineering peer review programs has been the fact that such programs are built on a foundation of confidentiality, whereby an individual agreeing to serve as a peer reviewer must sign a "confidentiality agreement" in which the peer reviewer agrees not to disclose information that is revealed to the peer reviewer about the firm being reviewed during the course of

Copyright © 2000 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org)

the peer review process. The Board noted that there are sound reasons for such an approach. Firms being peer reviewed should be encouraged to provide as much pertinent detailed information to the peer reviewer to allow the peer reviewer the opportunity to perform a thorough evaluation of the firm, and confidentiality helps to assure that the maximum amount of disclosure will occur. In addition, confidentiality helps build trust between the parties involved in the peer review process and promotes an atmosphere that will improve the likelihood that the peer review process will be mutually productive and ultimately successful.

While the merits of confidentiality are clear, in BER Case No. 96-8, the Board was faced with a situation where the engineer performing the peer review, Engineer A, discovered that the work of the engineer being peer reviewed, Engineer B, may be in violation of state and local safety code requirements and could endanger public health, safety, and welfare. This ethical dilemma appeared to involve two separate provisions of the NSPE Code, Sections III.4. and II.1.e. The Board noted that it had previously considered at least one case involving an engineer gaining knowledge of information damaging to a client's interest which involved the public health and safety (see BER Case No. 76-4). On the one hand, the engineer has an obligation not to disclose confidential information concerning the business affairs or technical processes of any present or former client without their consent. On the other hand, an engineer having knowledge of any alleged violation of the NSPE Code has an obligation to cooperate with the proper authorities in furnishing such information or assistance as may be required.

Weighing the competing considerations in that case, the Board decided that Engineer A would have to exercise appropriate judgment and discretion concerning this matter, depending upon all of the facts and circumstances. If Engineer A determined that there was an imminent risk of harm to the public health and safety, such as loss of life or serious risk of injury to persons or property, Engineer A must immediately take appropriate steps by notifying Engineer B. In the event that Engineer B failed to take appropriate corrective actions, Engineer A may cooperate with proper authorities in furnishing such information or assistance as may be required. While confidentiality is an important ethical value, as a licensed professional engineer, Engineer A's paramount responsibility is to protect the public health and safety.

The Board continued by noting that assuming from the facts that Engineer A determined that Engineer B's work *may* be in violation of state and local safety code requirements, and *could* endanger public health and welfare, a more appropriate action would be for Engineer A to expeditiously discuss these issues with Engineer B in an effort to seek clarification and early resolution of this issue. If Engineer A and Engineer B are unable to resolve the issue, Engineer A must inform Engineer B that as a professional engineer, his only alternative is to cooperate with the proper authorities as indicated above.

Copyright © 2000 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org)

Turning to the facts in the present case, unlike BER Case No. 96-8, there do not appear to be any overriding or legitimate ethical reasons for Engineer B to agree to a consulting contract with the sole purpose of preventing Engineer B from speaking out in public or testifying in any future litigation involving industrial tools manufactured by Company A. By taking this position, Engineer B is compromising his professional judgment and is playing the role of a "hired gun" bound by "golden handcuffs" without regard to the individual facts and circumstances involved in a particular case. There may be situations in the future where it would be in the public's interest for Engineer B to speak out publicly, etc., concerning information that could have an important bearing on the public health, safety, and welfare. As a professional engineer with an affirmative obligation to hold paramount the public health and safety, the Board cannot see how Engineer B is serving this ethical value by executing an agreement that prevents Engineer B from prospectively performing this basic ethical obligation.

Conclusion:

It would not be ethical for Engineer B to knowingly agree to a consulting contract (with Company A) for the sole purpose of preventing Engineer B from speaking out in public or testifying in any future litigation involving industrial tools manufactured by Company A.

BOARD OF ETHICAL REVIEW
Lorry T. Bannes, P.E., NSPE
John W. Gregorits, P.E., F.NSPE
Louis L. Guy, Jr., P.E., F.NSPE
William J. Lhota, P.E., NSPE
Paul E. Pritzker, P.E., F.NSPE
Harold E. Williamson, P.E., NSPE
E. Dave Dorchester, P.E., NSPE, Chair

Copyright © 2000 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org)

NOTE: The NSPE Board of Ethical Review (BER) considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

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, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services -- which services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and that appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

Visit NSPE's website (www.nspe.org) and learn how to obtain volumes that include NSPE Opinions (or call 1-800-417-0348).

Copyright © 2000 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org)