EXPERT WITNESS – CRIMINAL PROSECUTION

Case No. 02-1

Facts:

Individual A is involved in a vehicular accident during which another individual, Individual B, is killed. During the police investigation, the police determine and recommend to prosecutors that the matter should be converted from a civil matter to a criminal prosecution and Individual A is charged with homicide. As part of the prosecutor's investigation, the prosecutor, Prosecutor C, retains Engineer D, an engineering expert, to review the record and provide a supporting forensic report and testimony in the prosecution of Individual A. Following Engineer D's extensive review of the record, Engineer D finds technical evidence to demonstrate that the cause of the accident was non-criminal and determines that he cannot support the prosecution's theory that Individual A's actions support a criminal prosecution. Learning of Engineer D's determination, Prosecutor C, continues the prosecution of Individual A, and does not call Engineer D as a witness at trial. The trial ends in a hung jury and the case is expected to be retried in the near future.

Question:

What are Engineer D's ethical obligations under the facts and circumstances?

References:

Section I.1.	-	*Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall hold paramount the safety, health and welfare of the public.*
Section II.1.a.	-	*Code of Ethics:*	*Engineers shall hold paramount the safety, health, and welfare of the public. 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.*
Section II.1.c.	-	*Code of Ethics:*	*Engineers shall hold paramount the safety, health, and welfare of the public. Engineers shall not eveal facts, data or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
Section II.4.	-	*Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section III.1.	-	*Code of Ethics:*	*Engineers shall be guided in all their relations by the highest standards of honesty and integrity.*

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Discussion:

Because of their education, experience, and background, engineers are sometimes confronted with situations and circumstances under which they are privy to information and material that the average layperson may not completely understand or appreciate. In view of their unique technical expertise and their status as professionals, engineers have an important role to play within society. Engineers generally perform this role on a daily basis in their professional lives in their professional practice. At the same time, issues may emerge in their professional lives that require engineers to take steps beyond what might normally be required in their professional practice to serve the interests of the general public health and safety.

Over the years, the NSPE Board of Ethical Review (BER) considered a variety of cases relating to this basic obligation of professional engineers. For example, in BER Case 76-4, the XYZ Corporation was advised by a State Pollution Control Authority that it had 60-days to apply for a permit to discharge manufacturing wastes into a receiving body of water. XYZ Corporation was also advised of the minimum standard that must be met. In an effort to convince the authority that the receiving body of water after receiving the manufacturing wastes will still meet established environmental standards, the corporation employed Engineer Doe to perform consulting engineering services and submit a detailed report. After completion of his studies, but before completion of any written report, Doe concluded that the discharge from the plant would lower the quality of the receiving body of water below established standards. He further concluded that corrective action would be very costly. Doe verbally advised the XYZ Corporation of his findings. Subsequently, the corporation terminated the contract with Doe with full payment for services performed, and instructed Doe not to render a written report to the corporation. Thereafter, Doe learned that the authority has called a public hearing and that the XYZ Corporation presented data to support its view that the present discharge meets minimum standards. In ruling that Doe had an ethical obligation to report his findings to the authority upon learning of the hearing, the BER, citing BER Case 67-10, reinforced the fundamental notion that "it is basic to the entire concept of a profession that its members will devote their interests to the public welfare, as is made abundantly clear in (the) Code."

More recently in BER Case 98-5, Engineer A served as a director of a building department in a major city. Engineer A had been concerned that as a result of a series of budget cutbacks and more rigid code enforcement requirements, the city had been unable to provide a sufficient number of qualified individuals to perform adequate and timely building inspections. Each code official member of Engineer A's staff was often required to make as many as 60 code inspections per day. Engineer A believed that there is no way even the most conscientious code official could make 60 adequate, much less thorough, inspections in one day, particularly under newer, more rigid code requirements for the city. These new code requirements greatly enhanced and protected the public's health and safety. The code officials were caught between the responsibility to be thorough in their inspections and the city's desire to hold down costs and generate revenue from inspection fees. Engineer A was required to sign off on all final inspection reports. In ruling that it was not ethical for Engineer A to agree to concur with the

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chairman's proposal under the facts and, additionally, it was not ethical for Engineer A to sign inadequate inspection reports, the Board noted that previous BER cases provide sufficient guidance for Engineer A. The BER noted that each of the earlier cases discussed presented a constant theme that the engineer must hold the public health and safety paramount and that the engineer has a responsibility to insist, however strongly and vociferously, that public officials and decision-makers take steps, and corrective steps if necessary, to see that this obligation is fulfilled. Said the Board, "The Code of Ethics makes it clear that engineers have an obligation to advise their clients or employers when they believe a project will not be successful. In this case, Engineer A should make it plain and clear to the chairman that "righting a wrong with another wrong," does grave damage to the public health and safety (See NSPE Code Section III.1.b.). Engineer A should insist that the public will be seriously damaged in either case and that if the integrity of the building code enforcement process is undermined for short-term gain, the city, its citizens, and its businesses will be harmed in the long term."

Turning to the facts in the present case, the BER believes that Engineer D has a special obligation under the facts to take appropriate steps to make the facts and circumstances known in this case. As is well-understood within our society, the standard of proof in the U.S. criminal justice system is "proof beyond a reasonable doubt." Based upon the facts in the case, it is clear that Engineer D had a strong basis, based upon his engineering expertise, to believe that Individual A is not guilty of a criminal act. Engineers D's options are to ignore this fact or to take appropriate action. The BER believes that Engineer D has an obligation to take immediate action and bring this matter to the attention of an appropriate authority. In this case, it appears that the appropriate authority is the prosecuting attorney, the judge presiding in this criminal case, and ultimately the defense attorney. The BER takes this position for a variety of reasons. First, in the interests of justice, it is important for an engineer with clear knowledge and understanding that a public injustice is being committed to bring that matter forth to the proper authority. The engineer should first seek further resolution of the matter with the prosecuting attorney. Otherwise the engineer, in essence, becomes a party to the injustice. Afterwards, if the higher authority, in this case, the presiding judge, declines to take action, it is the BER's position that the engineer has an obligation to bring the existence of the evidence to the defense attorney. There is a genuine public welfare issue at stake in a matter such as this since the cost of a trial and a retrial is extremely high, involving enormous public and private financial resources. To the extent that Engineer D can contribute to a decision-making process that eliminates the need for this public and private expense, the interest of the public welfare is being well-served.

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Conclusion:
Engineer D has an obligation to tell the prosecuting attorney that he plans to bring the existence of the evidence to the attention of the presiding judge in this case. If the prosecuting attorney takes no action and the presiding judge then also declines to take action following review, it is the BER's position that Engineer D has an obligation to bring the existence of the evidence to the defense attorney .

BOARD OF ETHICAL REVIEW
E. Dave Dorchester, P.E., NSPE
Louis L. Guy, Jr., P.E., F.NSPE
Harold E. Williamson, P.E., NSPE
William J. Lhota, P.E., NSPE, Chair

The following member did not participate in the approval of this opinion:
William D. Lawson, P.E., NSPE

The following member abstained:
Robert L. Nichols, P.E., F.NSPE

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 must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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NSPE BER Case 02-1 -- Dissenting Opinion

The point of dissention is not the engineer's obligation to hold paramount the safety, health, and welfare of the public – on this we all agree – but rather how best to uphold this obligation given the facts in this case.

In contrast to the majority opinion which encourages Engineer D to promote his opinion before ever-widening circles of exposure until he satisfies his personal view of justice, I submit a moderate view. Engineer D has an obligation, at the least, to discuss his views in a professional and courteous manner with his client, the prosecuting attorney.

This conversation might reveal a number of pertinent things not mentioned in the facts that Engineer D could be ignorant of. For example, although the prosecuting attorney has not disclosed Engineer D's findings, an amicable conversation might reveal that the *defense attorney* also retained an engineer expert who identified substantially the same evidence as Engineer D and presented this evidence at trial to the judge and jury. If this happened, and it seems highly reasonable that it *could have* happened, I believe that Engineer D has satisfied all ethical obligations in the matter. The trial was convened according to the laws of the land, evidence was presented with due process, and the defendant had his day in court before a jury of his peers.

What about the alternative? What if Engineer D learned that the attorney for the defense did not have an engineer present the evidence at trial? In this case, Engineer D and the prosecuting attorney would have much to talk about, not the least of which would be the competence of the defense attorney, the engineer's obligation to hold paramount the safety, health and welfare of the public, the ethics of the prosecuting attorney, and the court's jurisdiction and views regarding unauthorized disclosure of evidence by the engineer. Perhaps such a conversation might influence the prosecuting attorney to take appropriate steps within the justice system that would satisfy the engineer, and certainly it seems ethical that the prosecuting attorney be given an opportunity to do the right thing.

But the prosecuting attorney might persist in repressing evidence, and faced with this situation, the engineer would be obligated to go the presiding judge and discuss his views, having first informed the prosecuting attorney of his intention to do so. Ultimately, it is the judge's role and responsibility to direct the course of legal events associated with the trial, including the determination of the extent to which Engineer D's findings and evidence should be made known. Having talked with the presiding judge, it is my opinion that Engineer D would have fully discharged his ethical obligation in this matter. A murder trial is a legal proceeding, and the United States justice system has both authority and jurisdiction. Only if Engineer D had good reason to believe that the judge or local court system was politically compromised or otherwise corrupt should the matter be taken further.

Viewed from this perspective, Engineer D becomes more of a unifier and encourager, rather than a whistleblower. Arguably it is sometimes necessary, but communication of privileged information outside of approved channels always means some degree of ethical failure, and with failure comes damage. It seems better to work within channels if possible so as to avoid damage for all concerned. Such communication affords opportunity to uphold not only the public safety, health and welfare (NSPE Code of Ethics Canon 1), but also other fundamental ethical obligations such as acting for clients as faithful agents and trustees (Canon 4), issuing public statements only in an objective and truthful manner (Canon 3), and conducting oneself honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession (Canon 6), to name a few.

William D. Lawson, P.E., NSPE

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