CONFLICT OF INTEREST – EXPERT TESTIMONY INVOLVING LANDLORD

Case No. 02-9

Facts:
Engineer A, a forensic engineer, performs services for Plaintiff X's attorney, Attorney Y, in connection with a retail shopping mall owned by Defendant B. A year later, Engineer A moves his business to another location. Some time later, Attorney Y calls Engineer A about testifying at the trial involving Defendant B. Upon reviewing various papers, Engineer A learns, for the first time, that the landlord in his new business location is Defendant B. Engineer A discusses this matter with Attorney Y and Plaintiff X, and neither Attorney Y or Plaintiff X have any objection to Engineer A performing the work as agreed. Engineer A performs the work as agreed.

Question:
Was it ethical for Engineer A to testify at the trial of Defendant B?

Reference:
Section II.4.a. - Code of Ethics: 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.

Discussion:
Conflicts of interest involving the offering of expert testimony have been considered by the NSPE Board of Ethical Review (Board) on several occasions. Increasingly, engineers are being requested by attorneys and clients to provide expert testimony in their professional capacity and sometimes these engagements present difficult ethical issues for practitioners.

For example in BER Case 82-6, Engineer A was retained by the U.S. government to study the causes of a dam failure. Later, Engineer A was retained by the contractor on this project, who filed a claim against the U.S. government for additional compensation. In determining that it would not be ethical for Engineer A to be retained as an expert witness for the contractor under these circumstances, the Board noted that there was a danger that Engineer A's opinions, based on his firsthand knowledge and his understanding of the facts of record, would touch upon privileged, specialized, and confidential knowledge gained while he was retained by the U.S. government. Indeed, Engineer A could be called upon to give an opinion as to the very facts with which he was involved as a consultant with the government.

More recently in BER Case 94-9, Engineer A, a principal in a private practice firm, was retained orally by an attorney for a litigant involved in a legal action to provide accident reconstruction consultation. The litigant, a plaintiff, was suing a defendant allegedly responsible for a traffic accident. Although Engineer A sent a letter of agreement to plaintiff's attorney, it was never

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returned signed by the plaintiff or his attorney. No additional information was exchanged between Engineer A and the plaintiff's attorney. Approximately two years later, the law firm representing the defendant contacted Engineer A and sought to retain his services in connection with the same legal action. Engineer A, assuming the plaintiff and his attorney had decided to retain the services of another expert, agreed to provide his services to the law firm representing the defendant. Later, the plaintiff's attorney contacted Engineer A with the expectation that Engineer A would provide accident reconstruction consultation per the earlier discussion. In ruling that it was ethical for Engineer A to agree to provide accident reconstruction services to the law firm representing the defendant, the Board stated that Engineer A was never involved substantively in the accident analysis and was only provided with a general and perfunctory description of the nature of the accident and the issues involved in the case. From the facts, it appeared to the Board that the only exchange that took place between Engineer A, the attorney, and the plaintiff was an agreement by Engineer A to provide the requested services and a written letter agreement prepared by Engineer A which was never signed by either the plaintiff or his attorney. Therefore, it is plausible to conclude that since no actual substantive discussion of "particular, specialized knowledge" or facts and circumstances of the case were ever revealed to Engineer A, Engineer A never became privy to any information that could cause a conflict of interest of the types described in earlier BER Cases.

Turning to the present case, we think the earlier Board cases are instructive to the Board's consideration. First, it is clear that there was no privileged, specialized, and confidential knowledge gained by Engineer A in his business relationship with Defendant B that would have any significant bearing on his serving as an expert witness for Attorney Y on behalf of Plaintiff X. Moreover , as the facts demonstrate, neither Attorney Y or Plaintiff X have any objection to Engineer A continuing to serve as their expert, even though Engineer A had revealed his business relationship with Defendant B. There is a possibility that Engineer A may believe his relationship with his landlord might be strained and, therefore, could be compromised as an expert witness by not being as aggressive as Engineer A might have otherwise been. Second, the relational circumstances involved in this matter are somewhat remote and cannot be the basis upon which to find a true conflict of interest. Were this Board to find a conflict of interest in this case, it would be difficult to virtually imagine any situation involving an engineer's activities in business or commerce where a conflict could realistically be avoided. Engineer A performed the ethically appropriate act by at least raising the issue with Engineer A's clients, Attorney Y and Plaintiff X, and absent a clearly reasoned objection on their part, this Board can find no ethical violation. Engineer A's disclosure to Attorney Y and Plaintiff X appears to be a key element in resolving the ethical matter.

Conclusion:
It was ethical for Engineer A to testify at the trial of Defendant B.

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