EXPERT WITNESS—
MATERIAL INADVERTENTLY SENT BY OPPOSING COUNSEL

Case No. 03-1

Facts:

Engineer X is a professional engineer in private practice who serves as a forensic engineer and expert witness. Recently, Engineer X was engaged as an expert for the defense by an insurance company in a lawsuit involving the design of a sports complex. Engineer X receives correspondence in an envelope addressed to him in his office from the attorney representing the plaintiff in the lawsuit. Engineer X notices the source of the correspondence, unseals the correspondence, reads some of the contents, and realizes that it was not intended for him. The correspondence was intended to be sent to the plaintiff's expert and not the defense expert. He then reseals the information and sends it back to the plaintiff's attorney with a note indicating that the correspondence was inadvertently sent to him, but that Engineer X did not review the contents of the correspondence.

Questions:

1. Was it ethical for Engineer X to open the correspondence?

2. Was it ethical for Engineer X not to reveal that he reviewed some of the content of the correspondence?

References:

Section II.3.a.	-	*NSPE Code of Ethics:*	*Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.*
Section II.5.	-	*NSPE Code of Ethics:*	*Engineers shall avoid deceptive acts.*
Section III.3.	-	*NSPE Code of Ethics:*	*Engineers shall avoid all conduct or practice that deceives the public.*
Section III.3.a.	-	*NSPE Code of Ethics:*	*Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.*

Discussion:

Engineers have a basic obligation to be honest and truthful in their professional activities, including their reports, correspondence, and various other communications. Further, honesty and truthfulness are a fundamental ethic—not unique to engineering or professional practice. At the same time, the issue of confidentiality and the degree to which an individual is obligated to share all

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information with another party may have an impact on the extent to which an individual is obligated to be honest and truthful. As the Board has noted on several occasions, the provisions of the NSPE Code of Ethics are intended to be read in relation to one another and no single provision should be considered or understood without a full review of the entire Code.

In BER Case 82-2, the Board was faced with a situation involving an engineer offering homeowner inspection services. There, Engineer A undertook to perform an engineering inspection of a residence for his client, a prospective buyer (husband and wife). Following the inspection, Engineer A prepared a one-page written report concluding that the residence under consideration was in generally good condition, requiring no major repairs, but noting several minor items needing attention. Engineer A submitted his report, with an invoice, to the client (buyer) showing that a copy of the report was also sent to the real estate firm handling the sale of the residence. The client (buyer) objected that such an action prejudiced their interests by lessening their bargaining position with the owners of the residence. They also complained that Engineer A acted unethically in submitting a copy of the report to any others who had not been a party to the agreement for the inspection services.

In finding that Engineer A acted unethically in submitting a copy of the home inspection report to the real estate firm representing the owners, the Board noted that, at first blush, this appears to be a case involving a relatively small economic issue compared with the larger commercial and industrial projects with which engineers are often concerned. But as it involved an ethical principle the Board had not had occasion to address before, the Board considered the case on the broader philosophical aspects. The Board noted that this was not a case of an engineer allegedly violating the mandate of NSPE Code Section III.4. (not to disclose confidential information concerning the business affairs of a client). That provision of the NSPE Code necessarily relates to confidential information given the engineer by the client in the course of providing services to the client. Here, however, there was no transmission of confidential information by the client to the engineer. Whether the client in this case actually suffered an economic disadvantage by the reduction of its bargaining power in negotiating the price of the residence through the owner having knowledge gained from the inspection report, the same principle should apply in any case where the engineer voluntarily provides a copy of a report commissioned by a client to a party with an actual or potential adverse interest. It is a common concept among engineers that their role is to be open and aboveboard and to deal in a straightforward way with the facts of a situation. This basic philosophy is found to a substantial degree throughout the NSPE Code (e.g.,

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Sections II.3. and II.3.a). At the same time, NSPE Code Section II.l.c. recognizes the proprietary rights of clients to have exclusive benefit of facts, data, and information obtained by the engineer on behalf of the client. In BER Case 82-2, the Board read into the case an assumption that Engineer A acted without thought or consideration of any ulterior motive. As a matter of course, he considered it right and proper to make his findings known to all interested parties in order that the parties handle their negotiations for the property with both sides having the same factual data flowing from his services. Thus, although we tend to exonerate Engineer A of substantial or deliberate wrongdoing, he was nevertheless incorrect in not recognizing the confidentiality of his relationship to the client. Even if the damage to the client, if any in fact, was slight, the principle of the right of confidentiality on behalf of the client predominates.

BER Case 82-2 is instructive because it deals with a situation similar to the present case, where an engineer takes what appears to be inadvertent action that could have ethical consequences. At the same time, there are significant differences in the two situations. In BER Case 82-2, Engineer A's actions were in apparent conflict with the interests of Engineer A's clients. In the present case, Engineer X's actions do not appear to directly jeopardize the interests of Engineer X's clients, but could potentially compromise the interests of parties whose interests are adverse to Engineer X's client. This fact raises a basic question of whether Engineer X has some special obligation under the facts that would require Engineer X to take special steps to address the situation created when he opened the envelope. In other words, does Engineer X, in the role of an expert witness, have some ethical obligation to deal with the situation faced in some special manner?

It does not appear that the language of the NSPE Code places any special obligation on a professional engineer acting as an expert witness to use anything other than ordinary care in the performance of the engineer's professional services. Under the facts, Engineer X opened what he believed to be correspondence intended for him. The correspondence was addressed to Engineer X with no indication that it was intended for another party. There was no reason for Engineer X to suspect that correspondence sent by the opposing counsel to him was intended for another party. There is nothing in the facts to suggest that Engineer X should have had any doubts or suspicions about the correspondence. On this basis, it is the Board's opinion that it was not unethical for Engineer X to open the correspondence.

Turning to the second question, the Board believes the NSPE Code compels Engineer X to reveal that he had reviewed some of the content of the

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correspondence. That is, the ethical course of action by Engineer X obliged him to be honest and truthful by disclosing to the plaintiff's attorney that he had reviewed a small portion of the material. While the NSPE Code places on the engineer the obligation to serve the employer or client as faithful trustee, the Board believes that obligation could be fulfilled if Engineer X also informed his client (the defense attorney) that he had inadvertently reviewed some of the contents of the correspondence. As noted earlier, by reviewing the material in the manner described, Engineer X had not done anything that was unethical. Under the facts, it is clear that once Engineer X identified the material and understood the circumstances, he immediately ceased reviewing the contents of the correspondence. Whatever interest Engineer X may have thought he was protecting by misstating his actions to plaintiff's attorney is potentially outweighed by the apparent conclusion that plaintiff's attorney will draw that Engineer X did, in fact, review the material based upon the probable condition of the correspondence, and quite possibly discredit Engineer X's subsequent actions and testimony in connection with the case. Such appearances would not reflect well upon Engineer X, Engineer X's client, nor upon the engineering profession in general. For those reasons, the Board believes Engineer X would have been better served and would have better served his client if Engineer X had accurately and fully reported that he had reviewed some of the content of the correspondence. Furthermore, Engineer X should be certain to advise his client of the events that have transpired.

Conclusions:

1. It was not unethical for Engineer X to open the correspondence.

2. It was unethical for Engineer X not to reveal that he had reviewed some of the content of the correspondence. In addition, Engineer X should advise his client of the events that have transpired.

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