CONTINGENT FEE – PRACTICE OF FORENSIC ENGINEERING

Case No. 03-13

Facts:

Engineer X is a professional engineer with long experience in engineering practice who has been called upon several times in recent years to investigate accidents, and report on same where the responsibility was in dispute or had pending litigation. In a few instances he has been required to testify under oath in a deposition and twice in court. Engineer X is beginning to think of himself as a "forensic engineer."

A young lawyer, with whom Engineer X is friendly, approaches Engineer X seeking help. The lawyer complains to Engineer X about the financial burden involved in starting a new law practice and in particular that the contingent fee system for legal work means that he will not even get paid until each plaintiff's case is completed and won. To put a finer point on it, the lawyer explains that he is trying to help a person who has been injured, but he has very limited cash to put out for engineering investigations and reports and the person he is trying to help has none! If only Engineer X would just help them along by producing a report, the lawyer claims he is certain he can negotiate a quick settlement and then Engineer X would be paid. In fact, the lawyer tells Engineer X he could bill well above his regular fees if only he would wait to get paid until the case is settled. Further, the lawyer tells Engineer X that this case would be like "found money," and he could promise Engineer X a lot more work like this.

Question:

Would it be ethical for Engineer X to accept this "opportunity" to help his lawyer friend and the person who was injured by providing engineering services in the manner described?

References:

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.*

Section III.6.a. - *Code of Ethics:* *Engineers shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised.*

Discussion:

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The Board of Ethical Review has had several opportunities to review circumstances that involve relationships with clients and others which could potentially call into question the independent judgment of an engineer. Sometimes the facts and circumstances have related to contractual arrangements between an engineer and his or her client, and one of the areas that the Board has examined with great frequency involves those relationships where the remuneration between the engineer and the client is based upon some contingent event or occurrence.

An early example, BER Case No. 66-11, considered the situation where an engineer expert was requested to provide technical advisor services for a plaintiff on the basis of being paid a percentage of the amount recovered by the plaintiff. If the plaintiff prevailed, fine, but if the judgment was in favor of the defendant, this engineer would not be paid for his services. Citing the language of what is now NSPE Code section III.6.a and finding that this engineer could not ethically serve on a "contingent fee" basis, the Board crisply noted that (a) this engineer's conclusions might be influenced by the fact that he stood to gain financially by having his conclusions coincide with his personal interest in his remuneration, and (b) the engineer must not be in a position whereby the form of compensation might tend to prevent him from being completely impartial, or from rendering a full and complete report containing both favorable and unfavorable facts or conclusions.

Another early case (BER Case No. 67-8) dealt with the situation where an injured workman involved in a proceeding before a workmen's compensation board asked an engineer to appear before the workmen's compensation board as an expert witness on his behalf, but who claimed he was indigent and could not afford to pay for the engineer's services. On the same rationale as described above, the Board of Ethical Review found that the engineer could not provide services on a contingent arrangement whereby he would be paid a percentage of the amount received by the workman; however, the engineer could, if he desired, provide such services on a free basis.

It is appropriate to emphasize that the Board has interpreted NSPE code Section III.6.a to indicate that a contingent relationship is not *per se* unethical but only those that may have the effect of compromising the professional judgment of the engineer. For example, BER Case No. 93-5 recounts that a man, Smith, is killed as a result of an alleged defective product. Smith's widow, Mrs. Smith, is unable to afford the services of an expert to investigate

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the technical issues relating to the allegedly defective product. Mrs. Smith contacts Engineer A, a product design specialist who frequently provides forensic engineering and related services. Following a long discussion, Mrs. Smith requests that if it is determined that a legal action should be brought against the manufacturer, that Engineer A act as Mrs. Smith's agent to direct the legal action on her behalf. She requests that Engineer A advise her regarding the selection and retention of an attorney, and oversight of the attorney's general approach to the case. Engineer A would not serve as an expert witness as part of the legal action. Since Mrs. Smith had limited resources, Engineer A, following considerable contemplation and thought, agreed to perform the services on a contingency fee basis, with Engineer A receiving a percentage of the settlement or award. On the assumption that Engineer A's judgment would not be compromised by the contingency fee issue in that particular case, the Board found that it was ethical for Engineer A to agree to provide the services in question. However, the Board emphasized that any contingency fee basis arrangement must be carefully scrutinized by the engineer to make certain that the engineer's judgment is not compromised. The engineer must be free to provide objective, unbiased professional judgments and not be placed into a position in which he will be perceived as compromising his integrity and judgment in pursuit of a professional fee or continuing relationship.

One other point of background deserves mention; namely, that it is accepted practice in the legal profession for an attorney to represent a client on a contingent fee basis, this by virtue of the fact that attorneys are direct advocates for their clients in the US justice system. NSPE BER Case 00-10 describes just such a situation, where an engineer/attorney is retained on a contingency basis to provide legal services for a client. The question for consideration is whether a professional engineer may ethically provide *engineering services* in like manner under the provisions of the NSPE Code.

Turning to the present case, the facts closely parallel those of BER Case Nos. 66-11 and 67-8; namely, a situation where the professional engineer's fee for expert engineering services would be dependent on the outcome of his or her work. Consistent with past decisions and NSPE Code Section III.6.a, the Board contends that fee agreements should never be made on a contingent basis for expert witness testimony nor should the investigations, analysis, or reporting prior to testimony be contingent.

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Published articles by the National Academy of Forensic Engineers emphasize that forensic engineers must guard against bias and test for hidden bias with meticulous care. The forensic engineer is not the advocate of a specific interest or point of view and may not be an interested party in the matter as to the outcome. As such, the forensic engineer can work for either side of any given case without ethical conflict. That is why contingent arrangements are necessarily to be avoided. There is an overt bias in such an arrangement and objectivity may be lost.

Any agreement for professional service which provides a substantive incentive related to the results of the case to a witness who is brought to the court for objective testimony is contrary to the interest of the public. No matter how well intended the expert witness may be, and though sincerely believing that he/she is objective and unbiased, the appearance is clearly given to the public (the court and the jury) of biased or unethical testimony.

Nor is the unlikely possibility of not revealing a contingent arrangement an acceptable substitute for complete candor. The penalties for deceptive testimony range from having testimony stricken from the record to various court sanctions and even to felony conviction for perjury. Rigorous cross-examination of experts is typical and includes attacks on credibility, including fee arrangements. Objective unbiased testimony will diminish the effectiveness of such attacks. Non-contingent service is an important element in the credibility of the expert.

The engineer is not precluded from providing service on a charitable basis without payment for service. This is commonly called *pro-bono* service (Latin: "for the good") or *pro-bono publico* ("for the good of the public"). Engineers might well seek assurance that the attorney asking them to serve *pro-bono* is also serving *pro-bono* and that there will not later in the process be a conversion to contingent service.

For the engineer expert witness, contingent fee arrangements must be totally avoided. No matter how conceived of or contrived, they are unethical.

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Conclusion:

It would not be ethical for Engineer X to accept this "opportunity" to help his lawyer friend and the person who was injured by providing engineering services in the manner described (a contingent fee arrangement). The engineer is not precluded from providing service on a charitable basis.

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