DISCLOSURE OF WORK FOR FORMER EMPLOYER-- REQUEST FOR INFORMATION AFTER CHANGE OF EMPLOYMENT

Case No. 03-2

Facts:

While employed at Company 1, a geotechnical engineering firm, Engineer Y, a professional engineer, was responsible for an investigation of soil and groundwater conditions at a facility administered by a public agency. This investigation was conducted for a landscape contractor client who was being held in default by the public agency due to a large number of plants dying. Engineer Y's report was issued by Company 1 to the landscape contractor client. Less than one month after completing the study, Engineer Y left Company 1 to work for another company and has no additional contact with the former employer or client related to the project.

Approximately two months after Company 1's report was issued, Company 2, another geotechnical engineering firm, is retained by the public agency to perform a geotechnical investigation of the soil and groundwater conditions. Company 2's report is issued to the client and identifies similar soil conditions, but offers a different opinion than Company 1 as to possible causes. Company 2's report was intended to be used in an arbitration proceeding between the public agency and the landscape contractor.

Approximately six months after leaving Company 1, Engineer Y is hired by Company 2 as a project engineer. At the time of hire, Engineer Y was not aware that Company 2 has provided services to the public agency on the same project that Engineer Y had worked on for the landscape contractor. Six months later, Company 2 is contacted by the attorney representing the public agency in ongoing litigation with the landscape contractor client of Company 1. Attorney wishes to discuss the findings in Company 2's report with the Company 2 principal engineer, Engineer B. A meeting time is arranged. At the meeting, Attorney states that he understands that Engineer Y is now employed with Company 2 and indicates that he, Attorney, wishes to also meet with Engineer Y to informally discuss the information in the Company 1 report. The Company 2 principal is hesitant to allow this meeting because of the potential conflict of interest for Engineer Y and recommends that Attorney contact the owner of Company 1 for an explanation of the Company 1 report. Attorney responds that as the project engineer for Company 1, Engineer Y is a material witness to the conditions, regardless of where he is currently working and should be able to supply the information to Attorney.

Copyright © 2003 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).

Questions:

1. Is it a breach of trust for Engineer Y to meet with the attorney representing the public agency for the purpose of informally discussing the information in and findings of the Company 1 report?

2. Assuming that Engineer Y will be deposed, or called as a witness by the public agency, how should Engineer Y proceed in his testimony?

References:

Section II.1.c.	-	*NSPE Code of Ethics:*	*Engineers shall not reveal facts, data or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
Section III.4.	-	*NSPE Code of Ethics:*	*Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*
Section III.4.b.	-	*NSPE Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client or employer.*

Discussion:

Over the years, the Board of Ethical Review has considered numerous cases recognizing the confidentiality of facts, data, and information prepared for clients in a variety of contexts. In BER Case 82-2, an engineer offered to perform an engineering inspection of residence for a prospective buyer (husband and wife). Following the inspection he 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.

The engineer submitted his report to client showing that a copy was sent to the real estate firm handling the sale of the residence. The client objected that such action prejudiced their interests by lessening their bargaining position with the owners of the residence. They also complained that the engineer 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 considering the case, the Board noted that this was not a case of an engineer allegedly violating the mandate of Section III.4. not to disclose confidential information concerning the business affairs of a client. That provision of the Code necessarily relates to confidential information given the engineer by the client in the course of providing services to the client. In case 82-2, there was no transmission of confidential information by the client to the engineer. Whether or not the client in that 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

Copyright © 2003 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).

a report commissioned by a client to a party with an actual or potential adverse interest.

The Board noted that 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 Code, e.g., Sections II.3. and II.3.a. At the same time, Section II.1.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. The Board read into Case 82-2 an assumption that the engineer acted without thought or consideration of any ulterior motive; that he, as a matter of course, 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 the Board exonerated the engineer 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.

In addition, the role of engineers in connection with the judicial process has been a topic of NSPE Board of Ethical Review consideration on several occasions. Professional engineers are frequently called upon prior to or during litigation to investigate or explain technical reasons for various types of failures that result in bodily injury, as well as physical and economic damages. One of the more interesting and relevant BER cases involving an engineer serving as an expert witness is BER Case 82-6. There, Engineer A was retained by the U.S. government to study the causes of a dam failure. Contractor X was hired by the U.S. government as the contractor on the same project. Later, Engineer A was retained as an expert witness by Contractor X, who had filed a claim against the U.S. government for additional compensation. In finding that Engineer A's actions (*viz.*, working on the dam failure case for the US Government and then later for Contractor X in an adversarial proceeding against the US Government) were in conflict with the NSPE Code of Ethics, the Board noted that there was nothing in the record to indicate that Engineer A was given the consent of his former client, the U.S. government, to represent the interests of the contractor in its claim against the government for additional compensation. In addition, the Board noted that it had no doubt that the expert testimony offered by Engineer A in a legal proceeding would constitute "particular, specialized knowledge gained on behalf of a former client or employer." As an expert witness, Engineer A would be required to state his opinion based upon his firsthand knowledge and on facts of record. There would be a danger that Engineer A's opinions, based on his firsthand knowledge and his

Copyright © 2003 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).

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, the Board noted that Engineer A may be called upon to give an opinion as to the very facts with which he was involved as a consultant with the government. There can be no doubt that NSPE Code Section III.4.b. was enacted to prevent engineers from disclosing such information. For those reasons, the Board found that it would be unethical for an engineer who was retained by the U.S. government to be retained as an expert witness for a contractor who filed a claim against the U.S. government for additional compensation. These earlier cases establish appropriate precedents for guidance in the present case.

While the Board does not believe that it would be unethical for Engineer Y to meet with the attorney representing the public agency to explain the limitations on his availability, the Board does believe it would be unethical for Engineer Y to discuss the information in and findings of the Company 1 report in the absence of a formal deposition or being called as a material witness. Section III.4.b of the NSPE Code is explicit in not permitting engineers to participate in or represent an adversary interest in connection with a specific project or proceeding in which the engineer has gained particular specialized knowledge on behalf of a former client or employer, without the consent of all interested parties. Under the facts, it appears that Attorney is seeking to obtain background information from Engineer Y in his former role as engineer to the landscape contractor, and not in his role as a project engineer for Company 2. It is the Board's view that Engineer Y has ongoing ethical obligations to Company 1 that did not cease when Engineer Y became employed by Company 2. To state otherwise would seriously undermine the professional integrity of Engineer Y.

Further, the Board acknowledges and supports the position of the Company 2 principal engineer in being hesitant because of the perceived conflict of interest and also in recommending that Attorney contact the owner of Company 1 for an explanation of the Company 1 report. The Board is also of the view that Attorney's response that as the project engineer for Company 1, Engineer Y is "a material witness to the conditions, regardless of where he is currently working and should be able to supply the information to Attorney," begs the fundamental question. Engineer Y should not be forced to compromise his professional integrity because there may be some legal circumstance whereby Engineer Y is compelled to testify as a witness during litigation. Attorney should not use the agency's current business relationship with Company 2 as "leverage" to pressure one of Company 2's employees to compromise his ethical integrity to serve the interests of the agency.

Copyright © 2003 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).

Insofar as Engineer Y's obligations as a potential material witness called by the agency, Engineer Y's obligation is to provide full disclosure both with respect to the nature of Engineer Y's employment with Company 1 (and his work in connection with the landscape contractor) and with respect to his subsequent employment with Company 2 (and his work in connection with the agency). In addition, as a material witness, Engineer Y's testimony should of course be completely factual and should include his best professional judgment and understanding of the issues involved. The Board notes Section II.1.c of the NSPE Code, which permits the revealing of facts, data, or information without the prior consent of the client or employer in the case where such disclosure is authorized or required by law or the NSPE Code. Engineer Y should not yield to the temptation to curry favor with his present employer by not vigorously defending his opinion for Company 1. It would be considerate for Company 2's principal engineer to assure Engineer Y that there will be no prejudice on the part of Company 2 for a vigorous defense of his opinion for Company 1.

Conclusions:

1. It would be ethical for Engineer Y to meet with the attorney representing the public agency to explain the ethical constraints on access to his work while employed by Company 1, but it would be a breach of trust for Engineer Y to discuss in any way the information in and findings of the Company 1 report.

2. As a material witness, Engineer Y's testimony should be completely factual and should include his best professional judgment and understanding of the issues involved.

BOARD OF ETHICAL REVIEW
E. Dave Dorchester, P.E., F.NSPE
Louis L. Guy, Jr., P.E., F.NSPE
James D. Lesikar, II, Ph.D, P.E., F.NSPE
William J. Lhota, P.E., NSPE
Robert L. Nichols, P.E., F.NSPE
Harold E. Williamson, P.E., NSPE
William D. Lawson, P.E., NSPE, Chair

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

Copyright © 2003 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).

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.

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 www.nspe.org and learn how to obtain additional NSPE Opinions (or call 800/417-0348).

Copyright © 2003 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).