# Conflict of Interest – Expert Witness Testimony

## Case No. 06-11

### Facts:

Engineer A, a licensed professional engineer, is serving as an expert witness in a civil case brought by a school board against another engineer, Engineer B, in connection with the engineer's preparation of a football field and track site plan. The field and track regularly floods with minimal rainfall.

Engineer B calls as an expert witness, Engineer C, who is a member of the state engineering licensure board. Engineer A and the school board are concerned that this matter could ultimately be referred to the state engineering licensure board by the school board upon conclusion of the litigation and that Engineer C's judgment may be biased by the earlier litigation.

### Question:

Would it be ethical for Engineer C, a member of the state engineering licensure board, to serve as an expert witness under these circumstances?

### References:

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| *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.3.b.* | - | *NSPE Code of Ethics:* | *Engineers may express publicly technical opinions that are founded upon knowledge of the facts and competence in the subject matter.* |
| *Section II.4.d.* | - | *NSPE Code of Ethics:* | *Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.* |

### Discussion:

The obligations of professional engineers to be objective and truthful and the issue of conflicting interests are fundamental ethical principles go to the heart of the NSPE Code of Ethics. As with all professions, an engineer's objectivity and truthfulness are the cornerstones of the services they provide to their clients and upon which the public justifiably relies. In addition, engineers have an ethical obligation to avoid conflicts of interest that can affect their objectivity and the quality of the services the engineer provides to the client and to take all appropriate steps to disclose those conflicts as appropriate.

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On several occasions, the NSPE Board of Ethical Review has examined the issue of the engineer's basic obligation to be objective and truthful and the issue of conflict of interest. An important and relevant example is BER Case No. 82-4. In that case, Engineer A, who was in full-time private practice, was retained by the county as county engineer for a stipulated monthly fee. His duties included reviewing plats and construction drawings to determine whether they met county requirements and making recommendations to local developers, county commissions, and the planning and zoning board. In addition, Engineer A was retained by the city as city engineer for a stipulated annual fee. His duties included making recommendations to the city council concerning the approval of completed engineering work. Engineer A also served as project administrator for the county airport authority and was responsible for formulating a plan for the continued development of an airport industrial park. Finally, Engineer A was administrator of the city block grant program and oversaw engineering work on various projects. Engineer A had been retained as a consultant by several private firms to help develop city and county project proposals. In determining that some of these parallel activities were consistent with the NSPE Code of Ethics while others were not, the NSPE Board of Ethical Review noted, citing earlier BER Case No. 67-12, that an engineer serving on a commission could ethically provide services to private owners where the engineer had abstained from the discussion and vote on permit applications. The board cautioned, however, that care must be taken that the engineer in such a situation not have taken any action to influence the favorable decision on the permit. In BER Case No. 82-4, there was nothing to suggest that Engineer A had taken any action to influence decisions as administrator of the city block grant program or as project administrator of the county airport authority. Therefore, the board found under the facts presented that Engineer A could properly provide engineering services through his private firm to the two city and county programs. The board also noted that when an engineer serves as a part-time county engineer and as a private consultant and in the latter capacity submits the plans of a private developer to the county for approval, the engineer should not offer any recommendation for their approval. To do so is a useless act because it is basic to the Code that an engineer will not submit plans or other work that he does not believe represents the best interests of his client. Said the board, "we cannot see how an engineer can wear two hats and still represent the best interest of his client. To do so would constitute a conflict of interest. If the county wishes to obtain a recommendation on the merit of his work, it is our view that it should retain another engineer for review in accordance with NSPE Code Section III.8.a."

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While the facts and circumstances in the present case are somewhat different and distinguishable from those in the two earlier cited BER Case Nos. 82-4 and 67-12, the board believes the discussion in those cases are generally instructive to the issues at hand. In the present case, the issue is whether Engineer C is compromising his role as a member of the state engineering licensure board in serving as an expert witness on behalf of Engineer B in litigation. The issue appears to be the speculative question of whether, at some point in the future, the state engineering licensure board may hear a case involving Engineer B's conduct and whether Engineer C can be objective and truthful and may have a conflict of interest in this matter.

As a practical matter, state licensure boards members are generally practicing professional engineers actively engaged in professional practice. To suggest that Engineer C, a member of the state engineering licensure board, should avoid a professional engagement because of the possibility, however remote, that the party who retains the engineer may at some point in the future be brought before the state engineering licensure board does not seem to be a workable approach. Instead, as the board noted in the earlier cited BER opinions, there are procedures and techniques available to provide individuals serving as members of public bodies (full disclosure, abstaining, recusal, etc.) to avoid a conflict of interest or the appearance of a conflict of interest. In addition, state engineering licensure boards may have policies and procedures to address these issues separate and apart from the broad policy language contained in the Code.

**Conclusion:**

It would it be ethical for Engineer C, a member of the state engineering licensure board, to serve as an expert witness under these circumstances. However, Engineer C may need to abstain or recuse himself if the issue comes before the state engineering licensure board.

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