Expert Witness Testimony – Confidential Information

Case No. 06-2

Facts:

Engineer A's firm is solicited by WXY Corporation, a potential industrial client to submit a proposal on a major engineering project. During the interviews of Engineer A's firm and its qualifications, the potential client discusses certain limited technical details and elements of the project to Engineer A. Later, another engineering firm is selected to provide the design services for WXY Corporation and Engineer A is informed of this decision. Still later, a dispute arises between WXY Corporation and FGH Construction, the general contractor on WXY Corporation's major engineering project. FGH Construction contacts Engineer A and requests that Engineer A perform forensic engineering and provide expert witness testimony in connection with the dispute between WXY Corporation and FGH Construction.

Question:

Would it be ethical for Engineer A to perform forensic engineering and provide expert witness testimony in connection with the dispute between WXY Corporation and FGH Construction?

References:

Section II.4.a.	*NSPE 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.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.a.	*NSPE Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, promote nor arrange for new employment or practice in connection with a specific project for which the engineer has gained particular and specialized knowledge.*
Section III.4.b.	*NSPE Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, participate in nor 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:

The issue of an engineer serving as an engineering expert for a client that is in a dispute with which the engineer may have had some type of past relationship is an issue that the NSPE Board of Ethical Review has had occasion to consider in the past. As with other board issues, while sometimes these issues are easily resolved, in other cases the issues involve more complex questions and are not so easily determined. Many of the more difficult issues involve fact situations that raise difficult problems.

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The NSPE Board of Ethical Review's first review of this issue was in BER Case No. 82-6—a case involving a simple and straightforward set of facts. In that case, 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 had filed a claim against the U.S. government for additional compensation. In deciding that it was unethical for Engineer A to be retained as an expert witness for the contractor under these circumstances, the board noted that there is 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, as required by the NSPE Code of Ethics. Additionally, the board noted that as an expert witness, Engineer A would be required to state his opinion based upon his firsthand knowledge and on facts of record. There is a danger that Engineer A's opinions, based on his firsthand knowledge and 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, he may be called upon to give an opinion as to the facts with which he was involved as a consultant with the government. The board noted that there can be no doubt that NSPE Code Section III.4.b. was enacted to prevent engineers from disclosing such information.

Later, in BER Case No. 94-9, the board considered a situation involving Engineer A, a principal in a private practice firm, retained orally by the 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 the plaintiff's attorney, it was never 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 Engineer A's 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 agreement. In determining it was ethical for Engineer A to agree to provide accident reconstruction services to the law firm representing the defendant, the board noted that Engineer A was never involved substantively in the accident analysis and was apparently only provided with a general and perfunctory description of the nature of the accident and the issues involved in the case. The board noted that from the facts, it appeared 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 was 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

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conflict of interest of the types described in BER Case Nos. 76-3 and 82-6 to arise. (See NSPE Code Section III.4.b.) However, the board noted that while it may conclude under the circumstances that Engineer A did not have a conflict of interest per se, and that his conduct was ethical, the board was not entirely comfortable with Engineer A's actions and conduct. The board noted that before agreeing to being retained by the defendant and his attorney, Engineer A should have provided notice to the plaintiff and his attorney and to inquire of them whether his professional services would be required by them as part of the subject litigation. While the board noted that the plaintiff and his attorney's apparent inattentiveness in failing to respond to Engineer A's letter of agreement was not proper, because of the delicate nature of the matter at hand and the danger of misperception of Engineer A's actions, the board noted that Engineer A should not have assumed that the plaintiff and his attorney had sought consulting services elsewhere, but instead made inquiries before agreeing to provide services to the defendant.

Because the facts in the present case are similar to the facts in BER Case No. 94-9 and distinguishable from the facts in the earlier BER cases noted, the board is of the view that it would be ethical for Engineer A to perform forensic engineering and provide expert witness testimony in connection with the dispute between WXY Corporation and FGH Construction.

Unlike the situation in BER Case No. 82-6, Engineer A was never formally retained by the client, WXY Corporation, but instead only participated in a single interview to determine whether Engineer A would be retained to provide design services for WXY Corporation. Since Engineer A was never involved in a formal engineer-client relationship with WXY Corporation, Engineer A should not be restricted or penalized by WXY Corporation's independent decision to share limited technical information with Engineer A. Moreover, there is nothing in the facts to suggest that the technical information in question related directly to any dispute between WXY Corporation and FGH Construction. In addition, unlike the facts in BER Case No. 94-9, there is no doubt nor question regarding whether Engineer A had any continuing relationship or obligation concerning WXY Corporation. WXY Corporation had clearly communicated to Engineer A that it had not been selected by WXY Corporation and so the matter was unambiguously closed as far as both parties were concerned. Moreover, unlike the situations in both BER Case Nos. 82-6 and 94-9, at the time that Engineer A and WXY Corporation established their initial communication, there was no contemplated dispute or litigation under consideration.

Consistent with the discussion, the board sees no reason why Engineer A should not accept this commission. To decide otherwise would place undue restrictions upon the ability of engineers to perform their services on behalf of and for the benefit of their clients.

Conclusion:

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It would be ethical for Engineer A to perform forensic engineering and provide expert witness testimony in connection with the dispute between WXY Corporation and FGH Construction.

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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, and university engineering departments), the specific business form or type should not negate nor detract from the 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.

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