Expert Witness Testimony – Employee of Contractor Association

Case No. 06-3

Facts:

Engineer A is a full-time director of engineering for a national contractor association. In Engineer A's role, Engineer A has written two books that the association has published. Engineer A is recognized as a national expert in a unique, technical area of practice.

Recently, Engineer A has decided to establish his own consulting engineering firm and leave the association. Engineer A has announced his decision to leave the association to his employer, but not his decision to immediately establish the consulting engineering firm, and the association has decided to retain Engineer A as a consultant after Engineer A departs from the association at the end of the year.

While still employed by the association, Engineer A is contacted by an attorney who obtained a copy of one of the books authored by Engineer A and requested that Engineer A serve as an expert witness in a pending case against a contractor. Engineer A informed the attorney that as a general rule employees of the association have not served as expert witnesses, although the association has no formal policy addressing this issue. Engineer A offered to research other possible individuals to serve as an expert witness, but is not able to identify any experts with the technical expertise similar to his.

Questions:

1. Would it be ethical for Engineer A to perform outside services while employed by the association?

2. Would it be ethical for Engineer A to act as an expert witness under the facts and circumstances?

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.1.c.	-	*NSPE Code of Ethics:*	*Engineers shall not accept outside employment to the detriment of their regular work or interest. Before accepting any outside engineering employment, they will notify their employers.*
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 engineers have gained particular specialized knowledge on behalf of former clients or employers.*
Section III.6.b.	-	*NSPE Code of Ethics:*	*Engineers in salaried positions shall accept part-time engineering work only to the extent consistent with policies of the employers and in accordance with ethical considerations.*

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Discussion:
The issues presented in this case relate to a combination of matters, including questions relating to the age-old question of accepting outside employment from normal employment, obligations to employers and to clients, conflicts of interest, and other ethical concerns addressed by the NSPE Code of Ethics.

Beginning with the question of moonlighting, the NSPE Board of Ethical Review addressed this issue in the BER Case No. 64-2. In that case, Engineer Jones was employed full-time by the Acme Corporation, a contractor to a government agency. Acme permitted engineering employees with its approval to engage in outside consulting work, provided it was performed on the engineer's own time, did not conflict with the regular duties of the engineer, and did not become excessive, as well as other provisions. Acme also prescribed the following requirements for engineers proposing to perform consulting work for others:

1. Identify all organizations for which consulting has been done or for whom it was expected consulting might be done.

2. State the subject matter of all presently conducted or expected consultation.

3. State the number of days spent in consultation or expected to be spent in consultation without regard to any consideration of whether the time so spent was on weekends, vacation, leave time, time allowed away from work for such purposes, or regular working time.

4. State the total fee received or expected to be received.

5. Notify Acme in writing, and receive approval before making any consulting agreement.

In finding that the restrictions imposed on outside consulting services by Acme were in conformity with the then "Canons of Ethics," the board noted that under the circumstances, Engineer Jones had a choice and a duty—he must advise the outside organization he proposes to serve of the requirement that he provide the information indicated to his employer, and if the outside organization objects he may not make the disclosure. In that case his choice was to refrain from performing the services, or terminate his regular employment to perform the consulting service without disclosure of the facts to others. Said the board, "this is a protection of the rights and interests of the client or employer, not those of the engineer."

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Based upon reasonable inferences from the board's decision in BER Case No. 64-2 and the language in the NSPE Code of Ethics, the board concludes that the acceptance of outside employment questions can be easily resolved assuming that Engineer A makes a reasonable inquiry to determine whether his current employer has an employment policy on this issue of outside employment and, if so, take all appropriate steps to comply with the policy or negotiate some type of mutually acceptable understanding or agreement with his employer, the association. Basic to this obligation is the requirement to provide full disclosure to Engineer A's employer—an obligation that Engineer A apparently has not fulfilled under the facts.

Turning to the second question as to whether it would be ethical for Engineer A to act as an expert witness under the facts and circumstances, we are somewhat troubled by the possibility that an employee of an organization intended to serve an industry or profession might serve in the capacity of an expert witness in litigation involving companies or practitioners. The board's concern relates to the role that trade and professional societies play as honest brokers within their industry or profession and the possibility that such a role might be compromised by having an association employee serving in the role of an expert witness. Members or potential members of the association may be concerned about supporting an organization whose employees might at some point appear in litigation as an adverse party expert witness. The fact that Engineer A appears to possess some unique skill or understanding of certain technical issues is not wholly convincing to the board. Engineer A's actions in serving as an expert witness under the described circumstances does not appear to be consistent with the spirit or the letter of the NSPE Code of Ethics.

Although the board reaches a conclusion that Engineer A serving as an expert witness is inconsistent with the NSPE Code, the board is also mindful that under the facts, Engineer A was in the process of departing from the association, at which time, Engineer A would presumably be free to pursue employment opportunities with less ethical restrictions than those he would be under as an employee of the association, unless otherwise restricted by some type of employment agreement, which under the facts does not appear to be the case.

Conclusions:

1. It would be ethical for Engineer A to perform outside services while employed by the national contractor association, assuming Engineer A makes reasonable inquiry to determine whether his current employer has an employment policy on this issue of outside employment and, if so, take all appropriate steps to comply with the policy or negotiate some type of mutual understanding or agreement between Engineer A and his employer following full disclosure to Engineer A's employer.

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2. It would not be ethical for Engineer A to act as an expert witness under the facts and circumstances.

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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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