Expert Witness - Disclosure of Interests Represented

Case No. 07-12

Facts:

Engineer A serves on the State X Environmental Quality Council. The State Y Environmental Quality Council conducts a hearing on proposed rules for coal bed methane discharge permits. Engineer A was retained to testify by a coal bed methane company. In State Y, Engineer A began his testimony by stating that he was a licensed professional engineer only in State X. Engineer A then stated that he is employed by the U.S. Department of Energy, working in the coal bed methane arena. Engineer A's PowerPoint presentation listed his job title with the U.S. DOE.

Although Engineer A also provides consulting services, primarily for coal bed methane companies, Engineer A never stated in his testimony that he works for coal bed methane companies. When asked at the end of his testimony if he was testifying on behalf of the U.S. DOE, Engineer A said, "I am testifying on my own behalf."

Later, a newspaper article on the hearing reports that a "U.S. DOE researcher" testified at the hearing, and information is later revealed that Engineer A's attendance at the hearing was paid for by the coal bed methane company through his consulting business.

Questions:

1. Was it ethical for Engineer A to provide expert testimony in the manner described?

2. Was it ethical for Engineer A to serve as a expert witness under the circumstances?

References:

Section I.4.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall act for each employer or client as faithful agents or trustees.*
Section I.5.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall avoid deceptive acts.*
Section I.6.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.*
Section II.3.	-	*NSPE Code of Ethics:*	*Engineers shall issue public statements only in an objective and truthful manner.*
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.*

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Section II.3.c.	-	*NSPE Code of Ethics:*	*Engineers shall issue no statements, criticisms, or arguments on technical matters that are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters.*
Section II.4.	-	*NSPE Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
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.3.	-	*NSPE Code of Ethics:*	*Engineers shall avoid all conduct or practice that deceives the public.*

Discussion:

This case raises a number of significant issues and identifies a number of troubling ethical issues that can arise when a professional engineer performs services as a government employee and also is involved in private practice activities outside of his role as a government employee.

This Board has examined situations involving a professional engineer working in both the public and the private sector during the same period of time. For example, in the early BER Case No. 67-1, John Doe, a professional engineer, was a county engineer and a member of the county planning board. He also engaged in part-time consulting practice. Doe prepared the plans for a subdivision development in his capacity as a consulting engineer, then as county engineer, recommended approval of his plans to the county planning board. As a member of the county planning board, he later voted to approve these plans. In finding that Doe's actions were unethical, the Board found it abundantly clear that Doe's operations were in direct conflict with the NSPE Code of Ethics. In his capacity as an engineer in private practice, Doe had prepared plans for approval by a governmental body on which he served as a member. Said the Board, "(Doe) would be in violation of NSPE Code even if he had not been a member of the county planning board by virtue of his employment as the county engineer and the responsibility of the county engineer to submit the plans to the county planning board with recommendation."

Thirty-five years later in BER Case No. 02-8, Engineer A served as a traffic engineer for the State Department of Transportation. Engineer A reviewed private engineering firm contracts and traffic signal plans, specifications, and estimates submitted from outside entities (developers, municipalities, etc.) for traffic signal work performed on the state highway system. Prior to Engineer A's employment with the State DOT's traffic engineering division, Engineer A performed airport design through a consulting firm which currently does no traffic signal work in the state highway system. The State DOT contracted directly with municipalities by means of a grant agreement to fund improvements to municipal airports. The State DOT did not contract directly with

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consultants hired by the municipalities for their airport improvements, nor was the state involved in the selection of airport consultants other than to provide Federal Aviation Administration guidelines with respect to consultant qualifications-based selection procedures. Engineer A was approached by his former consulting engineering firm to serve on a part-time basis in seeking contracts with municipalities for design work associated with the airport improvements (master plans, runway extensions, etc.) while continuing to work as an employee with the State DOT. In deciding that it would be unethical for Engineer A to serve on a part-time basis in seeking contracts with municipalities for design work associated with the airport improvements (master plans, runway extensions, etc.) while continuing to work as an employee with the State DOT, the Board noted that it could easily foresee the potential for a conflict of interest for Engineer A in his relations with municipality's work as a state highway employee and in his relations with the same municipalities as a representative for the consulting firm working on municipal airports. While the scope of his responsibilities (state highways vs. airports) were clearly different, there may be situations and circumstances where his role in one or another area could be compromised. Highways link to airports and decisions in one sphere could have an impact on decisions in another sphere. For example, there are airport and highway hubs that are inextricably linked and the traffic and airport issues are often closely related. Moreover, there are clear ethical appearance issues that would presumably need to be addressed. While with regard to Engineer A's dual role as a governmental employee and a private employee, assuming both the state governmental agency and the engineering firm are aware of Engineer A's activities as a dual employee and do not object to these activities, the Board indicated that it believed, based upon the engineer's obligation to serve as faithful agent and trustee, that there is a violation of the NSPE Code of Ethics under the facts and circumstances presented here. The Board also cautioned Engineer A to be mindful of the issues raised earlier relating to the need to carefully follow all applicable governmental procedures and policies and liability concerns and to avoid the use of public resources in the performance of private work.

Virtually all, and possibly more, ethical considerations noted in BER Case Nos. 67-1 and 02-8 are clearly apparent in the present case. This case seems to present a more extreme example of the ethical issues involved in a situation of this type. As an employee of the U.S. Department of Energy, working in the coal bed methane division of the U.S. DOE, Engineer A had a clear conflict of interest that would make it virtually impossible for him to work as a part-time consultant in this same area for private clients—which the facts suggest Engineer A in fact did. To do so would be to breach the basic trust as an honest and faithful agent for his employer. In addition, Engineer A's use of the same PowerPoint presentation illustrates one of the problems in attempting to draw a line between Engineer A's activities as a government employee and a private consultant. An obvious question to ask is whether Engineer A negligently or intentionally used the presentation with the U.S. DOE representation, since it could be viewed as a careless error or an intentional effort to provide greater credibility to his testimony.

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However, in either case it was entirely inappropriate since it appears that Engineer A was not testifying in an official capacity on behalf of the U.S. DOE, as was reported in the newspaper. At the same time, it is not entirely clear from the facts who Engineer A was testifying on behalf. On the one hand, Engineer A suggests that he is testifying on his own behalf, but the facts also indicate that Engineer A's attendance at the hearing was paid for by a private coal bed methane company.

In sum, under the circumstances, Engineer A's actions in serving as an expert witness and Engineer A's behavior as an expert witness calls into serious question Engineer A's understanding of his ethical obligations as a professional engineer.

Conclusions:

1. It was unethical for Engineer A to provide expert testimony in the manner described.

2. It was unethical for Engineer A to serve as a expert witness under the circumstances.

Board of Ethical Review:
Mark H. Dubbin, P.E., NSPE
Robert C. Gibson, P.E., F.NSPE
James D. Lesikar II, Ph.D., P.E., F.NSPE
Monte L. Phillips, Ph.D., P.E., F.NSPE
Michael L. Shirley, P.E., F.NSPE
Eric H. Yamashige, P.E., L.S., F.NSPE
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