Discovering Embedded Comments in Electronic Documents Damaging to Adversary

Case No. 09-11

Facts:

Engineer A is a forensic engineer and is hired by Plaintiff Attorney Y in a product liability case to review technical attachments that are part of settlement documents. The documents are relayed by Defense Attorney X to Plaintiff Attorney Y who then e-mails them to Engineer A. Engineer A's computer has commonly available commercial software that reveals embedded notes in the original document, which includes comments that are damaging to the interests of Defense Attorney X's interests. Engineer A reads the comments and realizes the implications of the comments.

Question:

What are Engineer A's ethical obligations under the circumstances?

References:

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.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 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.*

Discussion:

Increasingly, professional engineers are having frequent professional interactions with other professionals, including attorneys. Over the past 30 years, engineering has seen a dramatic increase in the field of forensic engineering, with engineers being retained by attorneys to conduct accident and other investigations, prepare analysis and reports, provide expert witness testimony, and perform other services as required. Both the plaintiff and the defense bar have found the services of professional engineers invaluable in the pursuit of their client's legal interests.

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On several occasions, the Board of Ethical Review has considered cases involving the ethical responsibilities of professional engineers in their relations with other professionals, including attorneys. Many of these cases have addressed the ethical responsibilities of the professional engineer serving as an expert witness. For example, in BER Case 82-2, the Board at that time was faced with a situation involving an engineer offering homeowner inspection services.

There, Examining Engineer A performed an engineering inspection of a residence for his client, a prospective buyer (husband and wife). Following the inspection, Engineer A 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. Examining Engineer A submitted his report and an invoice to the client, showing that a copy of the report was also sent to the real estate firm handling the sale of the residence. The client objected that such an action prejudiced their interests by lessening their bargaining position with the owners of the residence. They also complained that Examining Engineer A 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 finding that Examining Engineer A acted unethically in submitting the home inspection report to the real estate firm representing the owners, the Board noted that, at first blush, this appears to be a case involving a relatively small economic issue compared with the larger commercial and industrial projects with which engineers are often concerned. But, as it involved an ethical principle the Board had not addressed before, the Board considered the case on the broader philosophical aspects.

The Board noted that this was not a case of an engineer allegedly violating the mandate of NSPE Code Section III.4. (not to disclose confidential information concerning the business affairs of a client). That provision of the NSPE Code necessarily relates to confidential information given the engineer by the client in the course of providing services to the client.

Here, however, there was no transmission of confidential information by the client to the engineer. Whether the client in this case actually suffered a 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 a report commissioned by a client to a party with an actual or potential adverse interest. It is a common concept among engineers that their role is to be open, 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 NSPE Code (e.g., Sections II.3. and II.3.a.). At the same time, Code Section II.l.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.

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In BER Case 82-2, the Board read into the case an assumption that Examining Engineer A acted without thought or consideration of any ulterior motive. As a matter of course, he 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 having the same factual data flowing from his services. Thus, although we tend to exonerate Examining Engineer A 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 was slight, the principle of the right of confidentiality on behalf of the client predominates.

Later, in BER Case 03-1, the Board addressed a situation involving Engineer X, a professional engineer in private practice who served as a forensic engineer and expert witness. Engineer X had recently been engaged as an expert for the defense by an insurance company in a lawsuit involving the design of a sports complex. Engineer X received correspondence in an envelope addressed to him in his office from the attorney representing the plaintiff in the lawsuit. Engineer X noticed the source of the correspondence, unsealed it, read some of the contents, and realized that it was not intended for him. The correspondence was intended to be sent to the plaintiff's expert and not the defense's expert.

Engineer X then resealed the information and sent it back to the plaintiff's attorney with a note indicating that the correspondence was inadvertently sent to him, but that Engineer X did not review the contents of the correspondence. In finding that (1) it was not unethical for Engineer X to open the correspondence, and (2) it was unethical for Engineer X not to reveal that he had reviewed some of the content of the correspondence, Engineer X should have advised his client of the events that had transpired. In reaching its decision, the Board noted that it did not appear that the language of the NSPE Code places any special obligation on a professional engineer acting as an expert witness to use anything other than ordinary care in the performance of the engineer's professional services.

Under the facts, Engineer X opened what he believed to be correspondence intended for him. The correspondence was addressed to Engineer X with no indication that it was intended for another party. There was nothing in the facts to suggest that Engineer X should have had any doubts or suspicions about the correspondence. On this basis, it was the Board's opinion that it was not unethical for Engineer X to open the correspondence.

On the second issue, the Board stated that the NSPE Code of Ethics compelled Engineer X to reveal that he had reviewed some of the content of the correspondence. That is, the ethical course of action by Engineer X obliged him to be honest and truthful by disclosing to the plaintiff's attorney that he had reviewed a small portion of the

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material. While the NSPE Code placed on the engineer the obligation to serve the employer or client as faithful trustee, the Board indicated in Case 03-1 that obligation could be fulfilled if Engineer X had also informed his client (the defense attorney) that he had inadvertently reviewed some of the contents of the correspondence. By reviewing the material in the manner described, Engineer X had not done anything that was unethical.

Under the facts, it was clear that once Engineer X identified the material and understood the circumstances, he immediately ceased reviewing the contents of the correspondence. Whatever interests Engineer X thought he was protecting by misstating his actions to the plaintiff's attorney could be outweighed by the conclusion that attorney would draw from the situation. This could quite possibly discredit Engineer X's subsequent actions and testimony in connection with the case. Such appearances would not reflect well upon Engineer X or his client, nor upon the engineering profession in general. For those reasons, the Board concluded that Engineer X and his client would have been better served if he had accurately and fully reported the incident. Furthermore, the Board noted that Engineer X should be certain to advise his client of the events that have transpired.

The Board believes that the decision in Case 03-1 is instructive and was correctly decided. Under the facts in the present case, the Board is of the view that much like Case 03-1, Engineer A had an ethical duty to immediately advise Plaintiff Attorney Y of the fact that Defense Attorney X's comments have been revealed to Engineer A.

As earlier Boards have noted, as professional engineers find their professional practice intersecting with the professional practice of other learned professionals, such as attorneys, who are governed by their own rules of professional conduct and codes of ethics, engineers need to gain a better understanding of the ethical responsibilities of these professionals. Clearly, this case cannot be seen as strictly a matter involving engineering ethics, but must also be considered as a legal ethics matter. Since Engineer A is providing professional services within the context of a legal forum, it may be that the legal and legal ethics issues need to first be resolved before Engineer A can take all appropriate and necessary action in this matter. For example, it may be determined that Attorney X may have violated the legal profession's rules of professional conduct or code of ethics for negligently transmitting confidential documents electronically containing embedded comments to Attorney Y, especially if as stated under the facts, the software on Engineer A's computer was commonly and commercially available.

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Conclusion:

Engineer A had an ethical duty to immediately advise his client, Plaintiff Attorney Y, of the fact that Defense Attorney X's comments had been revealed to Engineer A. In addition, Engineer A may be required to suspend further action in this matter pending the court's resolution of the issue.

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