Expert Witness—Interested Party

Case No. 10-11

Facts:
Tenant has a water leakage problem in a building owned by Landlord and hires Engineer A to perform a basement inspection to determine the cause of the leakage. Landlord had earlier hired Contractor to install a sump pump in connection with an earlier leakage issue. Engineer A determines that the leakage is due to run off from an adjacent parking garage. Engineer A recommends a series of design and construction solutions to address the leaks and presents the report to his client, the Tenant. Engineer A's report briefly mentions Contractor's earlier work to install the sump pump, but is not critical of Contractor's work.

Ultimately, Tenant, with the Landlord's consent, agrees to have Engineer B develop an engineering solution. The work is completed and the leakage issues are successfully addressed. Later, Contractor's attorney contacts Engineer A in an effort to retain Engineer A as an expert witness in connection with litigation between Contractor and Landlord relating to the original sump pump work performed for Landlord.

Question:
Would it be ethical for Engineer A to perform the expert witness work for Contractor?

Reference:

Section II.4.	-	*NSPE Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section III.4.b.	-	*NSPE Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, participate in or 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:
Expert witness testimony by an engineer often raises important ethical considerations. Questions of confidentiality, conflicts of interest, scope of practice, competence, and other ethical considerations frequently come into play when expert witness testimony is the focus of a professional practice issue.

Copyright © 2010 National Society of Professional Engineer (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

The NSPE Board of Ethical Review has considered ethical issues relating to expert testimony on various occasions. One example is BER Case No. 82-6. 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 alleged by the U.S. government to be responsible for the dam failure, 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 was nothing in the record to indicate that Engineer A had been given the consent of his former client, the U.S. government, to represent the interests of the contractor in its claim against the government, as required by the NSPE Code of Ethics.

Importantly, the Board also noted that as an expert witness, Engineer A would be required to state his opinion based upon his firsthand knowledge of the facts of record. The Board further noted that there was 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 Engineer A had been retained by the U.S. government. Indeed, said the Board, Engineer A 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 or signed by the plaintiff or his attorney. Thereafter, 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 in the litigation. Later, the plaintiff's attorney contacted Engineer A with the expectation that Engineer A would provide accident reconstruction consultation per their 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 on behalf of the plaintiff and was apparently only provided with a general and perfunctory description of the nature of

Copyright © 2010 National Society of Professional Engineer (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

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 in essence a discussion 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 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 was not entirely comfortable with Engineer A's actions and conduct under the facts. 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 acknowledged 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 believed 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.

More recently, in BER Case No. 06-2, Engineer A's firm was solicited by WXY Corporation, a potential industrial client, to submit a proposal on a major engineering project. During interviews of Engineer A's firm and a review of its qualifications, the potential client discussed certain limited technical details and elements of the project to Engineer A. Later, another engineering firm was selected to provide the design services for WXY Corporation, and Engineer A was informed of this decision.

Thereafter, a dispute arose between WXY Corporation and FGH Construction, the general contractor on WXY Corporation's major engineering project. FGH Construction contacted Engineer A and requested that Engineer A perform forensic engineering and provide expert witness testimony in connection with the dispute between WXY Corporation and FGH Construction. In deciding 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, the Board saw no reason why Engineer A should not accept this commission. Said the Board, "…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."

Copyright © 2010 National Society of Professional Engineer (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Turning to the facts in the present case, the Board can find nothing specific in the NSPE Code of Ethics or the NSPE Board of Ethical Review opinions cited that would suggest that Engineer A could not perform the work in question for Contractor. The only potential ethical issues for consideration relates to language in NSPE Code Section II.4. and III.4.b. that requires (1) an engineer to obtain the permission of an "interested party" when representing adversarial interests in connection with a specific project and (2) "act for each employer as faithful agents or trustees."

Under the facts of the case, since Engineer A was never retained by Landlord, it would be difficult to make a plausible case that Landlord was in fact an "interested party" in the strict sense of the term, which would then require Engineer A to obtain Landlord's permission before performing services for Contractor. While the building in question was owned by Landlord, Engineer A's client was Tenant. Landlord did not share any confidential information with Engineer A.

Moreover, one must assume that as the contractor for Landlord, Contractor has access to the same if not more information about the building than did Engineer A. While Landlord may have been, at best, an incidental beneficiary of Engineer A's services (and arguably a potential adversary of Tenant in the event of a dispute between the tenant and landlord over the leakage issue), it does not appear under the facts that Engineer A owed any ethical obligation to Landlord. Therefore, Engineer A would be free to pursue a professional relationship with Contractor.

Conclusion:
It would be ethical for Engineer A to perform the expert witness work for Contractor.

Board of Ethical Review:
Mark H. Dubbin, P.E., NSPE
Robert C. Gibson, P.E., F.NSPE
Monte L. Phillips, Ph.D., P.E., F.NSPE
Michael L. Shirley, P.E., F.NSPE
Samuel G. Sudler III, P.E., NSPE
Mumtaz A. Usmen, Ph.D., P.E., F.NSPE
Curtis A. Beck, P.E., F.NSPE, Chair

NOTE: The NSPE Board of Ethical Review considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials, and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

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.

Copyright © 2010 National Society of Professional Engineer (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

To obtain additional NSPE opinions, visit www.nspe.org or call 800-417-0348.

Copyright © 2010 National Society of Professional Engineer (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).