Expert Witness—Accepting a Position with an Engineering Firm that Represented an Adverse Party in Litigation

Case No. 13-12

Facts:

In year 1, Engineer A worked for Engineering Firm L and served as an expert witness for Attorney X who represented Client T in litigation. In year 2, Engineer B, an engineer for Engineering Firm M served as an expert witness for Attorney Y who represented Client U in current litigation with Client T involving a legal matter related to Engineer A's earlier expert witness work for Attorney X. In year 3, during the time that Engineer B is still serving as an expert witness in the same litigation with Client T, Engineer A is asked to come to work as an engineer for Engineering Firm M.

Question:

Would it be ethical for Engineer A to accept the engineering position with Engineering Firm M?

References:

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 or 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 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:

Employment transition and the professional and ethical issues involved have long been a part of engineering practice. Although it is not unusual for some engineers to remain with the same employer for the engineer's entire career, many, if not most engineers move several times from one employer to another during their professional careers. This is not a new phenomenon and many observers see this trend only increasing in the future. However, when transitioning from one employer to another or to a different practice environment, ethical conflicts sometimes arise.

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Employment transition issues in the context of forensic and expert witness services have been examined on occasion by the NSPE Board of Ethical Review. In addition, the role of engineers in connection with the judicial process has been a topic of Board consideration on several occasions. Professional engineers are frequently called upon prior to or during litigation to investigate or explain technical reasons for various types of failures that result in bodily injury—as well as physical and economic damages. In that context, professional engineers often gain access to project information, legal strategies, particular and specialized knowledge, and other confidential information.

One of the more interesting and relevant BER cases involving an engineer serving as an expert witness is BER Case No. 82-6. There, Engineer A was retained by the US government to study the causes of a dam failure. Contractor X was hired by the US government as the contractor on the same project. Later, Engineer A was retained as an expert witness by Contractor X, who had filed a claim against the US government for additional compensation. In finding that Engineer A's actions (viz., working on the dam failure case for the US government and then later for Contractor X in an adversarial proceeding against the US government) were in conflict with the NSPE Code of Ethics, the Board noted that there was nothing in the record to indicate that Engineer A was given the consent of his former client, the US government, to represent the interests of the contractor in its claim against the government for additional compensation.

In addition, the Board noted that it had no doubt that the expert testimony offered by Engineer A in a legal proceeding would constitute "particular, specialized knowledge gained on behalf of a former client or employer." As an expert witness, Engineer A would be required to state his opinion based upon his firsthand knowledge and on facts of record. There would be a danger that Engineer A's opinions, based on his firsthand knowledge and his understanding of the facts of record, would touch upon privileged, specialized, and confidential knowledge gained while he was retained by the US government. Indeed, the Board noted that Engineer A may be called upon to give an opinion as to the very facts with which he was involved as a consultant with the government. Said the Board, "…There can be no doubt that NSPE Code Section III.4.b was enacted to prevent engineers from disclosing such information…" For those reasons, the Board found that it would be unethical for an engineer who was retained by the US government to be retained as an expert witness for a contractor who filed a claim against the US government for additional compensation.

Later, BER Case No. 03-2 involved Engineer Y, a professional engineer employed at Company 1, a geotechnical engineering firm, who was responsible for an investigation of soil and groundwater conditions at a facility administered by a public agency. The investigation was conducted for a landscape contractor client who was being held in default by the public agency due to a large number of plants dying. Engineer Y's report

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was issued by Company 1 to the landscape contractor client. Less than one month after completing the study, Engineer Y left Company 1 to work for another company and had no additional contact with the former employer or client related to the project.

Approximately two months after Company 1's report was issued, Company 2, another geotechnical engineering firm, was retained by the public agency to perform a geotechnical investigation of the soil and groundwater conditions. Company 2's report was issued to the client and identified similar soil conditions, but offered a different opinion than Company 1 as to possible causes. Company 2's report was intended to be used in an arbitration proceeding between the public agency and the landscape contractor.

Approximately six months after leaving Company 1, Engineer Y was hired by Company 2 as a project engineer. At the time of hire, Engineer Y was not aware that Company 2 has provided services to the public agency on the same project that Engineer Y had worked on for the landscape contractor. Six months later, Company 2 was contacted by the attorney representing the public agency in ongoing litigation with the landscape contractor client of Company 1. Attorney wished to discuss the findings in Company 2's report with the Company 2 principal engineer, Engineer B. A meeting time was arranged. At the meeting, Attorney stated that he understands that Engineer Y was now employed with Company 2 and indicated that he, Attorney, wished to also meet with Engineer Y to informally discuss the information in the Company 1 report. The Company 2 principal was hesitant to allow this meeting because of the potential conflict of interest for Engineer Y and recommended that Attorney contact the owner of Company 1 for an explanation of the Company 1 report. Attorney responds that as the project engineer for Company 1, Engineer Y was a material witness to the conditions, regardless of where he is currently working and should be able to supply the information to Attorney. The Board concluded that (1) it would be ethical for Engineer Y to meet with Attorney representing the public agency to explain the ethical constraints on access to his work while employed by Company 1, but it would be a breach of trust for Engineer Y to discuss in any way the information in and findings of the Company 1 report; and (2) as a material witness, Engineer Y's testimony should be completely factual and should include his best professional judgment and understanding of the issues involved.

Although BER Case Nos. 82-6 and 03-2 both involve different employment and professional practice transitions by engineers in the context of legal proceedings and their possible role in those legal proceedings, either as a fact witness or an expert witness, both cases highlight some of the important ethical obligations to which professional engineers must adhere in those circumstances. Among these obligations include the strict obligation to maintain confidential information on behalf of a current or former employer or client, disclosure, and consent obligations as well as other appropriate ethical responsibilities and duties.

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Turning to the facts in the present case, it is the Board's view that it would be ethical for Engineer A to accept the engineering position with Engineering Firm M provided that Engineer A does not perform any services in connection with the pending litigation between Client T and Client U. The Board would note that under the facts, there does not appear to be any contractual or other employment restrictions that would limit Engineer A's ability to accept employment with Engineering Firm M.

In passing, the Board notes that it does not know Engineering Firm M's actual reasons for hiring Engineer A. However, the Board must assume that Engineering Firm M's reasons for hiring Engineer A are independent from Engineer A's work on behalf of Attorney X and Client T. However, in that connection, if Engineer A has any suspicion that Engineering Firm M's motive in hiring Engineer A is to obtain Engineer A's assistance in connection with the pending litigation involving Client U, Engineer A should advise Firm M of his inability to provide assistance or guidance in connection with its work on behalf of Client U prior to accepting employment with Engineering Firm M. If, following Engineer A's hire, Engineer B, Engineering Firm M, or Attorney Y seek Engineer A's assistance or guidance in connection with its work on behalf of Client U, Engineer A has an ethical obligation to communicate to those parties Engineer A's ethical obligation to maintain the confidential information of Engineer A's former clients, Attorney X and Client T.

Conclusion:

It would be ethical for Engineer A to accept the engineering position with Engineering Firm M provided that Engineer A does not perform any services in connection with the current litigation between Client T and Client U. Furthermore, prior to accepting employment with Engineering Firm M, Engineer A has an ethical obligation to advise Engineering Firm M regarding his obligation to maintain the confidential information of Engineer A's former clients, Attorney X and Client T.

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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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