Report on a Case by the Board of Ethical Review

Case No. 66-11

Subject: Contingent Fee in Lawsuit
Section 9-Code of Ethics; Section 9(a)- Code of Ethics; Section 11(d)- Code of Ethics,

Facts:
An engineer who is an expert in his field of technology is often called upon to serve as a technical advisor on behalf of parties in lawsuits. His assignment is to provide the attorney for the party which retained him with expert analysis and advice on the technical reasons for the failure which led to the damage. He may also be called upon to testify as an expert witness in support of his findings on the technical aspects of the case.

The engineer has provided these services on a per diem basis. He has now been requested, however, to provide similar services for a plaintiff on the basis of being paid a percentage of the amount recovered by the plaintiff. If the judgment is in favor of the defendant he will not be paid for his services. The attorney for the plaintiff is handling the case on a similar arrangement for his fee.

Question:
Is it ethical for an engineer to provide technical advisor services or serve as an expert witness in a lawsuit on a contingent fee basis?

References:
Code of Ethics-Section 1-"The Engineer will be guided in all his professional relations by the highest standards of integrity, and will act in professional matters for each client or employer as a faithful agent or trustee."

Section 1(a) -"He will be realistic and honest in all estimates, reports, statements, and testimony."

Section 9-"The Engineer will uphold the principle of appropriate and adequate compensation for those engaged in engineering work."

Section 9 (a) -"He will not undertake or agree to perform any engineering service on a free basis, except for civic, charitable, religious, or eleemosynary nonprofit organizations when the professional services are advisory in nature."

Section 11(d)-"He shall not solicit or accept an engineering engagement on a contingent fee basis if payment depends on a finding of economic feasibility, or other conclusions by the engineer."

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Discussion:

It is accepted practice in the legal profession for an attorney to represent a client on a contingent fee basis. The questions which arise are whether the NSPE Code of Ethics permits similar arrangements for an engineer when he is serving as either a technical advisor or as an expert witness.

Section 9 of the Code deals with adequate fees and does not, we believe, control this case because it deals with the amount of fee, not whether a fee will be paid. Section 9 (a) does deal with the question of performing services without a fee and prohibits such except in a limited number of situations which are not pertinent here. However, we read "free" in Section 9(a) to mean that the engineer intends to and does donate his services, not expecting to be paid for them. That is not the case in this situation; the engineer does not intend to donate his services and expects to be paid for them, but his payment is contingent upon the party he serves in the case being successful. Therefore, we do not construe the arrangement as being within the purview of Section 9 (a).

Section 11 (d) of the Code does not prohibit all contingent contracts. It only forbids those in which payment to the engineer depends on a finding of economic feasibility, or other conclusions by the engineer. In construing this language in Case 65-4, we said that "the import of the restrictions in Section 11 (d) is that the engineer must render completely impartial and independent judgment on engineering matters without regard to the consequences of his future retention or interest in the project." We were there dealing with a normal engineering report and design function for a client.

There is no question of economic feasibility in this case, but there may well be "other conclusions" to be presented by the engineer in his technical report and in his testimony as an expert witness, if called in that capacity. The duty of the engineer as a technical advisor is to provide his client with all of the pertinent technical facts related to the case, favorable and unfavorable alike, and to perform one or more duties. He may prepare a written technical report to his client; he may sit with the client's attorney during the trial or other hearings to suggest questions to witnesses involving technical points; and he may serve the attorney with regard to explanation of technical facts which are developed in testimony. Whichever of these duties are performed, we think it reasonable to assume that the engineer will offer certain conclusions of a technical nature. On that basis he could not ethically serve on a contingent fee basis because his conclusions might be influenced by the fact that he stood to gain financially by having his conclusions coincide with his personal interest in his remuneration, which is dependent upon his client being successful in the litigation. To that extent the service as a technical advisor is comparable to the situation in Case 65-4; and the engineer must not be in a position whereby his form of compensation might tend to prevent him. from being completely impartial, or from rendering a full and complete report containing both favorable and unfavorable facts or conclusions.

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If the engineer is called as an expert witness he must have, in any case, formulated certain conclusions and therefore is prohibited by Section 11 (d) from engaging in such service on a contingent fee basis.

Conclusion:
It is not ethical for an engineer to provide technical advisory services or serve as an expert witness in a lawsuit on a contingent fee basis.

BOARD OF ETHICAL REVIEW CASE REPORTS: The Board of Ethical Review was established to provide service to the member ship of the NSPE by rendering impartial opinions pertaining to the interpretation of the NSPE code of ethics.

BOARD OF ETHICAL REVIEW FOR THESE CASES: T. C. Cooke, P.E.. C. C. Hallvik, P.E., James Hallett, P.E., N. O. Saulter, P.E., Sherman Smith, P.E., Kurt F. Wendt, P.E., Waldemar S. Nelson, P.E., Chairman.

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