Report on a Case by the Board of Ethical Review

Case No. 82-6

Conflict of Interest—Expert Witness for Contractor

Facts:
Engineer A is retained by the U.S. government to study the causes of a dam failure. Later Engineer A is retained by the contractor on this project, who has filed a claim against the U.S. government for additional compensation.

Question:
Is it ethical for Engineer A to be retained as an expert witness for the contractor under these circumstances?

Reference:
Code of Ethics - Section III.4.b. - "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:
The issue presented here was in many ways addressed by this Board in Case 76-3. In that case an engineer, under a retainer agreement with a county to provide water sewage design and expertise, and general advisory services, entered into a second retainer agreement with a developer with county approval. Thereafter, the developer filed a petition with the zoning board to rezone a substantial area of the county for commercial purposes. The county department filed several engineering reports adverse to the zoning petition, recommending denial of the rezoning because the proposed construction would overload available water sewage facilities. The development company then called the engineer as an expert witness at the zoning hearing. The engineer testified in support of the zoning petition. There we noted that when the engineer appeared before the body which had jurisdiction over the subject matter on behalf of a party whose position was adverse to that of the government while at the same time being an advisor to the government, he at best gave the appearance of trying to be on both sides of a public policy issue. We added that it would be incorrect to accept the engineer's role as an expert witness in the ordinary sense of that kind of professional service arrangement. The engineer was doing more than offering his expertise in engineering matters as an aid to a fuller understanding by the tribunal; he was in fact a paid advocate of a private interest in open conflict with the engineering opinions of the government. We noted that although the engineer was not required to agree with the government or even support its position at the hearing, if he chose to oppose that position on behalf of an adverse party, he could ethically do so by first resigning from his role as advisor to the county.

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The facts presented in the instant case are strikingly similar to those presented in Case 76-3 with one exception. Under the facts of this case, Engineer A was paid in full for his services to the government and apparently was no longer retained by the government and was free to oppose its position on behalf of an adverse party. Given the unambiguous language of Case 76-3 noted above, it would appear that Engineer A could ethically represent the interests of the contractor as an expert witness in its claim against the government for additional compensation. However, there is one important distinction between Case 76-3 and the case presented here. Case 76-3 was decided under the 1976 Code of Ethics which made no mention of an engineer's ethical obligation to refrain from representing an adverse interest in a proceeding. In July 1981, the Code of Ethics was revised. Section III.4.b. amended and refined the older Code Section 7 to read: "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 a particular specialized knowledge on behalf of a former client or employer."

Under the revised Code section it is clear that Engineer A's action was in violation of Section III.4.b. There is nothing in the record to indicate that Engineer A was given the consent of his former client, the U.S. government, to represent the interests of the contractor in its claim against the government for additional compensation.

In addition, we have 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 is 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 U.S. government. Indeed, he may be called upon to give an opinion as to the very facts with which he was involved as a consultant with the government. There can be no doubt that Section III.4.b. was enacted to prevent engineers from disclosing such information. For those reasons we find that it would be unethical for an engineer who was retained by the U.S. government to be retained as an expert witness for a contractor who filed a claim against the U.S. government for additional compensation.

Conclusion:
It would not be ethical for Engineer A to be retained as an expert witness for the contractor under these circumstances.

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