EXPERT WITNESS TESTIMONY -- SERVING PLAINTIFFS AND DEFENDANTS

Case No. 98-4

Facts:

Engineer A was retained by ABC Manufacturing for the purpose of reviewing documents to form an opinion in a patent litigation matter in an area of Engineer A's expertise. Engineer A performed the requested services and was paid for her work by ABC Manufacturing. Several years later, Engineer A was retained by Attorney X who represented a plaintiff in product liability litigation against ABC Manufacturing in a matter not involving any aspect of the earlier patent litigation. Several years later, Engineer A was again retained by ABC Manufacturing in a different patent litigation matter not related to either of the proceeding events. Engineer A again performed the requested services and was paid for her work. However, during cross-examination at trial, opposing counsel questions Engineer A's previous relationship both in defense of and in litigation with ABC Manufacturing, implying that by providing those services, Engineer A was acting improperly.

Question:

Was it ethical for Engineer A to provide services to the parties in the manner described under the facts?

References:

Section II.4. - Code of Ethics: Engineers shall act for each employer or client as faithful agents or trustees.

Discussion:

Over the years, the Board of Ethical Review has considered a variety of difficult cases involving conflicts of interest and the scope of an engineer's ethical obligation to past and present clients. The Board of Ethical Review has also considered several cases involving the question of engineers providing and performing forensic engineering services and the ethical issues that arise in that context (See BER Cases 92-5, 82-6, 76-3). These cases have involved such issues as performing such services on the basis of a contingency fee, licensure requirements when serving as an expert witness, the qualifications of the individual who is being considered to perform the expert services, relationships with attorneys, and examining the conflict of interest questions that may arise.

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As the Board has noted on at least one previous occasion, one of the most common ethical issues that face engineers in their professional lives is the issue of conflicts of interest. At one point in the past, engineering codes of ethics, including the NSPE Code of Ethics for Engineers, specifically implored engineers to avoid all conflicts of interest. The basis for this position was that the engineer cannot serve two masters and when faced with a conflict of interest, the engineer must in all cases take steps to remove him or herself from such conflicts. Among the concerns expressed by supporters of this position was that engineers who were involved in conflict of interest situations created a poor image for the engineering profession because the issue raised the appearance of impropriety. However, over time, the engineering profession came to the general conclusion that by the very nature of the role of the engineer in society, conflicts of interests were virtually an immutable fact of professional engineering practice and that it was generally impossible for the engineer to, in all cases, remove him or herself from such situations. As a result, codes were changed, and engineers were implored to disclose all known or potential conflicts of interest to their employers or clients, by promptly informing them of any business association, interest, or other circumstance that could influence or appear to influence their judgment or the quality of their services.

After careful review and analysis of the facts and circumstances in the case, we believe the facts do not rise to the level of a conflict of interest prohibited by the Code of Ethics. While engineers clearly have certain basic professional obligations to their employers and clients to protect their interests, engineers do not have a duty of absolute loyalty under which the engineer can never take a position adverse to the interests of a former client. Being a “faithful agent and trustee” to a client does not obligate an engineer to a duty of absolute devotion in perpetuity (See Code Section II.4.). Such an approach would be impractical and compromise the autonomy and professional independence of engineers. This is particularly true in the present case, where the matters at issue are not in any way related to any previous work Engineer A performed for either of her former clients.

While all engineers must make professional decisions based upon a variety of considerations and factors, engineers must analyze technical matters, weighing all appropriate considerations. For a variety of reasons, some engineers might choose to decline an engagement that could place the engineer in a position adverse to the interests of a former client, even though the engagement is not in any way related to the engineer’s earlier services to the client. However, the Board of Ethical Review is not prepared to say that an engineer who fails to follow this approach is somehow acting in violation of the NSPE Code of Ethics. To do so would undermine the individual judgment, independence, and discretion that each engineer must exercise.

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In this connection, the Board is also concerned by the attorney's implication under the facts that Engineer A may have acted improperly, with the suggestion that Engineer A's action may have constituted a conflict of interest. It appears that the attorney was attempting to draw a parallel between the legal profession, where there is an institutionalized "plaintiff's bar" and "defense bar," and the engineering profession. However, while engineers may find themselves at times working within the confines of the legal adversarial profession, unlike attorneys, they are not "advocates" in rendering their professional services, they should not be expected to compromise their professional independence and autonomy. While reasonable persons might differ as to whether Engineer A's actions under the facts would raise either a conflict or an appearance of a conflict, the Board concludes that a conflict does not exist.

Conclusion:

It was ethical for Engineer A to provide services to the parties in the manner described under the facts.

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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 of Ethics to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), 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 services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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