EXPERT WITNESS SERVICES

Case No. 98-7

Facts:

Client retains Attorney X in connection with litigation relating to a structural failure for a residence. Attorney X contacts Engineer A, with whom Attorney X has had an ongoing professional relationship for many years, to conduct a preliminary investigation. Engineer A agrees to provide these services, and as a favor to Attorney X, Engineer A agrees not to charge Client for the preliminary investigation.

Following a dispute between Client and Attorney X, Client dismisses Attorney X with payment for services and hires Attorney Y. Client then contacts Engineer A to prepare a written report and also serve as an expert witness during litigation. Engineer A indicates that as part of the compensation he would receive, he should be paid for the original preliminary investigation services Engineer A originally provided when Attorney X was Client's attorney.

Question:

Was it ethical for Engineer A to indicate to Client that Client should pay additional compensation for the preliminary investigation services Engineer A originally provided when Attorney X was Client's attorney?

References:

Section II.4.b.	-	*Code of Ethics:*	*Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.*
Section II.5.b.	-	*Code of Ethics:*	*Engineers shall not offer, give, solicit or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect or intent of influencing the awarding of a contract. They shall not offer any gift, or other valuable consideration in order to secure work. They shall not pay a commission, percentage or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.*
Section III.6.a.	-	*Code of Ethics:*	*Engineers shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised.*
Section III.7.a.	-	*Code of Ethics:*	*Engineers in private practice shall not review the work of another engineer for the same client, except with the knowledge of such*

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engineer, or unless the connection of such engineer with the work has been terminated.

Discussion:

The facts in this case do not directly reveal the relationship between Engineer A and Attorney X, but it is reasonable to assume that Engineer A and Attorney X may have had an informal relationship, under which Attorney X might refer preliminary investigation and expert witness business to Engineer A. It is not entirely clear what the extent of this arrangement was under the facts, but there is nothing in the facts to suggest that Attorney X did not enjoy similar relationships with other engineers in addition to Engineer A. NSPE Code of Ethics provision II.5.b. states in part that engineer "shall not pay a commission, percentage or brokerage fee in order to secure work, except to a bonafide employee or bonafide established commercial or marketing agencies retained by them" (See BER Case 91-4). However, in this context, the Board is not convinced that this Code provision is specifically applicable to the situation described under the facts. Without more information, it does not appear that the relationship was any different than the relationships that might exist between law firms and engineers who sometimes serve as expert witnesses prior to or during litigation. Lawyers and law firms often have lists of engineering experts that they use and on the basis of their experience may suggest to their clients for possible professional engagements. Clearly recommendations by "word of mouth" is a basic method through which engineering experts gain recognition, reputation, and notoriety within the professional community, and securing work through this method, without any indication of a formal marketing effort, does not require any careful analysis or review. Clearly there is nothing in the facts to indicate that Engineer A paid Attorney X for referring work to Engineer A.

Instead, the issue in this case appears to turn on the services being provided by Engineer A and whether Engineer A's obligation was to the Client or to Attorney X. Assuming Engineer A's obligation was to Attorney X, it appears that Engineer A would have no direct ethical duty to the Client that would obligate Engineer A to perform his services under the terms of the arrangement originally discussed with Attorney X. On the other hand, if the obligation of Engineer A was to the Client with Attorney X merely serving as the "go-between", it would appear that Engineer A would have an obligation to perform his services under the terms of the arrangement originally discussed with Attorney X. To find that the arrangement was between Engineer A and the Client would also require the Board to treat this case similar to one involving a contingency relationship (See Code Section III.7.a.), since it appears that at least in the mind of one of the parties (Engineer A), Client's payment or the forgiveness of the fee to Engineer A for the preliminary investigation was contingent upon at least one factor (e.g., continued use of Attorney X).

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The NSPE Code of Ethics Section III.6.a. states that engineers "shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised." This provision is intended to cause engineers to avoid cases where, for example, the payment of their fee is conditioned upon the results of their investigation. A good example of this is BER Case 91-2, involving an engineer reviewing the work of another engineer with his fee increased based upon the higher number of errors identified. There, the Board ruled the actions of the engineer were unethical. In the present case, the Board cannot identify any factors that would suggest that Engineer A's judgment could have been compromised since the payment of Engineer A's fee was not tied to the substantive results of his investigation as was the case in BER Case 91-2, but instead appeared to hinge on Attorney X's continued involvement in this matter.

Without exploring such matters as attorney client privilege, attorney work product, and the right of any client to select the legal counsel of their choice without interference, the Board is of the view that regardless of the formal nature of the relationship between the parties, Engineer A, either independently or through Attorney X, has some type of ethical obligation to the Client, either at the outset of the relationship or soon thereafter, to make clear what the terms and conditions of their relationship would be and what impact, if any, the termination of Attorney X would have on the rights and responsibilities of the parties, particularly Client and Engineer A. By failing to do so, Engineer A caused a misunderstanding with Client that could have been easily avoided through early disclosure, which should have been made in writing. In addition, it appears from the facts that Engineer A, by not agreeing later to provide expert testimony without additional compensation for the preliminary investigation, exacerbated this misunderstanding. Section II.4.b. states that "Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties." While engineers are clearly entitled to fair, just and reasonable compensation for their professional services, such compensation should be a reflection of the terms and conditions that the engineer agreed to provide in full and open disclosure and negotiation as appropriate with the Client.

Conclusion:

It was not ethical for Engineer A to indicate to Client that Client should pay additional compensation for the preliminary investigation services Engineer A originally provided when Attorney X was Client's attorney.

BOARD OF ETHICAL REVIEW

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