

Conflict of Interest— Professional Opinions of Engineering Expert Witness

Case No. 04-12

Facts:

Engineer A, a structural engineer, is retained by the defense attorney for an insurance company to evaluate damages to a structure owned by its insured, Mr. X. Eight months later, and without notice to the insurance company, Engineer A is retained by Mr. X. Engineer A provides a professional opinion completely different than the one provided to the insurance company.

Questions:

1. Was it ethical for Engineer A to agree to be retained by Mr. X?
2. Was it ethical for Engineer A to provide a professional opinion completely different than the one provided to the insurance company?

References:

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| Section II.3. | - NSPE Code of Ethics: | <i>Engineers shall issue public statements only in an objective and truthful manner.</i> |
| Section II.4. | - NSPE Code of Ethics: | <i>Engineers shall act for each employer or client as faithful agents or trustees.</i> |
| Section II.4.a. | - NSPE Code of Ethics: | <i>Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.</i> |
| Section II.4.b. | - NSPE Code of Ethics: | <i>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.</i> |
| Section III.1.b. | - NSPE Code of Ethics: | <i>Engineers shall not promote their own interest at the expense of the dignity and integrity of the profession.</i> |
| Section III.4. | - NSPE Code of Ethics: | <i>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.</i> |
| Section III.4.a. | - NSPE Code of Ethics: | <i>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.</i> |
| Section III.4.b. | - NSPE Code of Ethics: | <i>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.</i> |

Discussion:

Engineers play an important role when they serve as an expert witness as part of the litigation process. Engineers provide the triers of fact and of law with important assistance in better understanding the many technical issues faced by those called upon to resolve the conflicts that arise during the litigation, arbitration, mediation, and settlement processes.

On several occasions, the NSPE Board of Ethical Review has had an opportunity to consider ethical cases relating to the role of individual engineers serving as expert witnesses on behalf of their clients. For example, in a case that is strikingly similar to the present case, BER Case No. 82-6, Engineer A was retained by the U.S. government to study the causes of a dam failure. Later, Engineer A was retained by the contractor on this project, who had filed a claim against the U.S. government for additional compensation. In finding that it was unethical for Engineer A to be retained as an expert witness for the contractor under these circumstances, the Board noted that as an expert witness, Engineer A would be required to state his opinion based upon his firsthand knowledge and on facts of record. There was 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 might 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 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 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.

Similarly, the Board is of the view that the facts in the present case are somewhat similar to those faced by the Board in Case No. 82-6, except for two basic issues. In the present case, under the facts, Engineer A improperly agreed to be retained by a second party on the very same matter for which Engineer A was retained by the first party who was in an adversarial relationship with the second party without the consent of the first party. However, to make matters worse, Engineer A then provided a professional opinion that was completely different than the professional opinion provided to the first party, the insurance company. Without new information, and there is no reason to believe there is any, an engineer cannot issue a contradictory report that is truthful and objective. These actions not only undermine the credibility of Engineer A, but also cast a poor reflection upon engineers everywhere. Engineer A, while retained by the insurance company, had access to the insurance company's confidential information, company documents and other information. In the opinion of the NSPE Board of Ethical Review, Engineer A's conduct was well beyond any acceptable standards of professional behavior and should be condemned for what it is - a serious violation of the NSPE Code of Ethics.

Conclusions:

1. It was unethical for Engineer A to agree to be retained by Mr. X without securing the permission of the insurance company, which he had not secured under the facts.
2. It was unethical for Engineer A to provide a professional opinion completely different than the one provided to the insurance company, unless additional facts are brought to light.

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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, 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 must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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