

Expert Witness—Conflict with Attorney

Case No. 13-2

Facts:

Attorney A representing Client B called via telephone Engineer Q to explore if he could assist him with a matter that was in litigation. During the call with Attorney A, Engineer Q takes minimal handwritten notes concerning the incident circumstances of the litigation matter. No liability theory was discussed at the time of the telephone call. Engineer Q sends his fee schedule to Attorney A, which required that the fee schedule be signed and that an engagement retainer be paid to Engineer Q before any work could proceed.

A year and two months subsequent to the telephone call from Attorney A, Attorney B, representing another party in the same matter, calls Engineer Q. Subsequent to that time, no signed fee schedule was received nor was any engagement retainer received. Since the matter with Attorney A was never opened, Engineer Q agrees to accept the engagement with Attorney B. Following acceptance of the engagement with Attorney B, Attorney A contacts Engineer Q stating that he was ready to proceed with the matter and engage Engineer Q in the litigation. After Engineer Q explains that he has already been retained by Attorney B, Attorney A angrily states that he had already engaged Engineer Q's services because Attorney A had contacted Engineer Q before Attorney B. Attorney A threatens to seek to disqualify Engineer Q from working with Attorney B in the matter.

Question:

Was it unethical for Engineer Q to agree to accept the engagement with Attorney B?

References:

- Section II.4.a. - NSPE Code of Ethics: *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.*
- Section II.4.b. - NSPE 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 III.4. - NSPE Code of Ethics: *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.*
- Section III.4.a. - NSPE Code of Ethics: *Engineers shall not, without the consent of all interested parties, promote nor arrange for new employment or practice in connection with a specific project for which the engineer has gained particular and specialized knowledge.*
- Section III.4.b. - NSPE Code of Ethics: *Engineers shall not, without the consent of all interested parties, participate in nor 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 question of the role of a professional engineer serving as an engineering expert has been examined by the NSPE Board of Ethical Review on several occasions. While this case is certainly not one of first impression, the facts involved illuminate some very important ethical issues for professional engineers. As with other board issues, while sometimes these issues are easily resolved, in other cases the issues involve more complex questions and are not so easily determined. Many of the more difficult issues involve fact situations that raise difficult problems.

The NSPE Board of Ethical Review's first review of this issue was in BER Case No. 82-6—a case involving a clear-cut set of facts where the ethical issues were relatively simple and straightforward. In that case, Engineer A was retained by the US 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 US government for additional compensation. In deciding that it was unethical for Engineer A to be retained as an expert witness for the contractor under these circumstances, the board noted that there is nothing in the record to indicate that Engineer A was given the consent of his former client, the US government, to represent the interests of the contractor in its claim against the government for additional compensation, as required by the NSPE Code of Ethics for Engineers. Additionally, 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 is a danger that Engineer A's opinions, based on his firsthand knowledge and understanding of the facts of record, would touch upon privileged, specialized, and confidential knowledge gained while he was retained by the US government. Indeed, he may be called upon to give an opinion as to the facts with which he was involved as a consultant with the government. The Board noted that there can be no doubt that NSPE Code Section III.4.b. was enacted to prevent engineers from disclosing such information.

Later, in BER Case No. 94-9, a case more pertinent to the facts in the present case, the Board considered a situation involving Engineer A, a principal in a private practice firm, retained verbally by the attorney for a litigant involved in a legal action to provide accident reconstruction consultation. The litigant, a plaintiff, was suing a defendant allegedly responsible for a traffic accident. Although Engineer A sent a letter of agreement to the plaintiff's attorney, it was never returned signed by the plaintiff or his attorney. No additional information was exchanged between Engineer A and the plaintiff's attorney. Approximately two years later, the law firm representing the defendant contacted Engineer A and sought to retain Engineer A's services in connection with the same legal action. Engineer A, assuming the plaintiff and his attorney had decided to retain the services of another expert, agreed to provide his services to the law firm representing the defendant. Later, the plaintiff's attorney contacted Engineer A with the expectation that Engineer A would provide accident reconstruction consultation per the earlier agreement. In determining it was ethical for Engineer A to agree to provide accident reconstruction services to the law firm representing the defendant, the Board noted that Engineer A was

never involved substantively in the accident analysis and was apparently only provided with a general and perfunctory description of the nature of the accident and the issues involved in the case.

The Board noted that from the facts, it appeared that the only exchange that took place between Engineer A, the attorney, and the plaintiff was an agreement by Engineer A to provide the requested services and a written letter agreement prepared by Engineer A, which was never signed by either the plaintiff or his attorney. Therefore, it was plausible to conclude that since no actual substantive discussion of “particular, specialized knowledge” or facts and circumstances of the case were ever revealed to Engineer A, Engineer A never became privy to any information that could cause a conflict of interest of the types described in earlier BER Case Nos. 76-3 and 82-6 to arise (See NSPE Code Section III.4.b).

More recently, in BER Case No. 06-2, Engineer A’s firm was solicited by WXY Corporation, a potential industrial client to submit a proposal on a major engineering project. During the interviews of Engineer A’s firm and its qualifications, the potential client discussed certain limited technical details and elements of the project to Engineer A. Later, another engineering firm was selected to provide the design services for WXY Corporation and Engineer A was informed of this decision. Still later, a dispute arises between WXY Corporation and FGH Construction, the general contractor on WXY Corporation’s major engineering project. FGH Construction contacted Engineer A and requested that Engineer A perform forensic engineering and provide expert witness testimony in connection with the dispute between WXY Corporation and FGH Construction.

In deciding that it was ethical for Engineer A to perform forensic engineering and provide expert witness testimony in connection with the dispute between WXY Corporation and FGH Construction, the Board indicated that under the facts, Engineer A only participated in a single interview to determine whether Engineer A would be retained to provide design services for WXY Corporation. Since Engineer A was never involved in a formal engineer-client relationship with WXY Corporation, Engineer A should not be restricted or penalized by WXY Corporation’s independent decision to share limited technical information to Engineer A. Moreover, the Board noted that there is nothing in the facts to suggest that the technical information in question related directly to any dispute between WXY Corporation and FGH Construction. In addition, there is no doubt nor question regarding whether Engineer A had any continuing relationship or obligation concerning WXY Corporation. WXY Corporation had clearly communicated to Engineer A that it had not been selected by WXY Corporation and so the matter was unambiguously closed as far as both parties were concerned. Moreover, unlike earlier BER cases, at the time that Engineer A and WXY Corporation established their initial communication, there was no contemplated dispute or litigation under consideration.

Turning to the facts of the present case and weighing earlier BER decisions, it is the Board's view that Engineer Q was on firm ethical ground in accepting the engagement with Attorney B. As noted under the facts, there was no written agreement or fee payment made to Engineer Q as required and communicated to Attorney A. There was apparently no significant information shared between Attorney A and Engineer Q during the initial contact. Engineer Q should not be required to suffer because of Attorney A's failure to take appropriate and timely steps to engage Engineer Q.

We would also note that in BER Case No. 94-9, the Board was not entirely comfortable with Engineer A's actions and conduct. The Board noted that before agreeing to be retained by the defendant and his attorney, Engineer A should have provided notice to the plaintiff and his attorney and to inquire of them whether his professional services would be required by them as part of the subject litigation. While the Board noted that the plaintiff and his attorney's apparent inattentiveness in failing to respond to Engineer A's letter of agreement was not proper, because of the delicate nature of the matter at hand and the danger of misperception of Engineer A's actions, the Board noted that Engineer A should not have assumed that the plaintiff and his attorney had sought consulting services elsewhere, but instead made inquiries before agreeing to provide services to the defendant. While in the present case, this Board acknowledges that it may have been courteous for Engineer Q to first contact Attorney A before agreeing to the engagement with Attorney B, this Board is not prepared to say that Engineer Q had any obligation—ethical or otherwise—to take this action. In the Board's view, Engineer Q has taken all appropriate actions and had no further ethical obligations in this matter.

Conclusion:

It was not unethical for Engineer Q to agree to accept the engagement with Attorney B.

Board of Ethical Review:

Curtis A. Beck, P.E., F.NSPE

John C. Branch, P.E.

Daniel K. O'Brien, P.E., F.NSPE

Luke Patterson, P.E.

Robert J. Andreoli, P.E.

Mumtaz A. Usmen, Ph.D., P.E., F.NSPE (*Vice Chair*)**Samuel G. Sudler III, P.E., NSPE (*Chair*)**

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