

Expert Witness—Participation in an Expert Witness Consulting Network

Case No. 13-7

Facts:

Engineer A is contacted by an expert witness referral network which identifies and engages professional engineers to serve as expert witnesses. Engineer A agrees to participate in the expert witness consulting network. Under the procedure, the network establishes a directory of engineering experts and offers access to the directory to attorneys and other potential clients. Following the rendering of expert witness services, the attorneys and clients pay the network and the network then pays the engineering experts. In accordance with the network procedures, following the rendering of expert witness testimony, Engineer A invoices the network and the network then bills the attorney/client.

Question:

Is it ethical for Engineer A to participate in this type of arrangement?

Reference:

Section II.5.b. - NSPE 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.*

Discussion:

Engineers and engineering firms have employed different methods to market their engineering services to the public. While some methods have been found by the NSPE Board of Ethical Review to be acceptable, others have been determined to be inconsistent with the NSPE Code of Ethics for Engineers.

NSPE Code language specifically indicates that it is unethical for engineers to pay a commission, percentage, or brokerage fee in order to secure work, except to bona fide employees or bona fide established commercial or marketing agencies retained by them. The philosophy behind this language is that while it is inappropriate for engineers to offer any gift or other valuable consideration in order to secure work, compensating employees for their marketing efforts (e.g., via commission or bonus) or an independent marketing firm disassociated with the work itself does not run afoul of the NSPE Code.

For example, in BER Case No. 83-5, a local landscape architect was able to locate engineering projects throughout the state by using a network of contacts. The landscape architect contacted Engineer A and proposed to refer these clients to Engineer A in return for a fee over and above the value of the landscaping work which the landscape architect would presumably perform on these jobs. Generally, little landscaping work was required on the project. Engineer A accepts the proposal. In deciding that it was unethical for Engineer A to accept the proposal by the landscape architect to refer clients to Engineer A in return for a fee over and above the value of the landscape work which the landscape architect would presumably perform on each of the projects, the Board determined that there was nothing in this case to indicate that the landscape architect was a "bona fide marketing agency." To the contrary, it appeared that the landscape architect was wearing at least two hats and was wearing those hats simultaneously. The landscape architect proposed to act both as a marketing representative for Engineer A and, at the same time, expected to perform services at an inflated rate in connection with the work the landscape architect secured for Engineer A. In the Board's view, such conduct did not demonstrate the requisite good faith, integrity of dealing, and honesty implicit in the definition of a "bona fide marketing agency," as required by the NSPE Code. Clearly, in this case, the Board was troubled by the landscape architect's direct involvement with the work itself.

In contrast to Case No. 83-5, in Case No. 86-1 (Case 1 of a two-part case), Engineer A had the opportunity to join a business consortium, consisting of his engineering firm, an architectural firm, a construction firm, and a financial firm. The general purpose of the consortium was to improve general marketing and business development. To defray consortium expenses for promotion, publicity, overhead, etc., each firm was required to pay to the consortium an entrance fee plus a percentage of income derived from business successfully generated from referrals by consortium members. In deciding that Engineer A's participation in the consortium was not prohibited by the NSPE Code, the Board indicated that the consortium was formed primarily for marketing purposes and represent, in effect, a "pooling" of individual firm marketing capabilities and efforts through an "umbrella" approach. The Board's decision to find the approach in BER Case 86-1 ethically acceptable appeared to be based upon the fact that there was no direct remuneration to the individual consortium members based upon their individual referrals.

It is the Board's view that in the present case, the facts appear to be more in line with those in BER Case No. 86-1. The facts suggest that the expert witness referral network is more in line with the concept of independent bona fide marketing agency whose distinguishing characteristics are an arm's length relationship and process in place to appropriately compensate them for services rendered. The expert witness referral network's role appears to be limited to matching engineering experts with attorneys and not to become involved in performing any engineering or engineering-related services for any clients or other parties, which would raise ethical concerns regarding the inappropriate payment of compensation in order to secure work.

Conclusion:

It is ethical for Engineer A to participate in this type of arrangement.

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*)

NOTE: The NSPE Board of Ethical Review considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials, and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

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, and university engineering departments), 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.

This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

To obtain additional NSPE opinions, visit www.nspe.org or call 800-417-0348.