

Report on a Case by the Board of Ethical Review

Case No. 85-4

Objectivity of Engineer Retained as Expert

Facts:

Engineer A is a forensic engineer. He is hired as a consultant by Attorney Z to provide an engineering and safety analysis report and courtroom testimony in support of a plaintiff in a personal injury case. Following Engineer A's review and analysis, Engineer A determines that he cannot provide an engineering and safety analysis report favorable to the plaintiff because the results of the report would have to suggest that the plaintiff and not the defendant was at fault in the case. Engineer A's services are terminated and his fee is paid in full. Thereafter, Attorney X, representing the defendant in the case, learns of the circumstances relating to Engineer A's unwillingness to provide a report in support of Attorney Z's case and seeks to retain Engineer A to provide an independent and separate engineering and safety analysis report. Engineer A agrees to provide the report.

Question:

Was it ethical for Engineer A to agree to provide a separate engineering and safety analysis report?

References:

Code of Ethics - Section II.1.c. - "Engineers shall not reveal facts, data, or information obtained in a professional capacity without the prior consent of the client or employer except as authorized or required by law or this Code."

Section II.3.a.- "Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony."

Section II.4.b. - "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 to, and agreed to, by all interested parties."

Section III.4.b. - "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."

Discussion:

The facts of this case raise a number of issues pertinent to various provisions of the Code of Ethics. However, before this Board examines those several Code provisions, we think it would be appropriate to examine earlier BER decisions relating to the issues present here.

In BER Case 76-3, a decision involving an engineer appearing as an expert witness for a private development company before a county board while serving as a paid consultant to the county, this Board noted that the Code of Ethics requires an engineer to endeavor to avoid a conflict of interest: "When Engineer A was approached, while still on retainer to the county, by the development company, it should have been quite clear to him that a conflict of interest was inevitable."

It seemed in that case that a little interrogation of the development company concerning its plans would have revealed the conflict of interest. Under the facts of the case, Engineer A's role as an expert witness in the ordinary sense of that kind of professional arrangement would be unacceptable. Engineer A was doing more than offering his expertise in engineering matters as an aid to a fuller understanding by the county board; he was in fact a paid advocate of a private interest in open conflict with the engineering opinions of the county engineers.

In BER Case 76-3, this Board distinguished that case from earlier BER Case 74-2 in which the Board held that a part-time consultant arrangement to municipalities by engineers in private practice did not preclude those same engineers from providing normal engineering service to the same municipalities. We then noted that the key distinction between BER Case 74-2 and BER Case 76-3 was that in BER Case 74-2 the engineer's loyalties were not divided, whereas in BER Case 76-3 Engineer A is seen to be on both sides of the divided issue.

More recently in BER Case 82-2, a decision involving an engineer who prepared a home inspection report for a client, a potential home purchaser, and thereafter released the contents of the report to the real estate firm representing the seller of the home without the consent of the client, the Board ruled that this action was not in accord with the Code of Ethics. In that case this Board noted Section II.1.c.

During the same term, in BER Case 82-6, this Board ruled that where an engineer is retained by the U.S. government to study the causes of a dam failure, it would be unethical for the engineer to agree to be retained by the contractor involved in the construction of the dam. The contractor had filed a claim against the U.S. government for additional compensation. Citing the provisions of Section III.4.b., we found that there was nothing in the record to indicate that the engineer was given the consent of his former client, the U.S. government, to represent the interests of the contractor in its claim against the government for additional compensation.

All of the aforementioned cases represent longheld BER views relating to the question of conflicts of interest and the duty of engineers who gain, or are perceived to have gained, access to knowledge that may be advantageous to one client and disadvantageous to another. In some instances, it has been suggested by this Board that under certain circumstances, it may be appropriate for an engineer to first resign a particular position, such as consultant to a municipality, before agreeing to perform services for a client that might have a conflicting interest. (See BER Case 76-3.) Obviously, the degree to which this may be the proper, ethical course of action is dictated by the particular facts and circumstances of a case.

In the present case, the mere fact that Engineer A ceased performing services for Attorney Z would not be an adequate solution to the ethical dilemma at hand. Nor is the fact that Engineer A has agreed to provide a "separate and independent engineering and safety analysis report." On the former point, the fact that Engineer A ceased performing services for Attorney Z does not mitigate the fact that Engineer A throughout his first analysis had access to information, documents, etc., that were made available to him by the plaintiff and plaintiff's attorney in a cooperative and mutually beneficial manner. This Board cannot accept the proposition that following the termination of his relationship with attorney for the plaintiff he would "blot all" of that information from his mind and start from "square one" in performing his engineering and safety analysis report. Nor do we believe that latter point that Engineer A would be capable of providing a "separate and independent" report for the defendant in this case. (See also Section II.4.b.) It is clear from the facts that the real reason for the defendant's attorney's hiring Engineering A was that he believed Engineer A would provide a report that would be favorable. Engineer A had to have been aware of the reasons why his services were being retained by virtue of the sequence of events. Even if Engineer A was so naive as to believe that Attorney X was unaware of the circumstances of his termination, we believe that this would not excuse his actions. Section III.4.b. is clear in this regard. At a bare minimum, Engineer A should have fully discussed the issue with Attorney Z.

It may be argued, as was stated in the earlier BER Case 74-2, that Engineer A's loyalties under these facts were not divided because he had terminated his relationship with plaintiff's attorney. However, we must recognize that while Engineer A may not currently have a professional relationship with a former client, he still has an ethical obligation to that client to protect certain confidential information and facts, as well as a certain duty of trust and loyalty. How long that duty of trust and loyalty must be maintained we are not prepared to state at this time. However, we are certainly willing to state that such a duty exists for the duration of one legal proceeding.

Finally, with regard to the duty of the engineer to be objective in his professional reports and statements (II.3.a.), we note that it has sometimes been suggested that engineers who act as paid expert witnesses have an inherent conflict between their duty to tell the truth and their obligation to perform their services consistent with the best interests of the client. We note that in this case, Engineer A developed an analysis report that was inconsistent with the legal interests of the client. Under the facts, Engineer A did not act in the role as a "hired gun," seeking to testify in favor of the client who was paying his fee. We make this point to underscore the importance of forensic engineers "calling them as they see them." Had Engineer A ceased his involvement in the case following the termination of his relationship with Attorney Z, he would have been acting in a wholly ethical manner. His transgressions were a result of his subsequent involvement with Attorney X.

Conclusion:

It was unethical for Engineer A to agree to provide a separate engineering and safety analysis report.

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