

CONFIDENTIALITY –
RECORDS RELATING TO SERVICES TO FORMER CLIENT

Case No. 01-6

Facts:

Several years ago Engineer A, a mechanical engineer, consulted for Company A, a pressure vessel manufacturer, on a specific pressure vessel problem relating to the design of a boiler system. Engineer A's work focused on specific design and manufacturing defects that caused deterioration of the boiler system. Engineer A completed his work and was paid for his services.

Ten years later, Engineer A was retained by, Attorney X, plaintiff in a case involving the fatal explosion of a recently designed and manufactured pressure vessel at a facility previously owned by Engineer A's former client, Company A. The facility was sold to Company B seven years before the explosion. The litigation does not involve any of the issues related to the services Engineer A provided to Company A ten years earlier. The defendant's attorney discovered through Engineer A's deposition and statements relating to his professional experience that Engineer A had worked for Company A on a pressure vessel problem. Engineer A explains to the defendant's attorney that he is not relying upon any of his prior work for Company A in this case. Nevertheless, the defendant's attorney requests that Engineer A provide his files from the previous work performed for Company A.

Question:

Would it be ethical for Engineer A to voluntarily release the files to defense counsel?

Reference:

- Section II.1.c* - *Code of Ethics:* *Engineers shall not reveal facts, data or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
- Section II.4.* - *Code of Ethics:* *Engineers shall act for each employer or client as faithful agents or trustees.*
- Section III.4.b.* - *Code of Ethics:* *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 confidentiality of client or employer records has always been an important ethical consideration within the practice of engineering. Several provisions within the NSPE Code of Ethics' Fundamental Canons, Rules of Practice, and Professional Obligations address, or at least touch upon, these considerations. The ethical concerns in this area relate to the need to preserve the privacy and confidentiality of client or employer information, as well as the proprietary nature of much of what is often contained in the client or employer records. The engineer's duty in this area is rooted in the obligation to serve as a "faithful agent and trustee" to the client or

employer, and also the obligation to avoid circumstances that could appear to influence the engineer's professional judgment.

Over the years, the Board has considered a number of cases relating to the engineer's ethical obligation in connection with the engineer serving as an expert witness. In BER Case No. 74-2, 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 services to the same municipalities. The Board noted that the engineer's loyalties were not divided under the facts. In BER Case No. 82-6, the Board ruled that where an engineer is retained by the U.S. government to study the causes of a dam failure, it would not be ethical for the engineer to agree to retainment 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 NSPE Code Section III.4.b., the Board found that nothing in the record indicated 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.

In another BER case, Case No. 85-4, Engineer A, a forensic engineer, was 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 determined that he could not provide an engineering and safety analysis report favorable to the plaintiff. He could not do this 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 were terminated and his fee was paid in full. Thereafter, Attorney X, representing the defendant in the case, learned of the circumstances relating to Engineer A's unwillingness to provide a report in support of Attorney Z's case and sought to retain Engineer A to provide an independent and separate engineering and safety analysis report. Engineer A agreed to provide the report. In deciding that Engineer A's actions were not ethical, the Board noted that 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 was the fact that Engineer A had 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 did 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. The Board could not accept the proposition that following the termination of the relationship with attorney for the plaintiff Engineer A would "blot all" of that information from his mind and start from "square one" in performing his engineering and safety analysis report. Nor did the Board believe the latter point that Engineer A would be capable of providing a "separate and independent" report for the defendant in this case. (See also NSPE Code Section II.4.b.). The Board noted that "it is clear from the facts that the real reason for the defendant's attorney's hiring Engineering A was that the attorney believed Engineer A would provide a report that would be favorable to the attorney's client." The BER concluded that 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,” the Board noted, “this would not excuse his actions.” The Board further noted that Engineer A should instead have fully discussed the issue with Attorney Z. It may be argued that Engineer A’s loyalties under the facts in BER Case No. 85-4 were not divided because he had terminated his relationship with the plaintiff’s attorney.

It must be recognized that, while an engineer may not currently have a professional relationship with a former client, the engineer 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, the Board is not prepared to state at this time.

The aforementioned cases represent the longstanding BER positions 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. Obviously, the appropriate ethical course of action is dictated by the particular facts and circumstances of a case.

Turning to the facts of the present case, the Board believes that it would be ethically improper for Engineer A to voluntarily release the files relating to work for Company A to defense counsel. Certainly, before taking any action regarding the files, Engineer A would have an ethical obligation to consult with and obtain the consent of Company A. One can speculate that Company A may be very reluctant to permit the release of such information, which may be confidential, proprietary, or otherwise critical. In addition, the release of such information by Engineer A into the hands of an attorney representing another party could compromise Company A regarding future claims or litigation on other matters not related to the case being litigated by defense counsel. Finally, the release of such information by Engineer A would serve to compromise Engineer A’s reputation among potential clients and Engineer A’s ability to work with other clients on sensitive matters.

The Board does acknowledge that engineers may be compelled to surrender records, files, and other information under the direct order of a court through a subpoena or other legal process. However, in the absence of such compulsory actions, the Board does not believe an engineer should compromise one’s professional reputation.

Conclusion:

It would not be ethical for Engineer A to voluntarily release the files to the defense counsel.

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