

**EXPERT WITNESS –
SPECIAL CONSULTANT JOINTLY PAID BY PARTIES**

Case No. 03-12

Facts:

Engineer A is a forensic engineer. Engineer A is designated by a court to serve as a special consultant to two parties (Owner and Contractor) who are contemplating litigation in connection with the design and construction of a building. Engineer A will be jointly paid by the parties in equal sums to conduct an investigation and issue a report.

It is alleged that the original architect, who has left the area and cannot be located, provided defective drawings to the owner who provided the drawings to the Contractor. Although it was determined the drawings were defective, Engineer A also discovered that the Contractor also used inferior materials and provided faulty workmanship in connection with the project. As a result, in the report, Engineer A apportions joint responsibility for the damages to both the Owner and the Contractor.

Thereafter, without notifying Engineer A, the Contractor hires another engineering consultant, Engineer B, who does not consult with Engineer A. After Engineer B issues a report to the Contractor finding the damages the sole responsibility of the original Architect and the Owner that retained him, the Contractor files suit against the Owner.

The Owner then contacts Engineer A and asks Engineer A to serve as a consultant and expert witness on behalf of Owner per their original agreement. Engineer A sends a letter to the attorney for the Contractor advising that neither the Contractor nor Engineer B ever notified Engineer A of Engineer B's engagement and, therefore, Engineer B never discussed his report with Engineer A before rendering his opinion. Engineer A also informs the attorney for the Contractor that he is assuming that his contract with the Contractor has been terminated and that he, Engineer A will be called by the Attorney for the Owner and that Engineer A has every intention to testify consistent with his initial report, prepared jointly for the Contractor and Owner. Engineer A also informs the attorney for the Contractor that the

Owner has agreed to pay all of Engineer's fees and expenses from that point forward. The attorney for the Contractor informs Engineer A that the Contractor does not object to this action and releases Engineer A from the engagement.

Questions:

1. Would it be ethical for Engineer A to serve as an expert witness on behalf of the Owner?
2. Was it ethical for Engineer B to issue a report to the Contractor finding the damages the sole responsibility of the original Architect and the Owner that retained him without first consulting with Engineer A?
3. Did Engineer A have an obligation to contact the attorney for the Contractor regarding the Owner's request that Engineer A serve as the Owner's expert witness?

References:

Section I.4.	-	NSPE Code of Ethics:	<i>Engineers, in the fulfillment of their professional duties, 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.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>
Section III.7.a.	-	NSPE Code of Ethics:	<i>Engineers in private practice shall not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated.</i>

Discussion:

The facts and circumstances involved in this case raise a variety of important ethical and professional issues faced by practicing engineers including potential conflicts of interest, the duty of the engineer to maintain confidential information, and the obligation of one engineer to another engineer to provide notice to a client concerning the rendering of professional services.

The NSPE Board of Ethical Review has had occasion to consider all of these issues in a variety of contexts. In BER Case 62-7, the Board considered a situation involving Engineer Z, an engineering consultant, who had been retained by a County Metropolitan Commission to perform all necessary engineering and advisory services. The Commission did not have an engineering staff, so Engineer Z acted as the staff for the Commission in the preparation of sewerage and water studies, the establishment and financing of sanitary districts, and reviewed and approved plans submitted by other engineers. Engineer Z was also retained by a private company to perform the engineering design for a development of several thousand housing units. Involved were extensive contract negotiations between the Commission and the developer for the construction and financing of sanitary and water facilities for the development. As consultant to the Commission, Engineer Z had a key role in the negotiations. In deciding that this posed a conflict of interest for Engineer Z, the Board noted that the consultant was in the position of passing engineering judgment on behalf of the Commission on work or contract arrangements which the engineer performed, or in which the engineer participated. This would obviously involve the self-interest of the engineer and divide the engineer's loyalties. Even if the engineer acted with the best of intentions he was put into the position of assessing his recommendations to two clients with possibly opposing interests. The mere fact that there may be a conflict of interest between the parties was deemed sufficient to offend the principle of an engineer's duty of complete loyalty to the client. The language in the NSPE Code of Ethics takes precedence over well-intentioned claims that the engineer could work with both parties to reconcile any differences for the best interests of both. Even if this should prove to be correct, the engineering profession would have been exposed to potential misunderstanding by the public. The Board believes BER Case 62-7 and its reasoning of the ethical concerns has an important bearing on the case at hand.

The disclosure of confidential information is also a key part of the Board's consideration of the present case. In BER Case 87-2, Engineer Y agreed to provide consulting services to RMF, Inc. in connection with the development of a new product for manufacture. He developed a preliminary report, which was approved, then developed the design for the product. Engineer Y and RMF, Inc. did not negotiate any terms in their agreement relating to the actual

ownership of the design of the product, and neither took any steps to seek patent protection. When the design reached the production stage, RMF, Inc. terminated the services of Engineer Y in accordance with their agreement. Thereafter, Engineer Y agreed to provide consulting services to SYS, Inc., a competitor of RMF, Inc. As a part of those services, Engineer Y divulged specific information unique to the product designed for RMF, Inc. In concluding that it was unethical for Engineer Y to divulge specific information to SYS, Inc. unique to the product designed earlier by him for RMF, Inc., the Board noted that the drafters of the NSPE Code intended that the obligation to maintain confidentiality applied to the employed engineer as well as the consulting engineer.

The question of one engineer reviewing the work of another engineer is also a critical consideration in the present case. In BER Case 86-4, Engineer G prepared subdivision plans for a client. These plans included a 5-sheet set of grading plans and a 38-sheet set of public improvement plans. Each set had a cover sheet and all sheets in each set were signed and sealed by Engineer G. The client was not satisfied with the plans, so he discharged Engineer G after paying the complete fee for production of the plans. The client asked Engineer G for his original drawings. Engineer G complied, retaining a set of reproducible. Engineer H was later retained by the client to review and redesign the project. The client gave Engineer H the set of plans produced by Engineer G to use as a guide in the redesign. Engineer H reviewed the original drawings, made changes on the grading plans, including deletion of one sheet, raising the elevation of the housing pads and changing routing of the street. Engineer H did not note what changes were made nor did he sign any of the sheets, including the cover sheet. Engineer H also made major design changes to the storm drains, pipe dimensions, sewers, and utilities in the public improvement plans. He made no notation of the changes, did not sign the plans, and left Engineer G's seal and signature intact. Engineer H placed a note on the title sheet of the public improvement plans, leaving Engineer G's signature and seal intact, stating that he, Engineer H, was taking responsibility for the "revisions of the plans," making no notation what those changes were. At no time after Engineer H was retained were there any communications between the two engineers. In deciding that it was unethical for Engineer H to perform the services for the client without notifying Engineer G, the Board noted that while it is true that Engineer G had been "discharged" by the client, Engineer G still maintained a connection with the

work which he had performed by virtue of the fact that the client passed along Engineer G's work product to Engineer H. In addition, the facts indicate that Engineer H took those plans and made certain modifications in those plans. Therefore, the Board concluded that it would have been wiser and more professional for Engineer H to consult with Engineer G before undertaking to modify the plans prepared by Engineer G.

Turning to the present case, based upon the aforementioned decisions and the provisions of the NSPE Code, the Board is of the view that (1) it would be ethical for Engineer A to serve as an expert witness on behalf of the Owner; (2) it was ethical for Engineer B to issue a report to Contractor finding the damages the sole responsibility of the original Architect and the Owner that retained him, without first consulting with Engineer A; and, (3) Engineer A did have an obligation to contact the attorney for the Contractor regarding the Owner's request that Engineer A serve as Owner's expert witness.

The Board reaches these conclusions because the situation involved in the present case (unlike the facts in BER Case 62-7) relates to a court appointment as a consultant for two parties to resolve a specific matter. The engineer's role in the present case is more in the nature of serving as a special court fact-finding technical expert as opposed to serving in the traditional role as a consultant providing typical engineering services. As a result, the Board cannot conclude that such a role or relationship is somehow disapproved by the language of the NSPE Code or an earlier NSPE BER opinion on the basis of a potential conflict of interest. To rule otherwise would be to pre-empt a valuable role that engineers are increasingly being called upon to provide.

Insofar as the actions of Engineer B are concerned, the Board believes that Engineer B's failure to provide notice to Engineer A concerning Engineer B's engagement by the Contractor did not violate NSPE Code Section III.7.a. The Board has stated on numerous occasions, this language is intended to serve the best interests of the client by providing the successor engineer with a full understanding and appreciation of all technical and other facts, circumstances and background involved in the assignment so that the successor consultant will have a better grasp of all of the issues and can more appropriately perform services for the benefit of the client. This follows the general rule that "more information is always better than less information." The Board strongly endorses this general rule, particularly where the facts involve disputes and

conflicts among the parties. However, under the facts, Engineer B was representing the Contractor in an adversarial relationship with the owner and was seeking to serve the best interests of the Contractor. Moreover, when Engineer A submitted his report to the Owner and Contractor, the Board is of the opinion that Engineer A's obligations to the Contractor had ended.

The Board also concludes that Engineer A did have an obligation to contact the attorney for the Contractor regarding the Owner's request that Engineer A serve as Owner's expert witness. Engineer A was initially engaged by both the Contractor and Owner and therefore technically had an existing relationship with the Contractor, despite the Contractor's decision to later retain Engineer B. In a sense, the Contractor effectively discharged Engineer A by retaining Engineer B. Nevertheless, to clarify and bring closure to what appears to be a murky and unclear situation, Engineer A acted ethically by advising the attorney for the Contractor that he, Engineer A, had an obligation to continue to serve Owner based upon an existing and continuing relationship as a result of Engineer A's earlier agreement with the Owner (and Contractor) that Engineer A felt duty-bound to honor.

It is arguable that the Contractor could allege a potential disclosure of confidential information by Engineer A of the Contractor's affairs in connection with Engineer A's role in serving as an expert witness for the Owner. However, taking all factors into account, the Board concludes that by effectively dismissing Engineer A and hiring Engineer B following Engineer A's initial determination, the Contractor has little if any cause to complain about Engineer A's continuing service to the Owner, which was the original agreement entered into between Engineer A, the Owner and the Contractor. On balance, Engineer A has a right and an obligation to serve the Owner, and the Contractor should not be able to take advantage of its decision to hire another engineer after initially agreeing to a contractual arrangement and then disputing the resulting decision.

Finally, the Board would note that its decision assumes that Engineer A was engaged by the Owner and the Contractor at the direction of the Court. If the Board had concluded that Engineer A was working directly for the Court, the Board's decision may have been different.

Conclusions:

1. It would be ethical for Engineer A to serve as an expert witness on behalf of Owner.
2. It was ethical for Engineer B to issue a report to Contractor finding the damages the sole responsibility of the original Architect and the Owner that retained him without first consulting with Engineer A.
3. Engineer A did have an obligation to contact the attorney for the Contractor regarding Owner's request that Engineer A serve as Owner's expert witness.

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