

EXPERT WITNESS – TESTIMONY REGARDING FORMER EMPLOYER

Case No. 03-8

Facts:

Engineer W leaves his job as a design engineer with Phlowco, a plumbing equipment manufacturing company, and becomes a private consultant. Later, Engineer W is approached to serve as a forensic engineer to perform plumbing failure analysis by an attorney hired by a party in litigation with Phlowco in connection with a Phlowco product that may have leaked—causing extensive water damage. The work that Engineer W will be asked to perform is an investigation, which does not involve any product Engineer W worked on while an employee of Phlowco. However, Engineer W was familiar with some of the individuals involved in the design and manufacturing—but Engineer W was not personally involved in any of the design, testing, reliability studies, or manufacturing processes.

Question:

Would it be ethical for Engineer W to perform plumbing failure analysis on behalf of a party in litigation with Phlowco?

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.1.c.	-	NSPE Code of Ethics:	<i>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.</i>
Section III.4.	-	NSPE Code of Ethics:	<i>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.</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>

Discussion:

It is not unusual for individuals involved in the industrial design process to be called as expert witnesses in connection with litigation relating to the design or manufacture of a product or a process. For obvious reasons, their current employment status and any past relationship with the industrial manufacturer is a critical consideration in determining the ethical issues involved. On many occasions, the NSPE Board of Ethical Review has had the opportunity to consider in various contexts the ethical obligations of individual engineers who are asked to investigate the causes of accidents and failures, and also to serve as expert witnesses in connection with litigation. Sometimes the circumstances involved raise

confidentiality or conflict of interest questions covered under the provisions of the NSPE Code of Ethics for Engineers.

A review of selected cases that have been examined by the Board illustrate several of these points. In BER Case 82-6, Engineer A was retained by the U.S. government to study the causes of a dam failure. Contractor X was hired by the U.S. government as the contractor on the same project. Later, Engineer A was retained as an expert witness by Contractor X, who filed a claim against the U.S. government for additional compensation. In deciding that Engineer A's actions were unethical (*viz.*, working on the dam failure case for the U.S. government and then later for Contractor X in an adversarial proceeding against the U.S. government), the Board, citing NSPE Code Section III.4.b., noted that there was nothing in the record to indicate that Engineer A was given the consent of his former client to represent the interests of the contractor in its claim against the government for additional compensation.

Further, the Board noted that it had no doubt that the expert testimony offered by Engineer A in a legal proceeding would constitute "particular, specialized knowledge gained on behalf of a former client or employer." The Board further observed 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 would be a danger that Engineer A's opinions, based on his firsthand knowledge and his understanding of the facts of record, would touch upon privileged, specialized, and confidential knowledge gained while he was retained by the U.S. government. Indeed, he might be called upon to give an opinion as to the very facts with which he was involved as a consultant with the government. There can be no doubt that NSPE Code Section III.4.b. was enacted to prevent engineers from disclosing such information." For those reasons the Board found that it would be unethical for an engineer who had formerly been retained by the U.S. government on a certain project to later be retained as an expert witness for a contractor on the same project who filed a claim against the U.S. government for additional compensation.

Turning to the present case, the Board believes that the employment relationship issues in the present case are readily distinguishable from BER Case No. 82-6. Here, Engineer W was merely an employee of Phlowco, and never served as a project team member or lead designer for Phlowco where he would have access to particular specialized knowledge or information associated with the product in question. Instead, Engineer W was a general expert and did not obtain particular or specialized knowledge of the design/manufacturing process relating to the design of the plumbing system that failed. Moreover, there does not appear to be any

obvious requirement for Engineer W to obtain consent from Engineer W's former employer since Engineer W was requested to perform an investigation only relating to areas that did not involve any product Engineer W worked on while an employee of Phlowco. While Engineer W may have been familiar with some of the individuals involved in the design and manufacturing of the plumbing system, the facts indicate that Engineer W was not personally involved in any of the design, testing, reliability studies, or manufacturing processes.

On the basis of these facts and the earlier BER opinion cited, the Board cannot conclude that Engineer W's actions in performing a plumbing failure analysis would be in conflict with the provisions of the NSPE Code. However, if (a) it could be demonstrated that some of Engineer W's forensic services involved confidential information Engineer W gained as an employee concerning the business affairs or technical processes of Engineer W's former employer, or (b) if some of Engineer W's forensic services involved activities in Engineer W's capacity as a former employee in which Engineer W participated in a specific project or proceeding where Engineer W gained particular specialized knowledge of the product in question, Engineer W would need to obtain the consent of Engineer W's former employer before agreeing to provide the services. However, as noted earlier, based upon the facts, this does not appear to have been the case.

If Engineer W sought permission from Phlowco to provide this service to an adversary of Phlowco, there is a possibility that Phlowco would exercise its veto thus offered.

Conclusion:

It would be ethical for Engineer W to perform plumbing failure analysis on behalf of a party in litigation with Phlowco, even though Engineer W at one time had worked for Phlowco, provided none of Engineer W's forensic services involved confidential information Engineer W gained as an employee concerning the business affairs or technical processes of Phlowco, nor did these forensic services involve activities where Engineer W participated in a specific project or gained particular specialized knowledge of the product in question.

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in the approval of this opinion:*

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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, university engineering departments, etc.), 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.

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NSPE BER CASE NO. 03-8

DISSENTING OPINION

Discussion:

The ethical issues facing Engineer W in this case are very similar to the ethical issues faced by the engineer in BER Case No 00-6. In that case, Engineer B performed work for State Electric Light Company (SELCI) on several occasions and was subsequently retained by Consumer X to testify against SELCI regarding a complaint filed with the State Public Utilities Commission. We think the discussion in BER Case 00-6, Opinion #2 is helpful in the instant case. Paraphrasing the BER's opinion in that case, the first concern was the point at which an engineer acquires specialized knowledge or confidential information concerning the business affairs of technical processes of a former client or employer. Think of a continuum from zero knowledge on the left to total knowledge on the right. At what point on this continuum does the engineer acquire knowledge that meets the test of the Code of Ethics Sections III.4 and III.4.b? In our opinion, it is after completion of the first engagement (or assignment). In that case, Engineer B had on several occasions been employed by SELCI, affording her several times to acquire confidential knowledge.

Secondly, the BER does not think it was relevant whether the parent company or a subsidiary hired Engineer B. Corporations use consolidated accounting, and shareholders own the entire enterprise regardless of the corporate structure. For the purposes of that case, SELCI must be viewed as a single entity. Since SELCI retained Engineer B on several occasions, not just one ad-hoc assignment, they undoubtedly placed high value on her expertise and would have willingly provided her with access to information on the policies, procedures, and practices of the company to assist her in performing her work. In other words Engineer B acquired "confidential information concerning the business affairs or technical processes" of SELCI.

Thirdly, in evaluating this case, the BER thought it was necessary to read the relevant parts of the Code of Ethics in total. This reading reveals that an engineer considering appearing as an adversary of a former client must:

- Perform services only in areas of their competence.
- Act for each employer or client as faithful agents or trustees.
- Disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.
- Not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client.

- 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 of behalf of a former client.

Engineer B's work for Consumer X would have to be in her area of competence, which would have been in the same area she previously represented for SELCI, and, as a faithful agent for SELCI, she would have been privy to inside information on policies, procedures, and practices that could only be gained by a faithful agent of the company. As such, Engineer B, under the Code of Ethics, Section III.4.b, has an obligation to SELCI to seek their approval prior to representing an adversary interest. SELCI, as a good corporate citizen, should not unduly withhold approval if in their opinion no conflict exists. Also, Engineer B, in BER's opinion, has a duty to Consumer X to fully disclose her previous representation of SELCI if she is granted approval from SELCI to represent Consumer X.

Turning to the present case, we find the issues facing Engineer W are very similar to the issues facing Engineer B in BER Case 00-6. In the present case Engineer W was a former employee of Phlowco, not a consultant, as in BER Case 00-6, In contrast to a consultant we must presume that Engineer W has no aspirations for employment by Phlowco or the conflict of interest would be obvious. However, a former employee has even greater opportunity than a consultant to gain intimate knowledge of an employer's policies and procedures, which are applied across the board to all company activity. Specific examples are quality control and quality assurance policies and procedures, development planning and requirements to bring a product to market.

The real reason for plaintiff's attorney to hire Engineer W may be to gain access to this type of generally restricted information. We are concerned about potential prejudices that may have been developed in his prior employment, as a consequence of performance appraisals, unrealized promotional aspirations, and the cause and terms of separation. It seems impossible to us that Engineer W can "blot out" all influences from his prior relationship that could affect his perceived impartiality and objectivity. Such issues may represent vulnerabilities in the credibility of his testimony. Engineer W clearly fell within the "continuum" presented in BER Case 006, Opinion II, and as such must adhere to NSPE Code of Ethics Sections III.4 and III.4.b. as well as Sections I.2. and II.4.a.

Engineer A's work as a forensic engineer would have to be in his area of competence, which would have been similar to the work he did while employed at Phlowco, and, as a faithful agent for Phlowco, he would have been privy to inside information on policies, procedures, and practices that could only be gained by a

faithful agent of the company. As such, Engineer W under the Code of Ethics, Section III.4.b. has an obligation to Phlowco to seek their approval prior to representing an adversary interest. Phlowco, as a good corporate citizen, should not unduly withhold approval if in their opinion no conflict exists. Also, Engineer A, in our opinion, has a duty to the client employing him as a forensic engineer to fully disclose his previous employment by Phlowco if he is granted approval from Phlowco to represent his new client.

Conclusion:

It would not be ethical for Engineer W to perform plumbing failure analysis on behalf of a party in litigation with Phlowco without Phlowco's approval and notifying the potential client of his previous experience with Phlowco.

BOARD OF ETHICAL REVIEW

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