

## **Expert Witness—Working for a Law Firm Client Involved in Litigation With a Former Law Firm Client**

### **Case No. 11-10**

#### **Facts:**

Engineer W recently provided forensic engineering and expert witness services for attorneys with X, Y, and Z, a law firm with multiple offices in State L. Later, Engineer W is retained by an attorney from Law Firm Q, R, and S to assist an insurance claims specialist with an investigation of a claim that is expected to end up in litigation. Engineer W now learns that the opposing party in the insurance claim has hired an attorney from Law Firm X, Y, and Z, but from a different branch office with different attorneys than the ones with which Engineer W worked. Engineer W has never worked for any of the attorneys in the branch office. None of Engineer W's work in the past for the X, Y, and Z law firm has involved any of the lawyers or the parties involved in the insurance claim.

#### **Question:**

What are Engineer W's obligations under the circumstances?

#### **References:**

- Section II.4.a. - NSPE Code of Ethics: *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.*
- Section III.4. - NSPE Code of Ethics: *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.*
- Section III.4. a. - NSPE Code of Ethics: *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.*
- Section III.4.b. - NSPE 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:**

Professional engineers are frequently retained by law firms and other parties to provide forensic engineering and expert witness services. This field of practice has seen a significant growth in recent years, due largely to the increase in litigation, alternative dispute resolution procedures, risk management practices, and other factors.

Over the years, the NSPE Board of Ethical Review has considered a number of cases involving ethical concerns relating to forensic engineering, expert witness, and other related services. Some examples have included BER Case Nos. 92-5, 82-6, and 76-3. These cases have involved such issues as performing services on the basis of a contingency fee, licensure requirements when serving as an expert witness, the qualifications of the individual who is being considered to perform the expert services, relationships with attorneys, and examining the conflict of interest questions that may arise.

As the Board noted on at least one previous occasion, one of the most common ethical issues that engineers face in their professional lives is the issue of conflicts of interest. At one point in the past, engineering codes of ethics, including the NSPE Code of Ethics for Engineers, specifically implored engineers to avoid all conflicts of interest. The basis for this position was that the engineer cannot serve two masters and when faced with a conflict of interest, the engineer must in all cases take steps to remove him or herself from such conflicts. Among the concerns expressed by supporters of this position was that engineers, who were involved in conflict of interest situations, created a poor image for the engineering profession because the issue raised the appearance of impropriety. However, over time, the engineering profession came to the general conclusion that by the very nature of the role of the engineer in society, conflicts of interests were virtually an immutable fact of professional engineering practice and that it was generally impossible for the engineer to, in all cases, remove him or herself from such situations. As a result, codes were changed and engineers were implored to “disclose” all known or potential conflicts of interest to their employers or clients by promptly informing them of any business association, interest, or other circumstance that could influence or appear to influence their judgment or the quality of their services.

More recently, in BER Case No. 98-4, the Board considered a situation involving Engineer A who was retained by ABC Manufacturing for the purpose of reviewing documents to form an opinion in a patent litigation matter in an area of Engineer A’s expertise. Engineer A performed the requested services and was paid for her work by ABC Manufacturing. Several years later, Engineer A was retained by Attorney X who represented a plaintiff in product liability litigation against ABC Manufacturing in a matter not involving any aspect of the earlier patent litigation. Several years later, Engineer A was again retained by ABC Manufacturing in a different patent litigation matter not related to either of the preceding events. Engineer A again performed the requested services and was paid for her work. However, during cross-examination at trial, opposing counsel questioned Engineer A’s previous relationship both in defense of and in litigation with ABC Manufacturing, implying that by providing those services, Engineer A was acting improperly.

In deciding that it was ethical for Engineer A to provide services to the parties in the manner described under the facts, the Board noted that it does not believe the facts rose to the level of a conflict of interest prohibited by the NSPE Code of Ethics. The Board noted that while engineers clearly have certain basic professional obligations to their employers and clients to protect their interests, engineers do not have a duty of absolute loyalty under which the engineer can never take a position adverse to the interests of a former client. Being a “faithful agent and trustee” to a client does not obligate an engineer to a duty of absolute devotion in perpetuity. (See NSPE Code Section II.4.) Such an approach would be impractical and compromise the autonomy and professional independence of engineers. This is particularly true in BER Case No. 98-4, where the matters at issue are not in any way related to any previous work Engineer A performed for either of her former clients. The Board also noted that while all engineers must make professional decisions based upon a variety of considerations and factors, engineers must analyze technical matters, weighing all appropriate considerations. For a variety of reasons, some engineers might choose to decline an engagement that could place the engineer in a position adverse to the interests of a former client, even though the engagement is not in any way related to the engineer’s earlier services to the client. However, the NSPE Board of Ethical Review is not prepared to say that an engineer who fails to follow this approach is somehow acting in violation of the NSPE Code. To do so would undermine the individual judgment, independence, and discretion that each engineer must exercise. In this connection, the Board has also expressed concern regarding the attorney’s implication under the facts in BER Case No. 98-4 that Engineer A may have acted improperly, with the suggestion that Engineer A’s action may have constituted a conflict of interest. It appears that the attorney was attempting to draw a parallel between the legal profession, where there is an institutionalized “plaintiff’s bar” and “defense bar,” and the engineering profession. However, while engineers may find themselves at times working within the confines of the legal adversarial profession, unlike attorneys, they are not “advocates” in rendering their professional services, and thus they should not be expected to compromise their professional independence and autonomy. It is important to note that the engineer’s role as an expert witness in a litigation matter is to assist the trier of fact, which may be a judge or jury, in better understanding the technical complexities of the case. While reasonable persons might differ as to whether Engineer W’s actions under the facts would raise either a conflict or an appearance of a conflict, the Board concluded that a conflict did not exist. For many of the same reasons, under the facts in the present case, the Board does not believe Engineer W’s actions rose to the level of a conflict of interest.

At the same time, Engineer W should advise both the Q, R, and S law firm and the insurance company of his earlier relationship with the X, Y, and Z law firm and allow those parties to determine what steps, if any, they wish to take in connection with Engineer W’s services.

**Conclusion:**

Engineer W should advise both the Q, R, and S law firm and the insurance company of his earlier relationship with the X, Y, and Z law firm and allow those parties to determine what steps, if any, they wish to take in connection with Engineer W's services.

**Board of Ethical Review:**

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