

**Fee Dispute—
Forensic Study Dependent Upon Work of Engineer in Dispute With Client**

Case No. 11-11**Facts:**

Engineer A is hired by Client to perform a forensic study and provide expert testimony. Client hires Engineer B to perform geotechnical field work in order for Engineer A to perform his study. Client terminates Engineer B due to a dispute and hires Engineer C to perform additional geotechnical field work. Engineer A's forensic study, report, and testimony are dependent upon Engineer B, but because of the dispute Client has not paid Engineer B for Engineer B's work. Engineer C confirms to Engineer A that Engineer B's work was competently prepared.

Question:

What are Engineer A's ethical responsibilities under the circumstances?

References:

- Section II.2.a. - NSPE Code of Ethics: *Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved.*
- Section II.3.a. - NSPE Code of Ethics: *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, which should bear the date indicating when it was current.*
- Section II.3.b. - NSPE Code of Ethics: *Engineers may express publicly technical opinions that are founded upon knowledge of the facts and competence in the subject matter.*
- Section II.4. - NSPE Code of Ethics: *Engineers shall act for each employer or client as faithful agents or trustees.*
- Section III.6.a. - NSPE Code of Ethics: *Engineers shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised.*
- Section III.9. - NSPE Code of Ethics: *Engineers shall give credit for engineering work to those to whom credit is due, and will recognize the proprietary interests of others.*

Discussion:

In professional engineering practice, it is not uncommon for the work of one engineer to be interrelated and even dependent upon the work of another engineer involved in the same project. Professional engineering, as with many professional pursuits, is collaborative in nature and professional engineers frequently interact and share information and knowledge in a collegial manner for the benefit of their clients as well as for the public generally.

At the same time, it is not uncommon for disputes or other challenges to arise during the negotiation or performance phase between parties that create difficult situations for professional engineers and that interfere with their ability to effectively manage their professional practice. For example, in BER Case No. 77-4, a county agency published an open announcement to consulting engineering firms soliciting expressions of interest in providing services for a water system project. The announcement made it clear that the engagement would be for the purpose of preparing an engineering report to be submitted to a federal agency to seek financial assistance for the proposed project. It was also made clear that the agency did not have any present funds to pay the consultant, that the agency was not committed to carrying through the project to construction, that if the report showed that the project was not feasible either from an engineering or financial standpoint, "...or that there is discerned a majority sentiment against the project for whatever reason, prior to federal funding commitment, then the project preparation would be terminated." The announcement further stated, "The consulting engineer would be retained solely on the basis of speculation that the project might proceed through the construction phase. If the project was stopped at any time before federal funds were committed, then the [agency] would have no legal obligation to remunerate the consulting engineer for services performed." The announcement closed with the statement that all interested consultants were invited to attend a public hearing "...to observe personally the public sentiment about the project." Although deciding that it would not be ethical for an engineer to provide the services indicated under the stated conditions insofar as they included an engineering report to be used as a basis for determining the economic and technical feasibility of the project, the NSPE Board of Ethical Review noted that "we do not find that the code by its specific language barred an engineer from entering into a purely speculative contract. If the engineer wished to take a chance on being compensated for the services because negative public comment caused cancellation of the proposed project or because the owner may not ultimately obtain the needed funds for any reason, he or she may do so." Although the facts and circumstance of BER Case No. 77-4 are quite different from the facts in the present case, Case 77-4 does illustrate the difficulty in separating compensation from professional and technical considerations in the practice of engineering.

Later, the Board considered BER Case No. 00-10, where Engineer A was both an attorney and an engineer. Engineer A was retained as an attorney by Client X on a contingency basis to perform legal services in connection with an accident in which Client X alleged that a manufactured product caused an accident. Engineer A, in his capacity as an attorney, interviewed a number of experts familiar with the product and the reasons for similar accidents and hired Engineer B, who had expertise in connection with the product in question. No written agreement was executed between Engineer A and Engineer B for the services in question. Engineer B reviewed the facts and circumstances surrounding the accident, conducted and completed his study, and issued a report to Engineer A. Engineer A reviewed Engineer B's report and informed Client X that it appeared that no basis existed for a lawsuit. Engineer B billed Engineer

A for his professional services. Thereafter, Engineer A refused to pay, indicating that since Engineer A was not paid for his services, Engineer A had no obligation to pay Engineer B. In deciding that it was not ethical for Engineer A to refuse to pay Engineer B for his services, the Board noted that Engineer A's failure to have informed Engineer B in advance about the nature of Engineer A's arrangement with Client X was at best misleading. If Engineer A intended that compensation to Engineer B would be on a contingency fee basis, Engineer A should have negotiated this up front with Engineer B. Having not done so, Engineer A had a clear obligation to compensate Engineer B in full.

Turning to the facts in the instant case, the Board believes that much of the reasoning in BER Case No. 00-10 is relevant to the present case. In both cases, it appears that there was a lack of clear and direct communication between Client and the engineer which damaged the relationship between Client and the engineer. It is not clear under the facts whether, as in Case 00-10, there was an absence of a written contract or whether specific language in the contract was unclear regarding Engineer A's obligations or responsibilities to Client in the event of a dispute between Client and Engineer B. Nevertheless, in view of the fact that Engineer A's testimony would be dependent upon Engineer B's work and that Engineer C had confirmed that Engineer B's work was competently prepared, Engineer A should explain these facts to Client and encourage Client to resolve the dispute with Engineer B in order for Engineer A to be able to complete his services on behalf of Client.

Conclusion:

Engineer A should explain these facts to Client and encourage Client to resolve the dispute with Engineer B in order for Engineer A to be able to complete his services and testimony on behalf of Client.

Board of Ethical Review:

Curtis A. Beck, P.E., F.NSPE

Mark H. Dubbin, P.E., NSPE

Robert C. Gibson, P.E., F.NSPE

Monte L. Phillips, Ph.D., P.E., F.NSPE

Samuel G. Sudler III, P.E., NSPE (*Vice Chair*)

Mumtaz A. Usmen, Ph.D., P.E., F.NSPE

Michael L. Shirley, P.E., F.NSPE, Chair

NOTE: The NSPE Board of Ethical Review considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials, and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

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, and university engineering departments), 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.

This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

To obtain additional NSPE opinions, visit www.nspe.org or call 800-417-0348.