

Expert Witness—Reimbursement of Payment Advance

Case No. 11-2

Facts:

Engineer A, a professional engineer, performs expert witness services in the field of structural engineering. Engineer A is contacted by Attorney X, who is located in a foreign country, to perform a forensic engineering analysis in connection with a structural failure and perform expert witness services during an alternative dispute resolution procedure. Engineer A verbally agrees to perform the services and is paid an advance for those services to Attorney X. However, prior to performing the forensic analysis, the matter is settled. Attorney X contacts Engineer A and requests reimbursement from Engineer A of the advance, less any expenses. Engineer A refuses to reimburse Attorney X, arguing that Engineer A was prepared to perform the services in question as stated in their verbal agreement.

Question:

Was it unethical for Engineer A to refuse to reimburse Attorney X for the advance paid by Attorney X?

References:

- Section I.6. - NSPE Code of Ethics: *Engineers, in the fulfillment of their professional duties, shall conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.*
- Section II.4.b. - NSPE Code of Ethics: *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 parties.*
- Section II.5. - NSPE Code of Ethics: *Engineers shall avoid deceptive acts.*
- Section III.6. - NSPE Code of Ethics: *Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.*

Discussion:

Ethical issues relating to compensation for forensic engineering services can sometimes become complicated—particularly because sometimes conflicts are rooted in the different perspectives of the engineering and legal professions. Moreover, different national perspectives can complicate these matter even further, causing issues that are not easily resolved.

The Board has considered compensation for forensic engineering services and the differences between the legal and the engineering professions. For example, in BER Case No. 00-10, Engineer A was both an attorney and an engineer. Engineer A was retained as an attorney by Client X on a contingency fee basis to perform legal services in connection with an accident in which Client X alleged that a manufactured product caused injury to Client X. Engineer A interviewed a number of experts familiar with the product and the reasons for similar accidents and hired Engineer B, an expert in 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 a 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. 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 stated that the fact that Engineer A was a lawyer was not relevant to his obligation as an engineer dealing with another engineer, although it could be in other cases. The Board believed 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 had intended that compensation to Engineer B would be on a contingency fee basis, noted the Board, Engineer A should have negotiated this issue 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, it is the Board's view that the facts here are somewhat different than the facts in Case No. 00-10. Unlike the facts in Case No. 00-10, where the engineer provided and completed at least one phase of services on behalf of the client, in this case Engineer A was paid in advance for services which were ultimately never performed as a result of the fact that the case was settled. If it was Engineer A's intent to retain the advance payment in the event that the case was settled prior to Engineer A actually providing services for the benefit of Attorney X and his client, Engineer A had an ethical obligation to make his intent clear so that there would be no misunderstanding about this critical issue.

This is another case that points to the critical importance of engineers having a detailed understanding of what is expected in order to avoid misunderstandings and unmet expectations with clients which inevitably result in ethical conflicts and disputes.

Conclusion:

The Board concludes it was unethical for Engineer A to refuse to refund the advance, less any expenses, unless the circumstances were disclosed and agreed to by both parties.

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