

## **Expert Witness—Engineer’s Confidentiality and Non-Disclosure Agreement**

### **Case No. 13-4**

#### **Facts:**

Engineer A performs engineering expert witness services for attorneys and other clients in civil and criminal law matters. Engineer A is contacted by Attorney X who saw Engineer A’s information listed in an online directory. After discussing the case with Engineer A, and inquiring whether Engineer A would have the time and resources necessary to assist in a legal matter, Attorney X requests a copy of Engineer A’s curriculum vitae to review in contemplation of litigation, which Engineer A sends to Attorney X. Engineer A does not hear any more from Attorney X. Without engaging Engineer A’s services and as part of settlement discussions with the opposing party, Attorney X tells opposing counsel Attorney Y that he “has engaged the services of Engineer A” and thereafter shares Engineer A’s Curriculum Vitae with Attorney Y. Following this conversation, Attorney Y advises Attorney X that his client has decided to settle the case. Engineer A learns about Attorney X’s misrepresentation that his services had been engaged as part of the litigation. In order to prevent such future misrepresentations, Engineer A establishes a policy whereby any attorney or client who considers retaining Engineer A and who requests a copy of Engineer A’s curriculum vitae or other material must sign a confidentiality/nondisclosure agreement with Engineer A.

#### **Question:**

Was it unethical for Engineer A to establish a policy whereby any attorney or client considering retaining Engineer A and requesting a copy of Engineer A’s curriculum vitae or other material must sign a confidentiality/nondisclosure agreement with Engineer A?

#### **References:**

- |                 |                        |  |
|-----------------|------------------------|--|
| Section II.1.d. | - NSPE Code of Ethics: | <i>Engineers shall not permit the use of their name or associate in business ventures with any person or firm that they believe is engaged in fraudulent or dishonest enterprise.</i>  |
| Section II.1.f. | - NSPE Code of Ethics: | <i>Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required.</i> |
| Section II.4.   | - NSPE Code of Ethics: | <i>Engineers shall act for each employer or client as faithful agents or trustees.</i>   |

**Discussion:**

As a general matter, professional engineers play an important role in society by serving as expert witnesses and providing forensic engineering services prior to, during, and following litigation and other judicial, legislative, and administrative proceedings. Issues involving the relationship between professional engineers serving as expert witnesses and the attorneys and clients who retain them have been examined by the NSPE Board of Ethical Review on numerous occasions.

As the BER has noted in the past, engineers and engineering firms are generally free to provide engineering services to individuals and businesses consistent with local, state, and federal laws and regulations and rules of ethics that generally prohibit competition restrictions and boycotts. From time to time, entities (e.g., clients and government agencies) may seek to limit the ability of engineers to perform engineering services by contract or other means. As a general rule, the NSPE Code of Ethics encourages free and open competition by engineers, consistent with applicable laws, regulations, and practices. While depending upon the facts and circumstances, certain restrictions sometimes apply (e.g., in circumstances where the interests of the public, the client, the employer, or other engineers may be compromised—such as confidentiality, public health and safety, and conflicts of interest). As a general rule, engineers are free to perform engineering services to the individuals and clients of their own choosing.

The NSPE Board of Ethical Review has examined issues relating to restrictions on an engineer's ability to offer services in the past. One of the first cases involving this issue was BER Case No. 75-15. In that case, John Doe, P.E., chief engineer of a city agency responsible for a large public works program for which the agency regularly utilized the services of private engineering firms, sent a letter to all firms which had been retained by the agency, stating in pertinent part:

*“The program in which this agency is now engaged requires the services of every employee, especially the more capable and devoted. Our consultant firms, too, need such people, and some have approached our employees with enticing offers of jobs. I understand their needs for capable engineers, and their offers are compliments to the engineers involved and this agency. However, it is obvious that the rationale of retaining consultants is to augment our capability. This premise must be continually defended...including the city's approval of each consultant's contract. The tendering of employment offers or even entering into discussions with our engineering employees has a disturbing and unsettling effect on morale and is entirely inconsistent with the purposes of retaining consultants. I would, therefore, view with disfavor any such discussions with my engineering employees.”*

In deciding that Doe's actions were unethical, the Board, balancing the needs of the agency and the rights of its engineer employees, concluded that on balance it was an

offense to the NSPE Code for an engineer–employer to limit employment opportunities for its engineers by pressuring the consulting firms to avoid discussion or offer of employment to the engineers of the agency. While Case 75-15 was decided in the context of an employment rather than a business competition situation, the Board is of the view that similar considerations are relevant in both contexts.

More recently, in BER Case No. 00-7, Company A was involved in the manufacturing of consumer products including certain industrial tools. Engineer B had performed research and had experience in the design and manufacture of these specialized industrial tools. Engineer B was now an engineering faculty member at a private university. Engineer B also had an independent consulting engineering practice.

Company A contacted Engineer B and requested that Engineer B agree to a consulting contract whose sole purpose was to prevent Engineer B from speaking out in public or testifying in any future litigation involving industrial tools manufactured by Company A. In deciding that it would not be ethical for Engineer B to knowingly agree to a consulting contract (with Company A) for the sole purpose of preventing Engineer B from speaking out in public or testifying in any future litigation involving industrial tools manufactured by Company A, the Board stated that by taking this position, Engineer B would be compromising his professional judgment and would be playing the role of a “hired gun” bound by “golden handcuffs” without regard to the individual facts and circumstances involved in a particular case. The Board noted that there may be situations in the future where it would be in the public’s interest for Engineer B to speak out publicly, etc., concerning information that could have an important bearing on the public health, safety, and welfare. As a professional engineer with an affirmative obligation to hold paramount the public health and safety, the Board could not see how Engineer B would be serving this ethical value by executing an agreement that prevents Engineer B from prospectively performing this basic ethical obligation.

While the facts in the present case are somewhat different than the earlier cases discussed, many of the same important values and principles enunciated in the two earlier cases have an important bearing on consideration of the present case. Both earlier cases recognized the need to protect the integrity of professional engineers and professional engineering as well as the importance of honesty and transparency in the rendering of professional engineering services to clients and to the public. The facts and circumstances in the instant case involve an effort on the part of Engineer A to impose a “hurdle” on the use of information, while the two earlier cases involved efforts by external parties to limit the movement and activities of engineers. In this connection, it is the Board’s view that the “hurdle” in the present case is intended to protect the integrity and the autonomy of professional engineers and as such provides a level of protection for the public. By requiring the execution of a confidentiality/nondisclosure agreement, Engineer A is preserving the rights of engineers to be fully and fairly recognized and rewarded for who they are, what they do, and the services they ultimately provide. At the same time, by requiring a confidentiality/nondisclosure agreement, Engineer A is protecting the public

interest in discouraging third party misrepresentations and dishonest portrayals by unscrupulous parties who seek personal gain at the expense of fairness and evenhanded dealings. In this connection, it is the Board's view that in light of the misrepresentation and deception by Attorney X, Engineer A should consider bringing the conduct of Attorney X to attention of appropriate authorities for possible review and investigation should the circumstances warrant, consistent with NSPE Code Section II.1.f.

**Conclusion:**

It was not unethical for Engineer A to establish a policy whereby any attorney or client considering retaining Engineer A and requesting a copy of Engineer A's curriculum vitae or other material must sign a confidentiality/nondisclosure agreement with Engineer A.

**Board of Ethical Review:**

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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, 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.*

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