

Expert Witness Testimony – Refusal to Serve as an Expert Witness

Case No. 06-6

Facts:

Engineer A is retained by Attorney X to serve as a defense expert witness in a criminal trial involving a driver accused of negligent homicide in connection with the death of a pedestrian. The defendant is acquitted.

Following the trial, the attorney for the survivors of the pedestrian file a civil suit against the defendant. The plaintiff's attorney and the defendant's attorney both contact Engineer A to ask that Engineer A serve as an expert witness in the civil trial. During the pretrial process and before Engineer A has a chance to decline to serve as a plaintiff expert in the civil trial, the plaintiff's attorney includes Engineer A on his list of expert witnesses to be called at the trial. Thereafter, Engineer A informs both the plaintiff's attorney and the defendant's attorney that he will not serve as an expert witness during the trial. During the civil trial, Engineer A is called as a fact witness for both sides.

Questions:

1. Was it ethical for Engineer A to refuse to serve as an expert witness for the plaintiff in the civil trial?
2. Was it ethical for Engineer A to refuse to serve as an expert witness for the defendant in the civil trial?

References:

- Section I.3. - NSPE Code of Ethics: *Engineers, in the fulfillment of their professional duties, shall issue public statements only in an objective and truthful manner.*
- Section I.4. - NSPE Code of Ethics: *Engineers, in the fulfillment of their professional duties, shall act for each employer or client as faithful agents or trustees.*
- 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.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.b. - NSPE Code of Ethics: *Engineers shall not, without the consent of all interested parties, participate in nor represent an adversary interest in connection with a specific project or proceeding in which the engineers have gained particular specialized knowledge on behalf of former clients or employers.*

Discussion:

On multiple occasions, the NSPE Board of Ethical Review has examined ethical issues relating to the role of engineers serving as expert witnesses as well as the interplay between the law and engineering. However, questions relating to the relationship between civil and criminal matters raise difficult questions regarding engineering objectivity and the appropriate role of an engineer in the judicial process.

In BER Case No. 85-4, one of the earlier cases involving an engineer involved in the adversarial process, Engineer A, a forensic engineer, was hired as a consultant by Attorney Z to provide an engineering and safety analysis report and courtroom testimony in support of a plaintiff in a personal injury case. Following Engineer A's review and analysis, Engineer A determined that he could not provide an engineering and safety analysis report favorable to the plaintiff because the results of the report would have to suggest that the plaintiff and not the defendant was at fault in the case. Engineer A's services were terminated and his fee was paid in full. Thereafter, Attorney X, representing the defendant in the case, learned of the circumstances relating to Engineer A's unwillingness to provide a report in support of Attorney Z's case and sought to retain Engineer A to provide an independent and separate engineering and safety analysis report. Engineer A agreed to provide the report. In deciding that Engineer A's action in agreeing to provide a separate engineering and safety analysis report was unethical, the board reviewed various issues including questions involving engineers who gain, or are perceived to have gained, access to knowledge that may be advantageous to one client and disadvantageous to another. In some instances, said the board, it may be appropriate for an engineer to first resign a particular position, such as consultant to a municipality, before agreeing to perform services for a client who might have a conflicting interest. (See BER Case No. 76-3.) Obviously, the degree to which this may be the proper, ethical course of action is dictated by the particular facts and circumstances of a case. In BER Case No. 85-4, the mere fact that Engineer A ceased performing services for Attorney Z would not be an adequate solution to the ethical dilemma. Nor was the fact that Engineer A had agreed to provide a "separate and independent engineering and safety analysis report." On the former point, the fact that Engineer A ceased performing services for Attorney Z did not mitigate that Engineer A throughout his first analysis had access to information and documents that were made available to him by the plaintiff and the plaintiff's attorney in a cooperative and mutually beneficial manner. The board determined that it could not accept the proposition that following the termination of his relationship with the attorney for the plaintiff he would "blot all" of that information from his mind and start from "square one" in performing his engineering and safety analysis report. Nor could the board believe that Engineer A would be capable of providing a "separate and independent" report for the defendant in this case. It was clear to the board from the facts that the real reason for the defendant's attorney's hiring Engineering A was that he believed Engineer A would provide a report that would be favorable. In that case, the board said "Engineer A had to have been aware of the reasons why his services were being retained by virtue

of the sequence of events. Even if Engineer A was so naive as to believe that Attorney X was unaware of the circumstances of his termination, the board noted that this would not excuse Engineer A's actions. At a bare minimum, Engineer A should have fully discussed the issue with Attorney Z. Continued the board, "It may be argued, as was stated in the earlier BER Case No. 74-2, that Engineer A's loyalties under these facts were not divided because he had terminated his relationship with the plaintiff's attorney. However, we must recognize that while Engineer A may not currently have a professional relationship with a former client, he still has an ethical obligation to that client to protect certain confidential information and facts, as well as a certain duty of trust and loyalty. How long that duty of trust and loyalty must be maintained we are not prepared to state at this time. However, we are certainly willing to state that such a duty exists for the duration of one legal proceeding."

Finally, with regard to the duty of the engineer to be objective in his professional reports and statements (see NSPE Code Section II.3.a.), the board noted that it has sometimes been suggested that engineers who act as paid expert witnesses have an inherent conflict between their duty to tell the truth and their obligation to perform their services consistent with the best interests of the client. The board noted that in this case, Engineer A developed an analysis report that was inconsistent with the legal interests of the client. Under the facts, Engineer A did not act in the role as a "hired gun," seeking to testify in favor of the client who was paying his fee. The board made this point to underscore the importance of forensic engineers "calling them as they see them." Had Engineer A ceased his involvement in the case following the termination of his relationship with Attorney Z, Engineer A would have been acting in a wholly ethical manner. The board noted that Engineer A's ethical transgressions were a result of his subsequent involvement with Attorney X.

Many of the issues and questions are similar, including the challenges faced; obligations to clients; and duties of loyalty, confidentiality, and objectivity. In the present case, Engineer A participated in a criminal trial for the defense and the result was the acquittal of the defendant on whose side Engineer A testified. This board is unaware of any further ethical obligation Engineer A would have to provide services on behalf of the defendant in connection with the subsequent civil trial, assuming there was no written nor other agreement for Engineer A to provide such additional services. Regarding Engineer A providing services on behalf of the plaintiff in the subsequent civil trial, the board believes not only that Engineer A's actions in refusing to serve as an expert was ethical, but also that had Engineer A agreed to provide such services, it would raise serious ethical concerns for many of the reasons as outlined in BER Case No. 85-4. While it is true that the litigation involves separate and distinct legal proceedings with very different legal issues and legal standards of proof (e.g., "preponderance of the evidence" standard in a civil trial vs. "beyond a reasonable doubt" standard in a criminal trial), as noted in BER Case No. 85-4, the role of the engineer is to "call them as the engineer sees them" and not be distracted by other unrelated factors.

In passing, the board is troubled by the fact that Engineer A is being called as a “fact witness” by both the plaintiff and the defendant in the civil trial. It appears from the facts that Engineer A is strictly an expert in this matter and there is no indication that Engineer A has any other relationship or connection with the litigation other than as an expert. It appears that the attorneys for both the plaintiff and the defendant are seeking to circumvent rules of evidence and procedure to question Engineer A at trial. This is an abuse, and when such abuse occurs, it is the role of the court to intercede and prevent such abuse from occurring.

Conclusions:

1. It was ethical for Engineer A to refuse to serve as an expert witness for the plaintiff in the civil trial.
2. It was ethical for Engineer A to refuse to serve as an expert witness for the defendant in the civil trial.

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