

Expert Witness—Agreement Limiting Engineer from Working for Competitors

Case No. 10-4

Facts:

Engineer A serves as an expert witness and frequently assesses causes for project failures for various clients. Recently, Client X, a frequent client of Engineer A, has proposed a contract which includes a clause that attempts to limit or restrict the types of companies for whom Engineer A can work. The clause does not appear to be based upon any specific Client X confidential information, trade secrets, client knowledge, or project-specific information known to Engineer A. Engineer A suspects that Client X is attempting to prevent Engineer A from providing services to competitors of Client X.

Question:

Would it be ethical for Engineer A to enter into an agreement to limit or restrict the companies for whom Engineer A can work?

References:

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| Section II.4. | - | NSPE Code of Ethics: | <i>Engineers shall act for each employer or client as faithful agents or trustees.</i> |
| Section III.1.c. | - | NSPE Code of Ethics: | <i>Engineers shall not accept outside employment to the detriment of their regular work or interest. Before accepting any outside engineering employment, they will notify their employers.</i> |
| Section III.4. | - | NSPE Code of Ethics: | <i>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.</i> |
| Section III.5. | - | NSPE Code of Ethics: | <i>Engineers shall not be influenced in their professional duties by conflicting interests.</i> |

Discussion:

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, 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, 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 No. 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 is 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.

The Board believes both BER Case Nos. 75-15 and 00-7 establish important guidance to engineers faced with facts similar to those in the present case. The concept of freedom of employment, either as an employee or as an engineering company, is an important concept to preserve because it protects the economic and professional independence and autonomy of individual engineers and engineering companies, preserves an engineer’s role in protecting the public health and safety and in the absence of some special circumstance is consistent with public policy in favor of free and open competition. In the absence of some overriding ethical concern (e.g., conflict of interest, protection of confidential or proprietary information, protection of the public health and safety, legally enforceable contractual covenant), it is generally advisable that engineers and engineering companies not agree to provisions that restrict their autonomy and independence as engineers. Such provisions, particularly where they are overly self-serving, do not reflect well upon the individuals or companies that enter into such agreements and could hamper the ability of engineers to freely practice their profession.

Conclusion:

It was unethical for Engineer A to enter into a broad agreement which limits or restricts the companies for whom Engineer A can work because it could hamper the ability of engineers to freely practice their profession.

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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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