

Expert Witness—Privy to Earlier Statement by Opposing Counsel

Case No. 12-12

Facts:

Engineer A is a forensic engineer. Lawyer Y represents P, in litigation against D. Engineer A is approached by Lawyer Y to serve as an expert witness in this litigation. Several months before this inquiry, Engineer A was contacted by Lawyer X regarding his availability to serve as an expert witness in litigation involving his client D against P. Lawyer X did not disclose any confidential information or facts to Engineer A regarding the case. Subsequently, Lawyer X makes the statement to Engineer A, "Actually, we have a very weak case and will probably lose...", and never contacts Engineer A about serving as an expert witness involving Lawyer X's client D plaintiff.

Question:

Would it be ethical for Engineer A to serve as an expert witness retained by Lawyer Y whose represents P?

References:

- 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.a. - NSPE Code of Ethics: *Engineers shall not, without the consent of all interested parties, promote nor arrange for new employment or practice in connection with a specific project for which the engineer has gained particular and specialized knowledge.*
- 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 engineer has gained particular specialized knowledge on behalf of a former client or employer.*

Discussion:

The issue of an engineer serving as an engineering expert for a client that is in a dispute with which the engineer may have had some type of past relationship or gained some level of knowledge is an issue that the NSPE Board of Ethical Review has considered in the past. As with other Board of Ethical Review issues, while sometimes these issues are easily resolved, in other cases the issues involve more complex questions and are not so easily determined.

The NSPE Board of Ethical Review's first review of this issue was in BER Case No. 82-6—a case involving a simple and straightforward set of facts. In that case, Engineer A was retained by the U.S. government to study the causes of a dam failure. Later, Engineer A was retained by the contractor on this project, who had filed a claim against

the U.S. government for additional compensation. In deciding that it was unethical for Engineer A to be retained as an expert witness for the contractor under these circumstances, the Board noted that there is nothing in the record to indicate that Engineer A was given the consent of his former client, the U.S. government, to represent the interests of the contractor in its claim against the government for additional compensation, as required by the NSPE Code of Ethics. Additionally, the Board noted that as an expert witness, Engineer A would be required to state his opinion based upon his firsthand knowledge and on facts of record. There is a danger that Engineer A's opinions, based on his firsthand knowledge and understanding of the facts of record, would touch upon privileged, specialized, and confidential knowledge gained while he was retained by the U.S. government. Indeed, he may be called upon to give an opinion as to the facts with which he was involved as a consultant with the government. The Board noted that there can be no doubt that NSPE Code Section III.4.b. was enacted to prevent engineers from disclosing such information.

Later, in BER Case No. 94-9, the Board considered a situation involving Engineer A, a principal in a private practice firm, retained orally by the attorney for a litigant involved in a legal action to provide accident reconstruction consultation. The litigant, a plaintiff, was suing a defendant allegedly responsible for a traffic accident. Although Engineer A sent a letter of agreement to the plaintiff's attorney, it was never returned signed by the plaintiff or his attorney. No additional information was exchanged between Engineer A and the plaintiff's attorney. Approximately two years later, the law firm representing the defendant contacted Engineer A and sought to retain Engineer A's services in connection with the same legal action. Engineer A, assuming the plaintiff and his attorney had decided to retain the services of another expert, agreed to provide his services to the law firm representing the defendant. Later, the plaintiff's attorney contacted Engineer A with the expectation that Engineer A would provide accident reconstruction consultation per the earlier agreement. In determining it was ethical for Engineer A to agree to provide accident reconstruction services to the law firm representing the defendant, the Board noted that Engineer A was never involved substantively in the accident analysis and was apparently only provided with a general and perfunctory description of the nature of the accident and the issues involved in the case. The Board noted that from the facts, it appeared that the only exchange that took place between Engineer A, the attorney, and the plaintiff was an agreement by Engineer A to provide the requested services and a written letter agreement prepared by Engineer A, which was never signed by either the plaintiff or his attorney. Therefore, it was plausible to conclude that since no actual substantive discussion of "particular, specialized knowledge" or facts and circumstances of the case were ever revealed to Engineer A, Engineer A never became privy to any information that could cause a conflict of interest of the types described in BER Case Nos. 76-3 and 82-6 to arise. (See NSPE Code Section III.4.b.)

However, the Board noted that while it may conclude under the circumstances that Engineer A did not have a conflict of interest *per se*, and that his conduct was ethical, the Board was not entirely comfortable with Engineer A's actions and conduct. The Board noted that before agreeing to being retained by the defendant and his attorney, Engineer A should have provided notice to the plaintiff and his attorney and to inquire of them whether his professional services would be required by them as part of the subject litigation. While the Board noted that the plaintiff and his attorney's apparent inattentiveness in failing to respond to Engineer A's letter of agreement was not proper, because of the delicate nature of the matter at hand and the danger of misperception of Engineer A's actions, the Board noted that Engineer A should not have assumed that the plaintiff and his attorney had sought consulting services elsewhere, but instead made inquiries before agreeing to provide services to the defendant.

More recently, in NSPE Board of Ethical Review Case No. 06-2, the Board considered a case involving Engineer A's firm, which was solicited by WXY Corporation, a potential industrial client, to submit a proposal on a major engineering project. During the interviews of Engineer A's firm and its qualifications, the potential client discussed certain limited technical details and elements of the project with Engineer A. Later, another engineering firm was selected to provide the design services for WXY Corporation and Engineer A was informed of this decision. Still later, a dispute arose between WXY Corporation and FGH Construction, the general contractor on WXY Corporation's major engineering project. FGH Construction contacted Engineer A and requested that Engineer A perform forensic engineering and provide expert witness testimony in connection with the dispute between WXY Corporation and FGH Construction. Because the facts in BER Case No. 06-2 were similar to the facts in Case No. 94-9 and distinguishable from the facts in the earlier BER cases noted, the Board was of the view that it would be ethical for Engineer A to perform forensic engineering and provide expert witness testimony in connection with the dispute between WXY Corporation and FGH Construction. Said the Board, unlike the situation in BER Case No. 82-6, Engineer A was never formally retained by the client, WXY Corporation, but instead only participated in a single interview to determine whether Engineer A would be retained to provide design services for WXY Corporation. Since Engineer A was never involved in a formal engineer-client relationship with WXY Corporation, Engineer A should not be restricted or penalized by WXY Corporation's independent decision to share limited technical information with Engineer A. Moreover, there was nothing in the facts to suggest that the technical information in question related directly to any dispute between WXY Corporation and FGH Construction. In addition, unlike the facts in BER Case No. 94-9, there was no doubt nor question regarding whether Engineer A had any continuing relationship or obligation concerning WXY Corporation. WXY Corporation had clearly communicated to Engineer A that they had not been selected by WXY Corporation and so the matter was unambiguously closed as far as both parties were concerned. Moreover, unlike the situations in both BER Case Nos. 82-6 and 94-9, at the time that Engineer A and WXY Corporation established their initial communication,

there was no contemplated dispute or litigation under consideration. In concluding, the Board saw no reason why Engineer A should not have accepted this commission. To decide otherwise, said the Board, would place undue restrictions upon the ability of engineers to perform their services on behalf of and for the benefit of their clients.

In the present case, the Board is of the opinion that it would be ethical for Engineer A to be retained by Lawyer Y representing P. As was analyzed in the earlier cases considered by the Board, in this case, Engineer A never entered into a formal relationship with Lawyer X or Lawyer X's client D. Moreover, no substantive facts were ever shared with Engineer A in connection with Lawyer X's client D. Instead, the only mention of the case was a speculative opinion on the part of Lawyer X that the case in which Lawyer X was representing D was very weak and would probably be unsuccessful. Lawyer X's unsolicited admission as to the merits of client D's position should not be a basis to limit Engineer A's ability to serve as an expert witness retained by Lawyer Y representing P. In the Board's opinion, these factors taken together do not amount to a basis for concluding that the information disclosed to Engineer A constituted particular specialized knowledge or that Engineer A's actions rose to a level that constitute any breach of confidentiality.

Conclusion:

It would it be ethical for Engineer A to serve as an expert witness retained by Lawyer Y who represents P.

Board of Ethical Review:

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

Mark H. Dubbin, P.E., NSPE (*Vice Chair*)

Luke Patterson, P.E.

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

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

Samuel G. Sudler III, P.E., 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.