Ethics Forum: Spring Series 2014
Part I
A Conversation About Engineering
Expert Witnesses and Litigation

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Engineering Ethics

Introducing Ethics Forum Team:
- Mark H. Dubbin, P.E., NSPE
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- Michael L. Shirley, P.E., F.NSPE
- Samuel G. Sudler III, P.E., NSPE
- Mumtaz A. Usmen, Ph.D., P.E., F.NSPE
- Curtis A. Beck, P.E., F.NSPE, Chair
- William J. Lhota, P.E., NSPE, Former BER Chair

National Society of Professional Engineers
Engineering Ethics

- **Black and White Areas – Easy**
  - Right vs. Wrong

- **Gray Areas – Tougher**
  - Right vs. Right
  - Lesser of the Evils/Dilemma

- **Other Factors**
  - Time/Money
  - Family
  - Career
  - Reputation
Engineering Ethics

- **Why Study Engineering Ethics?**
  - To Understand the Standards Governing What is Acceptable Behavior in the Practice of Engineering

- **Why Practice Engineering Ethically?**
  - Personal Injury/Property Damage
  - Disciplinary Action
  - Impact on Reputation, Employer, Clients, Profession
  - Possible Loss of Job, Business, etc.
Engineering Ethics

- Three Basic Ethical Obligations – (1) Public, (2) Employer/Client and (3) Other Professionals...
  - Never Mutually Exclusive - Reciprocal
  - Not A “Zero Sum Game”
  - All Need To Be Considered At All Times
  - Should Be Complementary And Integrated With One Another To The Fullest Extent Possible
  - Ethical Integration = Professional Integrity
Engineering Ethics

- Seven Principles Impacting Each Obligation
  1. Protecting The Public Health, Safety and Welfare
  2. Demonstrating Professional Competence
  3. Maintaining Objectivity/Truthfulness
  4. Addressing Conflict of Interest
  5. Preserving Confidentiality
  6. Receiving and Providing Valuable Consideration
  7. Emerging Areas/Emerging Challenges
Engineering Ethics

- Engineering Expert Witnesses and Litigation
  - Code of Ethics Provisions
  - Guidelines for the P.E. as a Forensic Engineer
  - Recommended Practices for Design Professionals Engaged as Expert Witnesses in the Resolution of Construction Industry Disputes
- Issues
  - General Client Relations
  - Financial Arrangements
  - Investigation and Preparation
  - Procedural Problems/Issues
  - Courtroom Participation
  - Depositions
  - Post Trial Circumstances
Engineering Ethics

- How to address a conflict of interest
  - Disclosure
  - Manage
  - Recusal
  - Resignation
Engineering Ethics

NSPE Deputy Executive Director and General Counsel Arthur Schwartz and a panel of engineering ethics experts will examine a series of cases involving conflicts with the attorney, confidentiality and non-disclosure agreements, participation as an expert in a consulting network and accepting a position with a firm representing an adversary party in litigation. Polling questions and opportunity for Q&A will allow opportunities for audience interaction.
Engineering Ethics

Expert Witness—Conflict with Attorney

NSPE Board of Ethical Review

Case No. 13-2
Engineering Ethics

Facts:

- Attorney A representing Client B called via telephone Engineer Q to explore if he could assist him with a matter that was in litigation.
- During the call with Attorney A, Engineer Q takes minimal handwritten notes concerning the incident circumstances of the litigation matter.
- No liability theory was discussed at the time of the telephone call. Engineer Q sends his fee schedule to Attorney A, which required that the fee schedule be signed and that an engagement retainer be paid to Engineering Q before any work could proceed.
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Facts:

- A year and two months subsequent to the telephone call from Attorney A, Attorney B representing another party, in the same matter, calls Engineering Q. Subsequent to that time, no signed fee schedule was received nor was any engagement retainer received.

- Since the matter with Attorney A was never opened, Engineer Q agrees to accept the engagement with Attorney B. Following acceptance of the engagement with Attorney B, Attorney A contacts Engineer Q stating that he was ready to proceed with the matter and engage Engineer Q in the litigation.
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Facts:

- After Engineer Q explains that he has already been retained by Attorney B, Attorney A angrily states that he had already engaged Engineer Q’s services because Attorney A had contacted Engineer Q before Attorney B. Attorney A threatens to seek to disqualify Engineer Q from working with Attorney B in the matter.
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Question:

Was it unethical for Engineer Q to agree to accept the engagement with Attorney B?
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 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 interested parties.
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 or 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.
Conclusion:

It was not unethical for Engineer Q to agree to accept the engagement with Attorney B.
Engineer Q had an ethical obligation to confer with Attorney A before agreeing to perform services for Attorney B:
Engineering Ethics

Expert Witness—Engineer’s Confidentiality and Non–Disclosure Agreement

NSPE Board of Ethical Review

Case No. 13-4
Engineering Ethics

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.
Engineering Ethics

Facts:

- 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/non-disclosure agreement with Engineer A.
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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/non-disclosure agreement with Engineer A?
Section II.1.d. - NSPE Code of Ethics:

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.
Engineering Ethics

- Section II.1.f. - NSPE Code of Ethics:

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.
Engineering Ethics

Section II.4. - NSPE Code of Ethics:

Engineers shall act for each employer or client as faithful agents or trustees.
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 CV or other material must sign a confidentiality/non-disclosure agreement with Engineer A.
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Does Engineer A have a right or an obligation to report Attorney X to the appropriate Authorities?
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Expert Witness—Participation in an Expert Witness Consulting Network

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Case No. 13-7
Facts:

- Engineer A is contacted by an expert witness referral network which identifies and engages professional engineers to serve as expert witnesses.

- Engineer A agrees to participate in the expert witness consulting network.

- Under the procedure, the network establishes a directory of engineering experts and offers access to the directory to attorneys and other potential clients.
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Facts:

- Following the rendering of expert witness services, the attorneys and clients pay the network and the network then pays the engineering experts.

- In accordance with the network procedures, following the rendering of expert witness testimony, Engineer A invoices the network and the network then bills the attorney/client.
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Question:

Is it ethical for Engineer A to participate in this type of arrangement?
Section I.5.b. - NSPE Code of Ethics:

Engineers shall not offer, give, solicit, or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect or intent of influencing the awarding of a contract. They shall not offer any gift or other valuable consideration in order to secure work. They shall not pay a commission, percentage, or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.
Engineering Ethics

Conclusion:

It is ethical for Engineer A to participate in this type of arrangement.
Engineering Ethics

Would it be ethical for a professional engineer to pay a fee to another professional engineer to identify engineering experts for a client?
Engineering Ethics

Expert Witness—Accepting a Position with an Engineering Firm that Represented an Adverse Party in Litigation

NSPE Board of Ethical Review

Case No. 13-12
Engineering Ethics

Facts:

- In year 1, Engineer A worked for Engineering Firm L and served as an expert witness for Attorney X who represented Client T in litigation.
- In year 2, Engineer B, an engineer for Engineering Firm M served as an expert witness for Attorney Y who represented Client U in current litigation with Client T involving a legal matter related to Engineer A's earlier expert witness work for Attorney X.
Facts:

- In year 3, during the time that Engineer B is still serving as an expert witness in the same litigation with Client T, Engineer A is asked to come to work as an engineer for Engineering Firm M.
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Question:

- Would it be ethical for Engineer A to accept the engineering position with Engineering Firm M?
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 or 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 or 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.
Conclusions:

It would be ethical for Engineer A to accept the engineering position with Engineering Firm M provided that Engineer A does not perform any services in connection with the current litigation between Client T and Client U. Furthermore, prior to accepting employment with Engineering Firm M, Engineer A has an ethical obligation to advise Engineering Firm M regarding his obligation to maintain the confidential information of Engineer A’s former clients, Attorney X and Client T.
In your opinion, does this case raise an issue of the appearance of impropriety?
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- Discussion
- Questions and Answers
“The social responsibility of business is to increase profit within the bounds of the law which is to say, engage in open and free competition, without deception or fraud…”

– Milton Friedman, Nobel Prize Winning Economist
“Ethics is knowing the difference between what you have a right to do and what is right to do...”

- Potter Stewart, Former Justice, US Supreme Court
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- “The reputation of a thousand years may be determined by the conduct of one hour”

  – Japanese proverb
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