

Expert Witness—Serving Both Parties and Splitting Fees

Case No. 17-10

Facts:

Engineer A is a professional engineer in private practice and is contacted by both the attorney for a worker's compensation insurance company and the attorney for an estate of an employee who died in an industrial accident. The two attorneys ask Engineer A if he would serve as an expert for both the insurance company and the deceased employee's estate. Under the terms of the agreement, the fees would be split equally between the parties.

Question:

Would it be ethical for Engineer A to serve an expert for both the insurance company and the deceased employee's estate?

NSPE Code of Ethics References:

- Section I.4. - *Engineers, in the fulfillment of their professional duties, shall act for each employer or client as faithful agents or trustees.*
- Section II.1.c. - *Engineers shall not reveal facts, data, or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
- Section II.4. - *Engineers shall act for each employer or client as faithful agents or trustees.*
- Section II.4.a. - *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. - *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. - *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. - *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.*

NSPE BER Case Reference: 02-12, 91-6, 87-3

Discussion:

Situations and circumstances where professional engineers represent multiple parties on a project often raise difficult ethical issues. The NSPE Board of Ethical Review has examined these situations in the past.

BER Case 91-6 is instructive on the problems with vague and indefinite understandings between a consulting engineer and a client. In this situation, a consulting engineer agrees to provide basic consulting services along with an understanding that the client may request additional services at a later date. Nothing is contained in the agreement concerning work for other clients. Two years following completion of basic services to the client, the consulting engineer is retained by a major industrial corporation, which subsequently is deemed by the initial client to be responsible in a dispute over the clean-up of a hazardous waste site. Following the execution of a contract with the corporation, the consulting engineer is contacted by the former client and is asked to provide consulting services per the original understanding with the initial client in connection with the specific hazardous waste site of the major industrial corporation, which is now a client of the consulting engineer. The consulting engineer informs the initial client that the performance of such services would constitute a conflict of interest and declines to perform the services requested. Four Board members concluded it was unethical for the consulting engineer to perform services for the industrial corporation without prior approval of the initial client and three Board members dissented with the opinion that the agreement for future additional services, with no exercise in two years, was too vague and uncertain to be binding.

The discussion of BER Case 91-6 cites BER Case 87-3, in which the Board considered facts involving a county that employed individuals to perform building inspections in the country. Dissatisfied with the services provided by in-house inspectors, and as part of an effort to “contract-out” certain county functions, the county decided to retain a private consulting engineering firm to perform building inspections. The county selected and retained an engineer to perform the work. One of the engineer’s responsibilities was to inspect a building project developed by a client of the engineer. The client was a company for which she had regularly performed services in the past. Although the engineer did not provide any services in connection with the building project in question, the engineer and the client anticipated that they would continue to work together in the future. In contract negotiations with the county, the engineer disclosed the relationship with the client, and it became a matter of official record. In finding that it would not be unethical for the engineer to perform building inspection services for the county in connection with the project developed by the client, the Board, considering earlier BER cases, noted that unlike other cases, the facts did not deal with a situation where an engineer was being retained as a paid advocate for a particular position or point of view on a pending matter in direct conflict with the engineering opinions of her county client. Nor was the Board faced with a situation where the timing of the retainer raised questions of impropriety. Rather, in BER Case 87-3, the engineer was asked to perform basic inspection services in connection with a building with which she has never previously been involved but which was developed by a former and possibly future client. While the Board noted that the engineer had a professional obligation under NSPE Code Sections II.4 and II.4.a. to disclose her relationship with the client to the county, the Board did not believe it would be necessary for her to decline to perform the inspection services. To prohibit the engineer from providing building inspection services would be an unrealistic intrusion into her practice and would inhibit the county from utilizing a flexible method of delivering services consistent with the public health and safety.

More recently, in BER 02-12, Engineer A, a principal in a consulting structural engineering firm, was retained by Owner X to perform an inspection of a garage located on one side of Owner X's building. The garage backed against a steep incline at the rear end of the garage and was maintained by structural supports. Another garage, owned by Owner Y was located on the other side of the garage. Owner X was concerned that the structure was being compromised by defects in Owner Y's garage and directed Engineer A to perform a structural inspection of Owner X's garage. Engineer A performed the inspection and concluded that maintenance failures by Owner Y were causing structural damage to Owner X's garage. Owner X contacted Owner Y and advised Owner Y of the problem. Owner Y hired Engineer B to perform an inspection and Engineer B concluded that the structural problems were not the result of maintenance failures by Owner Y. Thereafter, Engineer A shared his findings with Engineer B, and after conferring, Engineer B agreed with Engineer A's conclusions. Engineer B then recommended that Owner Y hire Engineer A to perform the structural improvements to Owner Y's garage. Engineer A advised Owner X of the request and while Owner X did not oppose Engineer A from proceeding with the work for Owner Y, Owner X expressed concern that Engineer A could find himself in a conflicted situation should a problem arise. Engineer A proceeded with performing the work for Owner Y. The BER concluded that it was ethical for Engineer A to proceed with performing the work for Owner Y, noting that the facts did not indicate that Engineer A was on a retainer to Owner X, nor did Engineer A have any specific ongoing tasks for Owner X. The interests of both Owner X and Owner Y were served by Engineer A implementing the proposed maintenance. The Board concluded that it would be unduly burdensome for Owner Y to have to retain a third engineer to independently design a fix to the problem, and Owner Y might be reluctant to do so. The Board also suggested that Engineer A could further assure the absence of conflicts of interest between the Owners by obtaining an agreement for sharing information by the two Owners and noted that both Owners were fully informed of the circumstances.

Turning to the facts in the present case, the BER has long maintained that there are ethical challenges and concerns regarding professional engineers representing multiple parties in the practice of professional engineering. Representing multiple and adverse parties in litigation with one another—even in a more structured and generally predictable forum such as a worker's compensation procedure—raises the potential for a serious conflict of interest as well as the potential for a breach of confidentiality. While the parties may desire to keep their costs down for the services of technical experts, the BER believes the service of an expert to both parties in an adversarial or potentially adversarial proceeding could lead to ethical problems. The Board cannot conclude that such an approach is consistent with the NSPE Code of Ethics.

Conclusion:

It would not be ethical for Engineer A to serve an expert for both the insurance company and the deceased employee's estate.

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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 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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