

Confidential Information – Foundation Design Services

Case No. 06-5

Facts:

Engineer X is retained by Homeowner A to design a foundation. Engineer X prepares an engineering design and report for Homeowner A who is not satisfied with Engineer X's recommendations because they are too costly, but pays Engineer X in full for the services. Around the same time, Homeowner B retains Contractor P to build a wall and a fence between the two properties owned by Homeowner A and Homeowner B. After completion of Engineer X's services to Homeowner A, Contractor P retains the services of Engineer X to perform certain foundation design work in connection with Homeowner B's wall and fence. Prior to the construction of the wall and fence, Homeowner A sues Homeowner B for certain alleged structural damage to Homeowner A's property, not connected with the wall and fence. Homeowner B's attorney contacts Engineer X and requests that Engineer X provide Homeowner B's attorney with a copy of the original design and report Engineer X provided to Homeowner A.

Questions:

1. Was it ethical for Engineer X to agree to perform engineering services for Contractor P under the circumstances?
2. Would it be ethical for Engineer X to provide Homeowner B's attorney with a copy of the original report Engineer X provided to Homeowner A?

References:

- Section II.1.c. - NSPE Code of Ethics: *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. - NSPE Code of Ethics: *Engineers shall act for each employer or client as faithful agents or trustees.*
- 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:

Confidentiality of client or employer records is often a critical consideration when evaluating ethical conduct in the practice of engineering. The ethical concerns in this area relate to the need to preserve the privacy and confidentiality of client or employer information, as well as the proprietary nature of much of what is often contained in the client or employer records. The engineer's duty in this area is rooted in the obligation to serve as a "faithful agent and trustee" to the client or employer, and also the obligation to avoid circumstances that could appear to influence inappropriately the engineer's professional judgment.

The NSPE Board of Ethical Review has considered many cases relating to the engineer's ethical obligation in connection with the engineer serving as an expert witness.

In BER Case No. 85-4, 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. He could not do this 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 actions were not ethical, the board noted that 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 the fact that Engineer A, throughout his first analysis, had access to information and documents that were made available to him by the plaintiff and plaintiff's attorney in a cooperative and mutually beneficial manner. The board could not accept the proposition that following the termination of the relationship with Attorney Z for the plaintiff Engineer A would "blot all" of that information from his mind and start from "square one" in performing his engineering and safety analysis report. Nor did the board believe the latter point that Engineer A would be capable of providing a "separate and independent" report for the defendant in this case. (See also NSPE Code Section II.4.b.). The board noted that "it is clear from the facts that the real reason for the defendant's attorney's hiring Engineer A was that the attorney believed Engineer A would provide a report that would be favorable to the attorney's client." The board concluded that 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, "this would not excuse his actions." The board further noted that Engineer A should instead have fully discussed the issue with Attorney Z. It may be argued that Engineer A's loyalties under the facts in BER Case No. 85-4 were not divided because he had terminated his relationship with the plaintiff's attorney.

More recently in BER Case No. 01-6, the board reviewed a case involving professional services and subsequent litigation. Engineer A, a mechanical engineer, was serving as a consultant for Company A, a pressure vessel manufacturer, on a specific pressure vessel problem relating to the design of a boiler system. Engineer A's work focused on specific design and manufacturing defects that caused deterioration of the boiler system. Engineer A completed his work and was paid for his services. Ten years later, Engineer A was retained by Attorney X, plaintiff in a case involving the fatal explosion of a recently designed and manufactured pressure vessel at a facility previously owned by Engineer A's former client, Company A. The facility was sold to Company B seven years before the explosion. The litigation did not involve any of the issues related to the services Engineer A provided to Company A 10 years earlier. The defendant's attorney discovered through Engineer A's deposition and statements relating to his professional experience that Engineer A had worked for Company A on a pressure vessel problem. Engineer A explained to the defendant's attorney that he is not relying upon any of his prior work for Company A in this case. Nevertheless, the defendant's attorney requested that Engineer A provide his files from the previous work performed for Company A. In deciding that it would not be ethical for Engineer A to voluntarily release the files to the defense counsel, the board noted before taking any action regarding the files, Engineer A would have an ethical obligation to consult with and obtain the consent of Company A. The board speculated that Company A may be reluctant to permit the release of such information, which may be confidential, proprietary, or otherwise critical. In addition, the release of such information by Engineer A into the hands of an attorney representing another party could compromise Company A regarding future claims or litigation on other matters not related to the case being litigated by defense counsel. Finally, the release of such information by Engineer A would serve to compromise Engineer A's reputation among potential clients and Engineer A's ability to work with other clients on sensitive matters. The board did acknowledge that engineers may be compelled to surrender records, files, and other information under the direct order of a court through a subpoena or other legal process. However, in the absence of such compulsory actions, the board does not believe an engineer should compromise one's professional reputation.

The board is not troubled by Engineer X's decision to provide services to Contractor P because at the time of the engagement with Contractor P, there was no existing conflict or adversarial relationship between Homeowner A and Homeowner B. It would be patently unfair to expect a professional engineer, when establishing relations with clients and other professional relationships, to speculate and make decisions based upon the mere possibility that one client may have a conflict or an adversarial relationship with another client.

However, for the same basic reasons cited in BER Case No. 01-6, the board is concerned about any action by Engineer X to provide Homeowner B's attorney with a copy of the original report Engineer X provided to Homeowner A unless compelled by a court or by some other legal authority. Regardless of the decision by Homeowner A to terminate his relationship with Engineer X, Engineer X was paid in full for his services and was under a professional and ethical obligation to maintain the confidentiality of the engineering documents provided to Homeowner A. There is nothing in the facts to suggest that the engineering documents prepared by Engineer X for Homeowner A bears any relationship to the conflict between Homeowner A and Homeowner B. However, regardless of whether it does or does not, in the absence of direction from a court or other legal authority, it would be ethically improper for Engineer A to provide the documents to Homeowner B's attorney.

Conclusions:

1. It was ethical for Engineer X to agree to perform engineering services for Contractor P under the circumstances.
2. It would not be ethical for Engineer X to provide Homeowner B's attorney with a copy of the original report Engineer X provided to Homeowner A unless compelled by a court or by some other legal authority.

Board of Ethical Review:

Robert C. Gibson, P.E., F.NSPE
James D. Lesikar II, Ph.D., P.E., F.NSPE
William D. Lawson, Ph.D., P.E., NSPE
Robert L. Nichols, P.E., F.NSPE
Michael L. Shirley, P.E., NSPE
Eric H. Yamashige, P.E., L.S., F.NSPE
Louis L. Guy Jr., P.E., F.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.