

## **Conflict of Interest— Prior Forensic Engineering Services to Defense Counsel**

### **Case No. 17-4**

#### **Facts:**

Engineer A, a professional engineer, performs forensic engineering services. Engineer A has been advised by Attorney B, a plaintiff attorney who retained Engineer A several months before, that Attorney C, the attorney representing Defendant D in the same litigation, is an attorney for whom Engineer A regularly provides forensic engineering services. Engineer A has never been involved in any litigation or had any contact with Defendant D. Had Engineer A been aware that the litigation involved Attorney C, she would have first discussed it with Attorney B.

#### **Question:**

Does the fact that Engineer A is providing forensic engineering services to Attorney B, an attorney who is currently in litigation with Attorney C, to whom Engineer A has provided forensic engineering services in the past, raise a conflict of interest?

#### **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 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 References: BER 76-3, 82-6, 92-5, 98-4**

#### **Discussion:**

Over the years, the Board of Ethical Review (BER) has considered a variety of challenging situations involving conflicts of interest and the scope of an engineer's ethical obligation to past and present clients. The Board of Ethical Review has also considered several cases involving engineers providing and performing forensic engineering services and the ethical issues that arise in that context (See BER Case Nos. 76-3, 82-6, 92-5). These cases have involved such issues as performing services on a contingency fee basis, licensure requirements when serving as an expert witness, qualifications of the individual who is being considered to perform the

expert services, relationships with attorneys, and examining the conflict of interest questions that may arise.

As the Board has noted on at least one previous occasion, one of the most common ethical issues that engineers face in their professional lives is the issue of conflicts of interest. At one point in the past, engineering codes of ethics, including the NSPE Code of Ethics for Engineers, specifically implored engineers to avoid all conflicts of interest. The basis for this position was that the engineer cannot serve two masters, and when faced with a conflict of interest, the engineer must in all cases take steps to remove him or herself. Among the concerns expressed by supporters of this position was that engineers who were involved in conflict of interest situations created a poor image for the engineering profession because the issue raised the appearance of impropriety. However, over time, the engineering profession came to the general conclusion that by the very nature of the role of the engineer in society, conflicts of interests were virtually an immutable fact of professional engineering practice, and that it was generally impossible for the engineer to, in all cases, remove him or herself from such situations. As a result, codes were changed, and engineers were implored to disclose all known or potential conflicts of interest to their employers or clients, by promptly informing them of any business association, interest, or other circumstance that could influence or appear to influence their judgment or the quality of their services.

A significant case pertaining to forensic engineering conflict of interest decided by the Board was BER Case 98-4. In that case, Engineer A was retained by ABC Manufacturing to review documents to form an opinion in a patent litigation matter in an area of Engineer A's expertise. Engineer A performed the requested services and was paid for her work by ABC Manufacturing. Several years later, Engineer A was retained by Attorney X, who represented a plaintiff in product liability litigation against ABC Manufacturing in a matter not involving any aspect of the earlier patent litigation. And then several years after that, Engineer A was again retained by ABC Manufacturing in a different patent litigation matter not related to either of the preceding events. Engineer A again performed the requested services and was paid for her work. However, during cross examination at trial, opposing counsel questioned Engineer A's previous relationship both in defense of and in litigation with ABC Manufacturing, implying that, by providing those services, Engineer A was acting improperly. In deciding that it was ethical for Engineer A to provide services to the parties in the manner described under the facts, the BER noted that "while engineers clearly have certain basic professional obligations to their employers and clients to protect their interests, engineers do not have a duty of absolute loyalty under which the engineer can never take a position adverse to the interests of a former client." Being a "faithful agent and trustee" to a client does not obligate an engineer to a duty of absolute devotion in perpetuity (See NSPE Code of Ethics for Engineers, Section II.4.). Such an approach would be impractical and compromise the autonomy and professional independence of engineers. This is particularly true in BER Case No. 98-4, where the matters at issue are not in any way related to any previous work Engineer A performed for either of her former clients.

The Board noted that:

“While all engineers must make professional decisions based upon a variety of considerations and factors, engineers must analyze technical matters, weighing all appropriate considerations. For a variety of reasons, some engineers might choose to decline an engagement that could place the engineer in a position adverse to the interests of a former client, even though the engagement is not in any way related to the engineer’s earlier services to the client. However, the Board of Ethical Review is not prepared to say that an engineer who fails to follow this approach is somehow acting in violation of the NSPE Code of Ethics. To do so would undermine the individual judgment, independence, and discretion that each engineer must exercise.”

In BER Case 98-4, the Board was also concerned by the attorney’s implication under the facts that Engineer A may have acted improperly, with the suggestion that Engineer A’s action may have constituted a conflict of interest. It appeared that the attorney was attempting to draw a parallel between the legal profession, where there is an institutionalized “plaintiff’s bar” and “defense bar,” and the engineering profession. However, as the BER noted:

“While engineers may find themselves at times working within the confines of the legal adversarial profession, unlike attorneys, they are not “advocates” in rendering their professional services, they should not be expected to compromise their professional independence and autonomy. While reasonable persons might differ as to whether Engineer A’s actions under the facts would raise either a conflict or an appearance of a conflict, the Board concludes that a conflict does not exist.”

Specifically with reference to the present case and consistent with the Board’s reasoning in BER Case 98-4, the fact that Engineer A may have worked for Attorney C in the past does not by itself create a conflict of interest. Among the key questions to be examined to determine whether any grounds exist to establish a conflict of interest is (1) whether there has been full disclosure at the time the conflict was discovered by Engineer A (which appears to be the case under the facts) and (2) whether Engineer A is currently performing work for Attorney C. If the answer is yes to either question, those factors could raise at least the appearance of a conflict of interest. If the answer is no to both of those questions, then it would appear that the final decision regarding Engineer A’s continued service would be best left to the plaintiff’s attorney in consultation with the attorney’s client, to determine whether Engineer A should continue to provide services in the case. However, without more information, there does not appear to be any ethical proscription regarding Engineer A’s continued service to Attorney B.

In the event a decision is made that results in Engineer A's discontinuance of service, Engineer A has an ethical obligation to cooperate with any successor expert, providing all necessary information, background documentation, etc., to permit the successor expert to serve Attorney B. Engineer A would also have an obligation to not disclose or share any information regarding Engineer A's services to Attorney B with Attorney C or any other third party.

Finally, unless Engineer A believes that she was remiss or negligent in failing to bring her prior relationship to the attention of Attorney B and that such failure resulted in some level of harm to Attorney B, it would be ethical and proper for Engineer A to retain any fees and other expense reimbursement paid to her.

**Conclusion:**

Unless there is an additional factor such as (1) a failure to disclose compromising information to Attorney B or (2) a current engineer-client relationship between Engineer A and Attorney C, the fact that Engineer A is providing forensic engineering services to Attorney B, an attorney who is currently in litigation with Attorney C, to whom Engineer A has provided forensic engineering services in the past, does not raise a conflict of interest.

**Board of Ethical Review:**

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