



CONTINGENT FEE ETHICS

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What is a contingent fee agreement? A contingent fee arrangement is one where-by the engineer realizes little or no payment for his efforts until such time as the client is successful.

Should an engineer enter into such an agreement?

The major engineering associations provide guidance in their codes of ethics and associated materials, some more than others. A summary follows:

The American Society of Civil Engineers (ASCE) addresses the question in the ASCE Code of Ethics, Canon #5, item c. "Engineers may request, propose or accept professional commissions on a contingent basis only under circumstances in which their professional judgments would not be compromised." In addition, ASCE provides a Canon, #6, which states,

"Engineers shall act in such a manner as to uphold and enhance the honor, integrity, and dignity of the engineering profession."

ASCE leaves it up to the discretion of the engineer. Let's all trust that all engineers are as ethical and free of outside influence, such as monetary gain, as you and I are.

The National Society of Professional Engineers (NSPE) makes a specific reference to the subject in Part III Professional Obligations, item #6.a of the NSPE Code of Ethics for Engineers.

"Engineers shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised."

Again, a difficult task. Too often the future possible conflicts of interest are not apparent. So why take the risk by entering into any contingent fee arrangement?

NSPE also provides additional guidance in item #5 of the same Part when it states,

"Engineers shall not be influenced in their professional duties by conflicting interests."

The question of honesty and integrity, a subject closely allied to the question of contingent fees, is also addressed by NSPE in Part III item 1., Professional Obligations of the NSPE code of ethics,

"Engineers shall be guided in all their relations by the highest standards of honesty and integrity."

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Page 1 of 6



Unfortunately, “highest” may be conveniently interpreted on a personal basis. Lets all trust that all engineers have equally “high” standards, of course the intent is clear, but engineers normally deal with clear, identifiable facts and figures so why waffle on such an important ideal? Why not just say what you mean and mean what you say?

NSPE leaves it up to the discretion of the engineer but the conditions are much clearer and the concern is much more clearly expressed than in the ASCE Canons. Unfortunately, even these admonitions are not sufficient to keep many engineers from becoming engaged in potential conflicting arrangements such as design build contracts.

The Society of Fire Protection Engineers (SFPE) provides a document on ethics for their members, called the “Canon of Ethics”. As ethics documents go, it is short. Being short, it provides very few specific, clearly identifiable prohibitions. A reference to contingency fees, being one of those that is missing. The SFPE Canon of Ethics does provide a general reference to the need for members to, “... uphold and advance the honor and integrity of their profession . . . by being impartial . . .” However, it also tasks the members to, “. . . act in professional matters for each employer or client as faithful agents . . .” The former requirement would certainly provide some support to avoiding a conflict of interest situation, such as contingency fees. The latter, however, could easily be seen as placing the member in a catch 22 situation. How can the engineer maintain the goal of upholding the honor and integrity of the profession and at the same time be working as an “agent” of the client in regards to forensic work? The SFPE Canon uses the phrase, “shall not” only three times thus providing very few prohibitions. It does provide goals for the Engineer to strive for, thus failing to support the member who is looking for clear and direct guidance to daily challenges with ethics.

The NSPE weighted in on the subject once again, along with other fifteen other endorsing professional organizations that include the American Institute of Architects and the National Academy of Forensic Engineers, in 1988, when the document “Recommended Practices For Design professionals Engaged as Experts in the Resolution of Construction Industry Disputes” was published. The endorsed document consists of a brief preamble and a recommendation statement, “It is the duty of an expert to perform in a professional manner and serve without bias. Toward these ends:” Following this statement are 13 recommendations, two of which apply to the subject at hand:

- #11 “The expert should refuse or terminate involvement in an engagement when fee is used in an attempt to compromise the expert’s judgment.”
- #12 “The expert should refuse or terminate involvement in an engagement when the expert is not permitted to perform the investigation which the expert believes is necessary to render an opinion with a reasonable degree of certainty.”

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Page 2 of 6



The National Academy of Forensic Engineers (NAFE), in the Journal of NAFE, Vol. III No. 2 Dec. 1986, an article by E. Joyce Dixon, NAFE's first Executive Director and founder, "Ethical Practice of Forensic Engineering: Avoiding the Hidden Bias", says,

"The forensic engineer's role is not one of advocacy or having a stake in a winning outcome for one side or the other. Like justice itself, the forensic engineer must be blind to sides. The role of the forensic engineer is that of an impartial scientist who strives to obtain truth through scientific inquiry, employing the toils of the scientific method and his/her engineering expertise." The article continues, "Even more difficult than avoiding bias in simple engineering analysis is the task of the forensic engineer to remain aloof from human emotions with regard to who is right or wrong or who is the most injured needy."

An admirable goal for forensic engineers and one that is just as appropriate for any engineer.

The NAFE, in "Guidelines for the PE as a Forensic Engineer, Jan. 2001, updated the association's position on contingent fees,

"So that there is no doubt as to the basis of service by the expert, the agreement for services to be rendered should explicitly state that 'payment to the engineer shall be made promptly, and shall not be contingent upon the results of any legal action, arbitration or settlement'". It then continues, "Be aware that the laws forbid the practice of "champerty," which means the subsidizing of all or part of a lawsuit, either directly or through payment of expenses of the litigant, in return for sharing in the benefits of the lawsuit if the party supported is successful."

In the same publication NAFE also advises forensic engineers,

"... although it may not be your feeling at the moment, an astute attorney can leave a jury or other determinative body with the impression that your testimony is not independent and impartial if it is ascertained that you are waiting for substantial fee payments."

The NAFE sums up any question about contingent fee arrangements in the NAFE publication "Business & Financial Practices for Forensic Engineers", 1996, in the section, Ethics and the Forensic Engineer" by Robert E. Witter, PE.

"The complexities of forensic engineering practice are magnified by various technical and professional situations that may confront the practicing Forensic Engineer. Their unique legal and professional status presents questions that may never occur to the non-forensic engineering community. A sampling of those questions include:

- Contingency Fee arrangements (never acceptable)."

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NAFE does not leave it to question that a contingent fee arrangement is not acceptable. It is unfortunate that the other engineering associations have not been as explicit.

Many of the larger engineering associations invest a lot of ink in discussing the importance of improving the public's perception of engineers. Engineers are urged to become more involved in society. Two of the frequently suggested methods are speaking to students about their careers and running for political office. Both are admirable and worthwhile methods of making the public aware of the value of engineers. So why would we, as engineers, want to compromise our ethics on an issue such as contingent fees and risk the negative public perception that we otherwise put so much effort into dispelling? A fee arrangement that may so easily lead to a conflict or apparent conflict of interest is certainly not in the best interest of the engineering profession or the individual engineer. No amount of denial by the engineer will matter if the public's perception is tainted by an apparent conflict of interest on the part of the engineer.

There is a legal side to this subject that applies to forensic engineers, in Arizona. No attempt to review the laws in other states was made. The following is from the Arizona Supreme Court Ethical Rules for lawyers (Rule 42, ER 3.4). ER 3.4 says, in part, that:

"a lawyer shall not . . . (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law" The comment to this section explains further.

"With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee."

According to a well versed lawyer that I have worked with, "a contingent fee probably won't fly; the expert who signs up for one may get burned and the lawyer involved may be disciplined by the bar."

It has been argued that payment of an invoice is such an inducement, regardless of the financial arrangements. That is the reason that NAFE counsels its members to obtain full payment for all work, including anticipated time for either deposition or trial work, before making any testimony. All reasonable efforts should have then been made to dispel an appearance, real or imagined, of a conflict of interest over fees.

Presently the use of a contingent fee arrangement has become common in two general areas of engineering practice despite the ethics canons to the contrary.

1. Design – Build contracts where-in the design engineer's fee is subject to the level of success of the entire project. The opportunities for conflict of interest in this situation, especially for professionals dealing directly with life safety issues

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Page 4 of 6



such as structural and fire protection engineers, would seem obvious. This is not the case, however, as design build projects become more common, this design / construction process is even politically supported by ASCE and other engineering associations.

2. “Preliminary reports” prepared as the precursor to legal action. These reports frequently surface related to unhappy or gullible Home Owners Associations (HOA). The so-called preliminary report is prepared by architects and engineers but is not sealed, under the guise of not being complete. This is so that it may be added to in the future, as if a list of construction deficiencies or code violations could ever be accurately described as “complete”. The professional involved, not sealing the work, regardless of how inaccurate the data may be, has not violated the Code and Rules for registrants, promulgated by the AZ State Board of Technical Registration, as either written or interpreted by the State. The “Preliminary Report” is then used as a tool by lawyers in negotiations with the defendants. The defendants are frequently a long list of design and construction firms who were involved with the original design and construction of the HOA project. These reports are often very large, including large amounts of detail that may be questionable. The accuracy of the reports is of little or no concern to the “professional” who drafted it as it has not been sealed. The “professional’s” compensation is contingent upon the level of success that the lawyer has in using the report to extract money from the design and construction insurance companies. The primary reason that this method pays so well is not that the draft “professional report” is accurate. They succeed because the cost of defense is so high. All allegations made in the unsealed report must be thoroughly resolved by the defendants group of forensic professionals in order to be successful. The plaintiff’s “draft report” is frequently vague and poorly documented forcing the defense into a search for “the needle in a haystack”. All this is due to a “professional’s” willingness to work on a contingency fee basis, ignore the harm done to the profession as a whole and use the State Board rules as a shield for their shady and unethical practices.

The solution to the problems discussed involves a concerted effort on many fronts by engineers. A short list of action items might be:

1. Think about the ethics that apply to your business decisions.
2. Read and follow the Codes of Ethics of the associations to which you belong.
3. Very carefully consider the question of your involvement in design-build projects. Modify your design build contract to avoid being affected by the associated contingency fee arrangement or refuse to take part.
4. Refuse all contingent fee offers associated with forensic work.

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Page 5 of 6



5. Work to have your State Board of Technical Registration strengthen its rules regarding “Preliminary reports” especially when related to forensic work. When a report leaves the office of an engineer, preliminary or not, it should be sealed, thereby attesting its accuracy based upon the data available at the time of preparation.
6. Use the Codes and Rules available and report illegal or unethical conduct by lawyers, engineers and architects when you become aware of it. Report it to the Bar Association, State Board of Technical Registration and professional societies. Demand that they take action. Once you have filed a complaint; follow-up. Don't expect an automatic or a timely response unless you are persistent.

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