

Expert Impartiality: A Thing of the Past?

(Case 1004)

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The Case:

You have been retained as an engineering consultant by Adams, Baker and Charles, legal counsel for the insurance company which insures Wastewater Treatment Systems, Inc., the defendant in a law suit filed by Kinkora Developments. Your responsibility is to analyze the claims made by the plaintiff, Kinkora Developments, concerning the alleged failure of the sludge treatment facility at a sewage treatment plant which was designed 12 years ago by Wastewater Treatment Systems for a very large residential community planned and constructed by Kinkora. It is understood that in addition to providing technical consultation regarding the sludge treatment system and possible reasons for the alleged failure, you may also be requested to appear in court as an expert witness on behalf of the defendant.

You indicate to Fulton Adams (of Adams, Baker and Charles), the attorney assigned to the case by Wastewater Treatment's insurance company, that you will review all of the available information, make a site visit and advise him as to whether you believe the plaintiff has a reasonable complaint, or whether there is other evidence to explain the failure of the sludge treatment process. With his approval, and the concurrence of Wastewater Treatment, you spend a considerable amount of time reviewing the design parameters and construction of the facility, including two days of observations at the plant while you have a severe cold.

You subsequently advise Adams that you believe there is reasonable doubt that the system failure is due to the design, but rather it appears that Kinkora Developments had never had experience operating a sewage treatment plant previously, and had hired a number of inexperienced treatment plant operators who systematically neglected to maintain the equipment in accordance with the recommendations made in the O & M (Operations and Maintenance) Manual prepared for the plant by Wastewater Treatment Systems.

Despite the presentation of this evidence in depositions during the discovery process, the plaintiff, represented by Amanda Cuthbert of Xernon, Young and Zimmer, is considering taking the claim to court. You are soon informed that Clyde Cleghorn, an engineer with one of your competitors, has been retained by Kinkora Developments as their engineering consultant and expert witness. You have run into Cleghorn from time to time at various engineering society meetings, and understand that his experience has been primarily dealing with small, on-site sewage disposal systems for single family lots. Other than that, you have little first-hand knowledge of his capabilities.

During his deposition (to which you are invited by Fulton Adams as an observer), Cleghorn makes a variety of statements which reveal that he has little understanding of sludge treatment systems design or operations. During the occasional breaks in the deposition proceedings, you casually notice that Cleghorn tends to be quite solicitous of Amanda Cuthbert, more so than you would expect in a client/consultant relationship.

Reviewing the statements and analyses made by Cleghorn, you are all the more convinced that he has missed the mark completely and that shoddy maintenance was the cause of the failure. You inform Fulton Adams of your reinforced opinion, and he in turn indicates that the insurance company for Kinkora has refused to provide any further financial support for Amanda Cuthbert. Nonetheless, the president of Kinkora insists on pursuing the matter in court, and there is conjecture that Amanda has agreed to continue with the case on a contingency basis (that is, she and her firm will receive approximately 40% or more of the award if the court finds Wastewater Treatment Systems at fault).

Dates for the trial are arranged by the court, starting in approximately six weeks. In the interim, you attend an engineering society conference at a resort some 400 miles from your city. Looking through the list of attendees, you note that most of the engineers have brought their wives, and the attendance roster lists them as in the following example:

Robert and Mary Jones
Delbert and Cynthia Ryley

Further down the roster you see the following entry:

Clyde Cleghorn and Amanda Cuthbert

Checking with the front desk, you find that they are sharing a room at the conference. Once you return to your city, you make some discreet inquiries only to find out that Clyde has been separated from his wife for several months, and that Amanda Cuthbert has been divorced for three years. In addition, one of the engineers in his office verifies that Clyde moved in with Amanda about the time the Kinkora case started and they have been living together since then.

What, if anything, do you do?

Alternate Approaches and Survey Results for “Expert Impartiality, a Thing of the Past?” (Case 1004)

1. This type of thing probably goes on all the time, to one extent or another. Better to leave things alone, since you will still have to live in the same engineering community as Cleghorn after the case is decided. So what if they are working together to make as much money as possible from the contingency arrangement that they have made with the plaintiff after the plaintiff's insurance company pulled out of the case? More power to them for being so clever!

Percentage of votes agreeing: 2%

2. Say nothing. Stick to doing your best job on engineering matters and don't involve yourself in politics or other matters. Give your expert opinion on the technical matters at hand only.
Percentage of votes agreeing: 12%
3. Say nothing. You probably violated some right of personal privacy by inquiring at the front desk to ascertain that Cleghorn and Amanda Cuthbert were registered in the same room at the engineering convention. Also, how do you know what one of the engineers in Cleghorn's office told you is true? In this day and age, such a relationship is not unusual and who are you to be so self-righteous? Despite their personal relationship, Cleghorn could still be behaving as an unbiased professional with regard to the law suit.
Percentage of votes agreeing: 6%
4. Say nothing. The recent emphasis in government and the press on "the appearance of fairness" and presumed lack of integrity, especially regarding professional engineers, is demeaning and denigrating to the profession. People, especially engineers, are inherently good, and left alone, they will make moral, ethical decisions and behave accordingly. By saying anything, you are implying that Cleghorn is not acting in an ethical manner.
Percentage of votes agreeing: 1%
5. Although the behavior of Cleghorn and Cuthbert may be against your religious and moral principles, do not try to use it against him in this situation. Their behavior is not at issue and society, in general, has accepted this type of behavior to some degree. Instead, the strategy would be to delve into Cleghorn's technical background to find weaknesses that can be exploited during trial and try to discredit him as an "expert witness". Put aside the moral issues for the time being.
Percentage of votes agreeing: 14%
6. Call Cuthbert and Cleghorn on the telephone at home and inform them of your suspicions and evidence, mentioning both the situation at the convention as well as "confidential information" given to you by unnamed, but otherwise reliable, sources in the local engineering community. Suggest the prudent thing is for Cleghorn to find a plausible excuse for excusing himself as an expert witness in the case before it gets to court.
Percentage of votes agreeing: 4%
7. Inform the defendant's attorney, Fulton Adams (your client) of what you have discovered, and the sources of the information. Suggest that this may well be a conflict of interest and a violation of the NSPE Code of Ethics for Engineers under the Rules of Practice and Professional Obligations. If so, then Cleghorn's credibility as an unbiased engineering expert is seriously in question. In similar cases in the past, the testimony of the "expert" has not been allowed (admissible) in court.
Percentage of votes agreeing: 46%

8. Inform the defendant's attorney, Fulton Adams (your client) of what you have discovered, and the source of the information. Suggest strongly that Cleghorn's emotional desires have caused him to overstep the bounds of ethical professionalism, and this is a wonderful opportunity to get rid of him as a witness for the plaintiff, Kinkora, thereby providing excellent leverage for the defendant, Wastewater Treatment Systems to win the case. (You never did like Cleghorn, anyway).

Percentage of votes agreeing: 6%

9. Compile the information you have and file a complaint against Cleghorn with the state's Board of Registration for Professional Engineers. This type of thing is demeaning to the engineering profession and should be stopped. Getting Cleghorn's license suspended or revoked is the best way to do it.

Percentage of votes agreeing: 9%

Forum Comments from Respondents

1. The first thing to be done is to contact Cleghorn directly to see if he feels the same way you do. If that doesn't work, bring it up with the defendant's lawyer, Fulton Adams.
2. If Cleghorn is really as inexperienced as you believe him to be, his expert testimony will have some discrepancies. Also, he will have to state his credentials and experience at some point, which will surely throw some doubt on the value of his testimony. Personally, I don't care who he's sleeping with as long as it's not the judge.
3. My first reaction in a case like this is to speak with the offending party directly about my concerns, especially if I knew him personally. I would convey a belief in my ethical responsibility to report the situation if he didn't take action to correct this conflict of interest. However, due to the impending court appearance, a private conversation that is not part of the public record may be illegal.
4. Getting personally involved in the situation is completely unnecessary. Not only does it waste your time, it would undermine your position as an expert witness in the case. Let lawyers stick to legal stuff.
5. The information about Cleghorn's relationship with Amada Cuthbert suggest that he was selected to represent Kinkora because of this relationship rather than his professional expertise. However, if Cleghorn is not qualified, he should not be allowed to testify as an expert. The best person to handle this legal matter is Fulton Adams, the defendant's attorney.
6. An expert witness is not an attorney. If Cleghorn's behavior raises a conflict of interest concern, it is the defense attorney's job to deal with it. After informing the

defense attorney, Adams, you should drop the issue and stick with the technical stuff.

7. You should let the defendant's attorney handle the situation. Attorneys are not hampered by mundane details like ethics.
8. Keep the information you have discovered about the relationship between Cleghorn and Amanda Cuthbert as an "ace in the hole" as you approach the trial date. Discreetly let Cuthbert and Cleghorn know that you are aware of their relationship (they are obviously not trying to hide it) and the potential conflict it represents. Advise them that this will be fair game in court (judge permitting). Then it's their move...
9. It is the defense attorney's job to investigate and determine the legalities of such items as the relationship between Cleghorn and Cuthbert, the bearing it has on the case and any course of action to take. If after all the matters of the case are settled and you still feel that Cleghorn violated his professional code of conduct, you should recommend to your client that a complaint be filed with the State Board of Registration. If the case is litigated Cleghorn's credibility would likely receive quite a bit of scrutiny.
10. My view is that there will always be professionals on the project end of things who will under-bid, under-investigate and under-build in order to get and keep as much work as possible in-house. These professionals contribute to the proliferation of "hired guns" who commonly are highly talented, but highly jaded professionals forced out of their practices because they found they could not compete with those willing to offer a lower level of service. While I have no problem with these hired guns, advocates, on the other hand, are as reprehensible. That is why it is so important for the honest professional expert to do his work well so that the advocate is discredited on the basis of lack of technical merit. The job of the professional expert is to weave a defensible, internally consistent, technical study and present it in a clear, understandable manner. This is the ethical approach to the destruction of the advocate, regardless of the advocate's motive.
11. The facts suggest that Clyde Cleghorn has several potential ethical problems with his client, Amanda Cuthbert. First, it does not appear that Cleghorn is being trustworthy in his deeds and is not acting for his client diligently, faithfully, and with principles. Secondly, Cleghorn does not appear to be providing complete, clear, accurate, objective, and truthful opinions between himself and his client regarding the services sought and rendered. There is further confusion because it appears that Amanda is not necessarily seeking the truth, rather she would like a "hired gun" for an expert witness. As a result, Amanda's client (Kinkora) may not be getting an objective analysis of the case. Because of my involvement in the case as a technical expert, I would ask another reputable engineer that I respect and trust to examine the facts and provide an unbiased opinion on Cleghorn's conduct.

Based on that opinion, I would pursue further action on what was defined as ethical violations.

Epilogue

Fulton Adams was informed of what had been learned and the sources of the information. When the case came to court, Adams petitioned the presiding judge to disallow testimony from Clyde Cleghorn due to his lack of impartiality and obvious conflict of interest. The judge refused to disqualify Cleghorn, and instructed the parties to proceed with litigating the case. There was some conjecture by the defendant's attorneys that the judge's liberal empathy for Amanda Cuthbert influenced his decision, even in face of the evidence.