

An Interesting Conflicition: What's Love Got to Do with It? **(Case 1037)**

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The Case:

Fulton Adams, legal counsel for the insurance company which insures Wastewater Treatment Systems, Inc. (the defendant), has retained you, Joe Friday, P.E., as an engineering consultant in a lawsuit filed by Kinkora Developments (the plaintiff). Your responsibility is to analyze the claims made by Kinkora Developments concerning the alleged failure of the sludge treatment facility at a sewage treatment plant for a very large residential community. The treatment system was designed and constructed by Wastewater Treatment, and operated by Kinkora Developments. 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 Mr. Adams 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.

On the basis of your work, you 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 no previous experience operating a sewage treatment plant. Furthermore, Kinkora had hired a number of inexperienced treatment plant operators who systematically neglected to maintain the equipment in accordance with the recommendations made in the Operations and Maintenance (O&M) 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 Ms. Amanda Cuthbert of Xernon, Young and Zimmer, is considering taking the claim to court. You are soon informed that Clyde Cleghorn, P.E., 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 Mr. Cleghorn's 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, the plaintiff's attorney, 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 spouses, and the attendance roster lists them as in the following example:

- Robert and Mary Jones
- Cynthia and Delbert Ryley

Further down the roster you see, and are rather surprised by, the following entry:

- Clyde Cleghorn and Amanda Cuthbert

The following evening, it so happens that, while visiting one of your friends in another wing of the conference hotel, you notice Clyde and Amanda entering a room together. Keeping this in mind, after you return to your city, you make some discreet inquiries and 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 Clyde's 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 "An Interesting Conflicition: What's Love Got to Do with It?" (Case 1037)

1. *Narrow your focus.* Stick to doing your best job on engineering matters and don't involve yourself in politics, personalities, or other matters. Give your expert opinion on the technical matters at hand only.
Percentage of votes agreeing: 16%

2. *Believe the best.* You probably violated some right of personal privacy when you inquired about Cleghorn and Cuthbert's relationship. Also, how do you know if the information that one of the engineers in Cleghorn's office told you is true? And even if Cleghorn and Cuthbert are lovers, despite their personal relationship, Cleghorn could still be behaving as an unbiased professional with regard to the lawsuit.

Percentage of votes agreeing: 6%

3. *Don't cast stones.* The recent emphasis in government, business, and the press on corporate misconduct and presumed lack of integrity, especially regarding professionals, is demeaning and denigrating to the profession. The world doesn't need another scandal. Besides, people –engineers in particular – are inherently good, and left alone, they will make moral, ethical decisions and behave accordingly. By saying something, you would be suggesting that Cleghorn is not acting in an ethical manner.

Percentage of votes agreeing: 0%

4. *Keep it professional.* Although the relationship between Cleghorn and Cuthbert may be against your religious and moral principles, their personal morality is not at issue in this situation. Rather, the question is whether they are working together to enrich themselves by means of Amanda Cuthbert's contingency arrangement with the plaintiff. Your strategy should 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 personal moral issues for the time being.

Percentage of votes agreeing: 19%

5. *Be a friend.* Call Cleghorn on the telephone at home and inform him of your observations, mentioning both the convention roster as well as "confidential information" given to you by unnamed, but otherwise reliable, sources in the local engineering community. In a friendly way, point out that if he and Cuthbert *are* romantically involved, such a relationship might raise questions about Cleghorn's motivation in his testimony and this could be used against him to the detriment of his client. Suggest that the prudent thing is for Cleghorn to excuse himself as an expert witness in the case before it gets to court.

Percentage of votes agreeing: 11%

6. *Call your lawyer.* Inform 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. Recommend that he (Fulton Adams) look into the matter.

Percentage of votes agreeing: 23%

7. *Play to win.* Inform Fulton Adams (your client) of what you have discovered about Cleghorn, 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 might be seriously in question, 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: 3%

8. *Really play to win.* Inform Fulton Adams (your client) of what you have discovered about Cleghorn, and the sources of the information. Acknowledge that although Cleghorn's credibility as an unbiased engineering expert might be seriously in question, suggest to Adams that he set aside the ethics of the matter and focus on the bigger picture. You really don't want Cleghorn to be excluded from the case, because you know you can show that Cleghorn doesn't know what he's talking about. If Kinkora has to replace Cleghorn (assuming they have the chance), they might get someone who knows something, or is willing to testify to whatever they want. Better to stay with "the devil you know."

Percentage of votes agreeing: 8%

9. *File a complaint against Cleghorn.* 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: 6%

10. *File a complaint against Cuthbert.* You have a deep abiding passion for the legal system, and it seems plain enough to you that Cuthbert's behavior is out of line. Her affections have clouded her judgment and led her to hire her unqualified lover to be her expert. You know that Cuthbert's colleagues would be outraged at her behavior and its potential affect on the reputation of their 100+ yr. old firm. You should send the managing partner of Cuthbert's firm a letter detailing Cuthbert's conduct and expressing how it would look if brought to public attention.

Percentage of votes agreeing: 2%

Forum Comments from Respondents

1. A combination of alternative 5 (be a friend) and alterative 6 (call the lawyer) is appropriate for this case.
2. Is it ethical to invade on personal business? It may be best to call the engineer, inform him of the information you have seen, and tell him that you will not use this information to discredit him in court. But you could suggest that he consider stepping down as expert witness, because of the potential bad that could come of it.
3. Option 6 is the preferred choice. Then assuming Cleghorn and Cuthbert are

outside the acceptable boundaries of the NSPE code of ethics, it would be appropriate to choose to act as a friend (5) and inform them. There is no point in discrediting a colleague whose qualifications we are unsure of. Hopefully the case will be resolved to Wastewater Treatment's satisfaction in court.

Comments from Board of Review Members

1. This case presents an interesting situation calling more for dealing with Cleghorn's competency and credibility than his personal relations. If he were competent to testify, would it really matter whether he was sleeping with the attorney who puts him up as an expert witness? Similarly, if he is not competent, shouldn't the protagonist focus his efforts on exposing Cleghorn's unsuitability as an expert?
2. Option No. 9 is the appropriate course of action, since there appear to be enough issues to warrant a complaint to the Board of Registration for Professional Engineers. A complaint before the Board would allow Clyde Cleghorn, P.E. to respond to the allegations and give him the opportunity to present his side.

It is interesting to note that this case makes explicit reference to the NSPE Code of Ethics for Engineers. With that in mind, in reviewing the NSPE Code of Ethics, it would be helpful for Clyde Cleghorn, P.E. to address Code Section I.5 (Engineers, in the fulfillment of their professional duties, shall...avoid deceptive acts), Code Section I.6 (Engineers, in the fulfillment of their professional duties, shall... conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession), Code Section III.5 (Engineers shall not be influenced in their professional duties by conflicting interests), and Code Section III. 6.a (Engineers shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised). In relation to the facts of this case, these provisions of the NSPE Code of Ethics present enough potential violations for the complaint.

3. This is a good case for introspection regarding our role as professionals. I think we should add another Alternative Approach:
 - x. Re-examine the assignment (as spelled out in the first paragraph): ...to analyze the claims madeconcerning the alleged failure of the sludge treatment facility, and provide technical consultation regarding the sludge treatment system and possible reasons for the alleged failure and, if requested, appear in court as an expert witness. These are the professional services Joe Friday has been retained to provide.

Remember that, as a professional, we have an obligation to respect the privacy of others and the stature of our profession. Offering gratuitous comments or statements outside the scope of our professional engagement would be unprofessional.

4. Adjudicating the morals of another engineer is beyond the scope of enforcing the Code of Ethics. The difficulty in this case is proving Cleghorn's intent, *i.e.*, does he stand to benefit from the testimony by getting a part of the contingency fee that Amanda would receive if she wins the case? The conflict of interest has to be proven and all that is available now is conjecture. The engineer should inform Fulton Adams of the situation and leave it up to him to pursue the conflict of interest issue. The engineer (Joe Friday) should concentrate his efforts on building a case to discredit Cleghorn as an expert witness based on his experience and background and the lack of experience in the type of problem involved in this case.