EMPLOYMENT – QUESTIONING ABILITY OF FORMER EMPLOYER TO MEET CLIENT'S EXPECTATIONS

Case No. 01-1

Facts:

Engineer A, a professional engineer working for a small private practice firm, leaves the employment of Firm X. Engineer A had represented that he was going to start his own one-person consulting firm, Firm Y, and that he would not be in the position of competing with Firm X.

A month after Engineer A departs from Firm X, Engineer B, a principal in Firm X learns that Engineer A has contacted one of Firm X's employees, Engineer C, and offered her a position with Firm Y.

Soon thereafter, Engineer B learns that Engineer A has contacted Firm X's clients and is making representations that because Engineer C is going to be leaving Firm X to work for Firm Y, Firm X will be "hard pressed" to perform successfully on its projects and that Firm X's clients should hire Firm Y to perform engineering services.

Questions:

Question 1: Was it ethical for Engineer A to offer a position to Engineer C?

Question 2: Was it ethical for Engineer A to make representations to Firm X's clients that because Engineer C is going to be leaving Firm X to work for Firm Y, Firm X will be "hard pressed" to perform successfully on its projects and that the clients should hire Firm Y to perform engineering services?

References:

Section I.6	-	*Code of Ethics:*	*Conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.*
Section III.1.e.	-	*Code of Ethics:*	*Engineers shall not promote their own interest at the expense of the dignity and integrity of the profession.*
Section III.6.	-	*Code of Ethics:*	*Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other*
Section III.7.	-	*Code of Ethics:*	*Engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice or employment of other engineers. Engineers who believe others are guilty of unethical or illegal practice shall present such information to the proper authority for action.*

Discussion:

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The issue of employed engineers breaking off from their employer and going into business for themself is certainly not a new issue and has been examined by the NSPE Board of Ethical Review on earlier occasions. In each instance, the Board has sought to strike a fair balance between the basic right of an individual engineer to demonstrate individual initiative and ambition in establishing an independent engineering business entity, coupled with the obligation and responsibility of that engineer to his/her former employer and/or clients. These cases are often not easily resolved because the two competing considerations are generally viewed as important positive values that should be encouraged for the benefit of the public as well as the engineering profession as a whole.

As examples of earlier Board review of these important considerations, in Case No. 86-5, a city requested proposals from various consulting engineers for a major job that was planned. Engineer A, a principal in a large engineering firm in the city decided to have his firm submit a proposal. Engineer A asked three engineers on his staff, Engineers X, Y, and Z, to develop the proposal for the firm. Engineers X,Y, and Z developed the proposal which was ultimately submitted to the city. Soon thereafter, the city learned that Engineers X, Y, and Z were the engineers who actually developed the proposal for the firm and a city official approached Engineers X, Y, and Z and asked if they would agree to a contract as consultants, independent of Engineer A's firm. Engineers X, Y, and Z disclosed the facts to Engineer A, resigned from the firm, and entered into negotiations with the city.

The Board concluded that, according to a strict interpretation of the Code, it would be ethical for Engineers X, Y, and Z to agree to a contract for consulting services independent of Engineer A's firm. In reaching its conclusion in Case No. 86-5, the Board reviewed two earlier BER cases, Nos. 77-11 and 79-10.

In Case No. 77-11, the Board found that four engineers who left the employ of a firm, founded a new firm, and contacted the clients of the former firm were not in violation of the NSPE Code for doing so. However, the Board determined in Case No. 77-11 that the four engineers violated the NSPE Code with regard to projects for which they had gained specialized knowledge while in the employ of the firm. In Case No. 79-10, the BER determined that an engineer employed by a firm that was winding down its operations, and who sought to offer his services to complete projects under his own responsibility and risk without the concurrence of the principal of his employing firm, was ethical. In reviewing each case, the Board noted the need to balance (1) the interests of the client in retaining the firm of its choice; (2) the interests of the individually employed engineers; and (3) the interests of the firm and its interest in maintaining business goodwill with its clients. No one can deny that a client has a right to retain the engineering firm of its choice. What must be addressed, however, is a method to effect that right in a manner that is both fair and equitable to all of the concerned parties.

Moving to the specific facts of this case and balancing the interests of all parties involved in this matter, the Board believes that Engineer A's actions in offering a position to Engineer C was not in and of itself unethical. The BER cannot find any specific language in the NSPE Code of Ethics that would prevent one engineer from offering an employment position to another

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engineer. Offers of employment are common practices in today's marketplace and most engineers understand that in the absence of a written agreement or other restriction, an employed engineer has the freedom to move from one engineering position to another. Unlike BER Case No. 77-11, it does not appear that Engineer C has obtained any particular specialized knowledge as an employee of Firm X that would restrict her ability to go to work for Firm Y and eventually compete against Firm X. Also, no formal written agreement between Engineer C and Firm X would address the issue of whether and under what terms Engineer C could compete with Firm X after departing from Firm X. This approach is in essence the "flip side" of the standard employment relationship where an employer, with few exceptions, may generally discontinue the services of an employed engineer "at will."

While the departure of an employee is often disruptive and costly to an employer's operations as well as to a client's needs, this is the price that a free society pays in striking a balance between the rights of individual employees and the legitimate business considerations in the employment market. It should also be noted that there does not appear to be anything under the facts to suggest that Engineer C is engaged in a specific project for which she has gained particular and specialized knowledge that would require Engineer C to gain the consent of Firm X or appropriate clients to perform work for Firm Y. Also the Board believes that Engineer A's conduct in hiring Engineer C is appropriate and within the bounds of what would be considered reasonable, particularly since Engineer A was an employee of Firm X and not a partner or principal of the firm.

Turning to the second question of whether it was ethical for Engineer A to make a representation that "because Engineer C is going to be leaving Firm X to work for Firm Y, that Firm X will be "hard pressed" to perform successfully on its projects and that Firm X's clients should hire Firm Y to perform engineering services," the Board is somewhat troubled by the actions of Engineer A for several reasons. First, Engineer A made it clear at the time of his departure from Firm X that he was going to start his own one-person consulting firm, Firm Y, and that he would not be in the position of competing with Firm X. While Engineer A was not ethically obligated to make this statement, one must assume that Engineer A intended the statement to be a truthful and honest statement of fact. Engineer A's statement clearly could have a significant impact on the manner in which Firm X treated Engineer A during Engineer A's departure from Firm X. However, it is apparent that Engineer A's subsequent actions were in direct conflict with his statement. Second, the NSPE Code of Ethics clearly states that (a) engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, and that (b) engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of other engineers. But under the facts, Engineer A has made at least one statement to the clients of Firm X stating or implying that Firm X might be incapable of fulfilling its professional obligations to them because of Engineer C's pending departure. The combination of the departure of Engineer C from Firm X and the hiring of Engineer C by Firm Y, along with the earlier expressed assurances by Engineer A about his intentions in establishing a new firm, give the Board great pause and concern in reviewing the motives and intentions of Engineer A. Moreover, unlike the facts in BER Case No. 97-2, in which the client actually approached the engineer and encouraged the

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engineer to open his own company and suggested that the engineer could expect a retainer with the client, there does not appear to be any client impetus that would mitigate the actions taken by Engineer A under the facts. Considering all factors and earlier BER cases on this issue, the Board must conclude that Engineer A's actions fell below the standards of appropriate ethical conduct.

Conclusions:

Question 1: It was ethical for Engineer A to offer a position to Engineer C.

Question 2: It was not ethical for Engineer A to make representations that because Engineer C is going to be leaving Firm X to work for Firm Y, that Firm X will be "hard pressed" to perform successfully on its projects and that Firm X's clients should hire Firm Y to perform engineering services. As an observation, the Board believes it was unethical for Engineer A to make misleading statements about Engineer C's future plans.

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