Employment Agreement – Obligation of Subconsultant

Case No. 07-5

Facts:

Engineer A is the owner of a medium-sized consulting engineering firm that retains subconsultants, including Engineer C, for various aspects of design work performed for its clients. Engineer B is employed by Engineer A. Engineer B departs from Engineer A's firm and establishes his own engineering firm. As a condition of employment, Engineer B had been required to sign a written employment agreement with Engineer A that would restrict Engineer B's ability to perform mechanical engineering services in a proscribed geographical area for a period of one year. One month following departure from Engineer A's firm, Engineer B contacts Engineer C and requests that Engineer C's firm provide mechanical engineering services to Engineer B's firm within the proscribed geographical area. Engineer C is unaware of the terms of the earlier employment agreement between Engineer B and Engineer A but is aware that such an agreement exists.

Questions:

1. Was it ethical for Engineer A to require Engineer B to sign as a condition of employment a written employment agreement with Engineer A that would restrict Engineer B's ability to perform mechanical engineering services in a proscribed geographic area for a period of one year?

2. Were Engineer B's actions ethical?

3. Would it be ethical for Engineer C to contact Engineer A and advise Engineer A that she has been requested to provide engineering services to Engineer B?

References:

Section I.5.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall avoid deceptive acts.*
Section I.6.	-	*NSPE Code of Ethics:*	*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.*
Section II.1.c.	-	*NSPE Code of Ethics:*	*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.1.e.	-	*NSPE Code of Ethics:*	*Engineers shall not aid or abet the unlawful practice of engineering by a person or firm.*
Section II.4.	-	*NSPE Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section III.4.	-	*NSPE Code of Ethics:*	*Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*

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Section III.6.	-	*NSPE Code of Ethics:*	*Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.*
Section III.7.	-	*NSPE 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:

The issues involved when an individual departs from an engineering firm often raise ethical and, in some cases, legal issues. The obligations on both sides of the equation are often complicated by a variety of factors including reasons or motivations for departure, client relations, existing or ongoing projects, and other factors.

The NSPE Board of Ethical Review has had many occasions to address this issue, particularly on the issue of employee non-compete agreements. As the Board noted in BER Case No. 97-9, these cases typically involve a balancing of the benefits, responsibilities, and obligations of both the employer and the engineer in the performance of engineering services.

In BER Case No. 88-3, the Board addressed a case where an engineer was a president of a company that designed and manufactured a wide range of consumer products. The engineer's company employed many engineers on staff who had a wide range of responsibilities for the company. Upon hire, each of the design engineers was required to sign an agreement covering employee inventions and writings, confidential information, and noncompetitive employment. The engineer decided to include in the agreement the following clause:

> "In the event that my employment with the company is terminated without regard to whether such termination is voluntary or involuntary, I agree that for a period of eighteen months after termination, I will not, directly or indirectly, become employed by or render any services of an advisory nature to participate or engage in any business competitive with the company's business without first receiving the prior written consent of the company. I further agree to notify the company in writing during this non-compete time period of any offers of employment received from a competitor or possible competitor of the company by me at least two weeks prior to the commencement of any such employment. The company will inform me as to whether it consents to such employment by mailing a registered letter within three working days of receipt of notification to my last known address. In the event the company does not consent to the providing of services for employment for a competitor during the non-compete period, the company agrees to pay me on a monthly basis at the rate of one-third of my last monthly salary with the

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> company, starting with the time of denying consent and up to a maximum time period of eighteen months, to coincide with the non-compete time period, as consideration for my not participating or engaging in any business competitive with the company's business."

After carefully evaluating this restrictive provision, as well as an earlier opinion, BER Case No. 72-5, which involved an engineer in private practice subject to a restrictive employment agreement, the Board laid out a basis for evaluating such provisions. The Board reasoned that the appropriate method of evaluating these provisions is by measuring the provision's reasonableness in terms of time, scope, and manner. In terms of the clause in BER Case No. 88-3, the Board determined that the agreement was not reasonably limited as to time because, although it would only bind the employee for a period of eighteen months, it would apply to an employee who worked for the company for one month as it would to an employee who worked for the company for ten years. As to scope, the agreement was not limited in terms of geography (e.g., to a city or state). Instead, the provision would apply to all worldwide operations of the company. The Board determined that the provision was inherently unfair because it would require former engineer employees of the company who had developed a particular technical expertise to remain unemployed for a period of eighteen months and collect one-third compensation. The Board noted that any agreement which by its terms forces an engineer to remain out of work is in direct violation of NSPE Code of Ethics Section III.7, because it clearly injures the prospects or employment of another engineer. Finally, the agreement was not narrowly limited to any substantive area of company operations but applied broadly to all aspects of company activities. For example, under the provision, an employee would not be permitted to accept a position with a competitor even if the competitor planned to assign the employee to a division whose activities and functions had no connection with the employee's previous activities. We believe the Board's analysis in BER Case No. 88-3 is relevant and easily applicable to the case presently before us.

As the Board noted in earlier cases, engineers in industry are frequently privy to highly confidential information, trade secrets, patented products and processes, and other highly valued material and data. Therefore, it is arguable that engineering employers should be permitted a wider scope in using restrictive employment agreements. In today's economy, confidential information, including client information, marketing techniques, and business associations, may be some of the most highly valued data possessed by an engineering company.

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In BER Case No. 97-9, Engineer A was a professional engineer with 22 years of experience. He had been employed with his employer for seven years. During this time, Engineer A had helped his company develop a very successful division that recycles rubber tire scraps into flooring-type mats, a product for which its customers find many uses. Engineer A was the sole engineer in the division and had been focused on improving the product and the manufacturing process. New management had taken over the company and one of the first acts of the company president, Engineer B, was to require each current employee to sign a confidentiality and non-solicitation agreement. Under the terms of the agreement, Engineer A was required to (1) assign ownership of all patents, inventions, copyrights, and other intellectual property created during the course of employment to the company, (2) maintain confidentiality of all trade secrets and other confidential and proprietary information of the company during and after employment, (3) agree not to solicit customers or prospective customers of the company following termination of employment with the company, and (4) agree not to compete with the company or work for a competitor of the company for a period of three years. Engineer A agreed to sign the agreement but crossed out all references to sections three and four of the confidentiality and non-solicitation agreement.

The Board ruled that (a) it was not ethical for Engineer B to seek Engineer A's signature to the confidentiality and non-solicitation agreement in the manner described and (b) it was ethical for Engineer A to sign the agreement but cross out all reference to sections three and foud of the confidentiality and non-solicitation agreement. The Board found certain parts of the agreement being proposed by the employer to be more restrictive than the agreement provision in BER Case No. 88-3. It was noted that clause sections one and two were not objectionable because they were consistent with the NSPE Code of Ethics, law, and the general custom and practice within the engineering profession. Clause section three was generally not prohibited by the NSPE Code of Ethics unless it involved confidential information concerning the business affairs or technical processes of a present or former client or employer and is done without consent.

However, the Board noted that section four would appear be too broad because it would apply to all employed engineers in the company regardless of their tenure with the company and would be binding on the employed engineers (including Engineer A) for three years without limitation. Unlike the agreement in BER Case No. 88-3, under which an individual would only be bound for eighteen months and receive some limited compensation if offered a position by a competitor, this agreement, said the Board, would appear to totally bar any employment with a competitor for a period of three years under any circumstances. In addition, much like the agreement in BER Case No. 88-3, this agreement was not bound in any way by any geographic limitation. Instead, the agreement applied to any competitor in the world. Also, said the Board, like the provision in BER Case No. 88-3, clause section four would force a knowledgeable engineer to remain unemployed in his or her area of expertise or be hired by a company that did not compete with the employer for a period of three years following termination

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of employment, regardless of the cause of employment termination. The Board noted that this is unreasonable, and on that basis, the Board believed it would be unethical for Engineer B to seek to obtain Engineer A's signature on the confidentiality and non-solicitation agreement as it was presently worded.

Turning to the second issue in Case No. 97-9, the Board indicated that since the action referred to in section three is generally not prohibited by the NSPE Code of Ethics unless it involved confidential information concerning the business affairs or technical processes of a present or former client or employer and is done without consent, it was appropriate for Engineer A to strike out the provision in the agreement. As an employee, another approach for Engineer A to consider, said the Board, would have been to attempt to discuss and negotiate a change to clause sections three and four and possibly other provisions in the proposed confidentiality agreement. As stated earlier, employers, particularly industrial employers, have legitimate business interests in maintaining the confidentiality of information possessed by their employees and, therefore, a balanced approach, said the Board, would seem to be the best course to pursue. The Board concluded that crossing out language seemed to be ethical, professional, and in keeping with the NSPE Code of Ethics as well as prior Board of Ethical Review Opinions.

A reading of prior Board of Ethical Review Opinions on this matter causes the Board to conclude that the one year agreement in question appears to be reasonable and not inconsistent with acceptable engineering industry standards. Moreover, the agreement was limited with regard to scope of practice and geographic area. Balancing applicable equitable considerations, the Board concludes that it was not unethical for Engineer A to require Engineer B to agree to the provision as a condition of employment. In addition, it was ethical for Engineer B to sign it.

The Board also concludes that it was not ethical for Engineer B to evade the terms of this agreement by contracting and retaining Engineer C to perform mechanical engineering services in the proscribed area one month after leaving Engineer A's employment.

Turning to the question of whether it would be ethical for Engineer C to contact Engineer A and advise Engineer A that she has been requested to provide engineering services to Engineer B, the Board is of the view that such an action would be consistent with the NSPE Code of Ethics Sections II.4., III.6., and III.7 if she first informs Engineer B that she plans to contact Engineer A. Engineer A is a client of Engineer C and so Engineer C's actions are consistent with NSPE Code Section II.4. Furthermore, assuming Engineer C advises Engineer A of Engineer B's actions in an honest, factual, and professional manner without resorting to any disparaging comments or statements, there would not appear to be any violation of NSPE Code Sections III.6. or III.7.

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In closing, the Board believes that Engineer C has an obligation to inform Engineer A of Engineer B's approach to her.

Conclusions:

1. It was ethical for Engineer A to require Engineer B to sign as a condition of employment a written employment agreement with Engineer A that would restrict Engineer B's ability to perform mechanical engineering services in a proscribed geographic area for a period of one year.

2. While it was ethical for Engineer B to sign the non-compete clause as a condition of employment with Engineer A, it was not ethical for Engineer B to contact Engineer C to provide mechanical engineering services in the proscribed geographical area.

3. Engineer C has an ethical obligation to contact Engineer A and advise Engineer A that she has been requested to provide engineering services to Engineer B.

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