Report on a Case by the Board of Ethical Review

Case No. 64-2

Subject: Employer Restrictions on Outside Practice
Canon 14 - Canons of Ethics; Canon 15-Canons of Ethics; Canon 18-Canons of Ethics; Canon 21-Canons of Ethics; Rule 16-Rules of Professional Conduct; Rule 17-Rules of Professional Conduct; Rule IS-Rules of Professional Conduct; Rule 23-Rules of Professional Conduct; Rule 35 -Rules of Professional Conduct; Rule 52-Rules of Professional Conduct; Rule 53-Rules of Professional Conduct.

Facts:
Engineer Jones is employed fulltime by the Acme Corporation, a contractor to a government agency. Acme permits engineering employees with its approval, to engage in outside consulting work, provided it is performed on the engineer's own time, does not conflict with the regular duties of the engineer and does not become excessive. The agency's regulations, applicable to contractors, further provide that employees of the contractor shall disclose to the contractor all consultant services which the employees propose to perform for others, and the contractor shall notify the agency of all information received from such disclosures.

Any proposed outside consulting services by employees of Acme are limited by the agency to a rate of remuneration which is not significantly in excess of the employee's regular rate of remuneration, which has been defined by the agency as $100 per day or at a rate of 30 per cent greater than the employee's basic salary calculated on a similar basis, whichever is greater. Acme's policy further provides that, "... it should be emphasized that the consulting means making available the engineer's own background technical information and does not include the use of any of Acme's or the Government's facilities for carrying out research."

In accordance with the agency's regulations and its own policies, Acme has prescribed the following requirements for engineers proposing to perform consulting work for others:

1. Identify all organizations for which consulting has been done or for whom it was expected consulting might be done.

2. State the subject matter of all presently conducted or expected consultation.

3. State the number of days spent in consultation or expected to be spent in consultation without regard to any consideration of whether the time so spent was on weekends, vacation, leave time, time allowed away from work for such purposes, or regular working time.

4. State the total fee received or expected to be received.

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5. Notify Acme, in writing and receive approval before making any consulting agreement.

Question:
Are the restrictions imposed on outside consulting services in conformity with the Canons of Ethics?

References:
Canons of Ethics-Canon 14 "He will disclose no information concerning the business affairs or technical processes of clients or employers without their consent."

Canon 15-"He will not accept compensation, financial or other wise, from more than one interested party for the same service, or for services pertaining to the same work, without the consent of all interested parties."

Canon 18-"He will promptly disclose to his client or employer any interest in a business which may compete with or affect the business of his client or employer. He will not allow an interest in any business to affect his decision regarding engineering work for which he is employed, or which he may be called upon to perform."

Canon 21-"He will uphold the principle of appropriate and adequate compensation for those engaged in engineering work, including those in subordinate capacities, as being in the public interest and maintaining the standards of the profession."

Rules of Professional Conduct Rule 16-"He will not solicit or accept employment to the detriment of his regular work or interest."

Rule 17-"An engineer in private practice may be employed by more than one party when the interests and time schedules of the several parties do not conflict."

Rule 18-"While in the employ of others, he will not enter into promotional efforts or negotiations for work or make arrangements for other employment as a principal or to practice in connection with a specific project for which he has gained particular and specialized knowledge without the consent of all interested parties."

Rule 23-"Designs, data, records, and notes made by an employee and referring exclusively to his employer's work are his employer's property."

Rule 35-"He will not undertake work at a fee or salary that will not permit professional performances, according to accepted 'standards of the profession."

Rule 52-"While in a salaried position, he will accept part-time engineering work only at a salary or fee not less than that recognized as standard in the area."

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Rule 53-"An engineer will not use equipment, supplies, laboratory, or office facilities of his employer to carry on outside private practice without consent."

Discussion:
For purposes of clarity, we believe the circumstances of this case can be divided into three parts:

1. Both the agency policy and Acme's implementing requirements tend to impose stringent requirements on Engineer Jones, and other employees similarly situated, in terms of their freedom to contract on their own time for their professional services. Canons 15 and 18, and Rules 16, 17, 18, and 23 all go to the basic question of avoiding a conflict of interest to the detriment of the client or employer of the engineer. Acme's requirements numbered 1 and 2 are intended to provide essential information to determine if there is or might be a conflict of interest by the engineer-employees. Requirement number 3 is apparently related to the prohibition against outside consulting services not becoming "excessive." We think that an employer who permits outside consulting by employees may properly limit it to the extent that the time spent by the employee does not sap his energy and creative ability to the detriment of his regular work. The extent to which such time might become "excessive" is necessarily flexible according to the circumstances, and therefore, we cannot say it was unreasonable for the employer to leave this phrase undefined. We perceive no objection to the requirement that the employee notify the employer of the organizations for which the consulting is to be performed, or the subject matter of the consultative services. These items of information are necessary for the employer to adequately determine whether there is or might be a conflict of interest.

2. In case 62-19 it was held that an employed engineer might ethically perform part-time engineering work outside of his regular employment. In that case, as here, the facts disclosed that the engineer would not use the equipment, supplies, laboratory or office facilities of his employer. Left for decision, however, is Acme's requirement that the employee disclose the total fee received or expected to be received for the outside practice. Acme's requirement on this point follows the agency's regulation limiting the outside fee to a formula stated previously, and it may be assumed that Acme has no choice as an agency contractor but to require this information. The facts do not disclose the reasons for the agency's limitation on fees for outside practice. Regardless of the reason for such limitation, we cannot say that a per diem of $100 or a fee 30 per cent higher than the employee's regular rate of pay would be in conflict with Canon 21, requiring appropriate and adequate compensation. Likewise, the fee limitations are not such as to require the engineer to violate Rule 52, which demands the performance of part-time engineering services only at a fee level not less than that recognized as standard in the area.

3. The requirement that the employee disclose the organization for which he will perform consulting services, the subject matter of the services, and the fee to be received from the outside organization raise the question of the application of Canon 14.

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Under the normal circumstances, an engineer may not disclose information of this type, except with the consent of the organization which he serves. In the circumstances stated, Engineer Jones has a choice and a duty-he must advise the outside organization he proposes to serve of the requirement that he provide the information indicated to his employer, and if the outside organization objects he may not make the disclosure. In that case his choice is to refrain from performing the services, or terminate his regular employment in order to perform the consulting service without disclosure of the facts to others. Canon 14 is a protection of the rights and interests of the client or employer, not those of the engineer. For this reason we cannot say that Canon 14 is a shield behind which the engineer may take shelter in conflict with otherwise reasonable requirements of his employer and in accordance with the requirements of the client served by his employer.

Conclusion:
The restrictions imposed on outside consulting services are in conformity with the Canons of Ethics and are binding upon engineers desiring to engage in outside consulting service.

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