Report on a Case by the Board of Ethical Review

Case No. 72-3

Advertising Direct Mail Solicitation Supplanting Another Engineer

Facts:
An engineer who had formerly been a city manager sent unsolicited letters to selected city officials in his state announcing the opening of his office to specialize in municipal engineering practice. His letter stated he expected to call on the city official recipient in the near future; meanwhile, he asked the city official to complete and return an information sheet. The information sheet asked if the municipality had a central water supply and distribution system and. if so. the source of supply of the water; a central sewerage system with sewage treatment and, if so, whether the treatment was primary only, secondary, or tertiary; a storm drainage system, and, if so, whether it was combined sewers or separate sewers; a full-time city engineer, and, if so, his name, and, if not, "do you have a formally appointed Municipal Consulting Engineer," and, if so, his name. The remaining questions asked whether the consultant could send the municipal official a professional resume and arrange a personal visit.

Questions:
1. Is the above-described letter a form of solicitation permitted by the Code?

2. Does this form of solicitation violate the Code provisions on one engineer supplanting another engineer?

References:
Code of Ethics-Section 3(a)- The Engineer shall not advertise his professional services but may utilize the following means of identification:

1. Professional cards and listings in recognized and dignified publications. provided they are consistent in size and are in a section of the publication regularly devoted to such professional cards and listings. The information displayed must be restricted to firm name, address, telephone number, appropriate symbol, names of principal participants, and the fields of practice in which the firm is qualified.

2. Signs on equipment, offices, and at the site of projects for which he renders services, limited to firm name. address, telephone number, and type of services as appropriate.

3. Brochures, business cards, letterheads, and other factual representations of experience. facilities, personnel, and capacity to render service, providing the same are not misleading relative to the extent of participation in the projects cited, and provided the same are not indiscriminately distributed.

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4. Listings in the classified section of telephone directories, limited to name, address, telephone number, and specialties in which the firm is qualified.

Section 1 1-The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods.

Section 11(a)-The Engineer will not attempt to supplant another engineer in a particular employment after becoming aware that definite steps have been taken toward the other's employment.

Discussion:
Before turning to the substance of this case, we think it is important to point out and emphasize that the Code of Ethics does not restrict or prohibit the entry of engineers into the consulting field of practice. The National Society of Professional Engineers has long published information in the form of pamphlets and articles to assist engineers who wish to enter consulting practice, calling to their attention guiding principles of ethics, business considerations relating to methods of negotiating contracts, and standard contract documents, as well as other sources of basic information.

The letter of solicitation in this case is akin to a brochure, and, if regarded as such, is clearly permitted under Section 3(a)(3) of the code. Although the facts contained in the letter are skimpy compared to the material in a normal brochure, we assume for the purpose of this case that they are factual representations. It would be difficult to draw a line as to the distinction between mailing a brochure, as authorized in Section 3(a)(3) with a covering letter, which is permissible, and barring the mailing of a solicitation letter alone. Both have the same purpose and should be treated for this case as allowable forms of solicitation if properly used.

The key question, we perceive, is the meaning of the injunction in Section 3(a)(3) that brochures and other forms of solicitation shall not be "indiscriminately distributed." In Case 62-2 we held that it was not a violation of the code for a consulting engineer to send his brochure to a large group of individuals and representatives of firms who had attended certain meetings in connection with facilities which would require engineering expertise. At that time the applicable rule limited distribution of brochures (treated as advertising) to "an interested and potential client or employer. . . ." It was then held that those receiving the brochure had indicated their interest by attending the particular meetings, therefore they were potential clients.

Although we might question whether we would reach that same result under the wording of Section 3(a)(3) that brochures shall not be "indiscriminately distributed," there can be little question but that the city officials contacted in this case were potential clients under the wording of the rule which controlled Case 62-2. If we treat "indiscriminately" as meaning that brochures should not be sent to those who might not

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reasonably be expected to be interested in the services of the engineer we would conclude that the distribution of the solicitation letter was not "indiscriminate."

On the other hand, if we treat "indiscriminately" as meaning that a brochure or other form of solicitation should not be sent to any person or organization unless there has been a definite request or indication of interest to retain the services of the soliciting engineer we unduly restrict the opportunity for new firms to take the initiative in developing their practice.

The solution to these alternatives, we believe, is to look to another section of the code which sets the principle that one engineer may not undertake to supplant another engineer already retained or in the process of being retained for a particular project. Section 11 (a) is the "control rod" by which engineers can determine the bounds of proper solicitation. Several previous cases have dwelt upon the limits imposed by Section 11 (a). (See Cases 62-18, 64-9. and 65-8.)

In Case 62-10, however, we established a point which we think is of particular importance in this case. There we held that then-prevailing Canon 25, which is the same as present Section 11 (a), did not "grant an engineer an exclusive right to perform engineering services for a particular client. There can be no question but that the client has a right to change from one consulting engineer to another." The only question, we said, is whether the consulting engineer may make an initial contact with the client and offer his services. Paraphrasing the result in that case and later cases we conclude that there is no prohibition for an engineer to offer his services to a client dealing with another engineer on a general consultant-client relationship, but that the limitation applies only when one engineer attempts to displace another engineer who has been retained for a specific project, or who is in the process of completing arrangements with a client for a specific project.

Taken in this light, and assuming that one or more of the municipalities contacted did have a general arrangement with a consulting engineer for advisory services or for services on future projects when required, the engineer in the case before us has not attempted to supplant another engineer who may have had a general consultant relationship with a particular municipality.

Conclusions*:

1. The solicitation letter is permitted by the code.

2. The solicitation letter did not violate the code provisions on one engineer supplanting another engineer.

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