Report on a Case by the Board of Ethical Review

Case No. 77-6

Continued Practice Under No-Competition Agreement

Facts:
After long years of practice through the ABC Engineering, Inc., firm, the majority stockholder decided to sell the firm to a holding company in order to liquidate his assets. The other stockholders, including Engineer A, who was the president of the firm at the time of the sale, also sold their stock interest to the holding company. The acquisition agreement included a standard no-competition clause for five years under which the stockholders of ABC Engineering, Inc., would not solicit or perform engineering services in the same field of engineering activity previously provided by ABC Engineering. It was also agreed that Engineer A would continue to operate ABC Engineering for the new owner with the understanding that it would continue to be located in the same city as heretofore.

After three years under this arrangement, however, the new owner moved the firm to another city some substantial distance removed. Engineer A decided he did not wish to move to the new location and resigned from the firm. Engineer A then engaged in correspondence with the holding company, leading to an agreement that he could enter into private practice in the same field of engineering with a new firm on a smaller scale. The agreement provided that Engineer A in operating the new firm would notify the holding company of any projects he undertook with an estimated fee of $25,000, and that if he retained others as joint venturers or associate professionals for such projects he would give the holding company the right of first refusal for those functions through the continued operation of ABC Engineering in its new headquarters location.

Thereafter the holding company advised Engineer A that he was acting unethically in contacting former clients of ABC Engineering or in providing engineering services through his new firm upon being contacted directly by former clients of ABC Engineering and requested to provide engineering services to them. He was further advised by the holding company that he acted unethically in using in his new brochure artwork similar to that used in the brochure of ABC Engineering.

Questions:
1. Was it ethical for Engineer A under these circumstances to contact former clients, or provide services upon their request to former clients?

2. Was it ethical for Engineer A to use artwork for his brochure which was similar to the artwork used in the brochure for ABC Engineering?

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References:
Code of Ethics-Section 7(a)-"While in the employ of others, he will not enter 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."

Section 11-"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."

Discussion:
It is apparent that an initial question under this set of facts is whether Engineer A has violated the agreement not to compete with the new owners of ABC Engineering by engaging in independent private practice in the same field of engineering activity. It is not within our jurisdiction or competence to pass on the purely legal issue of whether the subsequent correspondence amended or waived the "no competition" provisions in the original sales agreement. For the purpose of dealing with the ethical issues which have been raised, however, we proceed on the assumption that Engineer A has not breached the legal agreement; otherwise it would automatically follow that his conduct was unethical if it was illegal under the agreement.

We have cited §7(a) of the code while recognizing that its exact language does not cover the facts before us in that when he undertook to contact former clients of ABC Engineering, or to respond favorably to contacts from the former clients to provide services through his new firm, Engineer A was not in the "employ" of ABC Engineering. But we note in passing that the concept of §7(a) has some pertinence to the broader aspect by expressing a philosophy of avoidance of a conflict by an engineer with other engineers to whom he or she has an obligation while in their employment. We do not say, however, that aside from the fact that Engineer A was not then employed by ABC Engineering, he offended even the spirit of §7(a) because its mandate runs to a conflict with a employer for "a specific project," and that is not the case here.

We come then to the controlling §11 to determine whether Engineer A has competed unfairly by "improper or questionable methods." Again basing our analysis on the assumption that there had not been a breach of the initial agreement by reason of the subsequent agreement, we believe that under these circumstances Engineer A did no more than he had a legal and ethical right to do. If the complaint of the new owner of ABC Engineering is based on the extent of the new practice of Engineer A exceeding the understanding that his activities would be on a smaller scale, we can only suggest that such a limitation should have been stated in the subsequent agreement in an appropriate manner.

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Turning to the second question on the use of the artwork, we believe a different result is warranted. Here Engineer A has deliberately chosen to use certain artwork which the former clients of ABC Engineering may interpret as representing the firm of Engineer A as the same firm he previously served. We believe it was ethically incumbent on Engineer A to avoid any stylistic references, artwork, or wording in his brochure which might tend to mislead clients or former clients into believing the new firm of Engineer A was a successor firm to ABC Engineering. In that context we believe that the use of similar artwork may be considered an "improper or questionable" method of competition.

Conclusions:*

1. It was ethical for Engineer A under these circumstances to contact former clients or provide services, upon their request, to former clients of ABC Engineering.

2. It was not ethical for Engineer A to use artwork for his brochure which was similar to the artwork used in the brochure of ABC Engineering.

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Board of Ethical Review

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