Report on a Case by the Board of Ethical Review

Case No. 79-9

Identification of Firm Ownership - Specification of Products of Owner

Facts:

A consulting engineering firm, Able-Baker Engineers, Inc., was purchased through majority stock acquisition by Consolidated Enterprises, Inc., which also owns subsidiary companies which manufacture materials used in construction. Able-Baker had been in the consulting field for approximately 50 years and enjoyed a high level of name recognition in its community and other locations in the state where it maintained branch offices. Under the purchase agreement the officers of Able-Baker will continue their functions in the management of the firm. The agreement further contemplates that Able-Baker will continue to operate under the same name. Also, Able-Baker in the past has from time to time specified products of the kind manufactured by Consolidated Enterprises subsidiaries in the design of various facilities and proposes to continue doing so when it believes such products are appropriate for the purpose.

Questions:

1. Would it be ethically proper for Able-Baker to continue operations under the same name without identification of the new ownership?

2. Would it be ethically proper for Able-Baker to specify products of the kind manufactured by subsidiaries of Consolidated Enterprises?

References:

Code of Ethics - Section 3 - "The Engineer will avoid all conduct or practice likely to discredit the profession or deceive the public."

Section 3(a) - "The Engineer shall not make exaggerated, misleading, deceptive, or false statements or claims about his professional qualifications, experience, or performance in his brochures, correspondence, listings, advertisements, or other public communications.

"Section 3(b) - "The above prohibitions include, but are not limited to, the use of statements containing a material misrepresentation of fact or omitting a material fact necessary to keep the statement from being misleading; statements intended or likely to create an unjustified expectation; statements containing prediction of future success, statements containing an opinion as to the quality of the Engineer's services; or statements intended or likely to attract clients by the use of showmanship, puffery, or self-laudation, including the use of slogans, jingles, or sensational language or format."

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Section 8 - "The Engineer shall disclose all known or potential conflicts of interest to his employer or client by promptly informing them of any business connections, interests, or other circumstances which could influence his judgment or the quality of his services, or which might reasonably be construed by others as constituting a conflict of interest."

Discussion:
The initial question is whether the continuation of the name of the firm as it has been used in the past in brochures, letterheads, business cards, etc. without a showing of the new ownership would be likely to ". . .deceive the public," as noted in 3 of the code, or would constitute a material misrepresentation by ". . .omitting a material fact necessary to keep the statement from being misleading. . ." as noted in 3(b).

Unlike earlier versions of the code which dealt with restrictions on the advertising of engineering services, the current language, adopted in July 1978, is broader in scope. It now extends beyond advertising to embrace all statements concerning the engineer's practice. We believe it is appropriate, therefore, to treat material contained in brochures, letterheads, business cards, etc., as "statements" of information subject to the code requirements.

The omission of information as to the true ownership of the firm may indeed be "misleading," particularly under these facts, in that clients or prospective clients may be led to believe that the firm's operations are under the same conditions as previously prevailed, whereas they may be substantially different. This is not to say that the quality of service may be less or even different from in the past, but it is equally true that the change in ownership may relate to those possibilities. We are not concerned ethically with ownership of engineering firms, as such, but do believe that under these kinds of conditions clients and prospective clients are entitled to know the facts when there has been a basic change from past understanding.

The ethical principle here involved can be handled with relative ease by merely noting on letterheads, brochures, business cards, etc. the name, Able-Baker Engineers, Inc., followed by "a subsidiary of Consolidated Enterprises, Inc.," or similar appropriate language.

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As to the continued specification of materials of the kind manufactured by subsidiaries of the parent company, we first note that the ethical considerations will depend in large measure on the circumstances involved. If, for example, the specification is for standard construction materials which are available on the open market, e.g., bricks, steel, lumber, there would be no reason for concern because a subsidiary of Consolidated produces such material. If, on the other hand, the specification was for a proprietary item manufactured only by a Consolidated subsidiary, it would be necessary for Able-Baker to make this fact known, in advance, to the client under the requirement of 8 to disclose not only actual, but also potential, conflicts of interest. In another typical situation, if Able-Baker should specify a brand-name product together with an "or equal" clause, it should disclose whether the specified brand-name product is manufactured by a Consolidated subsidiary in order that both the client and the bidders might be aware of that fact in evaluating the Able-Baker determination in accepting or rejecting the "or equal" item.

We dealt with a similar question in Case 69-8 in which the principals of a consulting firm owned a separate corporation engaged in the marketing of building products. We held then that even if the engineers intended to specify those products only to the extent they were best suited to the client's needs, and even though there would be an "or equal" clause in each case, nevertheless there would be an unavoidable implication that their professional judgment might be compromised. In a companion case, 69-13, we further held that even a minimal financial interest would ethically bar the engineer from specifying the products of the company in which he had an ownership interest. At that time 8 of the code required the engineer to "endeavor to avoid" a conflict of interest. The present language is more specific and requires disclosure under any condition which might be construed by others as constituting a conflict of interest.

Conclusions:*

1. It would not be ethically proper for Able-Baker to continue operations under the same name without identification of the new ownership.

2. It would not be ethically proper for Able-Baker to specify products of the kind manufactured by subsidiaries of Consolidated Enterprises, unless full disclosure is made in advance when such specification might give an undue advantage to the Consolidated subsidiary.

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Additional Comments:
The undersigned agrees with the conclusion reached on Question No. 1 under the circumstances outlined in the particular case; however, I have concern that the principles used to reach this conclusion could be extended to apply in other situations which would cause unnecessary restrictions on design firms.

It can be assumed that professionally oriented design firms will make a full disclosure of any potential conflict of interest, including revealing ownership by another firm, at the appropriate time during an interview.

However, there are many situations where a letterhead disclosure will not reveal the nature of the owning firm's business, but will merely alert the recipient of the letter to the fact that the ownership is not necessarily what it had been in the past and that the firm might now be controlled by non-professionals.

Such revelation is desirable and is the basis of the conclusion reached on Question No. 1. However, there are many design firms which are owned by internal holding companies. This arrangement is normally done for tax, financial, or other purely business reasons. In these situations the ownership is retained by the design professionals and thus control is in the hands of professionals who are subject to our Code of Ethics. Revelation of this subsidiary relationship on the stationery would not provide any valuable information and in fact would not reveal the potential conflict of interest which could exist between affiliated subsidiary firms.

Therefore I feel the thrust of this conclusion is directed to the revelation of ownership when it is by commercial organizations that could possibly be connected to firms that manufacture or supply building equipment and material; and should not be extended to imply that internal ownership arrangements need be revealed on stationery letterheads. *Louis A. Bacon, P.E.*

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