Report on a Case by the Board of Ethical Review

Case No. 83-1

Conflict Of Interest—Duty of Loyalty of Terminated Employed Engineer to Employer—Misleading Brochure

Facts:
Engineer A worked for Engineer B. On November 15, 1982 Engineer B notified Engineer A that Engineer B was going to terminate Engineer A because of lack of work. Engineer A thereupon notified clients of Engineer B that Engineer A was planning to start another engineering firm and would appreciate being considered for future work. Meanwhile, Engineer A continued to work for Engineer B for several additional months after the November termination notice. During that period, Engineer B distributed a previously printed brochure listing Engineer A as one of Engineer B's key employees, and continued to use the previously printed brochure with Engineer A's name in it well after Engineer B did in fact terminate Engineer A.

Questions:
1. Was it ethical for Engineer A to notify clients of Engineer B that Engineer A was planning to start a firm and would appreciate being considered for future work while still in the employ of Engineer B?

2. Was it ethical for Engineer B to distribute a brochure listing Engineer A as a key employee in view of the fact that Engineer B had given Engineer A a notice of termination?

3. Was it ethical for Engineer B to distribute a brochure listing Engineer A as a key employee after Engineer A's actual termination?

References:
Code of Ethics - Section I.4 - "Engineers, in the fulfillment of their professional duties, shall: Act in professional matters for each employer or client as faithful agents or trustees."

Section II.5.a. - "Engineers shall not falsify or permit misrepresentation of their, or their associates', academic or professional qualifications. They shall not misrepresent or exaggerate their degree of responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint venturers, or past accomplishments with the intent and purpose of enhancing their qualifications and their work."

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Section III.3.a. - "Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact necessary to keep statements 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 Engineers' 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."

Section III.4.a. - "Engineers in the employ of others shall not without the consent of all interested parties 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 the Engineer has gained particular and specialized knowledge."

Section III.7. - "Engineers shall not compete unfairly with other engineers by attempting to obtain employment or advancement or professional engagements by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods."

Discussion:
The case presented before the Board raises a number of significant points that have heretofore not been specifically addressed. In BER Case 77-11, the Board ruled that four engineers who founded a new firm did not violate the Code of Ethics by generally seeking work from former clients of their previous employer, but were in violation of the Code with regard to projects for which they had particular knowledge while working for their former employer. Although at first glance the facts in Case 77-11 appear to be quite similar to the instant case, they are distinguishable on two very important points: (l) In the instant case Engineer A notified "current" and not former clients of Engineer B and offered professional services to them. (2) Engineer A was still employed by Engineer B when Engineer A notified the clients and others of the offer of professional services. We are therefore now asked to decide whether one engineer in the employ of another who is aware of a pending termination may ethically contact "current" clients of an employer and offer professional services to the client without informing the employer.

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An engineer is expected to act, at all times in professional matters for the employer, as a faithful agent and trustee (Section I.4.). That requires the engineer to recognize both a duty of loyalty and good faith. An essential aspect of those is the duty to disclose. Certainly it is not possible for an engineer to meet those obligations to the employer if the engineer is engaging in such promotional activity to the employer's detriment. We do not mean to suggest than an employee who severs all ties with the employer and then seeks to contact clients of the employer in order to offer engineering services is in violation of the Code. To the contrary, those were the facts of Case 77-11 and that case remains a proper interpretation of the Code. Nor do we wish to suggest any restraint exists upon one's absolute right to select in all cases, the engineer of one's choice. As we noted in Case 77-11, "We have often held that (the Code) is not to be interpreted to give an engineer or firm a right to prevent other engineers from attempting to serve former clients of other firms." Nevertheless, for the above-noted reason, it is concluded that Engineer A violated Section I.4. by failing to act as a faithful employee.

Another issue related to the conduct of Engineer A is whether Engineer A violated Section III.7. by competing with Engineer B using "questionable methods." It seems obvious that by failing to act as a faithful employee and by failing to disclose the actions to Engineer B, Engineer A engaged in questionable methods of competition. Even if Engineer A was not certain that the actions constituted unethical conduct, Engineer A knew or should have known that they were problematic and dubious and raised the possibility of an ethical violation. Therefore, we are of the view that Engineer A was in violation of Section III. 7.

A related question under the facts of this case is whether Engineer A violated a duty of disclosure to all interested parties by entering into promotional efforts for work as a principal in connection with work for which Engineer A had gained a particular and specialized knowledge. The facts do not indicate whether Engineer A was attempting to secure work through particular and specialized knowledge gained. Assuming that in fact Engineer A had gained such knowledge and then sought such work without full disclosure to the employer, Engineer B, it appears that Engineer A would have violated Section III.4.a. of the Code. Again, Engineer A owes duties of loyalty, good faith, and disclosure to the employer for which the breach constitutes a violation of the Code. As an employee of Engineer B, Engineer A could not ethically use proprietary information concerning clients, trade secrets, or other valuable information of the employer without full disclosure to the employer.

The other dimension of this case is the actions of Engineer B. Section II.5.a. of the Code specifically states that brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates . . . with the intent and purpose of enhancing their qualifications and their work. Thus, the Code provision requires the Board to interpret that provision to determine whether (l) Engineer B in fact misrepresented "pertinent facts" and (2) whether it was the intent and purpose of Engineer B to "enhance the firm's qualifications and work." Both prongs must be present for a violation of Section II.5.a. to exist.

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"Pertinent facts" are those facts that have a clear and decisive relevance to a matter at hand. Another way to characterize pertinent facts is as those that are "relevant and highly significant." It is not unusual for an engineering firm that seeks to promote itself for business reasons to include in such a brochure a statement of the firm's experience, its history, its qualifications, and the names and qualifications of the members of the firm. The names of the firm's members are often quite significant to the client selecting the firm. The client may be familiar with an individual member of the firm and the selection of that firm may be based on the presence of that engineer in the firm as represented in the brochure. It is clear, therefore, that the inclusion of the name of Engineer A in the firm's brochure constituted a misrepresentation of "pertinent facts."

The second point of inquiry is whether it was the "intent and purpose" of Engineer B to "enhance the firm's qualifications and work" by including Engineer A's name in the promotional brochure after Engineer A had left the firm. The facts presented in the case appear to demonstrate that Engineer B acted with "intent and purpose" in distributing the misleading brochure. Certainly, Engineer B was well aware of the impending termination of Engineer A. Engineer B was the very person who terminated Engineer A. Engineer B distributed the brochure while Engineer A was still employed but had been given a notice of termination by Engineer B. That could easily mislead potential clients into believing that Engineer A, noted as a key employee, would be available in the firm for consultation on future projects. Moreover, Engineer B distributed the brochure after Engineer A had left the firm. That is a clear misrepresentation of a pertinent fact with the intent to enhance the firm's qualifications and as such constitutes a violation of the Code.

Section III.3.a. states in part that "Engineers shall avoid use of statements containing a material misrepresentation of fact or omitting a material fact necessary to keep statements from being misleading; statements intended or likely to create an unjustified expectation...." Although that section appears to provide Engineer B with the appropriate guidance under the facts in this case, we are of the view that a requirement that Engineer B insert an addendum or an amendment in the brochure informing prospective clients that Engineer A would soon be leaving the firm is both impracticable and unnecessary. That would be a burden to all firms from the standpoint of both time and cost. We do believe that during the interim period between Engineer A's being given notice of termination and his actual cessation of employment, Engineer B had an obligation, during negotiations with a prospective client, to inform the client of Engineer A's pending termination. However, once Engineer A had been formally dismissed, Engineer B had an ethical obligation to cease using the brochure with Engineer A's name in it entirely.

Conclusions:

Q1. It was unethical for Engineer A to notify clients of Engineer B that Engineer A was planning to start a firm and would appreciate being considered for work while still in the employ of Engineer B.

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Q2. It was not unethical for Engineer B to distribute a previously printed brochure listing Engineer A as a key employee provided Engineer B apprised the prospective client during the negotiation of Engineer A's pending termination.

Q3. It was unethical for Engineer B to distribute a brochure listing Engineer A as a key employee after Engineer A's actual termination.

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Board of Ethical Review: F. Wendell Beard, P.E., Ernest C. James, P.E., Robert W. Jarvis, P.E., Lawrence E. Jones, P.E., James L. Polk, P.E., J. Kent Roberts, P.E., Alfred H. Samborn, P.E., chairman.

Additional Views:
I readily submit that our English language is less than concise in word interpretation and often leads to ambiguous meanings. In the discussion of BER Case No. 83-1, and especially in reference to BER Case No. 77-11, I do not take exception to the ultimate conclusions. However, I find the use of the word "former" used in the context of "former clients" to be very misleading.

In my search of the dictionary and understanding of the definition, the word "former" appears to mean "occurring earlier in time," "pertaining to a period previous to the one specified," and therefore I interpret this to mean that the clients are no longer considered to be clients of the employer. In my opinion, this then determines that the "clients" which were contacted are indeed up for grabs by any engineer interested in promoting prospective clients.

Finally, I support the crux of BER Case No. 83-1 finding that Engineer A contacted current clients of Engineer B while still in the employ of Engineer B and therefore unethical. *Alfred H. Samborn, P.E.*

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