Report on a Case by the Board of Ethical Review

Case No. 87-2

Disclosure of Previous Work By Consultant

Facts:
Engineer A agrees to provide consulting services to RMF, Inc., in connection with the development of a new product for manufacture. He develops a preliminary report, which is approved, then develops the design for the product. Engineer A and RMF, Inc., do not negotiate any terms in their agreement relating to the actual ownership of the design of the product. Neither takes any steps to seek patent protection. When the design reaches the production stage, RMF, Inc., terminates the services of Engineer A in accordance with their agreement. Thereafter, Engineer A agrees to provide consulting services to SYS, Inc., a competitor of RMF, Inc. As a part of those services, he divulges specific information unique to the product designed for RMF, Inc.

Question:
Was it ethical for Engineer A to divulge specific information to SYS, Inc., unique to the product designed earlier by him for RMF, Inc.?

References:
Code of Ethics - Section II.1.c. - "Engineers shall not reveal facts, data or information obtained in a professional capacity without the prior consent of the client or employer except as authorized or required by law or this Code."

Section III.4. - "Engineers shall not disclose confidential information concerning the business affairs or technical processes of any present or former client or employer without his consent."

Section III.10.c. - "Engineers, before undertaking work for others, in connection with which the Engineer may make improvements, plans, designs, inventions, or other records which may justify copyrights or patents, should enter into a positive agreement regarding ownership."

Discussion:
As with many provisions of the NSPE Code of Ethics, Section II.1.c. appears to be stated in a clear and concise way. It recognizes that the engineer has the obligation to refrain from revealing factual information obtained in a professional capacity without the permission of the client or employer except under certain specific circumstances. However, that is subject to a degree of interpretation.

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From its earliest days, the Board has had to grapple with the meaning of the language contained in Section II.1.c. The Board faced quite similarly to the instant one. That case involved an engineer who was employed by the ABC Company and assigned by his supervisor to develop processing equipment for the manufacture of certain chemical products. In his previous employment with the XYZ Company, the engineer had participated in the development of similar equipment. The technical information concerning the equipment had not been published in the technical press, or otherwise released. By virtue of his previous involvement in its development, the engineer was familiar with the equipment and the principles of its design. His supervisors in the ABC Company suggested that knowledge of the particular equipment would be useful in developing similar equipment for their use and expected him to make it available to them.

In its decision on Case 61-8, the Board noted that most employers of engineers accept the obligation of permitting their engineers to decide for themselves what information they can carry and use from job to job, recognizing the ethical duty of the engineer not to disclose confidential information of a former employer. The Board concluded that inasmuch as the equipment developed for the XYZ Company had not been made known to the public or the industry, it was in the nature of a "trade secret" and the engineer who participated in its development may not ethically use or impart that particular knowledge to another employer without the consent of his former employer. He may, though, ethically apply general knowledge and general engineering principles gained in his former employment to solving the problems of ABC Company.

More recently, in Case 82-2, an engineering consultant performed home inspection services for a prospective purchaser of a residence and thereafter disclosed the contents of the report to the real estate firm handling the sale of the residence. The Board reaffirmed the principle of the right of confidentiality on behalf of the client.

Although Case 61-8 is quite similar, it relates to the ethical obligation of employees, while the present case involves the ethical obligation of a consultant. However, that narrow issue is easily dispensed because all Code references pertaining to the ethical obligation of the engineer to maintain confidentiality refer to both the employer and the client. (See Code Sections II.1.c. and III.4.) This would clearly suggest that the drafters of the Code intended that the obligation to maintain confidentiality applies to the employed engineer as well as the consulting engineer. It is the Board's view that consistent with Case 61-8, it would be unethical for Engineer A to divulge specific information to SYS, Inc., unique to the product designed earlier by him for RMF, Inc.

It should be pointed out that if the information divulged is generally available within the industry then his conduct might be considered proper.

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We note that since the rendering of Case 61-8,the NSPE Code of Ethics has been substantially modified. Of particular mention, in the context of this case, we refer to Section III.10.c., which admonishes engineers to take affirmative steps with employers or clients regarding ownership of patents or copyrights. In today's highly mobile and competitive society, more and more employers are demanding, and employees are expecting, special terms of employment that will clearly spellout the duties and obligations of both with respect to confidentiality and rights relating to intellectual property. That approach is a positive one and will take some of the mystery out of these matters. Presumably, the ethical question raised in this case could have been more easily interpreted had Engineer A and RMF, Inc., formally agreed to ownership of the design of the product.

Conclusion:
It was unethical for Engineer A to divulge specific information to SYS, Inc., unique to the product designed earlier by him for RMF, Inc.

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