REFERENCES:

II.4.	-	*Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
III.4.	-	*Code of Ethics:*	*Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*
III.4.a.	-	*Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a specific project for which the Engineer has gained particular and specialized knowledge.*
III.4.b.	-	*Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client or employer*.

FORMER EMPLOYER ESTABLISHING A NEW FIRM -- SOLICITING FORMER CLIENTS AFTER A PERIOD OF TIME HAS ELAPSED

FACTS:

Engineer A currently works for ABC Engineering Company. Engineer A has a very good working relationship with a major client, Clover City, which is a neighboring city. ABC is currently under contract with Clover City for the preparation of a report on an expansion of the city's water treatment plant. As an employee of ABC, Engineer A developed the report by which the city will get funding for the water treatment plant expansion. The report included a part dealing with funding for an elevated storage tank. Those aspects of the report that dealt with the elevated storage tank were not part of the scope of work originally negotiated between ABC and Clover City and no contract exists between the city and ABC for the design of the elevated storage tank. Clover City is impressed by Engineer A's initiative on this project. The city has paid ABC for this report.

Recently, officials in Clover City suggested that Engineer A open his own engineering company in Clover City. The city indicates that it would consider a city retainer contract and also a contract for the design of the elevated storage tank.

Six months later, Engineer A decides to establish his own firm in Clover City without soliciting work from ABC's clients, including Clover City for a period of time. However, after a year has passed, Engineer A begins soliciting work from ABC's clients, including Clover City. There was no "no-compete agreement" between Engineer A and ABC Engineering Company.

QUESTIONS:

Question 1: Was it ethical for Engineer A to establish his own firm in Clover City?

Question 2: Was it ethical for Engineer A to begin soliciting work from ABC's clients, including Clover City, after a year had passed?

DISCUSSION:

It is not unusual for engineers, employed by others, at some point, to break off from their employer and go into business for themselves. This is a fundamental principle of this nation's free enterprise system

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and generally should not be discouraged. As a general matter, this practice raises no ethical issues for the BER's consideration.

However, the Code does address some issues that could arise in this context and provides ethical guidance where the engineer considers this business option. The Code addresses the use of confidential information concerning the technical affairs or processes of the former employer, promotional activities and negotiations for employment or business, and the involvement of the engineer in adversarial situations relating to the former employer. (See NSPE Code Sections III.4., III.4.a., III.4.b.).

The Board has previously addressed similar cases. In Case No. 86-5, a city requested proposals from various consulting engineers for a major job that was planned. Engineer A, a principal in a large engineering firm in the city decided to have his firm submit a proposal. Engineer A asked three engineers on his staff, Engineers X, Y, and Z, to develop the proposal for the firm. Engineers X,Y, and Z developed the proposal which was ultimately submitted to the city. Soon thereafter, the city learned that Engineers X, Y, and Z are the engineers who actually developed the proposal, for the firm and a city official approaches Engineers X, Y, and Z and asks if they would agree to a contract as consultants, independent of Engineer A's firm. Engineers X, Y, and Z disclose the facts to Engineer A, resign from the firm, and enter into negotiations with the city. The Board concluded that a strict interpretation of the Code under the facts of this case led to the conclusion that it would be ethical for Engineers X, Y, and Z to agree to a contract for consulting services independent of Engineer A's firm.

In reaching its conclusion in Case No. 86-5, the Board reviewed two earlier BER cases, Nos. 77-11 and 79-10. In Case No. 77-11, the Board found that four engineers who left the employ of a firm, founded a new firm, and contacted the clients of the former firm were not in violation of the NSPE Code for doing so. However, the Board did determine in Case No. 77-11 that the four engineers did violate the NSPE Code with regard to projects for which they had gained specialized knowledge while in the employ of the firm. In Case No. 79-10, the Board determined that an engineer employed by a firm that was winding down its operations, who sought to offer his services to complete projects under his own responsibility and risk without the concurrence of the principal of his employing firm, was ethical. In reviewing each case, the Board noted the need to balance (1) the interests of the client in retaining the firm of its choice; (2) the interests of the individually employed engineers; and (3) the interests of the firm and its interest in maintaining business goodwill with its clients. No one can deny that a client has a right to retain the engineering firm of its choice. What must be addressed, however, is a method to effect that right in a manner that is both fair and equitable to all of the concerned parties.

Turning to the specific facts of this case and balancing the interests of all parties involved in this matter, the Board believes that Engineer A's actions and conduct were ethical. As to the first issue, the Board can find no general ethical proscription limiting Engineer A's decision to establish an engineering firm. As to the second issue, regarding Engineer A's solicitation of business, the interests of the client mandate BER concern. It is clear that the client, Clover City, is favorably disposed towards establishing a contractual relationship with Engineer A. Although Clover City was a major client of ABC, under the facts it appears that ABC's business with Clover City was related strictly to the presence of Engineer A in the firm. There does not appear to be any indication that Clover City's interest in ABC's services goes beyond the services provided by Engineer A. Moreover, unlike Case No. 77-11, it does not appear that Engineer A has obtained any particular specialized knowledge as an employee of ABC that would restrict his ability to establish his own firm and eventually compete with ABC. There was no formal written agreement between Engineer A and ABC that would address the issue of whether and under what terms Engineer A could compete with ABC after departing from ABC. In fact, Engineer A still declined an apparent offer of work by Clover City, decided not to compete directly with his former employer, ABC, and waited for a period of over a year before deciding to go into competition with his former employer, ABC.

We believe Engineer A's conduct is appropriate and within the bounds of what would be considered reasonable, particularly since Engineer A was an employee of ABC and not a partner or principal of the firm. While Clover City may have expressed preliminary interest in Engineer A's future services, there was no formal agreement between Engineer A and the city and no guarantee that with the passage of the year, Engineer A's solicitations for work would be positively received by Clover City. The fact that

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Engineer A declined to participate on an active project at the time that Clover City sought his assistance might have made Clover City far less likely to be interested in Engineer A's services.

This case does not appear to be dramatically different than Case No. 86-5 in that a client with a relationship with an engineering firm has sought out personnel within that firm to perform services for the benefit of the client. However there appears to be one difference. In Case No. 86-5, the three engineers disclosed the fact that the client was interested in their services to their employer before resigning, while in the present case, there is no disclosure between Engineer A and ABC. However, weighing all factors, the Board does not consider this to be particularly significant because (1) the engineers in Case No. 86-5 provided disclosure and did not seek consent or concurrence and (2) in the present case Engineer A's decision to depart from ABC and establish his own firm clearly appears to be motivated by factors independent from any relationship that Engineer A might be developing with Clover City.

CONCLUSION:

1. It was ethical for Engineer A to establish his own firm in Clover City.

2. It was ethical for Engineer A to begin soliciting work from ABC's clients, including Clover City after a year had passed.

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Each opinion is intended as guidance to individual practicing engineers, students and the public. In regard to the question of application of the NSPE Code of Ethics to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services -- which services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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