CONFLICT OF INTEREST – SOLICITING FORMER CLIENTS THROUGH AN EMPLOYEE

Case No. 99-1

Facts:

Engineer A is employed by Company X. Several of the partners from Company X leave Company X to create Company Y. Each of the departing partners had executed an individual non-solicitation provision in contracts they had executed with Company X at the time they began employment with Company X -- which is still in force. The provision is drafted to apply only to the partners but does not mention the activities of their future employees. Engineer A is contacted by one of the new Company Y partners, Engineer B, who originally hired Engineer A for Company X. Engineer A agrees to a request to join Company Y to serve as director of business development. One of the reasons Engineer B is interested in hiring Engineer A is that Engineer A has excellent business relationships with a number of Company X's public and private clients. In addition, Engineer B is aware that Engineer A never signed a non-solicitation provision. After becoming an employee of Company Y, Engineer A, who was not required to sign a non-solicitation agreement when employed by Company X, begins soliciting clients of Company X.

Questions:

1. Was it ethical for Engineer A to solicit clients of Company X?

2. Was it ethical for Engineer B to hire Engineer A to serve as director of business development for Company Y?

References:

Section 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.*
Section III.8.b.	-	*Code of Ethics:*	*Engineers shall not use association with a nonengineer, a corporation, or partnership as a "cloak" for unethical acts.*
NSPE PP 19	-	*Prof. Policy*	*"Employment Practices - Freedom of Employment." The National Society of Professional Engineers believes that an individual professional engineer has the right to seek and accept other employment, provided the seeking and acceptance of such other employment is consistent with the NSPE Code of Ethics as it pertains to relations with clients and employers. NSPE opposes any agreements between employers which limit the individual engineer's employment opportunities. Nothing in this policy opposes the use of noncompetitive agreements between partners, shareholders and/or other persons sharing an ownership interest in an engineering firm.*

Discussion:

The Board has previously addressed similar cases of this type involving conflicts of interest. In Case No. 86-5, a city requested proposals from various consulting

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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 that was ultimately submitted to the city. Soon thereafter, the city learned that Engineers X, Y, and Z were the engineers who actually developed the proposal for the firm, and a city official approached Engineers X, Y, and Z and asked if they would agree to a contract as consultants, independent of Engineer A's firm. Engineers X, Y, and Z disclosed the facts to Engineer A, resigned from the firm, and enter into negotiations with the city. The Board concluded that a strict interpretation of the NSPE 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 facts of this case, it is clear that while there is no reason to suspect that Engineer A is anything but a competent professional engineer who performs his services in a professional manner, the facts and circumstances in this case appear to indicate that Engineer B's primary motivation in contacting Engineer A to join the new Company Y is to solicit Company X's clients without Engineer B and the other engineers that were formerly employed by Company X violating the terms of the non-solicitation agreement. While at first glance the actions by Engineer B in seeking to "raid" Engineer A from Company X appear to be in conflict with the language and the spirit of the NSPE Code of Ethics, a review of the NSPE Code language appears to indicate that the issue is not entirely clear.

There does not appear to be anything under the facts to indicate that Engineer A gained particular or specialized knowledge in connection with a particular project in connection

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with his former employment or clients that would suggest an NSPE Code violation. The facts suggest only that Engineer A is especially talented and has had excellent client relations with Company X's clients. Having good interpersonal and public relations skills are personal and do not suggest particular or specialized knowledge under the NSPE Code.

Nor does it appear that changing employment constitutes a situation representing an adversarial interest. To reach such a conclusion would force the Board to reach the untenable conclusion that anytime an employee changes employment under circumstances that could be disadvantageous to an employer could result in a violation of the NSPE Code. While employees may have a certain basic duty of loyalty to current or former employers and clients, it certainly cannot extend to an obligation to refrain from accepting offers of employment.

It could be construed that Engineer A's actions were intended to "cloak" unethical actions by others. Engineer A's decision not to remain with Company X is presumably based upon a variety of factors. Had the facts indicated that Engineer A had been approached and had agreed in advance to join Company Y before the departure of Engineer B and the other partners, the Board may have reached a different result.

The Board believes NSPE Professional Policy 19 is instructive in amplifying the NSPE Code in this case. PP 19 is intended to recognize that engineers should have freedom of employment within the bounds of the NSPE Code. The policy language acknowledges that while non-compete agreements should be recognized and honored among partners and principals, the policy recognizes that individually employed engineers should be completely free to explore their employment opportunities in an unrestricted manner consistent with the NSPE Code. The Board believes that this is a reasonable approach. On this basis, the Board concludes that Engineer A's actions were ethical.

In view of the manner in which the non-solicitation provisions were drafted and applied, the Board concludes that Engineer B violated provisions of the NSPE Code by seeking the services of Engineer A. Presumably Engineer B and the other former partners will honor the terms of the non-solicitation agreement and not personally solicit former clients of Company X. At the same time, having an employee not subject to the non-solicitation agreement engage in solicitation activities appears to be inconsistent with the NSPE Code. Engineer B appears to have used the hiring of Engineer A as a cloak or subterfuge in order to avoid the effect of the non-solicitation agreement with Company X. Engineer A is acting as an agent of Company Y, all partners of which have a non-solicitation agreement, and should have informed Engineer A.

Conclusions:

1. It was ethical for Engineer A to solicit clients of Company X.

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2. It was not ethical for Engineer B to hire Engineer A to serve as director of business development for Company Y.

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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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