EMPLOYMENT – FAILURE TO DISCLOSE DETAILS OF OUTSIDE BUSINESS

Case No. 99-3

Facts:

Engineer A is employed by Company X and as part of her job, Engineer A organizes continuing education seminars (i.e., contacting speakers, making meeting arrangements, etc.) for Company X. Company Y, a company that competes for business with Company X, is aware of Engineer A's track record in organizing effective and well-received continuing education seminars and requests that Engineer A organize a continuing education seminar for Company Y's architects, engineers, and surveyors, whereby Company Y would pay Engineer A for such services. Engineer A agrees to provide the services to Company Y. Engineer A tells her supervisor about establishing the continuing education business but does not mention that the services will be provided to Company Y, a competitor of Company X. Her employer, Company X, does not object.

Question:

Was it ethical for Engineer A to agree to provide continuing education seminar services to Company Y?

References:

Section II.4.	-	*Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section III.1.c.	-	*Code of Ethics:*	*Engineers shall not accept outside employment to the detriment of their regular work or interest. Before accepting any outside engineering employment, they will notify their employers.*
Section III.3.a.	-	*Code of Ethics:*	*Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.*
Section III.6.b.	-	*Code of Ethics:*	*Engineers in salaried positions shall accept part-time engineering work only to the extent consistent with policies of the employer and in accordance with ethical considerations.*

Discussion:

The question of an employee accepting outside employment to the detriment of an employer has not directly confronted the Board of Ethical Review. The most recent case involving similar facts was BER Case No. 97-1. There, Engineer A was a licensed professional engineer and land surveyor in State A. Engineer A was associated with a firm, XYZ Engineering and Surveying (which offers professional engineering and surveying), as the licensed professional engineer in charge under the state's certificate of authorization requirement. The firm had not performed any work outside of State A. Engineer A's understanding of the law of State A was that a licensed professional

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engineer is to be in "responsible charge" of engineering and a person licensed as a professional land surveyor is to be in "responsible charge" of land surveying. These persons in responsible charge could be a principal of the firm or an employee of the firm under the state's laws. The agreement Engineer A has with XYZ Engineering and Surveying was that XYZ grants Engineer A 10% share of the stock in the firm as compensation for his engineering services and 5% of the gross billings for engineering work for which the seal of a licensed engineer in responsible charge of engineering was required. This agreement was contingent on the understanding that if any one of the three principals of XYZ Engineering and Surveying becomes licensed as a professional engineer in State A, the agreement would become void and the 10% stock would be returned to XYZ Engineering and Surveying. In addition to working with XYZ, Engineer A had a full-time engineering position for a state governmental agency. This work required no engineering license. Engineer A worked 35 hours per week on a flex-time basis and provided about 20 hours per week supervising engineering services at the firm, plus an additional 12 hours of work on the weekends. Engineer A did not normally go into the field for XYZ Engineering and Surveying but was available for consultation, 24 hours a day. In concluding that it was ethical for Engineer A to function in both capacities, the Board noted that both the state governmental agency and the engineering firm were aware of Engineer A's activities as a dual employee and did not object to these activities. However, the Board noted that should a conflict of interest arise (e.g., where Engineer A or the firm's activities conflict with the governmental employer's activities or interests) Engineer A will need to carefully address those activities consistent with NSPE Code Sections III.6.b., II.4.d., II.4.e., and other applicable provisions of the NSPE Code.

There is clearly merit in having engineers work to promote and expand engineering education opportunities for engineers and other design professionals. With the increasing interest in continuing professional competency, life-long learning, and other educational programs, there will undoubtedly be a great need for knowledgeable and experienced engineers and others to provide services for the benefit of the engineering profession. Certainly the efforts of engineers such as Engineer A should generally be encouraged in order to meet the needs of all elements of the engineering profession.

At the same time, the Board is somewhat concerned about aspects of and the manner in which Engineer A pursued her activities in this area. The NSPE Code makes clear that before accepting outside employment, an engineer has an obligation to notify the engineer's employer. This was an important aspect in the Board reaching its decision in Case No. 97-2. This obligation is intended, among other reasons, to permit the employer to evaluate whether the added burden of outside employment will have adverse consequences on the engineer's ability to perform her employment on the employer's behalf, but it is also intended to allow the employer the opportunity to assess

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whether the employee's outside employment will be in conflict or adverse to the interests of the employer.

While it is true that under the facts, Engineer A did notify her employer that fact that she was establishing a continuing education business, Engineer A failed to fully disclose that she would be working for the benefit of a competitor of her employer. Her failure to provide this critical information did not permit her employer with the opportunity to make an informed decision concerning her outside employment. In passing, the Board would note that Engineer A's firm, Company X, will most probably learn that Engineer A is providing services to Company Y and in view of her failure to inform Company X, of this fact when informing the company of her decision to establish a continuing education business, the consequences to Engineer A may be severe.

Over time, the NSPE Code and the Board of Ethical Review have moderated to the point of recognizing that certain types of conflicts of interest are difficult, if not impossible, to avoid and that the more realistic approach for individual engineers faced with this type of ethical conflict is to fully disclose the nature and extent of the conflict to the appropriate parties involved or impacted by the conflict. This is based upon the view that the parties that are most affected by the conflict and who have the most at stake (e.g., clients, employers, other engineering firms, etc.) are in the best position to determine whether their interests will be compromised by the conflict. While sometimes perceived conflicts of interest are resolved by the parties as a result of full disclosure, in other instances, the conflicts are deeper and require the engineer to disassociate from a specific project.

The Board was not certain of all of the facts and details involved in Engineer A's decision not to inform her employer of her relationship with Company Y. It may have been as simple as the fact that Engineer A believed that Company X would have objected to this relationship and Engineer A, therefore, decided not to fully disclose this fact to Company X since she wanted to pursue the opportunity. Or, Engineer A might have had plans to depart from Company X and establish her own business and decided to let her ties to Company X gradually diminish. Whatever her motivation, the Board believes that her actions were not consistent with the NSPE Code.

Conclusion:
It was not ethical for Engineer A to agree to provide continuing education seminar services to the competing Company Y without the knowledge and consent of her employer.

BOARD OF ETHICAL REVIEW
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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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