Report on a Case by the Board of Ethical Review

Case No. 72-5

Restrictive Employment Agreement

Facts:
A consulting engineering firm requires all of its engineering employees to sign the following agreement as a condition of employment:

"The undersigned hereby agrees on the date and place mentioned above for the sum of One ($1.00) Dollar and other considerations that upon leaving the employ of (name of firm) that he will not become engaged in or become interested in, directly, or indirectly, as an Owner, Partner, Proprietor, or Principal, in any business, trade, or occupation providing Architectural, Engineering, or Planning services within a geographical area of a One Hundred Mile (100) radius of any office established by the (name of firm) at the time of his termination within a period of Two Years (2)."

_____ signed (name of employee)

_____signed (witness)

Question:
Is it ethical for the engineer principal of the consulting firm to require engineering employees to sign the above-quoted agreement as a condition of employment?

References:
Code of Ethics Section 7-"The Engineer will not disclose confidential information concerning the business affairs or technical processes of any present or former client or employer without his consent."

Section 7(a)-"While in the employ of others, he will not 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 he has gained particular and specialized knowledge without the consent of all interested parties."

Section 12-"The Engineer will not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of another engineer, nor will he indiscriminately criticize another engineer's work in public. If he believes that another engineer is guilty of unethical or illegal practice, he shall present such information to the proper authority for action."

Section 15-"The Engineer will cooperate in extending the effectiveness of the profession by interchanging information and experience with other engineers and students, and will

endeavor to provide opportunity for the professional development and advancement of engineers under his supervision."

Discussion:
Agreements of the type quoted above are not uncommon in industry and are legally enforceable if reasonably restricted as to time and geographical area. The agreement in this case appears to meet these conditions for legal enforcement.

The effect of this type of agreement is to prevent future competition from employees who may leave the firm and who may seek to attract present or future clients of the firm in the areas served. It should be made clear at the outset that if a former employee improperly utilizes for his own benefits the trade secrets or business affairs of his former employer he would be in clear violation of Section 7 of the code. (See Case 61-8.)

It is true, of course, that merely concluding that the former employee was unethical in seeking to improperly use the confidential information of the former employer for his own advantage does not resolve the loss of the former employing firm. If the former employee does, for example, take over a project which was developed to a particular point at the expense of the former employing firm, that firm has suffered a direct and real loss. Consequently, there is a basis for a legally enforceable agreement to prevent that type of possible loss.

We are deeply concerned, however, about the ethics of private practice engineers applying a principle of restrictive employment conditions, however much it may be warranted to meet special problems, if the restriction goes too far. We are troubled by the concept inherent in this particular restrictive employment agreement which goes so far as to totally prevent a former employee from establishing a competing firm, even in the absence of improper conduct. Literally read, the clause prevents a former employee from offering his services on the most ethical basis to anyone in the covered area, leaving the impression that the firm of the former employee seeks to hold its clients by legal machinations rather than on the basis of demonstrated performance.

We find support for this concern in Section 12 of the code, wherein it speaks of one engineer not attempting to injure the "prospects" of another engineer. True, the reference to "prospects" is in the context of injury by false or malicious means, but we believe the entire section can fairly be read to include more than those bases for avoidance of injury to another engineer. While there is nothing "false" about the required employment agreement, we construe it to be "malicious" in the sense that it attempts to hurt the "prospects" of an engineer employee by preventing him from engaging in competition on the basis of quality with his former employer. We have held many times that an engineer does not have an exclusive right to serve a client and that correspondingly a client has a right to change from one engineer to another. (See Cases 62-10, 62-18 and 64-9.)

Section 15 of the code requires that engineers endeavor to provide opportunity for the professional development and advancement of engineers under their supervision. Again,

we recognize that the context of Section 15 relates primarily to an employer-employee relationship, but the history of the engineering profession is replete with examples of engineer principals of firms aiding their engineer employees to advance in their profession to the point in many cases where the engineer-employee is able to start his own firm. That, we suggest, is the desirable professional attitude rather than that of using a legalistic device to prevent an employee from striking out on his own. If the effect of the agreement is to prevent legitimate competition, the geographical area and time span is irrelevant to the ethical considerations. Treating the case from the standpoint of professional attitude, as we do, we would conclude that an overly restrictive employment agreement of this type is violative of a professional attitude and is outside the bounds of propriety.

This is not to say that a properly drawn restrictive employment agreement may not be utilized to protect the legitimate interests of the firm. It is beyond our purview to draft the proper legal language, but we can and do indicate that such a clause should be limited to such specifics as insuring that former employees do not engage in practice on their own behalf in connection with projects in which the employee was involved as an employee of the firm. Such a more narrowly drawn restrictive clause can be enforced by legal process and it should not be an undue burden for the firm to prove by its records that the former employee had in fact been associated with the development of one or more particular projects during his employment with the firm.

Conclusion*:
It is not ethical for the engineer-principal of the consulting firm to require engineering employees to sign the above-quoted agreement as a condition of employment.

***Note**-This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

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