

Nick Sandburg was sure he had the job; after all, Erin McCarthy was the president of the company, and she wanted to hire him. Yet eight months later, the deal still wasn't made. And now Erin is upset that Nick has gone on to work for the competition. Did she really expect him to wait?



Free agent or double agent

a case study
by regina maruca

Erin McCarthy, president of PhotoTree Corp., pressed the cell phone closer to her ear. “What?” she asked again. “Dan, I can’t hear you.”

“I said it’s true,” Dan Suzuki’s voice was still faint, but there was no mistaking what her senior designer was saying. “Nick Sandburg sold the ideas he developed for us — the marketing plan, the Web-site design, all of it — to Johnson Pictures. I guess he altered it slightly for them, but the bulk of it is the stuff we paid him for.”

McCarthy shook her head. “He sold our plan to one of our biggest competitors? But we hadn’t told him we didn’t want it yet. I was going to meet with our advisory board next week and go over it then. Dan? Dan?”

He was gone. McCarthy pressed End and slipped the phone back into her briefcase.

She was fuming. She had met Nick Sandburg at a trade show eight months ago. She had been looking for an independent contractor who could work closely with PhotoTree, her full-service commercial photography business, to bolster its online presence, to help it compete in what was becoming a tight regional market. McCarthy had founded PhotoTree in 1989; and for a long time, the company held a large share of the

greater Springfield, Massachusetts market. But recently, Johnson Pictures, the big name in the business in Hartford, and a few other competitors from the Boston area had begun to expand their reach. McCarthy wasn’t particularly worried, but she did see

ILLUSTRATIONS BY TOM GIANNI

This case is fictitious, as are all the characters portrayed in it. It is based, however, on actual dilemmas and decisions faced by independent practitioners. If you have an idea you'd like us to consider for a future Case Study, please write to: editor@1099.com.

the need to spend some time and money on marketing, an area that had never gotten a lot of attention at the company — and to get her online business as client-friendly as possible.

Sandburg had seemed to be the answer. For years, he had managed a well-known brand at one of the big consumer-goods companies. And he was a techie at heart: The portfolio of Web sites he had designed and helped launch since he started his own business was impressive.

So, about a month after the trade show, McCarthy had hired him to do a proposal for PhotoTree, agreeing to pay him a per-day rate for 20 days over a period of a month and a half. Sandburg spent a lot of that time getting to know the industry and the business, talking with McCarthy and other PhotoTree employees about the company and where it wanted to go. At the end of the 20 days, he presented McCarthy with a detailed proposal, including a marketing plan and the skeleton of a new Web site.

When Sandburg turned in the proposal, McCarthy had told him she was excited about the prospect of going forward with his proposal and with him. She also had told Sandburg that she would get back to him with an answer after the other senior managers and the advisory board — seven people in total — had a chance to review it. The idea was that if they agreed the plan was right for the company, McCarthy would hire Sandburg to help PhotoTree put it in place. For the better

part of the next year, he would consult almost full-time.

Then PhotoTree hit its busy season. The proposal sat on McCarthy's desk for almost seven weeks. Finally, she had her administrative assistant make copies and get it to everyone who needed to read it. Two weeks later, McCarthy tried to schedule a meeting, but another month went by before a date was set. She knew it was important; the others knew it was important — it just was hard to find a time that was good for everyone, particularly the advisors, who weren't all based locally.

When the group finally met, McCarthy announced that she liked the proposal, but her colleagues raised several concerns.

"If you hire Sandburg, what happens when he leaves?" asked Jack Loomis, the VP of operations. "We should think about hiring someone to work alongside him, someone who will stay on. Maybe we could cut down the time he'll work with us and make his job more training oriented."

"Jack's right," agreed Alexa Keene, a good friend of McCarthy's, who had been on the advisory board since the company's founding. "And you also have to consider what kind of a person would take a position as head of a fledgling marketing department that already has a plan in place. I wouldn't. I would want some

autonomy; I wouldn't want to come in and be charged with implementing someone else's ideas.

"What's more," Keene went on, "maybe we should consider at least one other proposal." Other members of the group agreed.

McCarthy said she would think about the group's objections and they would meet again in a week to discuss the matter further. But it was busy, and what with vacations and scheduling conflicts, it was another eight weeks before they were able to schedule a new meeting. Sandburg had called McCarthy a few times in the interim and had sent her several emails to check on the status of the proposal. McCarthy apologized for the delay and told him the proposal was still under consideration.

The meeting was scheduled for Tuesday of the coming week. McCarthy would have a decision for Sandburg by Wednesday morning. But now this. McCarthy couldn't stand it. She took out her phone and dialed Sandburg's number. When he answered on the second ring, she ranted at him for five minutes: He was unethical. He better not have given Johnson Pictures any proprietary information about PhotoTree or she'd have his house. She thought they had an understanding. How could he betray her like this?



When she finally stopped talking, there was a long silence. Then Sandburg spoke.

“Erin,” he said, “you brushed me off here. This is my livelihood; I can’t afford to wait indefinitely for a job. Do you realize it’s been almost six months since I left the proposal with you? At this stage, even if you accepted it, I wouldn’t have been able to take on the implementation. I felt that you were stalling and that ultimately you were going to go with another proposal or something of your own. Truth be told, I was pretty sure you were implementing my work without hiring me, and I was angry about that. Our agreement was that if you took my proposal, I would be on board to implement it.

“In hindsight, I know that you and I should have agreed, in writing, to a go-or-no-go date. And we should have agreed on terms if you decided to accept only part of the proposal or not to go forward with it at all. But we didn’t do that, and six months have gone by. Do you have any idea what that is in Internet time?”

He took a deep breath. “Yes, I’ve signed on to work with Johnson Pictures. Yes, I used my knowledge of the industry, which I gained in large part during my time with PhotoTree, to get the job. But I did not — would not ever — use proprietary information inappropriately. And my proposal for Johnson is tailored for Johnson. And I’m not going to tell you what it is; it’s none of your business.”

Sandburg paused again and then went on: “Look, I think we can both agree that mistakes were made, but I’ve done nothing wrong. I’m hereby formally withdrawing my proposal for PhotoTree from your consideration. I’ll send you a letter today to confirm that. I’m sorry it turned out this way. I wish you well.” And he hung up.

McCarthy was stunned. She also was confused. Was there any merit to what Sandburg had said? Was there justification for his actions?

Who Screwed Up Here?

It’s a given that McCarthy and Sandburg should have agreed in writing on a go-or-no-go date. But there’s another issue here: Did Sandburg cross an ethical line by using what he’d learned at PhotoTree to benefit another company? Assuming Sandburg didn’t pass along any proprietary information about PhotoTree, was he justified in pursuing work with a competitor?

Commentator 1

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What’s wonderful about a case like this is that both parties — McCarthy and Sandburg — can get righteously indignant over how they’ve been wronged, make all kinds of assumptions about the party who wronged them, and then wave it all up to unethical behavior. “He did what? What an unethical lout.” “She didn’t do what? What a major lapse in ethics.”

And granted, if you look at both sides of the story and the suppositions that McCarthy and Sandburg made about each other, and it all turns out to be true, then, indeed, you’ve got yourself one hell of an ethical imbroglio. If Sandburg used proprietary information or even insider knowledge and sold it to McCarthy’s competitor, he crossed a line. If McCarthy used her advisory board to stall and actually was thinking about implementing Sandburg’s plan without him, she crossed that line too.

Clearly, each thought the other had done wrong. But we really know just two facts: McCarthy took a long time (and apparently didn’t keep Sandburg informed

about what was going on), and Sandburg took on a new client that happened to be a competitor. On the basis of those facts, Sandburg’s actions seem ethical. He made no agreement that he would not approach

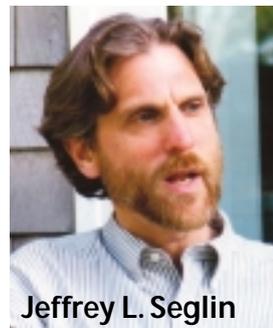
other prospects in the same industry while McCarthy made up her mind. It was perfectly reasonable for him to go after other business as long as — and this is a huge as long as — he didn’t disclose any proprietary information about PhotoTree.

Yes, Sandburg learned about the industry in general

on the PhotoTree job, and he used that knowledge to land the Johnson Pictures job. But that is not an ethical breach. Ideally, we all apply what we learn as we go from one project to the next. It would be nuts to assume that independent contractors chuck everything they’ve learned in the waste can each time they take on a new client in a similar industry. It’s the beauty, or maybe the curse, of being knowledge workers: In the end, all we have to sell is what we accumulate in our heads. As long as we don’t steal, lie, or misrepresent, acquired knowledge is fair game.

What independent professionals are wise to do is get the rules of the game straight up front. If a client wants you to commit to not working for its competitors for a stated period, that needs saying. And any smart independent contractor would be wise to have that factor play into how he sets his price. Ultimately, if an independent contractor does end up working for a competitor, then he is ethically bound not to use anything that’s proprietary to any specific company he worked for before.

The question, then, is how do you know that a former consultant won’t take your proprietary ideas elsewhere. Certainly no independent professional wants to find



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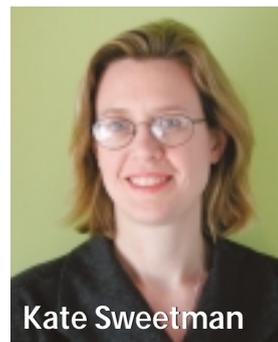
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him- or herself caught up in a nasty protracted lawsuit. But no matter how many written agreements you may have, it all comes down to trust. And by the final blowup, trust was sorely lacking between McCarthy and Sandburg.

Did Sandburg have a responsibility to tell McCarthy he was doing business with a competitor? Perhaps. But she would have found out easily if she had kept him apprised on the proposal. In fact, if they had been open with each other during the stall, they might have been able to reach some kind of agreement before Sandburg took himself to Johnson Pictures. If they couldn't work something out, then they could have agreed to part company, perhaps displeased, but without all the anger and suspicion.

Commentator 2

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Kate Sweetman

Sandburg skipped some basic independent-contractor protocol when he first agreed to work with McCarthy, and that's what got him into trouble. Essentially, he made two big mistakes.

First, he jumped too fast into the project without asking a few basic — yet critical — questions. If you're an independent contractor, and you're trying to decide whether or not to take on a certain project, you need to know two things: Is there money to pay you? And is the organization genuinely committed to having you do what you're going to be doing? If the answer to either question is no, then you should turn down the project.

Sandburg should have asked McCarthy: "What needs to happen for my proposal to

be approved?" Then McCarthy would have been forced to say something like: "I have to take it to my board, and here's the composition of the board, and, by the way, we don't have a head of marketing yet." In that dialogue, it would have become clear to both of them that she couldn't just hire him and that the process was going to take some time. Then, armed with the reality of the situation, they could have strategized together about how best to sell Sandburg's work to the board and to the company as a whole.

Because therein lies Sandburg's second big mistake: He let someone else represent him and his work to the real decision makers.

IPs should never let a third party — even someone with an impressive title — explain to decision makers what they do and why. That task is simply too important to hand off. What if the decision makers have questions? What if they want to know certain things about the IP's business or field? A third party can't be expected to answer those questions correctly. She simply doesn't have the expertise.

In this case, a better approach would have been for McCarthy and Sandburg to team up and work the politics together. Instead, McCarthy got caught up in process, and Sandburg was left out in the cold. It's no surprise that he went looking for other work. As long as he didn't use PhotoTree's proprietary information, he was well within rights. And it's no surprise that McCarthy was frustrated when she found out that Sandburg had moved on.

Ultimately, what happened here was a breakdown in communication and a relationship left untended, and for that they're both at fault.

You know, Sandburg and McCarthy probably have more in common than they

realize. They're both building businesses, and they're both vulnerable to the pressures of the marketplace. In Sandburg's case, that context caused him to take on a new client without properly disengaging from another one that had simply gone dormant. In McCarthy's case, it caused her to put a vendor on the back burner after all but promising him more work. Here are two genuinely excited people who believed they were working toward the same goal: Web-site glory. What they failed to consider in their enthusiasm were all the things that needed to take place for that goal to become a reality.

Commentator 3

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Marion McGovern

The issue that was never resolved in this situation was not one of a go-or-no-go decision but one of intellectual property: Who "owned" the Web-site concept Sandburg developed for PhotoTree?

In most jurisdictions, independent contractors own the product of their work unless they agree otherwise in writing. McCarthy may be legitimately confused, however, because the work product of an employee is typically the property of the employer on the basis of the "work for hire" body of law. Sandburg was not an employee, so without further clarification of property rights and interest, the idea belongs solely to him. As such, he passed no ethical line by subsequently selling his "property" to PhotoTree's competitor . . . as long as he did not pass along or use

proprietary information about the company.

The error here was the failure to address this issue initially, in the engagement letter. To be protected from the action Sandburg rightfully and understandably took, McCarthy would have had to require the independent consultant to cede ownership rights to PhotoTree. This can be done simply by describing the project as work for hire. Alternatively, the engagement letter could have been drafted to state that all ownership rights were assigned specifically to Phototree.

Consultants also can offer clients a license, either perpetual or discrete, so that a client can share in the ownership and revenue. Alternatively, if they don't want to cede the entire result, consultants can specify what portion of the property they expect to retain. Finally, of course, they can walk away from the job.

Many clients are even stricter in their interpretation of intellectual-property law. To the extent that Erin McCarthy was so concerned by this event, she might want to consider a more stringent contractual relationship with creative contractors. Some companies, especially in the entertainment industry, insert *droit moral clauses*, which ask a consultant to cede not only ownership rights but moral rights to an idea as well. If, for example, a consultant worked at Disney, and thought it would be great to see Mickey Mouse with a mustache and that version of Mickey Mouse becomes a licensing bonanza, by having ceded his moral rights to the idea (something Disney would no doubt require), the consultant could not reap any of the gains from the increased revenue derived from that idea. Keep in mind, however, that many consultants do not want to give up their intellectual property even if it means

1099 weighs in:

It pays to know your rights

- Ideas are products too. *Protect them.*
- Be sure your client has the authority to okay your work. *If she doesn't, you need to know who does.*
- Learn the jargon. *Know, for example, that work for hire is shorthand for "You've just sold this idea down the pike."*
- Your prices should reflect the ownership agreement: Clients should pay more for your work *and* your rights. *But you knew this already, right?*
- Until you're clear on the legalities of written agreements, run your contracts by your lawyer. *If you don't understand the agreement, don't sign it.*
- Speaking of lawyers, seriously consider if you need liability insurance. *It could save your butt should you find yourself on the wrong end of a lawsuit.*

losing a client. Nick Sandburg may be one of those who would not have agreed to such an arrangement and declined the project. Had he done so, PhotoTree wouldn't have received the proposal, which ultimately afforded some provocative insights. It also wouldn't be in its current awkward position.

The lesson in this story: Before you sign on as or hire a consultant, clarify in writing who owns the end result. Consultants need to protect their intellectual property and, if need be, educate clients to the fact that there are ownership rights to be negotiated. As Sandburg informed McCarthy, there is a market for ideas and knowledge, and both contractor and client must understand and agree on who has the right to sell in that market. In my view, it appears, Nick Sandburg had the right. **1099**

If you'd like to weigh in with your thoughts on this case, please join us at 1099.com/case or send your comments to: letters@1099.com.