



Disclosure of Information That Would Adversely Affect a Client; Making False Statement of Material Fact

Summary

The National Ethics Council (“Council” or “NEC”) ruled that an AIA Member violated Rule 3.401 of the Institute’s 1997 Code of Ethics and Professional Conduct (“Code”) by intentionally disclosing to a state agency information related to a former client’s project that would adversely affect the client. The Council found that the disclosure did not violate Rule 4.103. The NEC imposed the penalty of a two-year suspension of membership, which was reduced to admonition upon the Respondent’s appeal to the Institute’s Executive Committee.

All initials, names, dates, places, and gender references in this decision have been changed.

References

1997 Code of Ethics and Professional Conduct, Canon III, Obligations to the Client

Rule 3.401 Members shall not knowingly disclose information that would adversely affect their client or that they have been asked to maintain in confidence, except as otherwise allowed or required by this Code or applicable law.

Commentary: To encourage the full and open exchange of information necessary for a successful professional relationship, Members must recognize and respect the sensitive nature of confidential client communications. Because the law does not recognize an architect-client

privilege, however, the rule permits a Member to reveal a confidence when a failure to do so would be unlawful or contrary to another ethical duty imposed by this Code.

1997 Code of Ethics and Professional Conduct, Canon IV, Obligations to the Profession

Rule 4.103 Members speaking in their professional capacity shall not knowingly make false statements of material fact.

Commentary: This rule applies to statements in all professional contexts, including applications for licensure and AIA membership.

Findings of Fact

The Parties

The Complainant, ABC Company, operates self-storage facilities and is owned by its president. ABC Company purchased an industrial building in the City to redevelop as a multiuse facility including climate-controlled self-storage and office space (“Project”). Now completed, the Project is operated under the trade name “ABC Self-Storage.”

The Respondent is an architect who has practiced in the City for more than 20 years. He is a principal in the architectural firm Design Associates. ABC Company retained Design Associates to provide preliminary design services for the Project. The Respondent served on the Project in the role of design architect. He continues, today,



in his role at Design Associates as an employee and principal.

The Project

The Project site is located next to a highway that connects the City's downtown and airport. The site's visibility to a large volume of traffic was "one of the leading factors" in ABC Company's decision to acquire the site for redevelopment.

In May 1998, ABC Company retained the Respondent and Design Associates to "provide alternative building/site plans to study the arrangement of various components—existing and proposed" on the Project site. The work was to include the study of "ways that the proposed and existing buildings can be visually 'linked' and communicate to the traffic on the highway, north and south bound." Although the Design Associates proposal letter was not signed by ABC Company, the parties agree that it formed their contract. The parties also agree that their contract is silent on the matter of confidentiality requirements.

In 1998 and early 1999, the Respondent prepared various preliminary design drawings, including alternative pylon-type and wall signs, for consideration by ABC Company. None of the designs were utilized by the company for any Project signage that was ultimately erected, and the Respondent's services ended in May 1999.

The Signs

In December 2000, ABC Company obtained a building permit from the City for four double-sided monopole signs and installed three of them by early 2001. The signs quickly became the focus of significant public reaction. The local Historical Association openly voiced its disapproval of the signs.

In October 2001, a State Agency began an investigation to determine whether the signs were "off-premise" signs subject to state regulation or

were "on-premise" signs and therefore exempt from State rules. In February 2002, the Historical Association sent its members an "Action Notice" about the signs that urged members to:

write to the State Agency and ask that the illegal signs be removed and that if one on-premise sign is to remain, it must conform to the State's on-premise regulations.

The Respondent's Letter to the State Agency

The Respondent was a long-standing member of the Historical Association and received the Action Notice. In March 2002 in response to the Action Notice, he sent a letter to the State Agency, with copies to the City's Mayor and a City Councilman, that stated:

As a principal in Design Associates, I provided design services to the owners of the ABC Self-Storage facility We provided architectural design services, primarily site planning and preliminary designs, for the conversion of the buildings and vacant property into a multi-phase mixed use complex of offices, light manufacturing and self storage. . . . As a part of these services we investigated several schemes that employed integrated building elements, along the highway frontage. These elements were three dimensional and were detailed to be deferential to the historic existing structure. The final site plan, included a pylon, conforming to the City's sign ordinance requirements. During our presentation to the owner, one of the partners suggested that the use of multiple billboards along the frontage would maximize the income from signage from advertisers of all kinds. When I pointed out that the City did not allow "off-premises" advertising, his response was "based on what we can charge for the billboards we'll just throw in a free storage space or even an



office if there are any.” We recommended against this approach and although we continued to provide some limited consulting services for some months thereafter, we were uninvolved in the owner’s final decision to erect the current billboards.

I am deeply disappointed that the ABC Self-Storage owners have pursued this course. Their extremely shortsighted vision of the potential for this property is regrettable. Their own reasoning for acquiring and developing the property has been severely compromised and a critical component of the City’s extension of the nearby historic district improvements from the CBD to City Park will be permanently harmed if current billboards are allowed to remain.

Please feel free to call, should you have any questions or wish to discuss this further.

This letter is the sole basis for the ethics complaint. The letter is on Design Associates letterhead and provided the State Agency with information offered as a direct quote of ABC Company’s personnel. In addition, the Respondent’s letter claimed the Project’s signs to be “off-premise” and “billboards.”

ABC Company’s personnel involved deny having made any such statements. ABC Company’s president also testified that the signs have never been used to advertise off-premises businesses.

The City’s Sign Ordinances

The Respondent was not aware that the installed signs had been properly permitted through the City and specifically approved at the time of his letter to the State Agency. At that time, neither he nor his firm was working on the Project, and ABC Company was no longer a client.

The City, at the time of the Project’s design and construction, had detailed sign ordinances clearly stating the material difference between “on-premise” signs as opposed to “off-premise” signs. For a sign to be considered “on-premise” it must, among other requirements, consist of advertising for a party owning or leasing significant space on the property where the sign is located. “Off-premise” signs are commonly referred to as “billboards.”

The Respondent testified that he did not discuss his familiarity with the City’s sign-related ordinances with ABC Company prior to being retained for the Project, but he knew that exterior signage was a key component of the design duties. Furthermore, the Respondent acknowledged both his experience with pylon signs for retail (e.g., shopping mall) projects and a full understanding of the distinction between “off-premise” and “on-premise” signs, and that the distinction was indeed a material distinction.

Other Proceedings Involving the Parties

Although the City had issued the building permit for the Project’s signs, in 2002 the City denied permits to display advertising for ABC Self-Storage tenants. In response, ABC Company sued the City, and final judgment in the court case was entered several years later.

During discovery associated with that litigation, ABC Company learned about the Respondent’s March 2002 letter to the State Agency. Upon seeing the Respondent’s letter, ABC Company filed an ethics complaint with the Institute. At approximately the same time, ABC Company filed a complaint with the State Architects Licensing Board (“Licensing Board”), based on information indicating that the Respondent had provided architectural services for the Project without being licensed to practice architecture in the State. The Respondent testified in the AIA ethics hearing that he was first registered in the State in 2004. The Licensing Board found no violation, however, and dismissed the licensing complaint.



The Parties' Contentions

ABC Company contends that the State Agency was attempting to compel ABC Company to remove the signs. The company argues that the Respondent used his stature as an architect and his position in the community to cause ABC Company potential harm. While the company was unable to provide any evidence of specific damages incurred that was directly caused by the Respondent's letter to the State Agency, the company indicated it would have incurred costs and loss of income had the signs been required to be removed by the State Agency.

The Respondent acknowledged that his intent in writing the letter to the State Agency was to help have the signs removed. The Respondent claims not to have done so would have caused him to fail his "duty to promote the dignity and integrity of the profession" of architecture. Yet, except in the most general sense of an architect's duties being largely aesthetic, he was unable to demonstrate how his letter to the State Agency promoted the dignity and integrity of the profession.

Request for Dismissal

The Respondent requested dismissal of the Complaint based upon an alleged breach of confidentiality by the Complainant. The Respondent argued that ABC Company's president "discussed in public the complaint filed against the Respondent with the AIA." The Respondent asserted that ABC Company's president improperly testified about the ethics complaint in her deposition in the litigation between ABC Company and the City.

In response to questions asked by the City's attorney, ABC Company's president testified:

- Q. Did you personally have any participation in the complaint that was filed against [the Respondent] by ABC Self-Storage?

A. Yes.

Q. What participation did you have?

A. When I read the letter that he had written, I believe we filed a complaint with the National Architect's Association and the State Architect's Association.

When questioned at the ethics hearing, ABC Company's president stated that she meant the "National Architect's Association" to mean the AIA, and the "State Architect's Association" to mean the Licensing Board. It is not clear whether the City's attorney was inquiring about the Licensing Board complaint and thus had no knowledge of the AIA ethics complaint prior to the deposition.

Section 3.5 of the Rules of Procedure of the National Ethics Council provides:

In the interests of fairness and justice, Complainant shall avoid public disclosure and discussion of the Complaint, the parties involved, and the issues under consideration. Breach of this requirement may result in dismissal of the Complaint under section 5.5.

Section 5.5 gives the Hearing Officer authority to dismiss a complaint if ABC Company breached the confidentiality requirement of section 3.5.

The Hearing Officer concluded that the Respondent was unable to provide evidence (other than the above deposition testimony) demonstrating that ABC Company or its personnel were the source of the fact that an AIA ethics complaint had been filed. If the deposition question by the City's attorney was referring to the AIA complaint, no evidence was presented at the hearing as to how the City had learned about the complaint. If, on the other hand, the question was referring to the Licensing Board complaint, the response quoted above is the only reference



ABC Company's president made to the AIA complaint.

The Hearing Officer concluded that the Respondent did not show that ABC Company breached the confidentiality requirement. Even if, as argued by the Respondent, depositions in the State are formally public records, there is no indication that the deposition transcript of ABC Company's president was distributed or that any other consequence resulted from her single reference to the "National Architect's Association" complaint in the deposition. Her response to the question by the City's attorney had no effect whatsoever on any aspect of the merits of this case and has not resulted in any prejudice to the Respondent in any other respect.

The Hearing Officer concluded that the complaint should not be dismissed. The National Ethics Council concurs with the Hearing Officer's conclusion.

Conclusion

Rule 3.401

Rule 3.401 provides:

Members shall not knowingly disclose information that would adversely affect their client or that they have been asked to maintain in confidence, except as otherwise allowed or required by this Code or applicable law.

The Commentary to this rule states: "To encourage the full and open exchange of information necessary for a successful professional relationship, Members must recognize and respect the sensitive nature of confidential client communications. Because the law does not recognize an architect-client privilege, however, the rule permits a Member to reveal a confidence when a failure to do so would be unlawful or contrary to another ethical duty imposed by this Code."

ABC Company alleges that the Respondent violated Rule 3.401 by knowingly disclosing information that would have had an adverse effect upon the company's business. This information is contained in the Respondent's letter to the State Agency, which forms the basis for this alleged violation, and includes the description of the meeting and conversation held with the company's personnel and the description of the Project's signs as "billboards."

The Respondent has acknowledged that the purpose of his letter was to support the removal of the signs from ABC Company's Project. The disclosure of information was therefore not only knowing but intentional. Removal of the signs would adversely affect ABC Company because it would deny the company the ability to offer that advertising space to prospective ABC Self-Storage tenants. The Respondent was unable to demonstrate that his failure to disclose the information would have caused him to violate a provision of the Code or an applicable law.

The National Ethics Council concludes, although not unanimously, that the Respondent violated Rule 3.401 by sending the letter to the State Agency because he knowingly and intentionally disclosed information that would adversely affect his client.

Rule 4.103

Rule 4.103 provides:

Members speaking in their professional capacity shall not knowingly make false statements of material fact.

The Commentary to this rule states: "This rule applies to statements in all professional contexts, including applications for licensure and AIA membership."

The Complaint claims that the Respondent made a false statement of material fact in his letter to the State Agency by referring to the monopoly signs installed at the Project as "billboards,"



even though the signs were properly permitted on-premise signs.

A statement describing a sign as “off-premise” or a “billboard,” however, is a statement of opinion rather than a statement of fact. Consequently, the Respondent’s description of the signs as “billboards” in his letter to the State Agency cannot be considered a false statement of material fact.

The National Ethics Council concludes that the Complainant did not prove that the Respondent violated Rule 4.103.

Penalty

Having found a violation of Rule 3.401 of the Code of Ethics and Professional Conduct by the Respondent, the National Ethics Council must determine an appropriate penalty. The following factors should be considered in the assessment of this penalty:

- The information submitted to the State Agency was voluntarily provided by the Respondent in response to an encouragement provided by the Historical Association of which he continues to be a member. While his intention may have been to express a personal opinion to a public agency, he did so in a professional capacity.
- The information provided to the State Agency was “insider” information that he had only because he served as ABC Company’s architect; whether or not the information was accurate is irrelevant to the Rule 3.401 violation. The only possible effects on the company that providing such “insider” information to a third party would have were adverse.
- The Respondent states in the record that he “certainly had no intent to adversely affect the Complainant.” This statement is disingenuous. The Respondent acknowledged

that his intent in writing the letter was to see the signs removed.

- The Respondent’s acknowledgement that he gave no thought to the potentially damaging effect his letter to the State Agency might have had upon his client is also troublesome.

After careful consideration of the case and violation, the National Ethics Council imposes a suspension of membership for a period of two years.

Dissenting Opinion

The Dissent disagrees with the Majority finding that the Complainant proved that the Respondent violated Rule 3.401.

First, ABC Company asserts that the statement about signage the Respondent later cited was never made. Therefore, if no such statement was made by the client to the architect, then no disclosure of it could have occurred, so the client cannot, by definition, prove that it did.

Second, at no time in the written record nor in front of the NEC did any party to the Complaint claim that ABC Company asked the Respondent to maintain any information in confidence. Therefore, even if ABC Company did make the cited statement about signage (while now claiming it did not) there is no evidence that such a conversation would have been considered confidential by the parties involved.

Third, ABC Company claimed to incur no damages and failed (according to the Majority) to prove any adverse effects caused by the Respondent’s actions. Additionally, the greatest adverse effect that the Respondent’s actions “would” have caused would have been a change of content from off-premise advertising to on-premise content. This was, in fact, what ABC Company hired the Respondent to design and does not represent a prohibitive cost differential. Regardless, even if it were more costly, it would



represent an improvement to the property rather than an adverse effect. Furthermore, in his oral presentation to the NEC, the Respondent denied any intention to harm ABC Company, and the company's attorney confirmed that there was no precedent of nor evidence for the Respondent's intention to harm ABC Company. To summarize: there were no adverse effects, there was no intention to cause adverse effects, and the potential "adverse effects" were, in fact, improvements to the property.

Fourth, the Dissent finds that the Respondent believes that he did share information that was part of a conversation that did indeed take place. He did so, however, because he believed that the property should be improved in accordance with the City's conservation agenda and that otherwise he would be in conflict with other duties imposed by the Code.

As he testified at the hearing and in front of the NEC, it was his belief that promoting sensitivity to the larger contextual issues of the City was his duty under Ethical Standard 4.2, which speaks to the dignity and integrity of the profession.¹ As an aside, the Dissent believes that it is equally or more apt to apply Ethical Standard 1.3, which directly addresses the architect's duty to conserve the natural and cultural heritage.² But

¹ Ethical Standard 4.2 in the 1997 Code of Ethics and Professional Conduct states:

Dignity and Integrity: Members should strive, through their actions, to promote the dignity and integrity of the profession, and to ensure that their representatives and employees conform their conduct to this Code.

² Ethical Standard 1.3 in the 1997 Code of Ethics and Professional Conduct states:

Natural and Cultural Heritage: Members should respect and help conserve their natural and cultural heritage while striving to improve the environment and the quality of life within it

either way, it is NEC's obligation to interpret how the clauses apply, not the Respondent's.

In summary, the Dissent finds that ABC Company repeatedly concealed information and dissembled in order to further its goal of conducting a billboard business on a sensitive site that the City has struggled to keep free of such signage. Moreover, that pattern has continued into this proceeding as the company denied a conversation for which there were two witnesses and concealed material information during the hearing by falsely claiming protection under some sort of judicial privilege.

ABC Company is in the billboard business. The Respondent is an architect and conservationist who opposes billboards in this part of the City, who made that clear to his client while under its employ, who attempted to get his client to comply with the spirit of local laws, and who offered an acceptable alternative design that was more consistent with the intentions of the City ordinances and compatible with the historic facility on the site. It was consistent with his professional opinion and with the duties of the profession to the public for him to publicly oppose ABC Company's decision to install the unwanted signage.

No client has the right to have an architect's automatic approval of actions that are not in the best interest of the community. Just as in other professions, it is an architect's duty to maintain independent judgment and to attempt to bring client interests into alignment with the public interest. The Dissent finds that the Respondent attempted, in good faith, to accomplish this and is not in violation of Rule 3.401.

[The Respondent appealed the NEC's decision to the Institute's Executive Committee, as permitted in Chapter 7 of the Rules of Procedure. The Executive Committee approved the NEC's decision but reduced the penalty to admonition.]



THE AMERICAN
INSTITUTE
OF ARCHITECTS

**Code of Ethics and
Professional Conduct
DECISION 2003-13**

Members of the National Ethics Council

Victoria Beach, AIA
Janet Donelson, FAIA
Melinda Pearson, FAIA
Michael L. Prifti, FAIA
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The Hearing Officer, A.J. Gersich, AIA, did not participate in the decision of this case, as provided in the Rules of Procedure. Bill D. Smith, FAIA, NEC Chair, also did not participate in the decision.

March 20, 2009