



Misusing Business Funds; Making Misrepresentations about Others; Wanton Disregard of the Rights of Others

Summary

The National Ethics Council (“Council” or “NEC”) ruled that an AIA Member violated Rule 2.104 of the 1997 Code of Ethics and Professional Conduct. The Council found that the Member misused funds of a business in wanton disregard of the rights of other owners of the business. The Council also found that the Member violated Rule 2.104 by sending a letter to a third party under a business partner’s name that misrepresented that partner’s qualifications and without his permission. The Complainant failed to prove that the Member had violated Rule 4.101 or Rule 4.201. The Council imposed the penalty of a two-year suspension of membership on the Member.

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

References

1997 Code of Ethics and Professional Conduct, Canon II, Obligations to the Public

Rule 2.104 Members shall not engage in conduct involving fraud or wanton disregard of the rights of others.

Commentary: This rule addresses serious misconduct whether or not related to a Member’s professional practice. When an alleged violation of this rule is based on a violation of a law, then its proof must be based on an independent finding of a violation of the law by a court of com-

petent jurisdiction or an administrative or regulatory body.

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

Rule 4.101 Members having substantial information which leads to a reasonable belief that another Member has committed a violation of this Code which raises a serious question as to that Member’s honesty, trustworthiness, or fitness as a Member, shall file a complaint with the National Ethics Council.

Commentary: Often, only an architect can recognize that the behavior of another architect poses a serious question as to that other’s professional integrity. In those circumstances, the duty to the professional’s calling requires that a complaint be filed. In most jurisdictions, a complaint that invokes professional standards is protected from a libel or slander action if the complaint was made in good faith. If in doubt, a Member should seek counsel before reporting on another under this rule.

Rule 4.201 Members shall not make misleading, deceptive, or false statements or claims about their professional qualifications, experience, or performance and shall accurately state the scope and nature of their responsibilities in connection with work for which they are claiming credit.



Commentary: This rule is meant to prevent Members from claiming or implying credit for work which they did not do, misleading others, and denying other participants in a project their proper share of credit.

Findings of Fact

The Parties' Business Venture

In 1994, the Complainant and the Respondent formed a joint venture that they eventually incorporated as "The Consultants." The corporate shareholders and directors were the Complainant and his wife, the Respondent, and a fourth partner. The firm was established to provide forensic consulting for architectural and construction defect litigation cases. The Respondent and the fourth partner handled invoicing for the business, received client payments for it, and maintained the business account and paid funds from it.

Over time, the Complainant and his wife began to suspect that the Respondent and the fourth partner were making substantial unauthorized monetary withdrawals from the joint funds of the business. For example, according to testimony by the Complainant's wife, which the Respondent did not rebut, the expenditures included unexplained payments to a woman who performed housekeeping services and some office work for the Respondent, to his gardener, and to a personal friend of his. In addition, a letter sent by the Complainant's attorney to the Respondent while the business was still operating recounted a telephone conversation between them in which the attorney confronted the Respondent with information indicating that the Respondent had denied receiving funds from a client which, in fact, he had received but did not deposit into the business account. According to the letter, the Respondent ultimately admitted that he had not acknowledged receiving the money because he needed it. Although this letter featured prominently in the Complainant's case

at the hearing, the Respondent did not deny that the conversation had taken place, nor did he contest the accuracy of the letter's account of the conversation.

The Consultants ceased joint operations after several years. The parties subsequently submitted their dispute concerning the unequal share of the revenues of the joint venture to binding arbitration. The arbitrator's award formed the basis for a state court judgment. The Complainant and his wife received an award totaling more than \$200,000 (including more than \$150,000 as a total equalizing payment between the parties). A breakdown of the items underlying the judgment amount was included in the Complainant's exhibits. The Respondent disputes the accuracy of the judgment amount but has admitted that there was a disparate use of business funds between himself and the Complainant in an amount perhaps as high as \$50,000. The arbitrator found that the Respondent (and the fourth partner) "breached their fiduciary duties" to the Complainant and his wife, but that "fraud had not been established by a preponderance of the evidence" in the case. The arbitrator further found that the Respondent and the fourth partner did not "convert partnership property to their own use."

The Best Way Letter

While The Consultants was still operating, the Respondent composed a letter addressed to "The Best Way" requesting services and/or the return of a retainer paid by a third party. The Best Way letter was signed with the Complainant's name and composed on letterhead with the Complainant's name and indicating that he maintained a law office. During the hearing, the Respondent confirmed that he had typed the letter but stated that he didn't sign the Respondent's name. He also testified that in an earlier deposition he initially stated that he had signed the Complainant's name on the letter but later corrected his deposition testimony and refused to answer the question on the grounds that it might incriminate him. During his testi-



mony at the hearing, the Respondent also stated that “it was a mistake to use the Complainant’s name” and “I should have used a fictitious name or something.” When asked by the Hearing Officer whether the use of a fictitious name would have been an appropriate thing to do, the Respondent replied, “I don’t know.”

The Respondent’s Curriculum Vitae

A curriculum vitae of the Respondent contains an “Education” section that includes the notation, “State University, BA Degree.” In his sworn testimony during the hearing, the Respondent admitted that he had not received a bachelor’s degree from the State University. The Complainant discovered a copy of the Respondent’s curriculum vitae in materials disseminated from The Consultants (by the Respondent) in the offices of a third party. The Respondent has acknowledged and corrected the error. It is not clear when the correction was made.

Conclusions

The National Ethics Council’s consideration of this case must begin with a review of the Respondent’s alleged violations, as stated in the Complaint. (*See NEC Rules of Procedure, Section 3.2* (“A Complaint must allege violation of one or more Rules of Conduct stated in the Code.”).) As was previously noted, the Complainant cited Rules 2.104, 4.101, and 4.201 of the Code of Ethics as the basis for his Complaint.

Rule 4.101 requires a Member to file a Complaint with the NEC if that Member has substantial information which leads to a reasonable belief that another Member has committed a violation of the Code of Ethics “which raises a serious question as to that Member’s honesty, trustworthiness, or fitness as a Member.” Based on the evidence of record in this case, we find that the Complainant acted appropriately in filing the Complaint. However, this Rule does not provide an independent basis for establishing

a violation of the Code of Ethics by the Respondent.

The Complainant’s allegations that the Respondent violated Rules 2.104 and 4.201 of the Code of Ethics are based on the following key facts:

- The Respondent’s disparate use of business funds as between himself and the Complainant when the two were engaged in business together.
- The Respondent’s preparation and transmittal of the Best Way letter in which he misrepresents the Complainant as an attorney.
- The Respondent’s distribution of a misleading curriculum vitae suggesting that he had received a BA Degree from the State University.

The Council finds that the Complainant has established these key facts and concludes that the Respondent has violated Rule 2.104, but that the Complainant has not met his burden of proof as to a violation of Rule 4.201, as required by Section 5.13 of the Rules of Procedure.

Rule 2.104

Rule 2.104 provides that “Members shall not engage in conduct involving fraud or wanton disregard of the rights of others.” The commentary for this Rule provides:

This rule addresses serious misconduct whether or not related to a Member’s professional practice. When an alleged violation of this rule is based on a violation of a law, then its proof must be based on an independent finding of a violation of the law by a court of competent jurisdiction or an administrative or regulatory body.

The arbitrator found that fraud had not been established by a preponderance of the evidence



in the case before him. Under these circumstances, the Council does not have the authority to find that fraud exists in this case. Therefore, a violation of Rule 2.104 can be found only if the Respondent's conduct is determined to be in "wanton disregard" of the Complainant's rights.

In previous decisions involving violations of this Rule, the Council has addressed the concept of "wanton disregard" and noted that in the law it is considered to be "something more than simple negligence, but something less than intentionally damaging action." In other words, wanton disregard is "an action taken in disregard of a high degree of danger that is apparent or would be apparent to a reasonable person." (*See NEC Decisions 90-4 and 93-4.*) Also, in NEC Decision 88-8, the Council ruled that the Member's conduct did not violate Rule 2.104 because "there simply is no basis to find that there was fraud or a conscious indifference to some potential for injury to anyone." Applying these criteria to the facts in this case, and based on all the evidence in the record, we find that the Respondent's conduct was in wanton disregard of other persons' rights, most obviously those of the Complainant.

No evidence was presented in this case to suggest that the Respondent intended to harm the Complainant. However, the arbitrator's findings and the evidence concerning the Best Way letter establish that the Respondent engaged in conduct in disregard of a high degree of danger that was apparent or would have been apparent to a reasonable person. Moreover, it was undertaken with a conscious indifference to the potential injury it might cause to the Complainant and other persons, either financially or personally. The arbitrator found that the Respondent had "breached his fiduciary" duty to the Complainant and his wife and awarded them more than \$200,000 as an equalizing payment. This award formed the basis for a state court judgment. In addition, the Respondent admitted to typing the Best Way letter, in which he used the Complainant's name without his permission and misrepresented his qualifications as an

attorney in an attempt to deceive the recipient as to the identity and qualifications of the author.

In both of these instances, the Respondent either knew, or should have known, that his conduct could potentially cause the Complainant (and others) both financial and personal harm. He harmed the Complainant and his wife financially by denying them their full share of the revenue, which the arbitrator determined to be more than \$150,000 plus interest from the parties' business venture in which the Complainant and his wife had a substantial financial interest as shareholders, as directors, and, in the Complainant's case, as one of the providers of services. There was also the potential to harm the Complainant both personally and financially by having his professional reputation tarnished in the business community as a result of having his name associated with a scheme to mislead the recipient of the Best Way letter as to the true identity and the qualifications of the author. Any reasonable person would have recognized the possible danger to the Complainant, including potential damage to his professional reputation that could have prevented him from obtaining work and hindered his ability to earn a living in the future.

Finally, the Respondent's sworn testimony at the hearing reflects not only his indifference to any consequences that might occur as a result of his actions, but also his failure to recognize the serious and reprehensible nature of his conduct. For example, he did not deny the arbitrator's finding that there was a disparate use of the business funds between himself and the Complainant. Rather, he attempted to excuse his conduct by stating that the amount of the disparity was perhaps as high as \$50,000, but not as great as the arbitrator had found. He exhibited the same attitude when testifying about his preparation and transmittal of the Best Way letter. He admitted "that it was a mistake to use the Complainant's name," adding that "I should have used a fictitious name or something." When asked by the Hearing Officer whether the use of a fictitious name would have been the appropriate thing to do, he stated "I don't know."



Rule 4.201

Among other things, this Rule provides that Members “shall not make misleading, deceptive, or false statements or claims about their professional qualifications, experience, or performance.” The commentary for Rule 4.201 states that this

rule is meant to prevent Members from claiming or implying credit for work which they did not do, misleading others, and denying other participants in a project their proper share of credit.

In prior NEC decisions in which a violation of this Rule was found, the Council looked to whether the Member’s conduct was intentional, blatant, or continuous. (*See, e.g., NEC Decisions 89-8, 90-2, and 90-12.*)

The Complainant alleges that the Respondent violated this Rule by misrepresenting his educational background on his curriculum vitae. In his sworn testimony during the hearing, the Respondent admitted that he had not received a bachelor’s degree from the State University. He also testified that he corrected his curriculum vitae immediately upon finding the error there. Documentation supplied by the Respondent demonstrated that the correction had been made on the curriculum vitae while the Respondent was still with a firm at which he worked before going into business with the Complainant. However, it did not clarify why the error was carried over to the new firm. Testimony at the hearing suggested the possibility that the erroneous curriculum vitae was brought to the new firm by a secretary or transported on a computer drive from the prior firm. This evidence is not sufficient to support a finding of intentional and blatant misconduct by the Member for purposes of Rule 4.201. Moreover, the evidence will not support a finding that the Respondent intentionally continued to distribute his curriculum vitae after discovering the erroneous information, and thus that he engaged in continuing misconduct for purposes of this rule.

Accordingly, we conclude that the Complainant has not satisfied the burden of proof in establishing that the error on the curriculum vitae constituted a violation of Rule 4.201.

Penalty

Having found that the Respondent’s conduct violated Rule 2.104 of the Code of Ethics, we must determine the appropriate penalty to impose for this violation. In previous cases involving alleged violations of Rule 2.104, the Council determined that the Respondent’s conduct did not in fact violate this Rule. Because this is a case of first impression, we lack direct precedent on an appropriate penalty to impose in this instance. However, the penalties imposed by the Council in other cases and the commentary to Rule 2.104 provide direction on this issue.

The Council has four levels of sanctions that it may impose for violations of the Code of Ethics: admonition (private reprimand), censure (public reprimand), suspension, and termination of membership. The Council has considered the seriousness of the Respondent’s conduct as a key factor in determining the appropriate penalty and has imposed suspension or termination—the most severe penalties—in cases where the Respondent’s conduct was of a particularly egregious nature. (*See NEC Decisions 87-4, 92-5, and 93-7.*) Moreover, the commentary to Rule 2.104 states that this “rule addresses serious misconduct whether or not related to a Member’s professional practice.” Given that this rule is intended to address inherently serious misconduct by Members of the Institute, we believe that it warrants a penalty commensurate with the violation.

Based on the evidence in this case, we find the Respondent’s conduct to be of a particularly egregious nature. First, his self-dealing in his handling of the business account in which the Complainant had a substantial financial interest did not reflect a single isolated act but a continuing course of conduct in an initially suc-



cessful attempt to deceive his business partner. As a result, the Respondent enjoyed substantial unjust enrichment at the expense of the Complainant before eventually being brought to account in arbitration proceedings.

The Hearing Officer, Phillip H. Gerou, FAIA, did not participate in the decision of this case, as provided in the Rules of Procedure.

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Second, to make matters worse, his behavior in preparing and sending the Best Way letter reflected a deliberate and flagrant disregard for the Complainant's basic right to control the use of his name and protect his reputation. It also reflected his intent to mislead the recipient of the letter as to the qualifications, as well as the identity of the author. While acknowledging that he had made "a mistake" in using the Complainant's name in this manner, the Respondent does not seem to acknowledge the full seriousness of his action. On the contrary, he appears to believe that the letter may have been appropriate if only he had used a fictitious name.

Finally, the Council has generally reserved the penalty of termination for conduct potentially affecting the public health, safety, and welfare, which is not at issue in this case. (*See NEC Decision 87-4.*) However, it has imposed the penalty of a one-year suspension in two cases, one involving violations of Rules 4.107, 4.201, and 5.201, and the other one a violation of Rule 2.101. (*See NEC Decisions 92-5 and 93-7.*) Because Rule 2.104 is designed to address serious misconduct, and in view of the particularly egregious nature of the Respondent's conduct, we believe that a penalty of a two-year suspension from membership in the Institute is warranted in this case.

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