



Wanton Disregard of the Rights of Others; Making False Statement of Material Fact

Summary

The National Ethics Council (“Council” or “NEC”) ruled that an AIA Member violated Rule 2.104 and Rule 4.103 of the Institute’s 2004 Code of Ethics and Professional Conduct (“Code of Ethics”).

The Council ruled that the Member violated Rule 2.104 by intentionally using the Complainant’s e-mail address as the “from” address to send a large quantity of unsolicited commercial e-mail without the Complainant’s permission and in wanton disregard of his rights.

The Council also ruled that the Member knowingly made a false statement of material fact in violation of Rule 4.103 by sending e-mail that contained a false “from” address and that stated that it was from the Complainant’s e-mail address when it was not. The NEC found no violation of Rule 2.101 or Rule 5.301.

The NEC 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

2004 Code of Ethics and Professional Conduct, Canon II, Obligations to the Public

Rule 2.101 Members shall not, in the conduct of their professional practice, knowingly violate the law.

Commentary: The violation of any law, local, state or federal, occurring in the conduct of a Member’s

professional practice, is made the basis for discipline by this rule. This includes the federal Copyright Act, which prohibits copying architectural works without the permission of the copyright owner. Allegations of violations of this rule 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.

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, or of fraud, then its proof must be based on an independent finding of a violation of the law or a finding of fraud by a court of competent jurisdiction or an administrative or regulatory body.

2004 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.



*2004 Code of Ethics and Professional Conduct,
Canon V, Obligations to Colleagues*

Rule 5.301 Members shall recognize and respect the professional contributions of their employees, employers, professional colleagues, and business associates.

Procedural Background

The complaint in this case was filed in 2007. After receiving the complaint, the Respondent responded by letter, then filed a formal response through his attorney.

A pre-hearing conference was held by telephone. The participants included the Complainant, the Respondent's attorney, the Hearing Officer, and an Associate General Counsel of the Institute.

The Hearing Officer held the hearing in the metropolitan area where the Complainant and Respondent live. The participants included the Complainant, the Respondent's attorney, the Hearing Officer, and an Associate General Counsel of the Institute. The Respondent was not present at the hearing.

The NEC considered the case on June 25, 2010. Neither party submitted written comments on the Hearing Officer's Report and Recommendation as permitted by Section 6.2 of the NEC's Rules of Procedure, and neither party requested to appear before the NEC as provided by Section 6.3 of the Rules of Procedure.

Findings of Fact

The Parties

The Complainant, David Smith, provides internet design and development services and was retained by the Respondent to provide consulting services to support the marketing and architectural practice of the Respondent.

The Respondent, Bob Jones, is an architect providing architectural CAD services through his own firm.

The Consulting Services

Smith and Jones signed a Contract Agreement dated October 2, 2006, under which Smith was to provide Web site update services and digital photography for Jones's firm. Smith's services were to be billed at hourly rates, with Web site updating to be completed no later than 24 hours from the time of request from Jones. On October 9, 2006, Jones provided Smith access to Jones's Web server, and Smith began to provide consulting services.

On October 16, 2006, Smith terminated the Contract Agreement by letter, asserting that Jones or his firm

caused the use of my e-mail address of <consultant@smithconsulting.com> to be used to send out your October 13th newsletter as an unsolicited spam e-mail.

An invoice in the amount of \$500.00 accompanied the termination letter.

The October 13, 2006 E-mail Newsletter

As described in the Respondent's response in this case, he

periodically broadcasts e-mail communications to architects throughout the country utilizing a database that has been built up over the years primarily via personal telephone calls to the various architectural firms, and to a lesser extent by architects' e-mail addresses published on the Web.

Jones uses ACT! database software to maintain his list of e-mail addresses and to broadcast his marketing e-mails. ACT! software permits the user to enter a "master" or "controller" e-mail



address, which functions as the “from” or “reply” address.

In the early morning of October 13, 2006, Jones broadcast a “newsletter” by e-mail to a large number of recipients. The e-mail, titled “CAD Construction Drawings for Architects,” advertised his firm’s services. The e-mail stated that his firm has served 150 architects in more than 20 states since 1994. The body of the e-mail included Jones’s name, along with his firm’s business address, telephone numbers, e-mail address, Web site address, and a link to “Request More Information.”

The “From” line in the October 13 e-mail stated:

Bob Jones <consultant@smithconsulting.com>

The address <consultant@smithconsulting.com> is not the address of Jones or his firm, however, but is the Complainant’s e-mail address. As a result, any “reply” e-mail, including automatic replies, would be directed to Smith’s e-mail account. At the same time, clicking on the October 13 e-mail’s “Request More Information” link or Jones’s firm’s own e-mail address would send a message to Jones himself.

Bounce-back and other reply e-mail messages of a variety of types—undeliverable, returned mail, returned to sender, out-of-office reply, unsubscribe—began appearing in Smith’s Spam Arrest e-mail filter immediately after the October 13 e-mail was broadcast. The Complainant estimates the total number to be “600 messages.”

The complaint alleges that the October 13 e-mail itself was sent to “over 15 thousand architects, engineers and other potential clients” based on what Jones had described to Smith as the Jones’s usual practice. The complaint alleges that the Respondent used the Complainant’s e-mail address because “he has been blocked by his e-mail provider for past spamming.” The Complainant testified at the hearing that the Respondent’s IP address has been blacklisted for spamming. The Complainant claims that the

Respondent’s use of the Complainant’s e-mail address to send unsolicited marketing e-mail could cause serious harm to the Complainant’s business.

Jones denies that his provider has taken any action against him. He stated in his response that a “technical error somehow occurred when inputting the specific set of e-mails” that are the subject of this case. He stated that he “must have opened the ACT database and typed in” Smith’s e-mail address, which “caused [that] e-mail address to appear as the ‘master’ e-mail address.” In his response, Jones explained that he typically will see bounced e-mails in his inbox immediately upon launching an e-mail broadcast, but because he did not see any when he sent the October 13 e-mail he terminated the broadcast. He estimated that “somewhere between 50 and 150 e-mail addresses were broadcast before [he] could kill the session.” In his response, Jones stated that the “whole incident was unintentional, unknowing, and a result of human error.”

Expert Commentary and Demonstration of the ACT! Software

Upon seeing replies to the October 13 e-mail in his Spam Arrest filter, Smith exchanged e-mail correspondence with Spam Arrest Support, in which the technical support specialist stated he suspected that a “spammer is forging your e-mail address.” Subsequently, Smith inquired of several consulting firms whether, using ACT! software, “one can accidentally change the master e-mail address (the ‘from’ address in e-mail correspondence) without changing the ‘from’ name.” One ACT! Certified Consultant, responded: “I don’t think so.” Another ACT! Certified Consultant responded that he had “never heard of this issue happening” and that it “should not be possible.” A third ACT! Certified Consultant responded that the answer might depend on which version of ACT! was being used. He went on to say that, in the 2009 version of the software, “it isn’t simple [to change the ‘from name’] and ‘accidentally’ would not



describe it.” He also stated: “I have never encountered the situation you describe in your question with any of my customers over my life of consulting with ACT!.”

Smith also contacted Sage, the company that produces ACT! software. A Sage employee stated: “I can think of no way to ‘accidentally’ change the FROM e-mail address (or name)” and further stated: “To change it you would have to go through several screens, either in ACT! or in Outlook.”

Because determining how the October 13 e-mail was created and sent might depend on which version of ACT! was used by Jones, Smith requested that information from the Respondent’s attorney several times between the pre-hearing conference call and the hearing in this ethics case. The attorney promised to identify the version, but never did and did not provide that information at the hearing.

During the hearing, Smith demonstrated the current version of ACT! software and the operation of the “master” e-mail. His demonstration showed that revising the master e-mail requires deliberately altering several data fields within several sequential dialog boxes. Referring to the Respondent’s asserted actions within his ACT! software, Smith stated:

I attempted to do it, as well as all the other ACT! experts saying you just can’t do that, so that leads me to believe that you can’t do that.

Conclusions

Burden of Proof

The Complainant has the burden of proving the facts upon which a violation may be found under Section 5.13 of the Council’s Rules of Procedure. In the event the Complainant’s evidence regarding a referenced rule does not establish a violation, the Complaint is dismissed with res-

pect to that rule. (*See NEC Rules of Procedure, Section 5.13.*)

Rule 2.101

Rule 2.101 of the Code of Ethics states:

Members shall not, in the conduct of their professional practice, knowingly violate the law.

The commentary to this Rule states:

The violation of any law, local, state or federal, occurring in the conduct of a Member’s professional practice, is made the basis for discipline by this rule. This includes the federal Copyright Act, which prohibits copying architectural works without the permission of the copyright owner. Allegations of violations of this rule 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 Complainant alleges that the Respondent violated Rule 2.101 because Jones’s actions were not in compliance with the CAN-SPAM Act, which is a federal law that establishes requirements for commercial e-mail. No independent finding of a violation of that law was presented, however. In the absence of an independent finding, no violation of Rule 2.101 can be established, as explained in the commentary to that rule. (*See NEC Decision 2002-22.*)

The National Ethics Council concludes that the Complainant has not met his burden to prove that the Respondent violated Rule 2.101.

Rule 2.104

Rule 2.104 of the Code of Ethics states:

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



The commentary to this Rule states:

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, or of fraud, then its proof must be based on an independent finding of a violation of the law or a finding of fraud by a court of competent jurisdiction or an administrative or regulatory body.

Because the Complainant has not shown that a court or administrative or regulatory body has made a finding of fraud, a violation of this rule cannot be based on fraud in this case. (*See Rule 2.104, Commentary.*)

A violation of this rule may, alternatively, be based on conduct involving the wanton disregard of the rights of others. The NEC has previously described "wanton disregard" under this rule to be an action taken in disregard of a "high degree of risk that the Complainant would be adversely affected" and that risk "is apparent or would be apparent to a reasonable person." (*See NEC Decision 2005-15.*)

The Complainant alleges that the Respondent violated Rule 2.104 because Jones disregarded Smith's rights by sending of a large number of unsolicited commercial e-mail messages under Smith's business e-mail address.

There is no dispute about whether the Respondent sent the October 13 e-mail because he has made a direct statement of admission in his response. The Council concludes that Jones sent the e-mail to thousands of recipients—contrary to his contention that it was sent to 150 recipients at most—because at least 600 replies showed up in Smith's spam filter. The Council also concludes that sending such quantities of spam using the e-mail address of another person as the "reply" or "from" address creates a high degree of risk that the owner of that e-mail address would be adversely affected. The Coun-

cil further concludes that the risk would be apparent to a reasonable person and certainly to someone who uses spam for marketing.

If, as Jones claims, his use of Smith's e-mail address was an unintentional mistake, that might weigh against finding a violation of Rule 2.104. The evidence presented in this case, however, leads to the conclusion that the "master" e-mail in ACT! software cannot be changed inadvertently and that Jones intentionally created "*Bob Jones <consultant@smithconsulting.com>*" as a false address.

The National Ethics Council concludes that the Complainant has met his burden to prove that the Respondent violated Rule 2.104 by sending a large quantity of unsolicited commercial e-mail using the Complainant's e-mail address as the "from" address without the Complainant's permission.

Rule 4.103

Rule 4.103 of the Code of Ethics states:

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.

As described in the analysis of Rule 2.104, the Respondent intentionally created "*Bob Jones <consultant@smithconsulting.com>*," which is a false address. In addition, he sent the October 13 e-mail to thousands of recipients stating it was "from" *<consultant@smithconsulting.com>* when it was not. These are false statements made in connection with Jones's architectural practice and therefore in his professional capacity.



Jones's statement about the source of the October 13 e-mail is material because it affects both Smith's business and the ability of the e-mail's recipients to block e-mail or otherwise control which e-mails they want to receive. For the reasons described in the analysis of Rule 2.104, the Council concludes that Jones acted knowingly when he used Smith's e-mail address.

The National Ethics Council concludes that the Complainant has met his burden to prove that the Respondent violated Rule 4.103 by sending e-mail on behalf of his firm using a false "from" address.

Rule 5.301

Rule 5.301 of the Code of Ethics states:

Members shall recognize and respect the professional contributions of their employees, employers, professional colleagues, and business associates.

Previous decisions by the National Ethics Council have found violations of Rule 5.301 when a Member failed to attribute credit for a project to another architect. (*See, e.g., NEC Decision 2007-14.*) The Complainant does not claim that the Respondent failed to provide credit for his work. Rule 5.301 might apply to circumstances other than a failure to attribute credit, but the Complainant has not alleged or shown conduct by the Respondent that would constitute a failure to recognize and respect the Complainant's professional contributions under Rule 5.301.

The National Ethics Council concludes that the Complainant has not met his burden to prove that the Respondent violated Rule 5.301.

Penalty

Having found violations of Rules 2.104 and 4.103 of the Code of Ethics by the Respondent, the National Ethics Council must determine an appropriate penalty.

The penalty in past cases involving the violation of the referenced rules has ranged from admonition to a suspension of membership. The violation by the Respondent in this case is sufficiently serious to warrant a penalty of suspension of membership. After careful consideration of the violations, the National Ethics Council imposes the penalty of a two-year suspension of membership.

Members of the National Ethics Council

A.J. Gersich, AIA, Chair
Victoria Beach, AIA
Melinda Pearson, FAIA
Benjamin Vargas, FAIA

The Hearing Officer, Michael L. Prifti, FAIA, did not participate in the decision of this case, as provided in the Rules of Procedure. Bill D. Smith, FAIA a member of the Council, also did not participate in the decision.

June 25, 2010