



Unreasonably Withholding Permission for a Departing Employee to Take Copies of Work Performed in the Employer's Service

Summary

The Council finds that a Principal and two Associates in a firm had violated R. 5.203 by failing to give a departing employee access to materials relating to the employee's work while with the firm. The penalty imposed on the Principal is suspension of AIA membership for one year if prompt access to the materials is not provided. The penalty imposed on each of the Associates is Admonition.

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

Reference

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

R. 5.203 A Member shall not unreasonably withhold permission from departing employees to take copies of designs, drawings, data, reports, notes, or other materials relating to work performed by the employees in the member's service which are not confidential.

Commentary: A member may impose reasonable conditions, such as the payment of copying costs, on the right of departing employees to take copies of work performed while in the member's service.

Facts

The sole owner of an incorporated design firm (the Principal) decided to allow three Associates in the firm to buy shares pursuant to a stock purchase agreement. One Associate purchased 15% of the stock in the firm and two other Associates each purchased 3% of the firm's stock. The Principal continued in the role of day-to-day manager of the firm, including retaining sole authority to determine when and if further stock purchases would be permitted.

All of the stock-owning architects, including the Principal, were employees of the corporation and as such received paychecks, W-2 reports and the same benefits as other employees. The profit sharing and bonus programs in which they all participated were also available to employees who owned no stock. The Principal, however, retained the power to terminate the employment of any employee at will, including the Associates.

The Associate owning 15% of the stock decided to leave the firm, at which time he requested copies of drawings, specifications, and photographs of projects on which he had worked. Because he had been with the firm for some time, the list was quite lengthy. The Principal declared the material requested as client files. He stated that client files had an intrinsic value, for which the firm should be compensated. He refused to permit copying of the requested material without payment of compensation for its value. Coincidentally, the stated "value" of the requested material was the exact amount the Principal was required to pay the Associate to buy back his shares under the terms of their stock purchase agreement.



The Associate disclaimed any ownership interest in client files and revised his request for material to delete specifications and professional photographs. Nevertheless, the Principal, with the support of the two other stock-owning Associates, still refused to permit copying of the material on the grounds that the departing Associate was a partner in the firm and not entitled to the protection of Rule 5.203. When discussions reached an impasse, an ethics Complaint was filed.

Discussion

There are a few key questions to be addressed under Rule 5.203 that determine the decision in this case:

Is the departing individual an employee? The assertion that the departing Associate was a partner, not an employee of the firm, was the cornerstone of the defense presented in this case. The Principal and the two remaining Associates asserted that Rule 5.203 does not apply to departing partners, only departing employees. Since the departing Associate was an equity owner in the firm and, it is asserted, the four shareholders "functioned as a partnership" the request for copies of material is not governed by Rule 5.203.

The facts belie the assertion of partnership. Calling someone a partner in firm literature does not make that person a partner in fact. True partners participate fully in the management, profits and losses of the enterprise. The evidence here discloses that the Associates had minimal participation in management. The Principal exercised sole authority to hire and fire. The Principal, with some exceptions for small projects, signed all contracts for the firm. Any authority the departing Associate had to sign contracts was delegated from the Principal and could be revoked at any time. The Associates participated in a bonus program, but on the same terms as all other employees. There is no evidence that any of the Associates had any risk

of loss beyond the amount of their paid-in capital. The departing Associate had the title of Vice President, but no evidence in the record supports a finding that the position carried any real authority in the management of the firm. The evidence taken as a whole supports finding that the departing individual was an employee.

Was the employer's refusal to permit copying of the requested material "reasonable"? The first list of materials requested by the departing Associate was quite extensive and included materials that the Principal and the remaining Associates felt represented entire client files. They believed that the request was for the purpose of enabling the departing associate to compete with his former firm and perhaps to take clients away from the firm. They took the position that the Associate would have to pay a price that reflected the worth of the material and assume professional liability for the projects.

We have already decided, in Decision 91-2, that fear of prospective competition from a departing employee is not a valid ground on which to refuse to provide copies of professional materials. The Principal and the remaining Associates were aware of that decision, yet they persisted in denying the departing Associate's request. This obdurate and obstructive resistance was unreasonable.

The remaining members of the firm also objected that the request for materials was overbroad. They claimed the Associate wanted to copy "every piece of paper he ever touched." This is a gross exaggeration. Whatever merit the objection might have had with respect to the original request, it had none with regard to the revised and narrowed list of materials. The Council found that the departing Associate should receive, upon payment of reasonable copying costs, the following documents:

- Copies of sketches or other types of drawings which he, himself, produced;
- Copies of material related to projects



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where he had a significant contribution to the project;

- Copies of material related to projects on which he participated in design development;
- Copies of material representing designs which he, himself, developed even if the actual drawings were prepared by another employee.

This material includes site plans, floor plans, exterior elevations, and building sections, for projects that meet the stated criteria. It also includes copies of photographs taken by the Associate. Rule 5.203 does not require an employer to make available the entire contents of any project file with which the employee had any connection. It remains true, however, that the amount of material provided to a long-term senior employee may far exceed that which needs to be provided to an intern or newly-licensed architect leaving a firm.

Conclusion

For the reason stated above, the Council finds the Principal and the two Associates remaining in the firm in violation of Rule 5.203. The Principal made the initial decision to deny the departing Associate access to the materials he requested. The two Associates supported him in that decision and failed, as did the Principal, to reassess that decision after becoming aware of this Council's prior interpretations of the Rule. Their insistent opposition to a reasonable request for professional materials from a former colleague conforms neither to the letter nor the spirit of the Code of Ethics. Therefore, the following sanctions are imposed:

- The Principal's membership in the AIA is suspended for one (1) year.
- Imposition of that sanction is suspended for thirty (30) days. If within that thirty (30) day period, the Principal acknowledges the

decision of the Council and provides the designated material for copying, the sanction will be reduced to Censure.

This "stepped" sanction offers the member an opportunity to control the degree of penalty imposed. It is a message to the Principal that he violated the Code, that he has a way to remedy his actions, but that the sanction will increase if his refusal to comply continues.

The two Associates participated in the decision to deny access to materials, but they were not the prime movers in the matter. Nevertheless, they could have but failed to take any action at all to even discuss with the Principal the possibility that the position he had adopted on behalf of the firm was not in compliance with the Code and should be reassessed. Therefore, the sanction of Admonition is imposed on each of them. Letters of Admonition from the Secretary of the AIA, along with the decision in this case, have been placed in their membership files.

L. Kirk Miller, FAIA, Chair
Samuel A. Anderson III, FAIA
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As provided in the Rules of Procedure of the National Ethics Council, the Hearing Officer, D. Susan J. O'Brien, AIA, did not participate in the decision of this case. Council member Kenneth DeMay, FAIA, also did not participate.

September 10, 1994