



## Taking and Using Photographs of Client's Home on Firm's Website and Magazines

### Summary

The National Ethics Council ("Council" or "NEC") ruled that an AIA Member violated Rules 3.401 of the Institute's Code of Ethics and Professional Conduct ("Code") based on a using photographs of the Complainant's home against their wishes. The Council found no violation of Rule 4.103.

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

### References

*2012 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.*

*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*

At the time of the facts underlying this case, the Complainant was a resident of Blue City, State B; the Complainant currently lives in Green City, State A.

Respondent is an architect who resides and practices in Blue City, State B. At the time of the underlying facts of this case, the Respondent worked for Architecture Firm A. The Respondent presently operates Architecture Firm B.

#### *The Facts*

##### The Number [123] Residence Project 2009-2011

In May 2009, the Complainant decided to move to be near their daughter who was living in Springfield. The Complainant found a residence in Blue City, ("Number [123] Residence"). The only contingency for purchasing the house was that the Blue City zoning board would allow them to expand the upstairs. The Complainant went to Architecture Firm A, which was nearby, and retained the firm on an hourly basis to present the design to the zoning board. When the design was approved in June 2009, the Complainant hired the Respondent to prepare construction drawings on an hourly basis. No written contract was used to formalize the agreement. The Respondent would oversee the staff as they prepared the working drawings for the contractor. The final drawings were dated October 6, 2009.

The pre-hearing documents submitted by the Complainant and the Respondent, as well as testimony at the Hearing, show that the client-architect relationship developed cordially during the design process. The exchange of ideas and suggestions was fluid and amicable. Some



## Code of Ethics and Professional Conduct DECISION 2013-12

reactions in e-mails by the Complainant to the Respondent's design suggestions include: "Absolutely charming! I definitely came to the right person." Other examples include, "I love this house," and "Now that I have lived with the XYZ design, I must tell you that I think it is quite wonderful."

At the Hearing, the Complainant stated that they "was very pleased with the design prepared by the Respondent," and believed they worked very well together. The type of information and language used by the Complainant reveal that they were very knowledgeable in arts and architectural styles as they pertain to their personal preferences for this project.

The Respondent also cited e-mails evidencing the congenial working relationship. The record shows a pattern of the Respondent reacting by continuously consulting and thanking the Complainant, being readily available for meetings or coordination with suppliers. Finally, in a reaction to the owner's addition of a boardwalk in 2011, he compliments the Complainant's vision: "You are an architect's dream."

### Privacy Concerns: Tour and Photography 2010

By April 2010, the project was near completion. The Respondent e-mailed the Complainant passing along a request from a friend to have the house become part of the annual tour, which raises funds for a Center and showcases the high level of design, craftsmanship and restaurant fare existing in the Blue City area. The Complainant declined the request stating that because they lived by themselves, they were "hesitant to open my house up to hundreds of people." However, the Complainant did extend an invitation to the Respondent and their office staff to come by anytime.

On October 16, 2010, the Complainant sent the following e-mail to the Respondent:

[XX] mentioned to me that you had come by to take photographs of the cottage. May I ask

what the photos are for and why you did not ask for my permission prior to taking them?

The Respondent e-mailed this reply:

I am so sorry! I thought that you had conveyed openness about showing off your house, and clearly made an erroneous assumption.

The Respondent went on to explain that they were "construction" photos for record keeping and noted:

We would not take photographs for publication or web site use without consulting with you.

He added:

...although we do not have an AIA contract with you due to the informal nature of the way we started working together, our standard contract contains a proviso that allows us the right to use photographs for our portfolio—with our clients kept anonymous if desired.

Finally, the Respondent stated:

We are proud to have contributed to the creation of your wonderful residence and are eager to add it to our portfolio when you, and the construction activity, allow.

At the Hearing, the Complainant quoted her e-mail response, dated October 17, 2010:

Since I live by myself, I never allow photographs to be taken of my house once it is furnished and I move in. Conveying my belongings, entrances and exits of the house to the public or to anyone I do not know is something I am careful not to do for my own privacy and safety. I hope you understand how I feel about this situation.

### Relocation to State A 2011

In the summer of 2011 the Complainant's relative moved to Green City, and the Complainant, wishing to remain near her, decided to move near Green City, and sell her Blue City residence. On June 24, 2011, the Respondent sent the Complainant an e-mail about a photographer named [XX] who was



## Code of Ethics and Professional Conduct DECISION 2013-12

requesting a session of “scouting shots” of the house on June 27.

### June 27, 2011, Photography Session

At the Hearing, the Respondent stated that the Complainant permitted a photography session of the house and that they placed no restrictions on what could be photographed. By implication, the Respondent argues that the Complainant no longer had privacy concerns about the home being photographed, having now changed their mind.

At the Hearing, the Complainant said the Respondent

... hammered me for a long time wanting to take photographs of the house .... he came to me and said, [ZZ], please let us take photographs for our office files only.

Because there was an earlier e-mail from the Respondent stating he would not use them for publication or on-line postings, she relented.

On June 29, 2011, the Respondent’s office partner, e-mailed the Complainant and stated how they enjoyed the house during the shoot and requested permission to substitute the chairs in the living room, among other furniture adjustments, for another photo shoot. At the Hearing, the Complainant said it was then they realized “...that this had gotten far more ambitious than photographs for the office files,” and subsequently did not give permission to stage the house or to take additional photographs.

In an e-mail dated June 30, 2011, the Respondent told the Complainant:

Oh, my! I feel that our request .... has been misconstrued. We asked to make some changes not because we dislike your furnishings and interior ... This staging act is part of every high-end photographic effort, as we are told by photographers and publishers and other architects.

In a July 1, 2011, e-mail response, the Complainant indicated their disagreement with the photographer, noting the photographer did not “get” what they had been trying to accomplish with this house. The Complainant further stated their belief that putting the interior of the house on the Respondent’s website would be false advertising, concluding, “So let’s, please, put this behind us and proceed on.”

The Respondent sent an e-mail reply dated July 8, 2011, asking why the Complainant had denied their office the opportunity to take pictures of their design work, given that they were selling the house. The Respondent wrote:

What is the intent of this action [XX]? If your intent is to hurt me or [my partner] personally, then your actions can be explained. Why else would you renege on your permission to take photographs? Can you explain this?

The Respondent added that future business depended on the firm’s ability to illustrate its work. The Complainant’s brief response was:

This has become extremely unpleasant. It is my prerogative to not have my home photographed, then used to promote your business. I feel that it is extraordinarily unprofessional of you to continue to insist that you “deserve” otherwise. I shall not discuss this any further.

### [State] HOME+DESIGN and [State] Magazine 2012

On January 9, 2012, the Complainant wrote an e-mail to the Respondent about having been contacted by the Editor-in-Chief at [State] HOME+DESIGN and [State] magazine, regarding a request by Architecture Firm A to photograph the Complainant’s house. (the Editor-in-Chief’s communication is not part of the record.) The Complainant reminded the Respondent of their earlier discussions when she firmly declined permission to photograph the house. The



## Code of Ethics and Professional Conduct DECISION 2013-12

Complainant also stated that “the final design of the exterior was the result of our collaboration” as a response to the Respondent’s claim of an intellectual property right of the exterior design. The Complainant concluded:

In the absence of documentation to support any such claim, I must insist that neither you nor [Architecture Firm A] use any photograph, drawing or any other representation of (the project) for any marketing or publicity purpose.

### AIA [State] Website and [State] HOME+DESIGN and [State] Magazine Issues 2012

As part of the Pre-Hearing Exchange, both parties agreed that in June 2012, photographs and a video of Number [123] Residence were posted on the AIA [State] website under the heading “[ABC],” showing numerous interior and exterior photos and the floor plan of Number [123] Residence. The Complainant has also submitted as evidence a printed copy of the AIA [State] website for the 2012 awards and the covers and corresponding articles in the June and December 2012 issues of [State] HOME+DESIGN. Both show exterior and interior images of the house as well as the floor plans.

### Copyright Claims

The Respondent’s response to the claims are basically presented in the December 21, 2012, e-mail to the Complainant on the notion that copyright protection is automatic from the time of creation. The e-mail directed the Complainant to a Wikipedia article and went on to say:

The copyright goes to the architect, as the one who actually creates the drawings. Collaboration with clients—in the form of receiving input and preferences—is typical of every project, but it carries no copyright.

He also contended that their office’s exclusive rights to the design were clear and questioned:

...why you are opposed to having your house recognized or published. Certainly, a feature article in a publication or a design award could only add to its resale value.

The Respondent states this again in a response to the Complaint in this case, and refers to a right of use of photographs of their work for promotional purposes as “standard language in all AIA Owner-Architect Agreements.”

Finally, the Respondent maintains that the interior scouting shots of June 27, 2011, were taken with the Complainant’s permission, stating:

... The Complainant’s permission and her direct personal provision of access with the specific understanding between parties that the property was being photographed for publicity and publication by the Architect.

He adds:

The second series of photographs, of the building’s exterior, ... were taken from off the property, where permission of the property owner is not legally required.

In response, the Complainant stated at the Hearing that the Respondent:

... knowingly disclosed information that they had been asked to maintain in confidence when they furnished photographs of my Blue City house to the [State] AIA and to the [State] Home and Design Magazine, then used a photograph of my Blue City house for advertising their firm by postcard mailing, after I had repeatedly asked them not to use photographs of my Blue City house for any such purposes.

The Complainant said that they did not find the exposure appealing and that the Respondent was very aware of the privacy concerns.

In response to the Respondent’s statement that they are entitled to use photographs of their work for promotional purposes, the Complainant stated that the Respondent is not entitled to such use because a substantial portion of the work shown in such photographs is not their work but the Complainant’s. The Complainant offers an extensive detail of particular items shown in the pictures that were either designed, bought or made-



## Code of Ethics and Professional Conduct DECISION 2013-12

to-order by the Complainant that are not part of the details prepared by the Respondent on the architectural drawings dated October 6, 2009. Therefore the Complainant considers the Respondent untruthful in advertising that the work shown is the Respondent's.

### **Conclusions**

---

#### *Burden of Proof*

Under Section 5.13 of the NEC Rules of Procedure, the Complainant has the burden of proving the facts upon which a violation may be found. In the event the Complainant's evidence does not establish a violation, the Complaint is dismissed.

#### *Rule 3.401*

Rule 3.401 states:

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 Rule 2.101 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.*

Both the Complainant and the Respondent acknowledge that on many occasions the Complainant cited privacy concerns and stated they did not want photographs taken of the house. The Complainant clearly felt that conveying information about their belongings and about the entrances and exits of the house to the public would adversely affect the sense of privacy and safety.

The Respondent maintains that the Complainant (a) permitted a photo session of the house on June 27, 2011; (b) provided access to the house, and (c) did not issue specific instructions of any area of the house that they did not wish to be photographed. In the Respondent's view, this proves the Complainant changed their mind about their privacy concerns. We disagree. The Complainant's instructions to the Respondent were clear, explicit, and sustained over time, and the record does not show the Complainant changed their mind. Notwithstanding their specific instructions to the Respondent and the earlier incidents, the Respondent made an assumption about the Complainant changing their mind based on the photography session the Complainant permitted on June 27, 2011. However, the Respondent was unable to provide more definitive proof—such as an actual statement or correspondence from the Complainant—to conclude that they had in fact changed their mind.

The Respondent also argues that it is within an architect's contractual right to take and use photographs of the work by the architect given standard contract language and copyright definitions in an AIA contract document. Because the parties had not entered into a written contract using the form document cited by the Respondent, however, that argument has no bearing here.

The Respondent also notes that the Complainant agreed at about the same time to have a real estate agent take pictures of the house with the Complainant's personal belongings in it. The Respondent argues that they reasonably assumed from this that the Complainant's privacy concerns had changed. However, the Complainant's decision with respect to the real estate agent took place under a different set of circumstances. It did not reflect a change of mind on the instructions they had given to the Respondent. The record shows that the Complainant's specific instructions to the Respondent remained intact, and does not show a satisfactory effort from the Respondent to address this issue in a clear and timely way. This was



particularly true regarding the submission to the AIA [State] awards program and to [State] HOME+DESIGN magazine.

**The National Ethics Council concludes the facts in the record establish that the Respondent violated Rule 3.401 by using photographs of the Complainant's home against their wishes.**

*Rule 4.103*

Rule 4.103 states:

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

The Commentary to Rule 4.103 states:

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

The Complainant argues that the final result of the house's interior and exterior appearance are mainly due to efforts by persons other than the Respondent. Thus, the Complainant maintains the text of the project description in the AIA [State] awards program website and the two issues of [State] HOME+DESIGN magazine are false statements. We disagree. First, the Respondent does not control what AIA [State] or [State] HOME+DESIGN magazine publish. Second, for both AIA [State]'s website and [State] HOME+DESIGN magazine, stating Architecture Firm A as the architecture firm of the project and the Respondent as the architect are not false statements of material fact under Rule 4.103.

The Complainant also takes issue with the caption "Name withheld by request" under the heading "Client" on this project's AIA [State] website post. The Complainant maintains it was false as they were not even aware that such a submission had taken place. The Respondent admits that the statement did, in fact, come from the Respondent's office in the submission process. We do not find, however, that the Complainant met the burden of proof in showing that the statement was false statement of material fact.

## **Code of Ethics and Professional Conduct DECISION 2013-12**

**The National Ethics Council concludes that the Complainant did not meet the burden of proof in showing a violation of Rule 4.103.**

### **Penalty**

Having found a violation of Rule 3.401 of the Code of Ethics by the Respondent, AIA, the National Ethics Council imposes the penalty of Admonishment.

*[The NEC's decision was considered as an appeal by the Institute's Executive Committee and Board, as provided in Chapter 7 of the Rules of Procedure. The Executive Committee and Board approved the NEC's decision and the penalty imposed.]*

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

**December 14, 2014**