



Taking into Account Applicable Laws and Regulations; Recklessly Misleading a Client about the Results That Can Be Achieved Through the Use of a Member's Services

Summary

The National Ethics Council (“Council” or “NEC”) ruled that an AIA Member had not violated either Rule 3.101 or Rule 3.301 of the Institute’s 1997 Code of Ethics and Professional Conduct in providing professional services to the Complainants for the design of a complex residential project under a detailed written agreement. The NEC ruled that the Complainants had not met their burden of proof to show that the Member had acted recklessly.

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 3.101 In performing professional services, Members shall take into account applicable laws and regulations. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations.

Rule 3.301 Members shall not intentionally or recklessly mislead existing or prospective clients about the results that can be achieved through the use of the Members’ services nor shall the Members state that they can achieve results by means that violate applicable law or this Code.

Commentary: This rule is meant to preclude dishonest, reckless, or illegal representations by a Member either in the course of soliciting a client or during performance.

Findings of Fact and Analysis

The Complainants, a husband and wife, retained an Architect Member (“Respondent”) to design two new residences on land that the Complainants owned. The services that the Respondent was retained to provide in connection with the project were defined in an agreement based on AIA Contract Document B141-1997 (“Agreement”).

When Complainants purchased the property, it consisted of two parcels of land. However, an existing house, where they resided, straddled the property line between the two parcels, thus preventing it from being used as two separate lots. Therefore, the Complainants wanted to demolish the existing dwelling, subdivide the property into two lots, and then construct a house on each of the subdivided lots. The construction of the houses was to occur in two phases. The first house, which would be constructed on the lower portion of the site, would be built as a speculative sale or “spec” house, meaning that it would be inhabited by the Complainants for two years and then sold. They planned to use the proceeds from the sale of the “spec” house to finance the construction of the second home, which would be constructed on the upper portion of the site. They intended to make this house their permanent residence.



Both the Complainants and the Respondent admitted that the project was complex, given the property's location on a hillside and the fact that it was subject to "Sensitive Areas" limitations primarily because the site was steep, a stream was involved, and a landslide had recently occurred on the adjoining property. In order for the project to proceed, the Complainants needed the City to recognize the existence of two lots and grant them permission to construct a house on each of the subdivided lots. The property was located in a steep slope hazard area, so they also needed to obtain a partial use exemption from the steep slope requirements established by the local Municipal Code.

The Respondent presented the Complainants with preliminary conceptual design drawings for the two houses. The houses (size and budget cost) were based on market research conducted by the Complainants and provided to the Respondent. The Complainants were dissatisfied with these preliminary designs for several reasons. First, they believed that the "footprint" for the houses exceeded that allowed by ordinances. Second, the houses were larger than the Complainants wanted to build. And third, the houses would cost more than the amount specified in the Agreement. The Respondent testified at the hearing that he presented these initial schematics "as part of the discovery process" of designing the homes and recognized that the homes would ultimately need to be reduced in size to satisfy the Complainants' budget requirements and obtain the approval of local authorities.

During the next nine to ten months, the Respondent continued to refine the designs to address the Complainants' requirements. During this period, the Respondent was also working with local authorities in an effort to obtain the necessary permits and exemptions. These had still not been granted at the time of the hearing because the local authorities had not received certain additional information—including proof of the legal existence of two lots and an amended site plan—that they had

requested. Therefore, apparently frustrated by the failure to obtain the necessary zoning permits from the City, the Complainants decided to abandon the idea of constructing a "spec" house and to build only one home on the property as their permanent residence. They instructed the Respondent to cease all work on the two houses and to begin working on a single dwelling. This required the Respondent to modify the program, design concepts, material selections, and cost considerations in connection with this revised project.

Approximately eight months later, the Respondent presented the Complainants with schematic/design development drawings for a single-family residence of smaller size. These were eventually forwarded to the individual whom the Complainants had selected as the general contractor ("Contractor") for the project, after dispensing with the competitive bidding process provided for in Section 1.1.2.7 of the Agreement. The Complainants were "excited about the architect's submittals," but continued to raise questions regarding whether the project could be completed within their stated budget and design parameters. The Contractor initially indicated that the house could be constructed within their budget. However, three months after reviewing design development drawings, the Contractor informed the Complainants that this would not be possible and subsequently terminated his services. Following this, the Complainants informed the Respondent that he was no longer the architect of record for the design and construction of their home. They then filed a Complaint with the National Ethics Council alleging that the Respondent had violated Rules 3.101 and 3.301 of the Code of Ethics.

The services that the Respondent was retained to provide in connection with the project were defined in the Agreement. The nature of his obligations, as defined in the Agreement, was relevant to whether or not his conduct violated the Code of Ethics. The most pertinent provisions of the Agreement were as follows:



1.1.2.1 The objective is to request approval to build two houses on two existing, legally platted, adjacent lots in a sensitive area.

1.1.2.4 The city wishes to restrict development to a total of one house. The lots have been combined under one tax parcel number.

1.1.2.5.2 The budget for the east house is \$285,000. Market research has not been completed to verify the advisability of this amount.

1.1.2.8 The architect cannot guarantee the city will accept the house design or grant the use of the land as two separate lots for single family dwellings.

1.5.1 Compensation is calculated as percentage of cost of construction for services described in Articles 2.1, 2.3 and 2.4 for each house. The east house compensation for these services is 6.5%. The west house compensation for these services is 8.75%. Compensation for services in Article 2.5 and 2.6 is calculated on an hourly basis for the east and west house. Compensation for working with or working toward obtaining the city's approval for development of the two lots/two houses is calculated on an hourly basis. Rates: Principal Architect \$75/hr, Architect \$65/hr, Tech I 45/hr Tech II \$39/hr.

1.5.5 Other Reimbursable Expenses, if any, are as follows:

Plots \$15/page
Blueprints \$1.20/page

In the Complaint, the Complainants cited numerous instances that they believed demonstrated the Respondent's violation of Rules 3.101 and 3.301 of the Code of Ethics. However, their testimony at the hearing indicated that their

Complaint was primarily based on the following:

- The Complainants' belief that the Respondent failed to take into account a local authority provision, by initially designing homes with a square footage/footprint that exceeded the requirements allowed under this provision. The Complainants contended that this conduct resulted in the local authority's failure to recognize their property as two lots, grant them permission to subdivide it and construct a house on each of the subdivided lots, and locate one of the new houses close to the steep slope buffer zone.
- The Complainants' belief that the Respondent intentionally misled them regarding the possibility of building a house on one of the subdivided lots within their stated budget of \$285,000, as well as the amount of the architectural fees that they would be expected to pay for his services.

Rule 3.101

This Rule states:

In performing architectural services, Members shall take into account applicable laws and regulations. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations.

The Complainants maintain that the Respondent violated this Rule by failing to take sufficient account of municipal code provisions, as evidenced by the local authority's failure to recognize the existence of two lots on their property, grant them permission to subdivide it, permit them to build a house on each of the lots, or allow them to construct one of the houses close to the steep buffer zone.

The NEC has previously ruled that a finding of recklessness, rather than simple negligence, is required to establish a violation of Rule 3.101.



(See NEC Decision 88-14.) Based on the record, including the testimony presented at the hearing, the NEC concluded that the Complainants had not satisfied their burden of proving that the Respondent acted recklessly in allegedly designing homes which failed to comply with local authority zoning code provisions.

Rule 3.301

This Rule prohibits a Member from: (a) intentionally or recklessly misleading existing or prospective clients about the results that can be achieved through the use of the Member's services or (b) stating that the Member can achieve results by means that violate applicable law or the Code of Ethics. No testimony or documentation was submitted by the Complainants indicating a violation of applicable law. Therefore, only the first part of Rule 3.301 was at issue here.

The Complainants allege that the Respondent violated this Rule by intentionally misleading them regarding the possibility of building a house on one of the subdivided lots, within their stated budget of \$285,000, as well as the amount of architectural fees that they would be required to pay for his services. The Commentary for this Rule states that it is "meant to preclude dishonest, reckless, or illegal representations by a Member either in the course of soliciting a client or during performance." In NEC Decision 88-14, the NEC noted that a "finding of recklessness is explicitly required under Rule 3.301." Based upon the evidence in the record and for the following reasons, the NEC found that the Respondent's conduct did not violate this Rule.

First, the Agreement between the parties was inclusive and delineated all professional services and costs thereof in a detailed narrative.

Second, the NEC was unable to find that the Respondent intentionally or recklessly misled the Complainants regarding the fees for his services. In an outline of an action plan for the

project, the Respondent discussed the calculation of his fees. Moreover, the Agreement described in substantial detail how he was to be compensated.

Third, this project was extremely complex and entailed site constraints and municipal involvement in the design of the project. As required by the Agreement, the Respondent provided services during various phases of the Agreement and was involved in the project for at least two years. Thus, given these circumstances and the fee structure within the Agreement, there was a strong possibility that his fees would be substantial.

Finally, communication, or the lack thereof between the parties, appears to be at the heart of this case. And, unfortunately, as the Respondent's Construction Document Phase was nearing completion, it appears that the Complainants were communicating more with their selected general contractor than they were with the Respondent. This decision by the Complainants was instrumental in impacting the success of the project. However, the evidence does not support a finding that the Respondent violated Rule 3.301.

Conclusion

Under the NEC's 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. (See *Rules of Procedure, Section 5.13.*)

Based upon a review of the evidence in this case, the NEC determined that the Complainants had not met their burden of proving that the Respondent violated Rule 3.101 or Rule 3.301 of the Code of Ethics. Accordingly, having found no violation of the Code of Ethics by the Respondent, the NEC dismissed the Complaint.



THE AMERICAN
INSTITUTE
OF ARCHITECTS

Code of Ethics and
Professional Conduct
DECISION 2002-09

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*The Hearing Officer, Ronald P. Bertone, FAIA,
did not participate in the decision of this case,
as provided in the Rules of Procedure.*

October 23, 2003