



Failure To Develop a Design That Meets Client's Requirements and Budget; Failure To Provide Consulting Engineering Services; Signing or Sealing Construction Drawings Incorporating Work of Others

Summary

The National Ethics Council ("Council" or "NEC") ruled that two AIA Members did not violate Rules 1.101, 2.104, 3.102, 3.103, 3.301, or 4.102 of the Institute's 1997 Code of Ethics and Professional Conduct ("Code of Ethics") in providing architectural services in connection with a project involving the design of a barn home with living quarters on the top level and horse stables on the bottom level. The Complainant asserted, among other things, that the Respondents' design met only one of the three major requirements she had established for the project, that the Respondents billed her for consulting engineering services that were not provided, and that the Respondents misled her about the cost of the project. The NEC found that the Complainant failed to meet the burden of proving that the Respondents violated the cited Rules.

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

References

1997 Code of Ethics and Professional Conduct, Canon I, General Obligations

Rule 1.101 In practicing architecture, Members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good

standing practicing in the same locality.

Commentary: By requiring a "consistent pattern" of adherence to the common law standard of competence, this rule allows for discipline of a Member who more than infrequently does not achieve that standard. Isolated instances of minor lapses would not provide the basis for discipline.

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 the 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.

1997 Code of Ethics and Professional Conduct, Canon III, Obligations to the Client

Rule 3.102 Members shall undertake to perform professional services only when they, together with those whom they may engage as consultants, are qualified by education, training, or



experience in the specific technical areas involved.

Commentary: This rule is meant to ensure that Members not undertake projects which are beyond their professional capacity. Members venturing into areas which require expertise they do not possess may obtain that expertise by additional education, training, or through the retention of consultants with the necessary expertise.

Rule 3.103 Members shall not materially alter the scope or objectives of a project without the client's consent.

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.

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

Rule 4.102 Members shall not sign or seal drawings, specifications, reports, or other professional work for which they do not have responsible control.

Commentary: Responsible control means the degree of knowledge and supervision ordinarily required by the professional standard of care. With respect to the work of licensed consultants, Members may sign or

seal such work if they have reviewed it, coordinated its preparation, or intend to be responsible for its adequacy.

Findings of Fact and Analysis

The Complaint in this case was filed in September 2002. In response to a letter from the Institute's Associate General Counsel, the original Complaint was amended in November 2002 to comply with the requirements of the Council's Rules of Procedure governing the disposition of ethics cases. During a pre-hearing conference call in July 2003, the Hearing Officer asked the Complainant to submit a second amended Complaint ("Second Amended Complaint") clarifying specific conduct by the Respondents which the Complainant believed violated the various provisions of the Code of Ethics. The Second Amended Complaint was submitted to the NEC in August 2003. The Respondents filed Responses to the Complainant's original Complaint and to her two amended Complaints as well.

The Complainant was present and testified on her own behalf at the hearing. One of the contractors who submitted a bid on the project that is the subject of this case also testified on behalf of the Complainant. Respondent X was present and testified on his own behalf. Respondent Y did not attend the hearing but was represented by his counsel.

The Complainant is a doctor at a hospital where the Respondents' firm had provided architectural design services on a critical care unit. She was impressed with the firm's work on that project and sought its assistance when she was ready to build her "dream house," a barn home with living quarters on the top floor and horse stables on the bottom level. After consulting with other architects in the city, the Complainant decided that the Respondents' proposal was the most reasonable, both in terms of cost to design and cost to build.



The Respondents provided her with a copy of “You and Your Architect,” an AIA publication which describes the various phases of the design process. The parties engaged in a number of telephone conversations during the course of the project, although they did not keep a record of them. They did not execute a written contract outlining the exact nature of the design services that the Respondents were to provide.

In December 1999, the Complainant provided a hand-drawn schematic of her proposed home to the Respondents. In her Second Amended Complaint, she noted that she had three major requirements from the project’s inception. First, the home had to have adequate ventilation to ensure that no barn fumes entered the living quarters. Second, the home had to have a slate roof similar to her neighbor’s. Third, the home was to be energy efficient. In that regard, she envisioned a design that would incorporate insulated concrete form walls, added insulation, and adequate air conditioning. The Complainant alleges that only the first of her three requirements (*i.e.*, adequate ventilation) was incorporated into the design prepared by the Respondents.

At the onset of the project, the Respondents quoted a budget of \$21,666 for the architectural/engineering fees, excluding reproducible costs. They estimated the total residence/stables construction cost, excluding the barnmaster interior stables partitions, to be approximately \$431,600. Respondent X began the design services in late 2000. The Complainant testified that in the months following there were disputes between her and the Respondents regarding the amount of work completed and the amount of the invoices. In February 2002, the Respondents sent the Complainant a final bill in the amount of \$27,687, plus \$115 for copies of the plans. This exceeded the amount that the Complainant had budgeted for the design services by 30 percent.

The Respondents maintain that, in the words of Respondent Y’s attorney, “there was an increase

in the estimated price of the project because the project grew, and it grew with the consent of the Complainant.” The Complainant sent the plans to four general contractors. During her testimony at the hearing, she stated that all of them raised similar questions regarding alleged structural defects in the plans. In an effort to obtain answers to these questions, the Complainant, her contractor, and a concrete consultant met with the Respondents and received both oral and written responses to the questions. However, the Complainant testified that the responses were inadequate and left many of the decisions up to her, as the owner. According to the Complainant’s testimony, the contractor indicated that he still could not build the home without more complete answers to the questions.

The Complainant contends that the bids she received from contractors to construct her home were all well in excess of her original budget. Although the exact amount is disputed by the Respondents, the Complainant maintains in her original Complaint that the lowest bid she got was \$760,000. We note, however, that in her Second Amended Complaint the Complainant states that the lowest bid was \$690,000. At the hearing of this case, Respondent Y’s attorney contended that the amount of the lowest bid was actually around \$690,000 and that “we believe the \$100,000 exaggeration needs to be noted.”

The Complainant was so disturbed by the course of events surrounding the project that she consulted a lawyer about pursuing a civil action against the Respondents. However, she was advised to settle the case or file a complaint with the NEC. At the time of the hearing, the home had not been constructed, and the project had been delayed.

Respondent X was the primary architect on the project and Respondent Y the supervising and senior architect. The exact nature of Respondent Y’s role in creating the design is unclear. However, he is named in the Complaint because the Complainant believes that he should be held accountable for the conduct of his employee and



bears some responsibility for plans that carry his stamp. Respondent X and Respondent Y submitted separate responses, although Respondent Y granted Respondent X permission to reference his response. Given these facts, our analysis will focus on the Respondents' conduct together.

At the center of this Complaint is the Complainant's belief that the Respondents violated Rules 1.101, 2.104, 3.102, 3.103, 3.301 and 4.102 of the Code of Ethics, by providing inadequate design services and overbilling her. According to Section 5.13 of 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.

Based upon our review of the evidence in the record, including the testimony provided at the hearing by the parties and their witnesses, we have determined that the Complainant has failed to prove that either of the Respondents violated the provisions of the Code of Ethics cited in her Complaint. Therefore, the Complaint is dismissed.

Rule 1.101

This Rule provides:

In practicing architecture, Members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing practicing in the same locality.

In previous Decisions, the NEC has adhered to the principles stated in the commentary to this Rule and has ruled that more than an isolated failure to exhibit competence or to meet the skill and knowledge ordinarily applied by architects is required to sustain a violation of Rule 1.101. (*See NEC Decisions 88-14 and 92-12.*)

The Complainant points to several alleged shortcomings by the Respondents as evidence of their failure to demonstrate a consistent pattern of reasonable care and competence in providing design services in connection with her project:

- The Complainant contends that the design plans included only one of the three requirements (*i.e.*, adequate ventilation) that she had identified for her home. The plans purportedly included a faultily designed heating, ventilation, and air conditioning ("HVAC") system and allowed for only the minimum required amount of insulation under the roof, which would limit the energy efficiency of the house. Moreover, according to her, the designs included a 2:12 pitch, although 4:12 was the minimum amount required for a slate roof—one of the Complainant's three requirements for the home.
- The Complainant alleges that the Respondents failed to provide her and the contractor with "break out" plans so they could decipher the mechanical, electrical, and plumbing details of the project.
- The Complainant claims that she paid for structural engineering consultation but was not provided with the documents when the plans were initially given to her.

Based upon our review of the evidence, we conclude that the Complainant has failed to provide evidence sufficient to support her allegations that the Respondents demonstrated less than reasonable care and good competence while working on her project. Evidence in the record demonstrates that the Respondents consulted with the Complainant throughout the design and documentation process, including regarding changes necessary to achieve the type of home that she wanted. They also appear to have made reasonable efforts to address the problems that surfaced with her three main requirements for the home. Moreover, they expressed their con-



cern that the Complainant had found contractors who could not build the project in accordance with the design documents and requested that she ask the contractors to provide them with a list of items that could not be completed as drawn. Furthermore, in an effort to resolve any issues surrounding the designs, the Respondents provided both written and oral responses to questions submitted by the Complainant and the contractors.

With regard to the allegedly faulty HVAC system design, no evidence was presented by a professional in that business substantiating Complainant's allegation that the overall design was faulty. In addition, it appears that the Respondents offered solutions to address the HVAC system problems, including changing the design by lowering the ceiling and obtaining materials from a manufacturer to serve as reinforcements. However, these solutions were unacceptable to the Complainant. Moreover, based upon the record, we believe that Complainant desired more insulation than what was stated to the Respondents. Whether the design would ultimately result in a home that was not energy efficient, had it been constructed, was never evaluated, and no evidence was presented to prove this either one way or the other.

As to the requirements for the roof, the Respondents asserted that the roof was initially designed as a metal versus slate roof because a shallow slope roof (2 in 12) was required for adequate windows in the sidewalls. Subsequently, a fiberglass shingle roof was introduced to meet the requirements of the roof slope, and finally was changed to slate to accommodate the desires of the Complainant.

Finally, testimony given by both of the parties indicates that they communicated throughout the schematic and design development phases of the project. However, it deteriorated as the project progressed from construction documents to the bidding phase, which appears to be at the heart of the Complainant's allegations regarding Rule 1.101. The Complainant was asked to review

and approve Respondent X's work by signing off on it at the end of each phase, and approved the final design. Based upon our review of various documents, including the design plans by the architectural firm and the specifications, submitted during the hearing, and Addendum Number 1 submitted by the Respondents in the Second Formal Response, we believe that the Respondents exhibited a level of reasonable care and competence that is consistent with normal practice. Although there are elements in the design that would require construction coordination, which is common in any project, this does not demonstrate that the Respondents' conduct reaches the level required to prove a violation of Rule 1.101 of the Code of Ethics.

Rule 2.104

This Rule states: "Members shall not engage in conduct involving fraud or wanton disregard of the rights of others." We can find a violation of Rule 2.104 only if the Complainant has carried her burden of proving that the Respondents' conduct involved *either* fraud *or* wanton disregard of the rights of others. Typically, a finding of fraud is a legal decision made by a court of competent jurisdiction or an administrative or regulatory body and involves a false representation of fact, either by positive act or a concealment of something which should be disclosed, which deceives and is intended to deceive another so that he or she will act upon it to his or her injury. (*See NEC Decision 2000-04.*)

During her testimony at the hearing, the Complainant alleged that the Respondents violated Rule 2.104 by charging her \$4,400, which she paid, for a consultation with a mechanical engineer regarding the HVAC system. The Complainant questions whether the consultation ever occurred and "believe[s]" that the mechanical engineer made green copy plans only after the contractor visited him. The contractor testified that during a visit with the mechanical engineer to obtain answers to his questions regarding the HVAC system, he said "this is the



first time I've ever seen these plans." To provide further support for the contention that the mechanical engineer never saw the plans, the Complainant cites a letter from the contractor to the Complainant, in which he states:

The biggest area of concern for me however, was the Mechanical drawings. I personally visited with [the mechanical engineer], he stated, he was told of these plans, but never saw them.

The mechanical engineer did not testify at the hearing of this case.

The Complainant's unsupported beliefs about whether a consultation with the mechanical engineer took place and whether a bill for \$4,400 was appropriately submitted to her reflect sheer speculation on her part. They do not reflect the actual personal knowledge necessary to provide competent evidence. Similarly, testimony concerning statements allegedly made by the mechanical engineer to the contractor consists entirely of hearsay that we do not find reliable for purposes of establishing a violation of Rule 2.104. For their part, Respondents have vehemently denied the Complainant's allegations and, during the hearing, produced notes and sketches from their meetings suggesting that they had indeed consulted with the mechanical engineer. Thus, it appears that at some point during the design process, there was collaboration between the mechanical engineer and the Respondents in connection with this project.

The Complainant also contends that the Respondents violated Rule 2.104 by charging her a fee of more than \$5,300 for a meeting and other work addressing questions regarding the proposed design and other problems. We are not persuaded that the evidence on this point is sufficient to support a finding of fraud under Rule 2.104. There may have been communication problems between the parties, but we do not find competent evidence sufficient to prove an intent by the Respondents to deceive the

Complainant. Lacking proof of the element of intent, there can be no finding of fraud here.

In the absence of fraud, the Respondents' conduct could be found to violate Rule 2.104 only if it is determined to be in "wanton disregard of ... [the Complainant's] rights." In previous decisions, 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 Decision 90-4.*) Moreover, in NEC Decision 88-8, the Council ruled that the Member's conduct did not violate Rule 2.104 because "there was no basis to find that there was fraud or a conscious indifference to some potential injury to anyone." Applying these criteria to the facts reflected in the record in this case, we are unable to find that the Respondents' conduct was in wanton disregard of the Complainant's rights. In light of these circumstances, we believe that a violation of 2.104 has not been proven in this case.

Rule 3.102

Rule 3.102 provides that

Members shall undertake to perform professional services only when they, together with those whom they may engage as consultants, are qualified by education, training, or experience in the specific technical areas involved.

The Complaint alleges that the Respondents violated this Rule by taking on a design project on which they lacked the requisite background to work, because neither had much experience building with ICF material and Respondent X "took it upon himself to design what turned out to be an inadequate HVAC system." Moreover, according to the Complainant, the Respondents either failed to engage the necessary consultants or ignored their advice. For example, the Com-



plainant claims that the Respondents failed to consult with the mechanical engineer in designing the HVAC system. In addition, she asserts that they ignored the advice and concerns of an ICF wall salesman, whom she had recommended.

In response to the Complainant's allegations, the Respondents deny that they failed to consult the appropriate professionals in designing the project. During the hearing, they produced notes from their meetings and sketches by an experienced mechanical and electrical engineer as evidence that they consulted with the appropriate experts in creating the designs for Complainant's home and corrected errors based on their consultations. In addition, in a letter to the Complainant, they noted that they had discussed options for running the mechanical system with the mechanical engineer.

It is common practice for architects to draft the designs produced by their consultants, and the evidence suggests that occurred in this case. Products sold by manufacturers and represented by salespeople are frequently referred by architects to their consultants familiar with the area of expertise required. In this case, it seems appropriate that the structural engineer should provide that expertise. Furthermore, proprietary products and designs, which are included in construction documents, can often increase the bid cost of a project because competitive bids cannot be procured on proprietary items. This can contribute to high bid prices, which may have been the case in this project. Based on the foregoing, we are unable to find a violation of Rule 3.102.

Rule 3.103

Rule 3.103 states that "Members shall not materially alter the scope or objectives of a project without the client's consent." The Complainant alleges that the Respondents violated this Rule by changing major design elements that she wanted throughout the course of the project without her consent. Her allegations here closely mirror those discussed

above (*i.e.*, Respondents' alleged failures in addressing her wishes concerning her home's roof, ventilation, HVAC and insulation elements, as well as the overall size of the home).

Testimony presented by the Complainant during the hearing and other evidence in the record reflect that the parties communicated periodically regarding the scope of the project and that the Complainant reviewed the plans a number of times during their production. In addition, evidence in the record indicates that the Complainant signed a letter that had been sent by Respondent X in May 2001, stating that she had reviewed the drawings, was satisfied with the work, and was authorizing the Respondents to proceed with the construction documents.

Based upon our review of the designs, we have concluded that certain elements (*e.g.*, gable ends, balconies, and clerestory windows) may have been added to the design and the full cost implications not adequately explained to the Complainant. Explaining the changes in cost occurring as a result of a change in the scope of the project falls within the architect's responsibility to a client. However, there is no evidence in the record to substantiate the Complainant's claim that the Respondents intentionally altered the scope of the project beyond what they reasonably understood to be the Complainant's expectations. In fact, as previously discussed, the Respondents tried to find solutions to rectify the issues that surfaced during the design phase, including with the HVAC system and the slate roof. Moreover, although they might have been explained in greater detail, the cost implications for making the corrections do not appear to have been intentionally withheld from the discussions. A reasonable person would normally expect that amendments would alter the cost of the project. We believe that the Complainant's agreement with these changes should be considered consent. Based on the evidence presented, there is no finding of a violation of this Rule.



Rule 3.301

Rule 3.301 provides that

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.

The commentary to Rule 3.301 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. The Complainant alleges that the Respondents violated this Rule by: (a) estimating the cost of design services at \$21,666, and then billing a total of \$27,687 for them; and (b) estimating construction costs at \$431,600 for a project on which the bids proved to be 35 to 65 percent greater.

To find that the Respondents violated this Rule, the evidence must prove that they *intentionally or recklessly* misled the Complainant regarding the costs of their services and the overall construction costs to build the home. We note that in a December 1999 letter from the Respondents to the Complainant, they stated:

As per our previous discussion, we agreed to prepare a preliminary cost for our design fees and a preliminary construction cost for your project. Upon review of the Schematic Design Drawing presented to our office for your new Residence and Stables, we offer the preliminary cost proposal for the Architectural/Engineering Fees and Construction Cost for your new project.

Thus, the initial cost estimates provided to the Complainant were described as "preliminary," which implies that they could change depending on the course of the project.

As previously noted, the Complainant reviewed the plans a number of times during the design process and was involved in both telephone conversations and meetings with the Respondents. Therefore, she was, or should have been, aware of the changes to the design throughout the course of the project. These changes subsequently resulted in an increase in the costs of the design services and construction. Although the Respondents admit that they may have submitted an invoice prematurely, this does not reach the level of conduct taken with the specific purpose of intentionally or recklessly misleading the Complainant during the process of design and documentation. There is no finding of intentionally or recklessly misleading behavior and, therefore, no finding of a violation of Rule 3.301.

Rule 4.102

Rule 4.102 provides that "Members shall not sign or seal drawings, specifications, reports or other professional work for which they do not have responsible control." The Complainant alleges that the Respondent violated this Rule by stamping plans which included an inadequate HVAC design. In addition, she alleges that "[t]here are no stamped mechanical drawings even though a mechanical engineering consultation was paid for." Furthermore, she argues that Respondent Y has sealed drawings and specifications "for which he does not have control."

The evidence provided by the Complainant on this point is sparse. The record, including the Responses filed by the Respondents and testimony presented by the Respondents during the hearing, suggests that Respondent X, working directly under Respondent Y, had primary responsibility for the project and coordinated the work of the structural, mechanical, and electrical engineers and prepared the design and drafting of the documents. Therefore, based upon our review of the record, we are unable to find a violation of Rule 4.102.



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 substantiate a violation, the Complaint is dismissed. Based upon our review of the evidence in this case, we agree with the Hearing Officer's finding that the Complainant has not met the burden of proving the Respondents have violated Rules 1.101, 2.104, 3.102, 3.103, 3.301, or 4.102 of the Code of Ethics.

The heart of the dispute in this case clearly grew from miscommunication by all parties, including regarding the design services and overall costs in a complex and difficult project. However, this does not translate into conduct which violated the Rules cited by the Complainant. We believe that this case demonstrates why it is in the best interest of both the architect and the client to have a written agreement clearly defining the scope of the project and the architects' responsibilities. We commend the Respondents for providing the Complainant with a copy of "You and Your Architect." However, we also note, as reflected by this case, that it is not a substitute for a written contract.

Accordingly, having found no violation of the referenced rules by the Respondents, the Complaint is dismissed.

Members of the National Ethics Council

Ronald P. Bertone, FAIA
Brian P. Dougherty, FAIA
Phillip T. Markwood, FAIA
Peter Piven, FAIA
Kathryn T. Prigmore, FAIA

The Hearing Officer, Duane A. Kell, FAIA, did not participate in the consideration of this case, as provided in the Rules of Procedure.

August 5, 2004