Failure To Demonstrate a Consistent Pattern of Reasonable Care and Competence

Summary

The National Ethics Council ("Council" or "NEC") ruled that an AIA Member violated Rule 1.01 of the Institute's 1997 Code of Ethics and Professional Conduct ("Code of Ethics") by a failure to demonstrate a consistent pattern of reasonable care and competence. The Council found that the Member failed to complete drawings to obtain a revised building permit for the Complainant's home renovation project and that the Member recommended that construction proceed despite the city having issued a stop-work order. The Council ruled that the Complainant had not met his burden of proof to show that the Member had violated Rule 2.101, 2.104, 2.106, 3.101, 3.301, 4.101, 5.201. The Council imposed the penalty of admonition for the violation of Rule 1.101.

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 2.101 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 of 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, 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.

Rule 2.106 Members shall not counsel or assist a client in conduct that the architect knows, or reasonably should know, is fraudulent or illegal.

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.

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

Rule 4.101 Members having substantial information which leads to a reasonable belief that another Member has committed a violation of this Code which raises a serious question as to that Member's honesty, trustworthiness, or fitness as a Member, shall file a complaint with the National Ethics Council.

Commentary: Often, only an architect can recognize that the behavior of another architect poses a serious question as to that other's professional integrity. In those circumstances, the duty to the professional's calling requires that a complaint be filed. In most jurisdictions, a complaint that invokes professional standards is protected from a libel or slander action if the complaint was made in good faith. If in doubt, a Member should seek counsel before reporting on another under this rule.

1997 Code of Ethics and Professional Conduct, Canon V, Obligations to Colleagues

Rule 5.201 Members shall recognize and respect the professional contributions of their employees, employers, professional colleagues, and business associates.

Background

At the hearing in this case, the Complainant testified on his own behalf, and his wife testified briefly by telephone. Architect A, the original architect of record for the project, also testified on behalf of the Complainant by telephone. The Respondent testified on his own behalf. The contractor for the project also attended the hearing and testified on behalf of the Respondent.

Architect A's Services

The Complainant and his wife ("Homeowners") wanted to modernize their home. They hired Architect A to provide architectural services for the design through the construction documents phase of the project.

A Letter of Agreement dated October 2000 substantiates the arrangement. A second letter, dated November 2000, alludes to a compliment

given to Architect A by the Homeowners stating they "are happy with the latest version of the plans." A series of Architect A's invoices was also submitted into evidence in this case.

Architect A provided professional services for a fixed fee through the permitting phase. Construction phase services were contracted on an hourly basis. The Complainant paid Architect A in full for her services. No other project records (*e.g.*, letters, e-mails, telephone conversation records) related to this contract were submitted with the Complaint. The design was developed over time with the Homeowners' input. The testimony indicates the client/architect relationship was typical of that found for this type of residential project.

Architect A prepared architectural drawings containing the information necessary to document the design and obtained the initial Board of Architectural Review ("BAR") and permit approvals from the City where the project was located. Architect A was not involved with the bidding phase or with the selection of the contractor. She testified that, had she been involved with the contractor selection process, she would not have recommended the contractor the Homeowners chose ("Contractor") based on prior experience with one project. The Homeowners refuted the Respondent's statement that Architect A recommended the Contractor to them. Architect A also prepared the plans that were eventually submitted to the City to revoke a Stop Work Order issued by the City.

The Contractor began construction using Architect A's documents. The documents were hand-drawn and of average quality for this medium and technique. Both demolition and new construction elements are shown on the same drawings. The drawings show the type of information required by a contractor for construction. In contrast, the drawings subsequently prepared by the Respondent are of the type and quality more suited to communicating design ideas to a client. The Respondent's drawings that were submitted as evidence did not include the type of information required of construction documents. The style of drawing makes them much easier to read and, perhaps because of this, the Homeowners felt they were ready for submission for permit approvals. Both types of drawings are acceptable at a professional level, as evidenced by the success of both firms and by the fact that both are able to submit documents for approval and have their projects built.

During the course of construction, Architect A and the Contractor discussed the project over the telephone, at site visits, and in Architect A's office. The Contractor felt that Architect A was difficult to contact at times. Some of their discussions involved requests for clarification of information on the documents. Other conversations revolved around requests for changes to the design the Contractor said were requested by the Homeowners.

After the Respondent had been hired, Architect A became aware that the Homeowners had retained another architect to provide "design input on the front." Architect A's participation in the project was minimal during the time the Respondent was involved. Architect A made approximately three visits to the house during construction—during framing/reframing, when the gypsum wall board was in place, and near the completion of the project to prepare a punch list. During the course of the inspections, she recorded measurements for a set of as-built drawings. None of Architect A's walk-throughs took place during demolition, and she made her inspections without benefit of the Respondent's plans.

At the request of the Complainant, Architect A provided services during July 2001 to document the changes to the design made by the Respondent. This set of drawings was eventually submitted to the City's permitting department. Upon receipt and review of these documents, the City lifted the Stop Work Order which had been in place for approximately three and one-half weeks. Neither the Complainant nor the Respondent submitted a copy of these drawings or

the Stop Work Order to the NEC as evidence in this case.

During the hearing, Architect A testified that she knew the Respondent was providing additional design services and that her scope of work had ended with the completion of the documents and the securing of the BAR approval and the building permit. Bidding and construction phase services were not part of Architect A's base agreement with the Homeowners. She stated in a letter that she visited the site at least twice, that she responded to numerous calls from the Contractor, and that at least two meetings were held in her office during construction. In a letter dated March 2004, the Respondent indicates that Architect A was not fired from the project.

Architect A observed that "things were thrown in disarray" during her second visit to the house. She later submitted a letter to the Homeowners in August 2001 that lists numerous "discrepancies" between the documents and the work in place and listing a series of "defects" in the work.

The Contractor's Work

The Homeowners contracted with the Contractor to remodel their home based on the construction documents prepared by Architect A. AIA Document A101–1987, Standard Form of Contract Between Owner and Contractor, executed in January 2001, substantiates the arrangement. Architect A is listed in the contract as the architect for the project. No project records (*e.g.*, letters, e-mails, telephone conversation records) other than invoices were submitted with the Complaint.

The contract and an attachment also dated in January 2001 stipulated that the construction must be completed by a certain date in August 2001 (if construction started by a certain date in January 2001) or the contractor would pay liquidated damages of $100 per day.

The Contractor began construction using Architect A's documents and informed the Homeowners that he did not feel the quality of the construction documents was adequate for the complexity of the project. The set of documents prepared by Architect A consisted of a single plan for each floor documenting demolition, structural, and architectural requirements. The set also included architectural elevations. The Contractor sought clarification of Architect A's documents periodically during the course of construction.

The Homeowners also had two decorators providing design ideas for the project. Without the involvement of either Architect A or the Respondent, the Homeowners directed the Contractor to change the plans early during construction. The record is not clear, because of lack of written documentation, but it is possible that the Stop Work Order issued by the City may have been due to changes made during this period.

The Contractor informed the Homeowners that he would like them to meet with the Respondent, who (according to the Homeowners' testimony) would be able to provide landscape architecture services for the project. The Contractor brought the Respondent to the house in April 2001, which was early in the construction process. Demolition was basically complete at this point in the construction. The Contractor and the Respondent had worked together successfully for over 20 years. It was the Contractor's understanding that Architect A was no longer involved with the project when he introduced the Respondent to the Homeowners.

The project did not start out as a "teardown/rebuild," but it evolved into one during the period of time the Respondent was involved. The City building officials were alerted to the changing scope of the project by a neighbor. The magnitude of the changes precipitated the City's issuance of a Stop Work Order. The Contractor continued to build throughout the redesign period making changes when directed to by the Homeowners or the Respondent.

The Contractor continued to consult with the Respondent on the project after the Complainant terminated the Respondent's contract. The Homeowners did not move into their home until November 2001, and even then construction was not totally complete. They continue to dispute aspects of the quality and completeness of the Contractor's work.

The Respondent's Involvement

The Respondent is an AIA Member in good standing and was licensed and registered to practice architecture in the state where the project is located.

The Contractor introduced the Respondent to the Homeowners. There is conflicting testimony as to whether or not the Homeowners knew the Respondent was coming to the project site and what the proposed scope of his services would be. He was "hired on a handshake" with the stipulation that the Complainant would spend no more than $5000 for the Respondent's services and that there would be no written contract. The scope of work was restricted to landscaping and limited architectural design changes that would not require resubmission of plans to the Board of Architectural Review. The Contractor denies asking the Respondent to provide landscape design services, but the Homeowners believe that is the reason he was initially asked to visit them.

The Contractor felt that the Homeowners did not fully understand Architect A's architectural drawings, so he asked the Respondent to produce drawings to show the changes he recommended. Those changes include modifications to the kitchen/study area, the powder room, and the laundry room. The Respondent brought drawings of this scheme to his initial meeting with the Homeowners. The base drawings were developed using copies of Architect A's drawings provided to him by the Contractor. The Respondent did not confirm these changes with the Homeowners before starting redesign, nor did he contact Architect A to request permission to revise her design.

The Respondent provided professional services to the Homeowners without the benefit of a written contract. The parties had an oral agreement that the services were to be provided on an hourly basis. There is disagreement between the parties as to whether or not a maximum fee was stipulated. The Complainant insists they agreed to a $5000 maximum fee, while the Respondent believes the $5000 limit was not to be exceeded until they had agreed upon and documented the specific terms of the contract. In either case, the Respondent did not notify the Homeowners when they were approaching the $5000 limit so they would be able to give him options on how he was to proceed.

Information in the record does not substantiate the scope of work agreed to by the handshake agreement. The Respondent testified that the oral agreement was to be followed by a written one. He testified at one point in the hearing that he agreed with a handshake to a $5000 cap on fees to provide design enhancement that would not require refiling the plans with the permit department. Furthermore, he testified that he agreed to these conditions only if the work was to be completed "promptly."

The Respondent submitted a proposed Letter of Agreement Between Architect and Owner that expands the scope of services beyond what was agreed to in the handshake deal. Twice during the project, the Respondent sent the letter to the Complainant to review and sign. The proposed Letter of Agreement indicates that the Respondent was to provide:

1. Design changes requested by the client;
2. Professional advice and supervision, as requested by the client;
3. New working drawings as required by the City;
4. New sealed drawings, as required;
5. New Board of Architectural Review meetings, as required; and

6. Complete construction plan showing existing conditions versus proposed changes.

Tasks 4, 5, and 6 expanded the scope of work discussed at the initial meeting because these tasks would not be needed if there was no need to refile the plans with the City. However, these items seem to be congruent with a later request by the Complainant for the Respondent to document the changes requested by the building department after an early June 2001 meeting. The Respondent informed the Complainant of the increased scope and probable fee increase due to the building department's request. The Complainant interprets this action as the Respondent's solicitation of services for which another architect had already been retained, which the Complainant believes violates Rule 1.106 and Rule 3.301. The Complainant stated in the hearing that he did not sign the Letter of Agreement because he stated at their initial meeting that he would not sign one.

A letter from the Complainant to the Respondent documents an initial confusion about the hourly rates. The few available project records (*e.g.*, letters, e-mails, telephone conversation records, invoices) in the Respondent's files related to the case were submitted with the Response or at the hearing. Included in the documents was a copy of the Respondent's standard draft AIA Document B151–1987, Abbreviated Form of Agreement Between Owner and Architect. This draft agreement indicates the Respondent's normal hourly rates are $150 per hour for a Principal and $110 per hour for an Associate Principal. The Complainant maintains the hourly rates were always $120 and $90, respectively. This misunderstanding was resolved to the Complainant's satisfaction early during the period of time the Respondent performed services.

The Respondent submitted invoices for his services on a regular basis. He also testified that he notified the Homeowners that he had incurred expenses that they had not reimbursed. The Respondent added interest to each invoice, which added approximately $1,000 to the total amount that the Respondent asserts he is due. The amount invoiced was approximately $10,000. The total amount paid was $5500, a difference of $4,500, not including the interest. The Respondent provided no professional services sanctioned by the Complainant after his services were terminated in June 2001. However, he continued to advise the Contractor after that date.

Demolition and reframing had already begun when the Homeowners retained the Respondent. The initial changes proposed by the Respondent resulted in essentially a teardown and reconstruction. A February 2003 letter from the Respondent indicates it was his understanding that he was to provide new design studies, not just provide more legible documentation of Architect A's design.

The Respondent was aware of the liquidated damages clause in the contract between the Homeowners and the Contractor. He continued to explore design issues even though he was aware they might impact the construction schedule. He testified that he assumed the Homeowners would not impose liquidated damages considering the magnitude of the changes they were requesting late in the construction phase. This impact of the design changes on the construction schedule was not discussed with the Homeowners.

The Respondent had approximately nine meetings with the Homeowners. A review of the drawings submitted as part of the record of this case indicates the changes to the design in April 2001 were numerous. A July 2001 letter from the Respondent to the Homeowners states that substantial design changes were made during the five-week period that the Respondent worked on the project. The changes are also documented in a summary that he prepared dated February 2003.

The Complainant denied "signing-off" on any documents prepared by the Respondent, but it appears his wife did initial at least two sets. There is no indication that the Respondent ex-

plained the effect of "signing-off" drawings to her. Each of the three times the Respondent requested a signoff, the Homeowners requested additional changes to the design. The additional design work prevented the timely submission of the documents. The Complainant later testified that he eventually approved the design changes proposed by the Respondent and that he knew that the Respondent instructed the Contractor to make the changes.

A review of the documents confirms that changes made during the Respondent's involvement include several alternative locations for moving the kitchen, the stairs, and the master bath as well as several options for a "bump out" in the rear of the house. The Homeowners did not request that the kitchen be moved from its original location at the center of the house to the rear. This change was proposed by the Respondent and forwarded to the Contractor during construction. The scope of this change was clearly beyond the scope of design enhancements that would not require revising the building permit application, as agreed to initially. The final design is essentially the same layout as the design created by Architect A with the exception of the relatively small "bump out."

The Respondent maintained careful records of the time spent making the changes and billed the Homeowners on a regular basis. After completing several iterations of the design, he stopped work because the Homeowners had stopped paying him. The Homeowners indicated they were satisfied with the progress of the redesign. The Respondent feels the final design reflects the Homeowners' wishes. They were, however, disappointed that revised documents had not been filed with the City in a timely manner.

A June 2001 letter from the Respondent to the Homeowners asks why a meeting the week before had been cancelled; requests a discussion to resolve the design of the master bedroom suite and the kitchen; and requests a third and final sign-off of the design so he can complete construction documents and submit them to the City for approvals. The letter indicates the Respondent is only one-third of the way through completion of the documents. (The Complainant testified that he felt the design was complete and that the Respondent should have been more responsive to requests for completed documents to be sent to the permitting department.) Finally, the letter requests that the Homeowners sign the Letter of Agreement and pay the outstanding invoices.

Shortly thereafter, the Complainant terminated the agreement with the Respondent in a telephone conversation followed by an e-mail that same day. The reasons stated for the termination were that the Respondent instructed the Contractor to modify the construction prior to obtaining approval from the City and that the Respondent did not prepare documents for submission to the City Building Department to remedy a Stop Work Order related to this change in the design.

The Respondent assumed that the Homeowners understood the scope and complexity of the changes. Until late in the relationship, he did not inform or educate them about how additional design work meant additional design fees would be incurred. The Respondent continued to direct the Contractor to make design changes requested by the Homeowners, but he did not take the client's budget or schedule into account during the process. The Respondent's response to the liquidated damages clause was to do what he could to help out the Contractor.

The Respondent filed a mechanic's lien against the property in February 2002. In a letter to the Respondent in August 2002, the Complainant requested that he remove the lien. The Complainant indicated he would take legal action and "contact the AIA" if the Respondent did not have the lien removed. The Respondent then contacted the Complainant's lawyer, seeking to settle his claim and the lien. The Complainant indicated in a September 2002 faxed letter that the Respondent was free to "file a Summons and Complaint in the City Small Claims Court" but

that he would contact the Respondent's lawyer with a summary of monetary damages incurred by the Homeowners.

The Complainant provided a statement to the Respondent's lawyer in March 2003, summarizing his position relative to the mechanic's lien—that there was no contract because it was not signed; that there was no agreed total fee; that no monies were due to the Respondent; and that the contract was terminated in June 2001, not in January 2002. In an April 2002 letter, the Respondent had requested a check for $3,000 as payment in full as a counter-offer to the Complainant's denial that he owed the Respondent any money. The final piece of correspondence exchanged between the parties before this case was filed with the NEC is a letter from the Complainant to the Respondent restating his position regarding the lien and refusing his request to settle the matter.

The Complainant testified that the Respondent had not been to the project site between June 2001 and January of 2002. Based on this, he feels that the lien was improperly filed because the City requires that it be filed within eight weeks of the initiating event. The Respondent testified that he had been to the house during that period of time at the request of the Contractor. He was not paid for these services. He insists that filing the lien was not a malicious act because he felt his participation in the project continued into the fall even though the Complainant did not know he was still involved.

Conclusions

Based upon our review of the evidence in the record, we have determined that the Complainant has met his burden of proof required by Section 5.13 of the NEC's Rules of Procedure as to the Respondent's violation of Rule 1.101. However, the Complainant has failed to meet his burden of proof regarding the alleged violations of Rules 2.101, 2.104, 2.106, 3.101, 3.301, 4.101, and 5.201.

Several allegations of misconduct were made for each Rule alleged to have been violated by the Respondent. The individual findings are set out below.

Rule 1.101

Rule 1.101 provides that, "[i]n practicing architecture, Members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill that is ordinarily applied by architects of good standing practicing in the same locality." The commentary to this Rule states:

> 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 incidences of minor lapses would not provide the basis for discipline.

The Complainant alleges that the Respondent violated Rule 1.101 by:

(a) continuing to make changes to the design that prevented the completion of documents for prompt resubmission to the City so that the City would lift the Stop Work Order;

(b) recommending that construction on the house proceed even though the design changes had not been resubmitted to the City; and

(c) filing a fraudulent lien, which the Complainant argues could not have been valid because there was no signed contract and the parties did not agree upon a total fee.

We find that the evidence in the record substantiates the allegations made in (a) and (b) and a finding that the Respondent failed to demonstrate a consistent pattern of reasonable care and competence ordinarily applied by architects in providing professional services to a client

throughout this project. The fact that he failed to exhibit this behavior throughout his involvement in this project indicates that it was more than an isolated instance or minor lapse. The evidence does not substantiate the allegation made in (c).

Regarding the allegations in (a) and (b), although the Homeowners were indecisive regarding the final design that they wanted, nothing in the evidence demonstrates that the Respondent made an effort at any point during the project to explain to them that their indecision about the design was having a direct negative impact on both the project schedule and the budget. He continued to design and redesign the home addition after receiving directions to the contrary from both Homeowners, sometimes without the other spouse's knowledge. In addition, the Respondent failed to discuss the additional fees that would be associated with the design changes prior to commencing the extra work and did not clearly communicate his professional responsibility to have the clients' documented approval of the design prior to submitting the drawings to the City.

In addition, the Respondent was aware that changes such as relocating the kitchen would substantively alter the scope of a project and that additional drawings needed to be filed so that the permit reflected the scope of work under construction. He nonetheless failed to inform the Homeowners of this fact during their initial meeting. Although the Respondent addressed this issue in his proposed Letter of Agreement, that document was not sent until after he had started work on the project. The record indicates that the Respondent provided revised documents which included structural and other systems changes to the Contractor several times through the duration of construction but not to the City's Board of Architectural Review.

Even though the Homeowners continued to instruct the Contractor during the period after the Stop Work Order was imposed, this does not relieve the architect providing the professional services of his professional responsibility to advise his clients that he needed their approval of his work, nor his obligation to submit the drawings to the City for review.

As to the allegation in (c) above, the Complainant argues that the Respondent violated Rule 1.101 by filing a fraudulent lien, which could not have been valid because there was no signed contract. Therefore, he believes that no monies were owed to the Respondent. In addition, the Complainant maintains that if the handshake reflected ratification of a valid contract, then the lien should have been filed within four months after the completion of the contract. We believe that the evidence does not support a violation of Rule 1.101 based upon this allegation. It is clear that the Respondent performed professional services in an oral agreement consummated with a handshake. However, he attempted to get written documentation of the agreement after starting the project by putting the conditions in writing in a Letter of Agreement and requesting that the Complainant sign the document. He also submitted invoices for work that he had performed on the project. In addition, the Respondent relied on advice by his legal counsel in filing the lien as a means for obtaining payment of fees for services that he had performed in connection with the project.

Rule 2.101

Rule 2.101 states that "Members shall not, in the conduct of their professional practice, knowingly violate the law." The commentary for this rule states, in part, that 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."

The Complainant maintains that the Respondent violated Rule 2.101 by:

(a) being a party to an unrelated court case;

(b) ignoring requests by the City to submit drawings for review for work under construction; and

(c) working with the Contractor to set up a scam to increase the fees the Complainant would be required to pay for the Respondent's services.

Based upon our review of the decision in the court case, we have concluded that the Complainant has not demonstrated a violation of Rule 2.101 by the Respondent. The issue in the court case, in which the Respondent is named as a defendant, was whether a claim of fraud involving a contract for architectural services was subject to arbitration. The court held that the claim for fraud was subject to arbitration. However, the court did not find that the Respondent violated any law. Since there is no evidence in the record of an independent finding by a court or by an administrative agency that the Respondent has violated a law, we conclude that the Complainant has not borne the burden of proving a violation of Rule 2.101.

Finally, there is no evidence in the record of an independent finding by a court or an administrative agency of a violation of the law related to the allegations in (b) and (c). Therefore, the Complainant has not met his burden of proof as required by Section 5.13 of the Rules of Procedure.

Rule 2.104

Rule 2.104 states that "Members shall not engage in conduct involving fraud or wanton disregard of the rights of others." The commentary for this rule provides:

> 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, 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.

The Complainant contends that the Respondent violated Rule 2.104 by soliciting work although he knew another architect had been retained for the project and that the project was already under construction. He further maintains that the Respondent violated this provision by not having full knowledge of the City codes, specifically the requirements for submission to the BAR and to the permit department when design changes occur over the course of construction. Finally, the Complainant states that the Respondent violated Rule 2.104 by abusing the legal process in filing an allegedly fraudulent lien on the property and overbilling the Homeowners for architectural services that he performed on the project.

In a previous decision involving a violation of this Rule, the Council ruled that it did not have the authority to find that fraud existed in the absence of a finding by a court or an independent body. Following that decision in this case, we are unable to find that the Respondent has committed fraud in the absence of a finding by a court or independent body. Therefore, a violation of Rule 2.104 can be found only if the Respondent's conduct is determined to be in "wanton disregard" of the Complainant's rights.

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 "action taken in disregard of a high degree of danger that is apparent or would be apparent to a reasonable person." (*See NEC Decisions 90-4 and 93-4.*) Furthermore, 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 for injury to anyone."

The Complainant has failed to carry his burden of proving that the Respondent took action in wanton disregard of a high degree of danger to the Complainant or his wife. The Respondent

may have been careless in failing to advise the clients that the constant changes to the design would require additional drawings that needed to be filed so that the construction permit reflected the scope of work under construction and that this would also result in additional fees. However, the Homeowners' indecisiveness regarding the final design also contributed to the problems with his completion of the documents in a timely manner and the increase in the budget. Thus, there is nothing in the record to indicate that the Respondent took action in disregard of a high degree of danger to the Complainant or that reflect a conscious indifference on his part to any harm that the Respondent's actions might cause to the Complainant or his spouse.

Rule 2.106

Rule 2.106 states:

> Members shall not counsel or assist a client in conduct that the architect knows, or reasonably should know, is fraudulent or illegal.

The Complainant contends that the Respondent violated this Rule by instructing the Contractor to continue with construction without approved plans while the Stop Work Order was in place, and by not knowing and understanding the local building codes. Based upon the evidence in the record, we find that the Complainant has not submitted sufficient evidence to prove that the Respondent counseled or assisted the Contractor in conduct that the Respondent knew or should have known was fraudulent or illegal.

As we noted in the preceding discussion of Rule 2.104, the NEC is unable to find that a Member has committed fraud in the absence of a finding to that effect by a court or independent body. We think this requirement is also applicable to Rule 2.106. Therefore, to prove that the Respondent has violated Rule 2.106, the Complaint must show a finding by a court or independent body that the Respondent committed fraud or engaged in illegal conduct. The Complainant has failed to do so.

Even if a violation of Rule 2.106 could be established absent the pertinent finding by a court or other body, the result here would be no different. The Complainant maintains the Respondent violated Rule 2.106 by instructing the Contractor to continue construction without approved plans while the Stop Work Order was in place and by not knowing and understanding the local building codes. For all that appears in the record, however, the Respondent was fully aware of the codes and other regulatory requirements and attempted to obtain the Homeowners' concurrence on the design prior to completing documents so that they could be filed. The Complainant was involved in the design process and had full knowledge of the design changes. However, he and his wife changed their minds twice about significant design decisions after they had signed off on them. Without their approval, the Respondent could go no further in the process. When the Homeowners stopped paying their invoices, the Respondent decided that he could not expend any additional resources on the project. Shortly thereafter, the Complainant terminated his contract. None of this suggests that the Respondent assisted the Contractor in any conduct that the Respondent knew, or reasonably should have known, was fraudulent or illegal.

Thus, based upon the evidence in the record, we are unable to find a violation of Rule 2.106.

Rule 3.101

Rule 3.101 states that,

> [i]n 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.

The Complainant maintains that the Respondent has violated Rule 3.101 by not submitting documents to the City within one week of starting the redesign, by not knowing or understanding the local building codes, and by filing a fraudulent lien and thus purportedly abusing the legal process. The NEC finds that, based upon the evidence in the record, the Respondent's conduct has not violated Rule 3.101.

First, the Homeowners were part of the design process so they were aware that the one-week timeframe had passed. As the scope of the project expanded, it became more complex. Thus, the Respondent is not solely at fault for the delay. He failed to submit documents to the City related to lifting the Stop Work Order in a timely and competent manner because he did not have the support of the client to do so. Therefore, we are unable to find that his failure to timely submit documents to the City resulted in a violation of Rule 3.101.

Second, it is clear that the Respondent understood the codes and the requirements of professional practice and attempted to adhere to the City regulations and the state licensing laws by preparing appropriate documentation and attempting to get client sign-off prior to submitting the documents. Based upon our review of the record, we believe that the Respondent insisted that appropriate protocols be followed in the course of his work.

Finally, the Respondent appears to have consulted with his attorney regarding the proper mechanism for filing of the lien. He found that the lien laws require that the lien be filed within four months after the completion of the contract. The lien states that the Respondent was last employed in January 2002, while the Complainant asserts he fired the Respondent in June 2001. The Respondent sent invoices to the Complainant regularly for 15 months. The amounts covered costs he incurred prior to April, the date that the Complainant asserts he fired the Respondent. Although the Respondent was not actively performing architectural services, he was actively trying to resolve the payment issue without involving the legal system. Once he determined that the Homeowners were not going to respond, he resorted to using the lien process as a mechanism for collecting unpaid fees. The January 2002 date is the date of the last invoice, which can be interpreted as the last date there was a contractual obligation by the Complainant. No evidence was submitted that indicates the state considers the lien to be invalid. There was no evidence presented that the Respondent harassed the Homeowners.

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 this Rule states: "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."

The Complainant argues that the Respondent violated Rule 3.301 by representing that he had full knowledge of the City building codes and by filing a fraudulent lien and therefore purportedly abusing the legal process. The commentary to Rule 3.301 makes it clear that it is intended to preclude dishonest, reckless, or illegal representations while soliciting a client or while performing architectural services.

There is nothing in the record to indicate that the Respondent intentionally made dishonest or illegal representations while performing architectural services, that he did not understand the codes and the requirements of professional practice, or that he failed to adhere to the City's regulations and the state licensing laws. On the

contrary, he demonstrated his knowledge of these provisions by preparing the proper documentation. In addition, he attempted to get client sign-off prior to submitting the documents. Moreover, as noted in the discussion of Rule 3.101, the Respondent insisted that the appropriate protocols be followed in the course of his work. Finally, for reasons similar to those discussed above, the Respondent's filing of a lien does not provide a basis for finding a violation of Rule 3.301.

Rule 4.101

This rule provides that

> Members having substantial information which leads to a reasonable belief that another Member has committed a violation of this Code which raises a serious question as to that Member's honesty, trustworthiness, or fitness as a Member, shall file a complaint with the National Ethics Council.

The commentary to this Rule states that

> [o]ften, only an architect can recognize that the behavior of another architect poses a serious question as to the other's professional integrity. In those circumstances, the duty to the professional's calling requires that a complaint be filed. In most jurisdictions, a complaint that invokes professional standards is protected from a libel or slander action if the complaint was made in good faith. If in doubt, a Member should seek counsel before reporting on another under this rule.

The Complainant argues that the Respondent violated Rule 4.101 of the Code of Ethics by soliciting work when he already knew that another architect (Architect A) had been retained to perform professional services and by stating that he was aware of the City's codes but failing to provide documents to enable the quick lifting of the Stop Work Order.

Rule 4.101 requires a Member to file a Complaint with the National Ethics Council if the Member has substantial information which leads to a reasonable belief that another Member has committed a violation of the Code of Ethics. However, this Rule does not provide an independent basis for establishing a violation of the Code of Ethics by the Respondent and is inapplicable to the alleged conduct by the Respondent described above.

Rule 5.201

This rule states that

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

The Complainant states that the Respondent violated this provision of the Code by soliciting work, although he knew another architect had already been retained to perform architectural services, overbilling and harassing the Homeowners, and abusing the legal process.

There is no evidence in the record to support that the Respondent actively solicited work in connection with the Homeowners' project. Each architect was aware of the other architect's role on the project. Architect A had completed her design and construction document phase obligations to the Homeowners prior to the Respondent's involvement with the project. Her responsibilities during the construction phase were minimal, and the Homeowners had not contracted with her to perform any construction phase services. The Respondent's activities were therefore separate and apart from those of Architect A. Moreover, overbilling and harassing the Homeowners and abusing the legal process are unrelated to Rule 5.201 and, therefore, even if proven, do not support a violation of this Rule.

Penalty

The Council has four levels of sanctions that it may impose for violations of the Code: admonition (private reprimand), censure (public reprimand), suspension of membership in the Institute for a period of time, or termination of membership in the Institute.

Having found that the Respondent has violated Rule 1.101 of the Code of Ethics, we impose a penalty of admonition, a private reprimand. Given the totality of the circumstances surrounding this case, we believe this penalty is appropriate. As required by Sections 8.31 and 8.32 of the Institute's Bylaws, a record of the case will be placed in the Member's file but shall not be published in *AIArchitect* and will remain confidential.

Members of the National Ethics Council

Janet Donelson, FAIA
A.J. Gersich, AIA
Phillip T. Markwood, FAIA
Melinda Pearson, AIA
Michael L. Prifti, FAIA
Bill D. Smith, FAIA

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

July 11, 2006