



# Failure To Demonstrate a Consistent Pattern of Reasonable Care and Competence; Materially Altering the Scope or Objectives of a Project Without the Client's Consent

## Summary

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The National Ethics Council (“Council” or “NEC”) ruled that an AIA Member violated Rule 1.101 and Rule 3.103 of the Institute’s Code of Ethics and Professional Conduct (“Code of Ethics”). The Council ruled that the Member violated Rule 1.101 by showing a consistent pattern of unresponsiveness and lack of professionalism while providing services for a single-family residential project. The Member also violated Rule 3.103 by altering the scope and objectives of the project by adding a bedroom to the Complainant’s project without her consent. The Council found no violation of Rules 2.104, 2.106, 2.301, 3.201, 3.202, 3.301, 3.401, and 4.103. The Council imposed the penalty of a two-year suspension of membership on the Member.

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

## References\*

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*2004 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.*

*2004 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 a law, or of fraud, then its proof must be based on an independent finding of a violation of the law or a finding of fraud 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.

Rule 2.301 Members making public statements on architectural issues shall disclose when they are being compensated for making such statements or when



they have an economic interest in the issue.

*2004 Code of Ethics and Professional Conduct, Canon III, Obligations to the Client*

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

Rule 3.201 A Member shall not render professional services if the Member's professional judgment could be affected by responsibilities to another project or person, or by the Member's own interests, unless all those who rely on the Member's judgment consent after full disclosure.

*Commentary: This rule is intended to embrace the full range of situations that may present a Member with a conflict between his interests or responsibilities and the interest of others. Those who are entitled to disclosure may include a client, owner, employer, contractor, or others who rely on or are affected by the Member's professional decisions. A Member who cannot appropriately communicate about a conflict directly with an affected person must take steps to ensure that disclosure is made by other means.*

Rule 3.202 When acting by agreement of the parties as the independent interpreter of building contract documents and the judge of contract performance, Members shall render decisions impartially.

*Commentary: This rule applies when the Member, though paid by the owner and owing the owner loyalty, is nonetheless required to act with impartiality in fulfilling the*

*architect's professional responsibilities.*

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.*

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.*

*2004 Code of Ethics and Professional Conduct, 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**

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### *The Parties*

The Complainant is a private citizen who hired a contractor to build her house. The contractor contacted the Respondent to provide the drawings. The Respondent is an architect who provides architectural services through his own firm.

### *The Construction Contract*

The Complainant hired Smith Construction, Inc. (Joan Smith, Phil Smith, and Tyler Smith, principals) in April 2004 to build her home.

The contract between the Complainant and Smith Construction included:

labor and equipment necessary to construct a single family home ... in accordance with all applicable building codes and regulations [and] in substantial compliance with the plans and specifications which plans have been examined and approved by purchaser and are on file in the office of Contractor.

In addition, the contract states that the “purchaser agrees to pay [a fixed sum] excluding permit extras, and blueprint” and “[o]nce homeowner purchases lot, loan, blueprints, etc. estimated time of completion September 10th 2004.” The contract also states that the “Purchaser also agrees to pay for any changes required by governmental authorities, or necessary for Contractor to do the work according to the local building code, upon completion of the change order work.”

### *The Design/Drawing Process*

The Complainant hired the Respondent to provide the construction drawings for her house. The Complainant testified that the Respondent’s name was given to her by Smith Construction and she called the Respondent and worked out a rate of \$1.00 per square foot to do the drawings. That was the only time the Respondent talked with his client, the Complainant, prior to the building permit being issued. At no time before, during, or after the project did the Respondent meet with the Complainant. Most communications were through Smith Construction. The Complainant asked to meet with the Respondent several times, but to no avail.

In his response to the complaint, the Respondent stated that Tyler Smith of Smith Construction requested the Respondent to provide a “basic set of construction documents for permit for Lot 21 in Happy Dale Subdivision.” No written contract between Smith Construction and the Respondent was submitted as evidence in this case, however.

The Complainant testified that Smith Construction showed her several home design drawings, apparently taken out of a plan book, and she selected one. Smith Construction then gave the Respondent the selected design, whose floor plans and front elevation have been identified as hearing exhibits.

The original plan needed to be reversed, apparently to fit the site, and the Complainant requested other minor changes that were shown on the plans provided to the Respondent. The Respondent made the requested changes to the design and produced a set of drawings to submit to the building department, including “mirroring” the building. The “final permit set” submitted as part of the Respondent’s response in this case has his firm’s title block and is dated June 10, 2004 but is not signed or sealed. Smith Construction applied for a building permit on June 18, 2004; the Application for Permit shows the size of the house to be 3,046 square feet. The city issued the building permit on July 18, 2004.



When the Complainant went to pay for the permit, she saw that the house size was 3,046 square feet instead of the 2,568 square feet shown on the original house plan and on the construction contract. She asked Smith Construction why the permit showed the house with 3,046 square feet when the original house plan indicated 2,568 square feet and was told that the architect had made the plan bigger to avoid a “copyright issue.” No further evidence was submitted in this case regarding copyright ownership of the design or drawings.

On July 22, 2004, the Complainant sent a fax to Smith Construction asking again why the house had grown in size. She did not want the larger house. In her complaint, she claims the larger size caused her to pay a higher permit fee, a higher design fee, additional material costs, and higher real estate taxes.

It appears that the reason for most of the increase in size was that the second floor “bonus room” shown on the original plans was included as finished space in the final design, although the Complainant had told the contractor that she did not want the bonus room built out.

According to her complaint, when the Complainant told Smith Construction of the error the contractor initially responded by saying that “once the city saw the drawings [they] could not be re-submitted again to correct.” According to the complaint, the Complainant later learned that the construction materials had already been ordered in accordance with the permit drawings and that it would have cost more to change back to the original design. In any event, the Complainant felt pressured to proceed with construction based on the permitted drawings.

#### *The Invoicing/Payment Process*

The Respondent invoiced Smith Construction on June 12, 2004 in the amount of \$3,046.50 for his services on the project. According to the response he filed in this case, after the invoice went unpaid, the Respondent inquired about its

status, and Smith Construction responded that the invoice had been forwarded for payment to the Complainant, who indicated she was not going to pay it. The Respondent told Smith Construction that he would lien the project until payment was received, which he stated was standard practice. The Complainant testified that she was told by Smith Construction that the Respondent had also threatened to file a claim against the Smiths’ own home as well.

According to the Complainant, she made a partial payment to the Respondent, but contested the full amount of the invoice. When Smith Construction told the Complainant that the Respondent was going to lien her new property, the Complainant contacted the Respondent and inquired “why the bonus room was included in the permit set.” The Respondent explained that he had to provide the proper structure and framing to support the future bonus room.

The Complainant questioned why the invoice was \$400 more than the agreed-upon fee of \$1 per square foot multiplied by the original square footage of 2,568, and the Respondent explained it was for the bonus room and structural design. The Complainant disagreed, but after several months and more phone calls, the Complainant paid the Respondent’s invoice in full.

#### *The Construction Process*

Some time during construction, the Complainant called the Respondent stating that the breakfast area sliding door had not been installed according to plans. The Respondent reviewed the plans with Smith Construction and explained to the Complainant that the door had been installed according to the elevation, which was the correct drawing. He explained the plan drawing was generic and that “different manufacturers stack and slide their doors differently,” so that the plan was not the correct drawing to be used. The Respondent concluded that the door had been placed correctly by the contractor. The Complainant disagrees.



On December 18, 2004, the Respondent sent a letter to Smith Construction stating the sliding door was installed correctly per the elevation drawing. On December 22, 2004 the Complainant sent a letter to the Respondent stating the sliding door was installed incorrectly, per the floor plan. The contractor apparently never reversed the door opening direction.

## Conclusions

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### *Burden of Proof*

According to Section 5.13 of the Council'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 regarding a referenced Rule does not establish a violation, the Complaint is dismissed with respect to that Rule. (*See NEC's Rules of Procedure, Section 5.13.*)

### *Rule 1.101*

Rule 1.101 of the Code of Ethics states:

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.

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 instances of minor lapses would not provide the basis for discipline.

For architects to use reasonable care and competence in their practice, they must communicate with their clients. Communication with clients is essential in order to understand their requirements and to respond to their concerns.

The Complainant alleges that the Respondent violated Rule 1.101 by taking a sketch of a three-bedroom home and providing drawings for a four-bedroom home. This change, which resulted from the drawings incorporating the "bonus room," increased the size and cost of the house. A "bonus room" is a tool used by some residential developers to provide homes with more square feet without incurring additional development fees or costs. This strategy does not work in all jurisdictions, however, and apparently was not recognized by the building officials where the Complainant's home was built. The Respondent should have known how the local building officials would treat the "bonus room" and should have discussed this with his client. The Complainant did not want the additional space and cost but was saddled with them because the Respondent failed in his duty of professionalism and responsibility to his client.

The Respondent never met with the Complainant in person. He refused to return her phone calls. He was unresponsive to the Complainant's concerns and communications about conflicts and errors in the drawings and during construction.

The National Ethics Council concludes that the Respondent violated Rule 1.101 by showing a consistent pattern of unresponsiveness and lack of professionalism.

### *Rule 2.104*

Rule 2.104 of the Code of Ethics states:

Members shall not engage in conduct involving fraud or wanton disregard of the rights of others.



The commentary to this Rule states:

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, or of fraud, then its proof must be based on an independent finding of a violation of the law or a finding of fraud by a court of competent jurisdiction or an administrative or regulatory body.

The Complainant alleges that the Respondent violated Rule 2.104 because he threatened to place a lien on the Complainant's home if the Complainant would not pay the architect's fee for the additional square footage added to the home.

As described in the commentary, a violation of this Rule based on fraud must be supported by an independent finding of fraud by a court or administrative or regulatory body. The NEC has not been provided any such independent finding of fraud. As a result, the Complainant has not met her burden to prove a violation based on fraud.

A violation of Rule 2.104 may, alternatively, be based on the Respondent's wanton disregard of the Complainant's rights. The NEC has previously described "wanton disregard" under this Rule to be 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.*) The Respondent apparently did not file a lien on the Complainant's home, although he threatened to do so. This threat does not meet the standard to show wanton disregard of the Complainant's rights.

The National Ethics Council concludes that the Complainant did not prove that the Respondent violated Rule 2.104.

*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 alleges that the Respondent violated this Rule when he provided counsel to Smith Construction that he knew was fraudulent and illegal in his communications regarding the sliding door.

Rule 2.106 prohibits certain types of conduct in the architect/client relationship. The activities that the Complainant claims violate the Rule were between the Respondent and Smith Construction, however, not between the Respondent and the Complainant. The Complainant—not the contractor—was the Respondent's client. As a result, this Rule does not apply in this circumstance.

The National Ethics Council concludes that the Complainant did not prove that the Respondent violated Rule 2.106.

*Rule 2.301*

Rule 2.301 states:

Members making public statements on architectural issues shall disclose when they are being compensated for making such statements or when they have an economic interest in the issue.

The Complainant alleges that the Respondent made public statements regarding an architectural issue without the Complainant's permission by communicating directly with Smith Construction regarding the Complainant's project in ways that would help him to secure future business from that contractor.



Rule 2.301 applies to statements by Members that are “public,” such as letters to a newspaper editor, testimony before a planning commission, or statements made to other organizations on behalf of the Institute or one of its components. A Member’s communications to a contractor during a construction project are not “public statements” under the Rule. As a result, any statements the Respondent made to Smith Construction regarding the Complainant’s project would not support a finding that the Respondent violated this Rule.

The National Ethics Council concludes that the Complainant did not prove that the Respondent violated Rule 2.301.

*Rule 3.103*

Rule 3.103 states:

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

As explained in the discussion of Rule 1.101 above, the Respondent changed the Complainant’s project from a three-bedroom home to a four-bedroom home without her permission.

It is not clear in this case that the Respondent acted purposely when he increased the scope of the Complainant’s home. As described in the discussion of Rule 1.101 above, the dispute over the project’s scope came about because of the Respondent’s failure to communicate with his client. In such a situation, a Member’s actions do not need to be purposeful in order to establish a violation of Rule 3.103. The scope of the Complainant’s project was materially altered, the Respondent was responsible for the alteration, and he failed completely to communicate with his client about it.

The National Ethics Council concludes that the Respondent violated Rule 3.103 by altering the scope and objectives of the project by adding a

bedroom to the Complainant’s home without her consent.

*Rule 3.201*

Rule 3.201 states:

A Member shall not render professional services if the Member’s professional judgment could be affected by responsibilities to another project or person, or by the Member’s own interests, unless all those who rely on the Member’s judgment consent after full disclosure.

The commentary to this Rule states:

This rule is intended to embrace the full range of situations that may present a Member with a conflict between his interests or responsibilities and the interest of others. Those who are entitled to disclosure may include a client, owner, employer, contractor, or others who rely on or are affected by the Member’s professional decisions. A Member who cannot appropriately communicate about a conflict directly with an affected person must take steps to ensure that disclosure is made by other means.

The Complainant alleges that the Respondent rendered professional services while making decisions based on his own interest and the contractor’s interest. The Complainant believes that the Respondent had a conflict of interest because he had an ongoing working relationship with the contractor on various projects and hoped to get future work through the contractor, with the result that the Respondent made decisions during design and construction in favor of the contractor and against the Complainant’s interests. Specifically, the Complainant claims that the Respondent’s response during construction regarding the opening direction of the breakfast area sliding door was biased in favor



of the contractor because of the Respondent's conflict of interest.

The Respondent's response that the door had been installed according to the drawings cannot by itself be faulted. The plan shows the active door from the interior by the location of the light switch. The elevation shows the active door from the exterior by a minuscule triangle symbol. Which door is active may be misunderstood by a lay person who assumes that the inner door is the active one, and this was apparently misunderstood by the Complainant. The fact that the door opens in the opposite direction from what the Complainant wanted is the result of a lack of communication during design, for which the Respondent is responsible. But the Respondent's interpretation of the drawings during construction cannot be attributed to a conflict of interest.

The National Ethics Council concludes that the Complainant did not prove that the Respondent violated Rule 3.201.

#### *Rule 3.202*

Rule 3.202 states:

When acting by agreement of the parties as the independent interpreter of building contract documents and the judge of contract performance, Members shall render decisions impartially.

The commentary to this Rule states:

This rule applies when the Member, though paid by the owner and owing the owner loyalty, is nonetheless required to act with impartiality in fulfilling the architect's professional responsibilities.

The Complainant alleges that the Respondent violated Rule 3.202 in his interpretation of the drawings regarding the opening direction of the sliding door. As explained in the discussion of Rule 3.201 above, The Respondent's response

that the door had been installed according to the drawings was not incorrect. Consequently, the Complainant has not met her burden of proof that the Respondent was biased in favor of the contractor in any of his interpretations of the building contract documents.

For the same reasons set forth with respect to Rule 3.201, the National Ethics Council concludes that the Complainant did not prove that the Respondent violated Rule 3.202.

#### *Rule 3.301*

Rule 3.301 states:

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 alleges that the Respondent intentionally and recklessly misled them by portraying himself as being familiar with local building codes. The complaint alleges the Respondent was "clueless," costing them additional money and reduced quality of construction, specifically by drawing 2x4 walls when the Complainant expected 2x6 construction.

The Complainant's construction contract lists the exterior walls as 2x4, however. The permit drawings, which were apparently approved by the City, also show 2x4 construction. The drawings prepared by the Respondent that show 2x4 construction are therefore apparently consistent



with what Smith Construction originally contracted with the Complainant to build.

The National Ethics Council concludes that the Complainant did not prove that the Respondent violated Rule 3.301.

*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 this Rule 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.

The Complainant alleges that the Respondent knowingly disclosed information detrimental to her and adversely affected the Complainant's relations with the permitting agency and the contractor. In support of her claim, the Complainant cites the Respondent's threat to place a lien on her house and his interpretation of the drawings showing the sliding door.

Rule 3.401 prohibits Members from providing their clients' information to third parties when the client has designated the information as confidential or in other circumstances where the client should expect that the information not be provided to third parties. In neither of the in-

stances cited by the Complainant did the Respondent "disclose information" as that term is used in Rule 3.401. The Respondent's threat did not disclose any information except his own state of mind. With respect to his interpretation of the drawings, what the Complainant really take issue with is the correctness of the information provided to the contractor, not that it was disclosed. The Respondent, in fact, had an obligation to provide an interpretation of his drawings to the contractor.

The National Ethics Council concludes that the Complainant did not prove that the Respondent violated Rule 3.401.

*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 this Rule states:

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

The Complainant alleges that the Respondent knowingly made false statements of material fact by misinterpreting his drawings during construction. In support of her claim, the Complainant cites the Respondent's interpretation of the drawings showing the sliding door. As explained in the discussion of Rule 3.201 above, the Complainant did not show that the Respondent's interpretation was wrong. The Complainant has therefore not met her burden of proof to show that he made a statement that was false.

The National Ethics Council concludes that the Complainant did not prove that the Respondent violated Rule 4.103.



## Penalty

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Having found violations of Rules 1.101 and 3.103 of the Code of Ethics by the Respondent, the National Ethics Council must determine the appropriate penalty.

The violations by the Respondent in this case are sufficiently serious to warrant a penalty beyond censure. After careful consideration of the violations, the Council imposes the penalty of a two-year suspension of membership on the Respondent.

### Members of the National Ethics Council

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

*The Hearing Officer, Melinda Pearson, AIA, did not participate in the decision of this case, as provided in the Rules of Procedure. Kathryn T. Prigmore, FAIA, a member of the Council, also did not participate in the decision.*

**October 5, 2007**

- \* The Complainant claims that the Respondent violated the Code of Ethics both before and after September 2004, which is the date that the 2004 edition of the Code replaced the 1997 edition. Because none of the referenced Rules was amended by the 2004 edition of the Code, however, this decision makes no determination as to which of the two editions of the Code applies to each alleged violation.