



# Failure To File Complaint within One Year of the Alleged Violations

## Summary

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The National Ethics Council (“Council” or “NEC”) dismissed a Complaint that alleged that an AIA Member violated Rules 1.101 and 3.103 of the Institute’s 2004 Code of Ethics and Professional Conduct in connection with architectural services provided by the Member to the Complainants for a renovation and addition to their home. The Council dismissed the Complaint because it was not filed within one year of the alleged violations as required by the NEC’s Rules of Procedure.

**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 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.

## Findings of Fact

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### *The Parties*

The Complainants are homeowners. Their home had been owned by prior generations of their family but was renovated and expanded into a home for the Complainants during the last ten years.

The Respondent is the principal of ABC Architects, a firm specializing in vernacular design, founded in 1990. In 2002, the Complainants retained the Respondent to design a traditional renovation and second-story addition to their ranch-style home (hereinafter “the Project”).

Nancy Owens (hereinafter “Ms. Owens”), who testified as a witness for the Complainants, is the principal of her own firm specializing in vernacular design, founded in 1986 and based in a nearby city. In 2006, Ms. Owens investigated possible design and construction flaws in the Complainants’ residence at their request and later designed modifications to the front porch and other more minor elements when remedial work was ultimately done.

### *The Chronology*

On May 15, 2002, the Complainants and the Respondent entered into a fixed-fee contract for architectural services that would transform a one-story ranch-style house into a two-story,



five-bedroom, colonial-style house. The contract included phases for “Verifying Existing Conditions” through “Construction Administration,” which included twelve site visits. Additional site visits and certain other services, if required, were to be billed at hourly rates.

The Respondent completed a Construction Set of drawings dated November 13, 2002, which, with a few revisions made in January and February 2003, were submitted to the City building department. The drawings went out to bid in December 2002, and bids were received in February 2003. Three general construction bids were received, all from companies that the Respondent had referred to the Complainants.

After further negotiations, the Complainants entered into a contract with their Contractor in June 2003. Except for the drawings and specifications prepared by the Respondent, the construction contract was not submitted as evidence in the ethics case.

The Contractor began construction in August 2003. In the months that followed, the Complainants raised concerns about a number of issues, primarily regarding work sequencing, drywall and masonry work in low temperatures, an insecure building envelope, and wasteful space heating. In December 2004, uninsulated pipes burst and caused water damage, which the Contractor refused to fix.

Between the start of construction and issuance of a Certificate of Occupancy, the Respondent visited the site at least 14 times. No contemporaneous documentation of his site visits was provided as evidence in this ethics case, whether in the form of field reports, letters, e-mail, or photographs. In response to extended questioning from the Hearing Officer, the Respondent was unable to describe any issues that were raised or resolved as the result of his site visits.

The building department issued a Certificate of Occupancy for the Project on March 31, 2005.

By October 2005, the Complainants had observed water penetration in the garage, around the chimney, and at the front porch. They called the Contractor and followed up with a letter dated October 17, 2005, which they copied to the Respondent. He and the Contractor met at the Project to look at the water penetration, and the Respondent sent the Complainants a letter dated November 7, 2005, with copies to the Contractor and the masonry subcontractor, in which the Respondent recommended remedial work. The Respondent speculated that water penetration at the garage could be addressed with caulk, weatherstripping, and a pressure treated wood trim at the base of the drywall, that water penetration of the façade could be addressed with sealant (although he would not recommend it), and that the chimney flashing was intact according to the Contractor. The Respondent noted that, on his second look with the Complainants on November 2, 2005, the flashing was clearly not intact, since daylight was visible from below.

During this same period, the Complainants engaged Acme Engineering, an independent engineering firm, to assess the building design and execution. That firm provided an inspection report dated December 23, 2005, that concluded there were three categories of problems: plumbing, water intrusion, and thermal envelope deficiency. In March 2006, the Complainants forwarded Acme Engineering’s report to the Respondent. He responded in a letter to the Complainants dated April 5, 2006, in which he noted that the one “design flaw” alleged in the engineering report was the lack of continuous insulation on the drawings, but that requirement was included in the specifications.

On August 10, 2006, the Complainants sent the Respondent a 10-page letter, with a copy to the Contractor, enumerating many problems with the house, most of which remained unresolved. In that letter, the Complainants mentioned that they were “very happy with the aesthetics and layout” of the Project and the “quality materials” the Respondent had recommended. The letter



also stated, however, that the Complainants had retained an attorney to represent them in the matter and that the Respondent and the Contractor should direct any further communications to the Complainants' attorney.

At about the same time, the Complainants retained another architect, Nancy Owens, to assess the building's design and execution. She reviewed the Respondent's drawings and specifications, visited the home on August 13 and September 2, 2006, and reported her findings in a letter dated October 25, 2006. The report noted many construction deficiencies and two potential design issues: weepholes are shown only in certain parts of the drawings, and no flashing is shown above window lintels on the drawings.

In June 2007, the Complainants initiated a lawsuit against the Respondent and the Contractor, who, in turn, sued the masonry subcontractor. The parties were represented by attorneys, and the Complainants and Respondent ultimately agreed to a settlement in August 2009. A copy of the settlement agreement was not submitted as evidence in this ethics case.

In the settlement, the Complainants received payment of \$50,000 from the Contractor and its insurer, \$15,000 from the masonry subcontractor and its insurer, and \$12,000 from the Respondent, who did not have professional liability insurance. The Complainants began remedial work on the house that cost about \$100,000 and included removing and reinstalling all of the stone veneer and some of the brick veneer; removing and reconstructing the front porch and bay window; flashing around the chimney, a door and five windows; modifying the heating system; and replacing the fascia. One of the circumstances that came to light was the fact that the Contractor had installed a moisture barrier system at the stone veneer instead of a cavity wall as shown on the architectural drawings. The remedial work was largely completed by November 2009.

In June 2010, the Complainants filed the Complaint in this ethics case.

## Conclusions

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### *Introduction*

The Complaint makes two claims: first, that the Respondent failed to provide construction administration services that would have helped to ensure that the contracted design was properly executed by the general contractor and, second, that the Respondent made material changes to the scope of the project without the knowledge or consent of the Complainants.

According to the Complainants, the "infractions which are the basis of this complaint occurred from 2003-2005." Based on the same circumstances, the Complainants sued the Respondent in June 2007, and that litigation was resolved through settlement in August 2009. The Complainants have stated that they had "decided not to file an ethics complaint against the Respondent prior to the resolution of the court case." The Respondent received the Complaint in July 2010, and filed a response dated July 8, 2010.

### *Timing of the Complaint*

Section 3.1 of the NEC's Rules of Procedures states, in part:

A Complaint must be filed within one year of the alleged violation unless good cause for delay is shown.

Section 3.3 of the NEC's Rules of Procedure states, in part:

The Chair of the NEC reviews all Complaints preliminarily to determine if . . . (3) there is good cause for any delay in filing a Complaint more than one year after the alleged violation occurred; and/or (4) deferral of proceedings is necessary or advisable because of pend-



ing litigation or administrative proceedings involving one or both of the parties.

In his Response to the Complaint, the Respondent argues:

This Complaint should be dismissed without further consideration . . . for the lack of timeliness with which it has been filed. Rather than initiating a complaint in 2003-2005 (the dates of the alleged violations), the Complainants instead chose to pursue a legal action in court. Not satisfied by the settlement reached with all parties in 2009, the Complainants have now chosen to pursue this action. However a delay caused by the pursuit of civil litigation cannot be reasonably construed as good cause for not having filed a prior, timely Complaint.

The Complainants were aware of the time limitation on filing when they filed their Complaint in June 2010. In their Complaint, they state:

The infractions which are the basis of this complaint occurred from 2003-2005 but resulted in a civil litigation which was resolved via an out of court settlement just under one year ago (August 2009). We decided not to file a complaint against the Respondent prior to the resolution of our case.

The Complainants were asked at the hearing whether there was any further explanation they wished to offer regarding the timing of the filing of the Complaint, but they declined. It appears that they began considering a licensing or ethics complaint after settlement of the litigation and may not have been aware of the AIA's Code of Ethics until then. The record does not contain any other "cause for delay" in the filing of the Complaint.

The NEC's one-year Complaint filing deadline, like any prescriptive period, has many advan-

tages. Evidence and memories dissipate over time, unexpected re-openings of old conflicts seem excessively disruptive, and pragmatic considerations in operating any adjudicative system favor prompt attention to alleged violations so that resources are available to respond to newer allegations as they are made. However, on some occasions, a complainant may encounter an impediment to submitting the required documentation, such as lack of access to information, health issues, or other personal matters.

The Complainants have offered no evidence of any such impediments to explain why the Complaint was filed in June 2010, more than five years after the date of the alleged violations. Any violations alleged would have been committed by March 31, 2005, when the Certificate of Occupancy was issued. The Complainants possessed an independent engineer's report in December 2005 describing problems with the construction. In April 2006, the Complainants had alleged in writing to the Respondent and Contractor that the Project had "significant design and construction flaws." By August 2006, the Complainants had retained an attorney to represent them.

The NEC does not have other formal provisions for addressing late filings apart from dismissal. Had the Complaint been filed sooner, the parties might have been able to reach a resolution of the ethical allegations as part of their settlement of the litigation. It is true that, if the Complaint had been filed sooner, the NEC might well have deferred a hearing until the parties' litigation had concluded. (*See NEC Rules of Procedure, Sections 3.3 and 3.4.*) That is a determination for the NEC to make, however, and the fact that a complainant chooses to pursue litigation against an AIA Member does not automatically suspend the running of the one-year time period for filing an ethics complaint against that Member.

The one-year filing period in this case began in August 2006 at the very latest, 16 months after the alleged violations and the Certificate of Oc-



cupancy, when the property defects were known and the attorneys became involved.

The National Ethics Council concludes that, regardless of the potential merits of the Complaint, NEC Rules of Procedure dictate that it must be dismissed because it was filed after the mandatory deadline and the Complainants have not shown good cause for the delay. Therefore, the NEC has dismissed the Complaint.

Members of the National Ethics Council

Melinda Pearson, FAIA, Chair  
Tricia Dickson, AIA  
Clyde Porter, FAIA  
Michael L. Prifti, FAIA  
Benjamin Vargas, FAIA  
Bradford C. Walker, AIA

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

**October 7, 2011**