



Failure To Demonstrate a Consistent Pattern of Reasonable Care and Competence; Intentionally or Recklessly Misleading Clients about the Results That Can Be Achieved; Making False Statement of Material Fact

Summary

The National Ethics Council (“Council” or “NEC”) ruled that the Complainants failed to prove that a Member violated Rules 1.101, 3.301, 4.103, and 4.201 of the 1997 Code of Ethics and Professional Conduct.

The Member provided initial architectural services to the Complainants for a new residence, but the parties failed to agree on a fee or budget, and the Member’s services ended before the Complainants approved a schematic design.

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 infre-

quently 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 III, Obligations to the Client

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 4.103 Members speaking in their professional capacity shall not knowingly make false statements of material fact.

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



Rule 4.201 Members shall not make misleading, deceptive, or false statements of claims about their professional qualifications, experience, or performance and shall accurately state the scope and nature of their responsibilities in connection with work for which they are claiming credit.

Commentary: This rule is meant to prevent Members from claiming or implying credit for work which they did not do, misleading others, and denying other participants in a project their proper share of credit.

Findings of Fact

The Complainants acquired additional property adjacent to their vacation home. The adjacent property, which the Complainants refer to as the Jones property, included an existing cabin. In 2003, the Complainants decided to construct a new residence on the Jones property and finance the project from the prospective sale of their current home.

The Complainants' current home had been designed for them by architect Bob Smith, whom the Respondent describes as his "mentor." When the Complainants contacted Mr. Smith about designing a residence on the Jones property, he referred them to the Respondent.

The Complainants first discussed the project with the Respondent "in general terms" in June 2003. The discussions included Bill Johnson, who had built the Complainants' existing house. In response to the Complainants' questions about costs, the Respondent said that information about construction costs would need to come from Mr. Johnson and that the architectural fees would be determined as a percentage of construction cost. The Complainants claim that the Respondent said that he had been Mr. Smith's "partner" and led the

Complainants to believe that they could expect the same arrangement with him as they had with Mr. Smith.

In July, the Complainants decided to move forward, and they sent the Respondent their "wish list" and a copy of the plans of their existing house because they wanted a similar scope of work for the new project. On August 22, the Respondent, his assistant, and the Complainants measured the existing cabin. The Respondent prepared as-built drawings and, in early September, provided the Complainants schematic plans for a new house.

The Complainants requested revisions to the design, and the Respondent provided a second schematic plan, which the Complainants also found unsatisfactory. By this time, the parties had still not entered into a written agreement for architectural services, and apparently there was no understanding of the percentage fee that the Respondent would require.

According to the Respondent, the Complainants would not tell him their project budget, except to say that it would need to be paid for from the sale of their existing house. He believed that the existing cabin would need to be incorporated into the new residence in order to achieve the Complainants' budget goals. He also claims that the Complainants expanded their program requirements while he was working on the schematic design. After the Complainants rejected the second schematic design, the Respondent prepared an estimated cost of construction with the assistance of Mr. Johnson.

On September 17, the Respondent provided the Complainants a third schematic design. Along with the design, he provided his estimate of the construction cost. He also submitted an invoice for schematic design services, which was calculated as a percentage of the projected total fee. According to the Complainants, they were "shocked" by the amounts on the invoice.



The Complainants and Respondent met the following day. The Complainants protested the invoice and claimed that Mr. Smith had charged only half the percentage fee for architectural services being requested by the Respondent.

According to the Complainants, they offered to engage the Respondent for a fixed total fee, and, after negotiating over the next several days, the parties agreed on September 22 to a fixed fee amount and “shook hands on it.” During their meeting on September 22, the Complainants provided a draft contract they had prepared, and the parties discussed various details in the draft.

Later that same day, the Respondent e-mailed the Complainants a revised version of the contract. In the Complainants’ view, the Respondent’s revised version of the contract would have charged “hourly for drawings and services that should have been included in the basic fee” and the Respondent had reneged on their “‘hand shake’ agreement and tried to devise a way to inflate his billing.”

The parties exchanged numerous e-mails over the next several days without coming to agreement. On September 26, the Complainants wrote to the Respondent that the work already performed had not provided “any tangible benefit” and that they did not owe him anything because “our time has been wasted and we have received no value.” The Respondent did no further work on the project.

On September 29, the Respondent filed a claim against the Complainants in state court seeking payment of the maximum allowed by the small claims procedure. According to the Respondent, the court awarded him judgment in that amount, and the Complainants ultimately paid him that amount.

What followed was the Complainants’ pursuit of this ethics case.

Conclusion

Burden of Proof

According to Section 5.13 of the Council’s Rules of Procedure, the Complainants have the burden of proving the facts upon which a violation may be found. In the event the Complainants’ evidence regarding a referenced rule does not establish a violation, the Complaint is dismissed with respect to that rule. (*See NEC Rules of Procedure, Section 5.13.*)

Rule 1.101

Rule 1.101 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 provides:

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.

The Complainants claim that the Respondent acted unethically by beginning work on the Complainants’ project without disclosing his fee schedule, by producing drawings that did not meet the Complainants’ requirements, and charging the Complainants for services that provided them no benefit.

The evidence presented in this case shows that communication between the parties was inadequate during the brief duration of the project. The Respondent began work without a written



contract for architectural services, without an established project budget, and apparently without communicating to the Complainants how much the architectural services would cost. These circumstances do not, however, establish a violation of Rule 1.101.

Rule 1.101 contains two standards: a standard based on a consistent pattern of reasonable care and competence and a standard of technical knowledge and skill.

None of the evidence presented suggests that the Respondent failed to apply the necessary level of technical knowledge and skill. The Complainants apparently believe that the Respondent's September 17 estimate of construction cost was inaccurate and inflated, but the evidence does not support that conclusion, particularly in light of the fact that the project could have included custom interior finishes and details.

With respect to whether the Respondent demonstrated a "consistent pattern of reasonable care and competence," the commentary to Rule 1.101 explains that a violation occurs when a Member "more than infrequently" does not achieve the common law standard of competence. While the Respondent may be faulted for inadequate communication with his clients prior to September 17, his conduct in this case is not sufficient to establish a violation of Rule 1.101. The evidence shows that, less than a month after beginning work, he did take steps to clarify the project budget, including his fee, and attempted to negotiate with his clients a detailed contract for architectural services.

Whether the Respondent's proposed fee for the project was reasonable and whether he overcharged the Complainants for architectural services he delivered are not matters for the National Ethics Council to determine. Fee and payment provisions for a project are matters for negotiation by the parties involved, subject to any legal or regulatory restrictions that might apply.

The National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated Rule 1.101.

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 provides:

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 Complainants claim they were misled because they expected the Respondent to "provide the same level of service, using the same fee schedule" as the Complainants had received from Mr. Smith.

As described in the analysis of Rule 1.101, communication between the Respondent and his clients was inadequate up to September 17. The Respondent may properly be faulted for proceeding with work without establishing in writing such matters as the project's construction budget and the fee for architectural services. Such failures in the circumstances of this case, however, do not show that the Complainants' misunderstanding was the result of the Respondent's dishonesty or that he intentionally or recklessly misled them.

The National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated Rule 3.301.



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 provides:

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

The Complainants claim that the Respondent violated Rule 4.103 by making false statements about being Mr. Johnson's "partner," about the project's costs of construction, and about the architectural fees that the Respondent would charge. The evidence presented does not establish that the Respondent made any statement that would be a violation of Rule 4.103.

Rule 4.103 applies to "false statements of material fact." The truth or falsity of any statement made by the Respondent regarding being a "partner" of Mr. Smith is relevant only if that information is "material." As defined in Black's Law Dictionary, a "material fact" is a fact that is necessary to determine the outcome of an issue or goes to the merits of an issue. The Complainants have not provided sufficient evidence to prove that the Respondent represented himself as having been a partner of Mr. Smith, nor have the Complainants shown that such a fact would have been material to determining any issue involved in this case.

With respect to the Respondent's estimate of construction costs, such estimates are not statements of fact but merely opinions whose accuracy will be affected by decisions not yet made. Further, as described in the analysis of Rule 1.101, there is no evidence that the Respondent's estimate was incorrect. Finally, with respect to architectural fees, the evidence does not show that the Respondent made any false statement

about the amount of his fees, only that he failed to make a clear and complete statement about them.

The National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated Rule 4.103.

Rule 4.201

Rule 4.201 states:

Members shall not make misleading, deceptive, or false statements of claims about their professional qualifications, experience, or performance and shall accurately state the scope and nature of their responsibilities in connection with work for which they are claiming credit.

The commentary to this rule provides:

This rule is meant to prevent Members from claiming or implying credit for work which they did not do, misleading others, and denying other participants in a project their proper share of credit.

The Complainants claim that the Respondent represented that he had been Mr. Smith's "partner."

As described in the analysis of Rule 4.103, the Complainants have not provided sufficient evidence to prove that the Respondent represented himself as having been a partner of Mr. Smith. It is therefore unnecessary to determine whether, if the Respondent had made such a representation, it would be a violation of Rule 4.201. None of the other circumstances presented in this case would establish a violation of the rule.

The National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated Rule 4.201.



Summary

The National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated any of the four referenced rules cited in the complaint. Accordingly, the National Ethics Council dismissed the complaint.

Members of the National Ethics Council

A. James Gersich, AIA, NEC Chair
Victoria Beach, AIA
Melinda Pearson, FAIA
Michael L. Prifti, FAIA
Bill D. Smith, FAIA
Benjamin Vargas, FAIA

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

October 1, 2010