Intentionally or Recklessly Mislead Existing or Prospective Clients About the Results that Can Be Achieved

Summary

The National Ethics Council ("Council" or "NEC") ruled that an AIA Member violated Rule 3.301 of the Institute's 2017 Code of Ethics and Professional Conduct ("Code of Ethics") in connection with a Member intentionally or recklessly misleading existing or prospective clients about the results that can be achieved.

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

References

2017 Code of Ethics and Professional Conduct,

Canon III, Obligations to the Client

Rule 3.102 Members shall undertake to perform professional services only when they, together with those whom they may engage as consultants, are qualified by education, training, or experience in the specific technical areas involved.

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

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

Rule 3.202 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.

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.

Findings of Fact

The Parties

The Complainant is a homeowner who resides in Purple City and hired the Respondent to provide architectural designs for the remodel of Complainant's home.

Respondent is an Architect member who resides in Purple City.

Factual Background

On May 12, 2017, the Complainant sent a brief inquiry email to the Respondent regarding the remodel project (the "Project"). Shortly thereafter, the parties spoke by phone to discuss the details of the Complainant's Project, which included the

construction of a garage; basement remodel to create a short-term rental space; and plans for a future main-floor remodel and second-floor addition to the property. After this phone conversation, on or around May 15, 2017, the Respondent met with Complainant at the Complainant's home to discuss the Project in person. There is some dispute regarding the presence of the Project Manager, the Respondent's employee, at this meeting. According to the Complaint and the Complainant's testimony, the Respondent told the Complainant the designs for the Project would be complete in August and construction would likely not take longer than three months. Based on this meeting, the Respondent provided the Complainant with a client contract specifying the work requested by the Complainant. The contract stated that an existing bedroom in the basement remodel would be converted to a garage. In future conversations, the Respondent expressed concern regarding the location of the garage in the drawings the Complainant sent to the Respondent based on the slope of the driveway needed and related zoning regulations.

Between mid-May and mid-June, the Complainant and the Respondent exchanged a series of emails which included sample floor plan ideas provided by the Complainant to the Respondent, noting egress windows. On June 1, the Respondent and the Project Manager returned to the Complainant's property to take measurements related to the Project. On June 9, the Respondent sent the Complainant a client questionnaire on which to provide additional details regarding the scope of the Project. The Complainant returned the completed questionnaire on June 13 and noted on the questionnaire a budget of $60,000 for "phase one" of the Project, with $10,000 of that amount reserved for floor plans and engineering fees for all three levels of the property. The Complainant's responses on the questionnaire also indicated that the basement remodel was "phase one" of the Project and that the Complainant was "willing to phase everything else." The Complainant also indicated that they had about $80,000 total to spend, which included $10,000 for architectural and other fees, leaving $70,000 for construction costs. The Respondent testified that they believed the Complainant's budget was "more than enough for what [the Complainant] wanted" for a "simple basement remodel."

On June 12, the Complainant sent the Respondent an email to inquire again about the possibility of the garage addition to the property. In the Complaint and testimony, the Complainant states that the Respondent "wasn't educated enough in the Zoning Code" to perform the work for a garage addition based on the Complainant's review of the Purple City zoning regulations. The parties dispute the intention of the placement of the garage based on various drawings presented by the Complainant and email communications regarding zoning requirements.

The Respondent did not return to the Complainant's property again until early August, at which time the Respondent presented to the Complainant nine progress drawings for the Project – three drawings per floor of remodeling. At this meeting, the Complainant testified that they inquired about a possible "private entrance" in the basement remodel, not the egress windows as previously requested. After this meeting, the Complainant emailed the Respondent to ask again about a private basement entrance and an enclosed front porch. The Complainant then sent the Respondent the requested modifications to the initial plans to which the Respondent responded with revised plans on August 22. In the Respondent's response with the revised plans, the Respondent told the Complainant that a private basement entrance could not be built based on regulations in Purple City. The parties exchanged a number of emails regarding the plans over the next several days. In an email to the Respondent, the Complainant indicated that only the garage construction and basement should be done in the same phase.

The Complainant testified that they interpreted the Respondent's email on August 22 with new sketches to mean that the plans would be completely ready "within the week." On September 18, Complainant followed up with the Respondent to get an estimate on when the plans for phase one and the rest of the project would be complete. On September 20, the Respondent emailed Complainant and stated that the plans for phase one, the basement and garage addition, were in process and that the architectural portion would be

complete within two weeks. The Respondent went on to state that the construction documents for phase two would take approximately six weeks. On October 26, the Respondent emailed Complainant the drawings for the basement remodel only. The next day, Complainant emailed several follow-up questions, but did not receive a reply. The Complainant sent another email on October 31 and also inquired as to when the final plans for the garage and basement would be complete. That same day, the Respondent replied to Complainant and indicated that the garage drawings would "take another week or two" and that the first and second floor work "will take at least 6-8 weeks."

The parties continued to exchange emails regarding the scope of the project and consultation with the Purple City regarding the possibility of a basement entrance. After receiving conflicting answers from Purple City, the Respondent notified the Complainant that a basement entrance would, in fact, be possible, but the Respondent recommended including it with the garage plans so as not to cause further delay. Adding this entrance would require separate permitting, due to the construction and addition of stairs, which would take longer than an interior remodel. The Complainant agreed with this recommendation. The Respondent provided Complainant with the final basement drawings on November 15 and indicated the garage drawings would be "fairly complete" by the end of the week. In this email, the Respondent apologized that the project was "taking longer than expected" and that the Respondent had been "overwhelmed with work" which caused delays.

Over the next month, the Complainant and the Respondent continued to email one another disputing certain facts regarding the invoices and payments due, the Project timeline, the phased approach of the Project, and the interpretation of the Purple City zoning regulations. Ultimately, on December 17, 2019, Complainant terminated their relationship with the Respondent and requested the Respondent to stop all work on the Project.

Conclusions

Burden of Proof

Under Section 5.13 of the NEC Rules of Procedure, the Complainant has the burden of proving the facts upon which a violation may be found. In the event the Complainant's evidence does not establish a violation, the Complaint is dismissed.

The NEC adopts the Hearing Officer's Overview of Process, as modified below.

1. The Complainant and the Respondent were duly notified and advised of the hearing and the procedures to be followed, including their ability to challenge the Hearing Officer's appointment.
2. In the case filings, some confusion exists regarding the Rules cited by Complainant to which Respondent filed their Response. The chart below illustrates what is reflected in the record.

Rules Cited:

Complaint = 3.102; 3.103; 3.202; 3.301

Complaint Cover letter = 3.102; 3.103; 3.201; 3.301; 4.101; 4.103

Response (filed responsive to Complaint) = 3.102; 3.103; 3.202; 3.301; 4.101; 4.103

Hearing = 3.102; 3.103; 3.201 (withdrawn); 3.202; 3.301; 4.101 (withdrawn); 4.103

Hearing Officer's Report and Recommendation = 3.102; 3.103; 3.202; 3.301; 4.103

The NEC affirms that the Hearing Officer addressed Rules 3.102, 3.103, 3.202, 3.301, and 4.103.

Administrative Findings

The NEC adopts the Hearing Officer's Administrative Findings, but with the following additions:

1. Rule 3.201 and 4.101

Complainant's voluntary withdrawal of Rules 3.201 and 4.101 at the hearing are referenced in the Hearing transcript.

2. Timeliness

Respondent stated in the Response an objection regarding the timeliness of the Complaint. The NEC's Rules of Procedure state:

> Rule 3.2. Timeliness. A Complaint must be filed within one year of the alleged violation unless good cause for delay in filing is shown. A Complaint should be filed prior to or concurrent

with any litigation or administrative (licensing) proceedings in order to preserve a timely filing under these Rules.

The record in this case does not indicate whether the NEC Chair ruled or otherwise considered the issue of timeliness. The NEC addresses this here.

In the Response, the Respondent argued that the Complaint dated 02/12/19, states a last violation date of 04/29/18. The Respondent argues that the 04/29/18 date was the date of the Complainant's last communication with them, but that the Respondent ceased providing services to the Complainant on 12/17/17 when the Complainant terminated the relationship. The Respondent's argument is that the Complaint exceeds the one-year time period by fifty-seven (57) days.

The Complainant indicated in the Complaint that multiple spine surgeries and complications from those procedures prevented them from being able to submit a formal complaint to the NEC until 02/12/19.

Here, the NEC accepts the Complainant's statement as good cause for delay, as provided for in Rule 3.2.

3. Timeliness of Complainant's Pre-hearing Materials

Following the Pre-Hearing Conference Call with the Hearing Officer and the Parties, a deadline of February 7. 2020, was set for receipt of and Pre-Hearing materials the Parties wished to send.

On February 13, 2020, the Complainant requested an extension to submit their Pre-Hearing materials. The Hearing Officer granted the extension, setting the deadline to February 19th.

On February 18, 2020, the Respondent submitted their objection to the Hearing Officer's decision to extend the time for the Complainant to file their Pre-Hearing materials until February 19th.

Upon review, the NEC affirms the Hearing Officer's decision to extend the Complainant's deadline, and further finds the Respondent was not prejudiced by such extension of time.

Rule 3.301

Here, the NEC determines that the Respondent recklessly[1] misled the Complainant about the results that could have been achieved through the use of the Respondent's services with regard to two issues, as exemplified in at least two instances: the project schedule and the private entrance to the basement.

Schedule

The record shows that schedule was important to the Complainant for this project. In the questionnaire responses the Complainant provided the Respondent, they specifically stated they wanted the project completed "by Christmas" and that they wanted construction completed "within a year, but ASAP" so they could start collecting rental income. The Complainant emailed the Respondent in September 2017, "Do you know how long it may take to complete the floorplans for Phase 1 of my project?" and "... how long it make take to complete the plans for the entire project?"

The Complainant stated at the Hearing, "The architectural portion of my project timeline was tripled from what I was originally quoted...;" and "I was lied to regarding the status of my project...;" and "I was repeatedly told that my project was almost done, would be done next week, and was even told it was construction ready, when it was not." Completion of the project was an important if not critical factor for the Complainant, and the Respondent's failure to communicate more directly with the client regarding what using the Respondent's services and expertise could help the Complainant accomplish with their project fell short of what Rule 3.301 requires.

Upon review the of the Record, the NEC finds that the Respondent knew or should have known that the schedule and completion benchmarks were important to the Complainant and were "material" to the project.

Side Door

With regard to the creation of a new private entrance from the street to the home's basement, the Respondent stated by email "I did some

[1] "Reckless: marked by a lack of proper caution; careless of consequences." (See "reckless." Merriam-Webster.com 2021. *https://www.mariam-webster.com* (07/19/21).

checking, and you will not be able to build a separate entrance on the south side." Later, the Respondent admitted the private entrance could be built.

The NEC finds that the Respondent should have communicated the extent of their research on zoning and code regarding the side door. It is reckless to communicate certainty on the subject when one has clearly not performed the necessary research. Clients should be able to rely on architects as professionals to exhibit greater knowledge and expertise based on their education and experience to help guide them through their projects. Architects in turn are obligated to communicate clearly, succinctly, and accurately about what can be achieved. It is even acceptable to communicate that one needs more time to do the research. This did not happen here.

The NEC finds that Complainant met their burden of proof to show Respondent violated Rule 3.301 and imposes the penalty of Admonishment.

In both instances above, the Respondent should have exhibited greater care and truthfulness regarding the schedule and communicated their understanding (or lack thereof) of their knowledge of zoning and code regarding the issue of the side door.

Rule 4.103

The NEC disagrees with the Hearing Officer's conclusions regarding Rule 4.103. Here, the NEC does not find that the Complainant met their burden of proof to show that the Respondent knowingly made false statement of material fact. While the Respondent made statements regarding commitments that they ultimately did not meet and perhaps should have known were inaccurate or misleading regarding completion of the plans for which the Respondent was retained, the record does not establish that the Respondent knew such statements were false at the time they made them. Accordingly, the NEC does not find a violation of Rule 4.103.

The NEC finds that Respondent violated Rule 3.301.

Penalty

Having found the Respondent violated Rule 3.301, and taking into consideration the circumstances of the violation, the National Ethics Council imposes the penalty of Admonition.

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

July 20, 2021