Materially Altering the Scope of Objectives Without the Client's Consent; Misleading the Results that Can Be Achieved

Summary

The National Ethics Council ("Council" or "NEC") found no violation of Rules 3.103, 3.301, or 4.101 of the Institute's 2018 Code of Ethics and Professional Conduct ("Code of Ethics") in connection with a Member knowingly made altering the scope of objectives without the client's consent and misleading the results that can be achieved.

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

References

2018 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 3.301 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 4.101 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.

Findings of Fact

The Parties

The Complainants A and B are homeowners who resides in Purple City and hired the Respondent to provide architectural designs to build the Complainants' home.

Respondent is an Architect member who resides in Purple City.

Factual Background

Complainants A and B retained Respondent in a contract dated in December XX, 2019, to provide four phases of basic design services: pre-design/schematic design; design development; construction documents; and construction administration. The subject project was to be a duplex in Purple City.

Contractually, three prerequisites were required prior to Respondent's execution of services. The Complainants were required to: 1) pay a $12,000 deposit against a $30,000 total fee, 2) provide a property survey, and 3) provide a report from a

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soils engineer. The property survey was provided December XX, 2019; the retainer was received on January XX, 2020. The Complainants never provided a soils report.

By March XX, 2020, the Complainants terminated their agreement with Respondent. Complainant B wrote the Respondent at that time:

> I have to express my disappointment with the progress on this. When we contracted you, you said the design would be completed in January. We gave you that time without pressing. I've since contacted you numerous times to get an update with essentially no response. . . . We were aiming to put the unit on the market next spring but the delay that you've caused will now likely compromise our ability to hit that window.
>
> . . . .
>
> I'm sorry this has to be so firm [Respondent], but you knew what our timeframe was. You misrepresented yours and have made practically no progress in over three months' time – all while holding money that we delivered in good faith on December XX . . . Simply provide a reasonable paid invoice for services rendered along the balance of the money that is owed to us. We'll render the contract void and move on.

Respondent spent 39.75 hours in November, December, and January working on project administration and 38.33 hours in February and March drawing designs, which is a total of 78.08 hours. The contract specifies that if the Complainants terminate the contract, Respondent is entitled to be paid for all work completed and notes the hourly rate of $150.00.

On March XX, 2020, Respondent returned $6,250.00 of the retainer to the Complainants.

Conclusions

Burden of Proof

Section 5.13 of the NEC Rules of Procedure states: 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 will be dismissed.

The NEC finds Respondent did not violate Rule 3.103.

The Complainants failed to meet their burden of proof to show that the Respondent materially altered the scope or objectives of their project without their consent. As a threshold matter, while the Complainants do cite 3.103 in their Complaint, their supplementary materials submitted prior to the hearing did not provide any evidence regarding their claim of a Rule 3.103 violation; moreover, during the hearing, the Complainants made no mention of nor argument regarding Rule 3.103. Accordingly, Complainants' evidence does not establish a violation.

The NEC finds Respondent did not violate Rule 3.301.

The Complainants failed to meet their burden of proof to show that the Respondent intentionally or recklessly misled them about the results that can be achieved through the use of the Members' services.

The Complainants allege two bases on which Rule 3.301 was violated: Respondent's lack of expediency in providing their services given their schedule of the project, and Respondent's statements regarding the ease by which the Complainants' duplex project could be built, given the zoning of the property.

The December XX, 2019, contract memorialized the terms of agreement between the parties. Although the Complainants argue Respondent failed to provide work fast enough, the agreement between the parties makes no reference to scheduled deadlines.

The NEC notes that in Complainants' prehearing submission and at the hearing, Complainants focused much attention on the issue of zoning and Respondent's representation that rezoning

would not be an issue.[1]

Again, the agreement between the parties is the operative document, and that agreement makes no mention of services Respondent was to provide regarding zoning or any other feasibility services. Rule 3.301 hinges on whether a member intentionally or recklessly misled a client about the results that can be achieved through the use of the Members' services. Here, what services the Complainants could reasonably expect Respondent to provide were set forth in their agreement.

At issue in this case is the fact that the required procedure for rezoning may have prevented Complainants from building the duplex they wanted. The question is whether Respondent was responsible for identifying this challenge and raising more emphatically its difficulty to Complainants' attention.

While the NEC does not find Respondent's actions to be reckless, a minimal effort in pre-zoning due diligence on their part would have shown Respondent that building the duplex Respondents wanted would have required much more preliminary work. However, Complainants in this case also could have conducted a modicum of pre-zoning due diligence themselves. Here, neither party did the due diligence, which led to this disagreement.

When clients engage an AIA architect member, it is reasonable for them to expect that such member brings expertise, experience, and knowledge to their project and it is entirely reasonable for them to rely on that degree of professionalism. This does not obviate the client's own responsibility to ensure their engagement with an architect is memorialized in detail in a written agreement.[2] In this case, the contract was ambiguous about the scope of Respondent's engagement. There was no mention of pre-zoning work, and there was no mention of a schedule, despite the fact deadlines were important to Complainants.

While Respondent could have done better in providing Complainants a more accurate picture of the zoning issue, the NEC does not find that this shortfall rises to the level of an ethics violation.

The NEC finds Respondent did not violate Rule 4.101.

The Code of Ethics itself makes clear that Rule 4.101 does not provide an independent basis for a violation of the Code. That being the case, there was no violation of this rule by Respondent.

Penalty

The National Ethics Council having found no violation of Rules 3.103, 3.301, or 4.101 by Respondent, the Complaint is hereby dismissed.

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

April 6, 2022

[1] In an email to Complainant B on November XX, 2019, Respondent wrote:
"Hi [Complainant B], property is zoned U-SU-C1 (Urban-Single Unit - C1) … this zoning does not allow for a duplex/rowhouse … However, this does not mean it cannot be done as evidenced by the neighboring duplexes that are also in the same zoning … Per my conversation today with planning and zoning a Rezoning is needed. The gentlemen I spoke to was very helpful and guided me through the website. This is not a difficult process as there is a precedent set by the neighboring duplexes … just time-consuming…"
(See Exhibit C at NEC 00097-8.)

[2] Using standardized contracts developed for architectural projects and/or attorneys can minimize conflicts between parties down the line.