



Preparing Certificate of Merit for Professional Malpractice Claim Against Another Architect as Fraud or Wanton Disregard of the Rights of Others

Summary

The National Ethics Council (“Council” or “NEC”) ruled that Architect A did not violate either Rule 2.104 or Rule 2.106 of the Institute’s 1997 Code of Ethics and Professional Conduct (“Code of Ethics”) by preparing a certificate of merit for a professional malpractice claim.

In finding that there was no violation, the Council noted that Architect B had not proven that Architect A engaged in fraud, committed a violation of the law sustained by an independent finding by a court of competent jurisdiction or an administrative or regulatory body, or acted in wanton disregard of Architect B’s rights. The NEC also found no credible evidence that Architect A counseled or assisted her clients in conduct that was fraudulent or illegal.

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

References

1997 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, then its proof must be based on an independent finding of a vio-

lation of the law 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.

Findings of Fact and Analysis

The case against Architect A was initiated by Architect B with the NEC in 1999. It was initially held in abeyance pending resolution not only of civil litigation between Architect B and a third party (discussed more fully below), but also disciplinary proceedings brought by Architect B against Architect A before state licensing authorities involving issues relevant to this matter. Following the apparent conclusion of the last of these proceedings in 2002, the case returned to the Council’s active docket. The hearing of the case was then delayed until 2003, pending resolution of renewed proceedings in the civil litigation referenced above.

Architect B and his spouse at one time were equal partners with another married couple in a venture (“Partnership”) that owned a parcel of land containing several buildings which it leased to a school (“School”). At one time or another, each of the four partners played some role in the business of the School. Two of the four partners administered the affairs of the School. A third partner, not initially active in the business, became involved as a trustee (“Trustee”) around 1994. The last of the four partners, Architect B, provided professional design services as required.



In 1997 Architect B became aware that the School, without advisement of any sort, had employed Architect A for certain improvements to the leased structures. After warning the School, Architect B brought to the attention of the local building officials the possibility that a proposed improvement violated governing law. One thing led to another, and the School ultimately filed suit in state court against various defendants, including the Partnership and each of the partners individually. Included in this civil action was a claim for professional negligence against Architect B relating to architectural services Architect B had provided at the School site.

It is evident that the Trustee played a key role in initiating and pursuing the state court litigation. Before the case was filed, the Trustee understood that applicable state law required a claim of professional malpractice to be accompanied by a certificate of merit (“Certificate”) by another architect licensed to practice in the same jurisdiction. The Trustee asked Architect A to provide the necessary Certificate. Architect A declined in the first instance, referring the Trustee to another design professional with specific experience in that type of service. When that referral did not bear fruit, the Trustee again asked Architect A to prepare the Certificate. This time Architect A agreed, using information provided by the Trustee and his spouse to prepare the Certificate. Architect A had little direct contact with, and no personal animosity toward, Architect B.

After the commencement of the state court litigation, Architect B obtained an expert in building codes who under oath stated opinions contrary to those contained in the Certificate submitted by Architect A. It was only after this happened that Architect A became aware of documents and other information relating to certain facts relevant to the litigation. Those facts were reflected in reports Architect A subsequently submitted and amended in the course of the litigation. The state court ultimately issued an order granting summary judgment in favor of

Architect B as to four of the five counts brought by the School, and, in accordance with a settlement agreement among the parties, the litigation was dismissed with prejudice.

After the start of the state court litigation, Architect B filed a complaint against Architect A not only with the NEC, but also with the Board of Architectural Practice (“Board”) of the state in which the property lay and in which both architects were licensed to practice. The complaint alleged violations of state statutes and regulations regarding the work of Architect A for the School. After a review of evidence submitted, the Board concluded that no cause for disciplinary action against Architect A existed and dismissed the complaint.

Regarding a possible violation of Rule 2.104 in this case, the Council determined that Architect B neither proved fraud, showed a violation of the law sustained by independent finding by a court of competent jurisdiction or an administrative or regulatory body, nor established a wanton disregard of the rights of Architect B by Architect A. In failing to look further than the evidence provided by the Trustee and the Trustee’s spouse, Architect A may have been negligent in the preparation of the Certificate. This, however, was not enough to establish a violation of Rule 2.104.

Regarding a possible violation of Rule 2.106, the Council could find no credible evidence that Architect A counseled or assisted the Trustee or any other representative of the School in conduct that was fraudulent or illegal. Indeed, the evidence would tend to support the notion that Architect A was a victim, rather than a perpetrator of, or accessory to, such fraudulent or illegal activity as the Trustee may have instigated.

Accordingly, the Council dismissed the Complaint against Architect A.



THE AMERICAN
INSTITUTE
OF ARCHITECTS

Code of Ethics and
Professional Conduct
DECISION 99-07

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The Hearing Officer, D. Susan O'Brien, AIA, did not participate in the decision of this case, as provided in the Rules of Procedure.

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