



Ignoring Contractual Obligations Imposed on Client; Counseling or Assisting Client in Fraudulent or Illegal Conduct

Summary

The National Ethics Council (“Council” or “NEC”) ruled that the record did not establish a violation of Rules 2.101 and 2.106 of the 1997 Code of Ethics and Professional Conduct (“Code of Ethics”). The Complainant alleged that the AIA Member violated the Code of Ethics while providing architectural services to a client for a Project constructed in the Complainant’s office park. The Complainant alleged that the Member had ignored requirements imposed on the Project in agreements between the Member’s client and the Complainant. The Council ruled that there was no finding by a court or other independent body substantiating the Complainant’s allegation that the Member had violated local, state or federal law and no evidence that he had counseled or assisted his client in fraudulent or illegal conduct in violation of Rule 2.106.

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 2.101 Members shall not, in the conduct of their professional practice, knowingly violate the law.

Commentary: The violation of any law, local, state or federal, occurring in the conduct of a Member’s professional practice, is made the basis for discipline by this rule. This includes the federal Copyright Act,

which prohibits copying architectural works without the permission of the copyright owner. Allegations of violations of this rule must be based on an independent finding of a violation 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

Pursuant to Section 3.2 of the Rules of Procedure, the ethics case was deferred pending the resolution of a civil action involving the Complainant and the client of the firm in which the Respondent is employed.¹

After that litigation was concluded and as a prerequisite to scheduling the hearing in this case, a pre-hearing conference call was held. The parties and their counsel, along with the Hearing Officer and the Institute’s Associate General Counsel, participated. The purpose of the conference call was to (a) refine the issues to be discussed during the hearing and (b) discuss any other issues that might further the expeditious disposition of this case. The decision to dismiss this case is based upon review of the record, which includes the Complaint and Response, and statements made by the parties during the pre-hearing conference call.

The Complainant is the owner of a commercial office development. Respondent is a licensed



architect and current member of the AIA and an employee of the Architect of Record for the Project.

The Respondent's Client retained the Respondent's Firm, a firm specializing in architecture, space planning, interior design and tenant development services, to design and supervise construction of a new, freestanding building ("Project") on a parcel of property in the Complainant's Office Park. The Client had purchased the property from the Complainant. The Respondent's Firm assigned the Respondent to the Project as the professional in charge. There was no direct contractual relationship between the Complainant and the Respondent.

The commercial office development, including the parcel of land which the Client purchased from the Complainant in 1999, was subject to a number of development restrictions outlined in a Declaration of Covenants, Conditions and Restrictions ("CC&Rs") signed by the Complainant and his wife. The CC&Rs contain numerous provisions regarding site planning, building design, material selection, landscaping, and other matters for new construction, along with a review process that specifies how the plans for the development are to be reviewed and at what intervals. Other design parameters relating to the Project were outlined in a separate manual titled "Design Guidelines." As consideration for the purchase of the property, the Client entered into an Architectural Design and Landscaping Agreement ("Agreement"), in which it "agreed to cooperate and adhere to all conditions of the Covenants, Conditions and Restrictions," and abide by other conditions regarding the development of the property.

At the center of the Complaint is the Complainant's belief that that the Respondent, in providing architectural and design services in connection with the construction of the new building on the property, ignored the obligations imposed on the Client under the terms of the CC&Rs and the Agreement, and counseled his Client to do so as well, thereby breaching the

terms of both legal documents in violation of Rules 2.101 and 2.106 of the Code of Ethics.

The Complainant maintains that "[i]n the process of the assignment, the Respondent received, read, and was fully aware of the obligations" of the Client to the Planned Unit Development ownership. He also alleges the following as specific conduct by the Respondent which purportedly violated Rules 2.101 and 2.106:

- The Respondent "knew that the purchase of the property by the Client was conditioned on the right of an architect designated by the Complainant to review and approve the schematic design, then the design and development, then the construction documents."
- "The Respondent knew, or should have known, that all the existing trees and landscaping should remain intact, a fact brought home on several occasions during the early phase of the development, and the Respondent repeatedly and knowingly violated these terms."
- "The Respondent also knew that the Architectural Committee was to review plans to ensure their compliance with the Covenant Conditions and Requirements of the development, specifically as they pertained to the exterior of the building. In brief, a two-story, 13,000 sq. ft. building had been constructed several years earlier, a building that had been designed by another Architectural Firm. The initial building was enhanced with clear grain, high quality cedar siding. The Respondent, aware of the high standards that had been set, first attempted to substitute a synthetic material, and then when pressed and without approval by the Architectural Committee, substituted tight knot cedar, and then proceeded to use an opaque stain over the tight knot."
- The Respondent "ignored or failed to solicit an opinion from the Architectural Com-



mittee” in other instances prior to proceeding with the architectural and design services, such as:

- (1) placement of an electrical utilities trench “that endangered the major tree on the property”;
- (2) siting of a transformer in full view of the nearby arterial roadway; and
- (3) installation of curbs “that were in violation of the requirements of the Architectural Committee.”

This was purportedly “compounded by false testimony in Court,” in which the Respondent “alleged that the Complainant knowingly misrepresented the square footage of the property to the Client at the time of purchase.”

Prior to filing the ethics Complaint with the NEC, the Complainant filed a civil action against the Respondent’s Client. In an effort to settle that case, the parties engaged in mediation and were able to reach agreement on a number of the issues raised in the lawsuit. These were addressed in a Settlement Agreement. The remaining issues were litigated during the course of a trial.

With regard to the civil litigation and the findings of the judge, it is significant to note that:

- The Respondent was not a party to the litigation between the Complainant and the Respondent’s Client.
- The judge commented that the “disregard demonstrated by both parties to follow the provisions of the CC&Rs exacerbated the problems” that were the subject of litigation. There was, however, no specific mention of the Respondent or his actions in connection with the obligations imposed in the CC&Rs or the Agreement.

- The Complainant has not presented any other evidence of litigation or an administrative proceeding involving the Respondent in which he was found to violate local, state, or federal law.

The Complainant cited Rules 2.101 and 2.106 of the Code of Ethics as the basis for his Complaint.

Rule 2.101

Rule 2.101 provides that “Members shall not, in the conduct of their professional practice, knowingly violate the law.” The commentary that is associated with this rule states:

The violation of any law, local, state or federal, occurring in the conduct of a Member’s professional practice, is made the basis for discipline by this rule.... Allegations of violations of this rule must be based on an independent finding of a violation of the law by a court of competent jurisdiction or an administrative or regulatory body.²

During the pre-hearing conference call, the Complainant stated that he believed the Respondent had violated the law because he breached the contractual obligations imposed upon the Respondent’s Client in the CC&Rs, the Agreement, and the Settlement Agreement.

To establish a violation of Rule 2.101, the Complainant must present evidence that the Respondent has been found to violate a local, state, or federal law by a court of competent jurisdiction or an administrative or regulatory body. In NEC Decision 88-8, the Council in dismissing a Complaint alleging violations of Rules 2.101, 2.104 and 3.104, noted that “[t]aking Rule 2.101 first, the complainant has cited no applicable statute or common law principle that the architect violated.” (*See also NEC Decision 92-12.*) Based upon the evidence in the record, we believe the same is also true in this case. The Complainant has cited no statute,



either federal or state, or common law principle, that the Respondent has violated. In addition, we note that the only legal action referenced in the Complaint was the civil action filed by the Complainant against the Respondent's Client. However, as we noted previously, the Respondent was not a party to that lawsuit.

Finally, although the judge in the civil action found that both parties in the litigation disregarded the provisions of the CC&Rs, there was no mention of the Respondent or his actions in connection with the obligations imposed in the CC&Rs, the Agreement, or the Settlement Agreement. Thus, in the absence of a finding by a court or other body substantiating the Complainant's allegation that the Respondent has been found to violate a local, state or federal law, we are unable to find a violation of Rule 2.101.

Rule 2.106

Rule 2.106 provides that "Members shall not counsel or assist a client in conduct that the architect knows, or reasonably should know, is fraudulent or illegal." To demonstrate that a Respondent has violated this Rule, the Complainant must prove that the Respondent counseled or assisted his client in conduct that he knew or should have known was either fraudulent or illegal. The Complainant maintains that the Respondent, in designing and supervising the construction of the new building on the parcel of property in the commercial office development, counseled or assisted his Client to ignore its obligations under the CC&Rs, the Agreement, and the Settlement Agreement relating to the existing landscaping and the building exterior, as well as soliciting an opinion from the Architectural Committee prior to proceeding with aspects of the Project, and thereby assisted the Client in conduct which the Respondent knew or should have known was illegal or fraudulent.

First, we note that the Complainant has failed to meet the burden of proof required to demonstrate that the Respondent has violated Rule

2.106 by counseling or assisting a client in illegal conduct. As we noted above, there is no evidence of a finding by a court of competent jurisdiction or an administrative or regulatory body that the Respondent's Client violated a local, state, or federal law, or that the Respondent counseled or assisted the Client in violating a local, state, or federal law. On the contrary, this is essentially a contract dispute between the Complainant and the Respondent's Client regarding the enforcement of the CC&Rs and Design Guidelines and in no way raises the concerns that are at the heart of Rule 2.106.

Although in his Memorandum of Opinion the judge commented that both parties in the civil action disregarded the provisions of the CC&Rs, there is nothing in the record indicating that the court viewed this as a violation of the law by the Respondent's Client. Moreover, the comment made no mention of the Respondent. Thus, we are unable to find that the Respondent counseled or assisted his client in violating a law.

Second, there has been no proffer of evidence suggesting that the Respondent counseled or assisted a client in fraudulent conduct. Fraud involves "a false representation of fact, either by positive act or a concealment of something which should be disclosed, which deceives and is intended to deceive another so that he or she will act upon it to his or her injury." (*See Black's Law Dictionary at 594-95, 5th ed. 1979*). At the heart of this case is the ongoing conflict and breakdown in communication between the Complainant and the Respondent's Client regarding the process for arriving at a Project design that met the expectations of each. As the architect advising the Client regarding the design of the new building, the Respondent appears to have been drawn into this unfortunate situation. However, the Complainant has failed to provide evidence that would be sufficient to establish that the Respondent counseled or assisted the Client in conduct that he knew, or should have known, was fraudulent.



On the contrary, findings by the trial judge undermine any contentions of fraud in this matter. For example:

- The Complainant claims that the Respondent “knew, or should have known, that all the existing trees and landscaping [at the commercial office development] should remain intact” but that he “repeatedly and knowingly violated these terms.” The judge found, however, that the Complainant had “failed to prove by a preponderance of the evidence that the defendants are in violation of the CC&Rs or the development plan.” He noted that, under the terms of the Settlement Agreement executed by the parties in the civil action, the landscape architect chosen by each party’s architect had the authority to define and execute the terms of the Settlement Agreement, the CC&Rs and the landscaping agreement, and “that is exactly what happened.” He also noted that “[w]hile the architectural committee may have rejected the ultimate plan, I am satisfied that the work done was clearly in accordance with the Settlement Agreement and Release.” This provides no support for allegations of fraud necessary to find a violation of Rule 2.106 by the Respondent.
- As to the materials used on the building exterior, the judge noted that the Complainant had “failed to prove by a preponderance of the evidence that the defendant [the Respondent’s Client] violated the Settlement Agreement regarding the installation of siding of like kind and quality.” He also noted that he was satisfied that the siding put onto the building and the materials for the soffits on the building were in compliance with the Settlement Agreement. Again, this provides no support for allegations of fraud necessary to establish a violation of Rule 2.106 by the Respondent.

The relationship between the Complainant and the Respondent’s Client appears to have been rife with unmet expectations, which put the

Respondent in a difficult and unfortunate position in his capacity as the architect on the Project. This has been, no doubt, a stressful, costly and time consuming process for all parties, which, with better communication, could perhaps have been mitigated. While this unfortunate situation resulted in a dysfunctional business relationship, there is nothing presented in the evidence that substantiates the allegation that the Respondent counseled his Client in conduct violating Rule 2.106.

In accordance with Section 5.5 of the Rules of Procedure, the Hearing Officer with the concurrence of the Chair of the NEC, has determined that, viewing Complainant’s allegations and proffered evidence in a light most favorable to Complainant, the undisputed facts in the record establish that the Respondent has not violated either Rule 2.101 or Rule 2.106 of the Institute’s Code of Ethics and Professional Conduct. Therefore, the Complaint has been dismissed.

Members of the National Ethics Council

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¹ Section 3.2 states:

The Chair of the NEC reviews all Complaints preliminarily to determine if: (1) the allegations, if found to be true, could sustain a violation of a Rule of Conduct; (2) the alleged violation is not trivial; (3) there is good cause for any delay in filing a Complaint more than one year after the alleged violation occurred; and (4) deferral of proceedings is necessary



or advisable because of pending litigation or administrative proceedings involving one or both of the parties.

² The Preamble to the Code of Ethics notes that commentary is provided for some of the Rules of Conduct contained in the Code. “That commentary is meant to clarify or elaborate the intent of the rule.” The commentary is not part of the Code of Ethics, and “[e]nforcement will be determined by application of the Rules of Conduct alone.” The commentary, however, “will assist those seeking to conform their conduct to the Code and those charged with its enforcement.”