



## ***Charging Fee for Initial Appointment with Client; Filing Mechanic's Lien in Fee Dispute; Making False Statement of Material Fact***

### **Summary**

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The National Ethics Council ("Council" or "NEC") found that an AIA Member did not violate Rules 2.104, 3.301, 4.103, and 4.201 of the 1997 Code of Ethics and Professional Conduct ("Code of Ethics") by placing a mechanic's lien on the Complainant's apartment and cooperative for failure to pay a fee for an appointment relating to a home renovation project.

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

### **References**

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*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 violation of the law by a court of competent jurisdiction or an administrative or regulatory body.*

*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 all statements in all professional contexts, including applications for licensure and AIA membership.*

Rule 4.201 Members shall not make misleading, deceptive, or false statements or 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 credit or implying credit for work which they did not do, misleading others, and denying other participants in a project their proper share of credit.*

## **Introduction**

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This case was initially deferred pending the outcome of an administrative complaint that was filed with the state office governing discipline matters. After that matter was resolved, a pre-hearing conference call was held in the fall of 2004. The Hearing Officer, an AIA Associate General Counsel, and both parties participated in the call.

The Complainant asserts that the Respondent came to the Complainant's apartment for an initial appointment so that she could consider retaining the Respondent to perform drafting and design services in connection with an apartment renovation project. The Respondent maintains that the appointment was a first professional consultation, as agreed during a prior telephone conversation. The Complainant maintains that she does not owe the Respondent any compensation because the visit was an interview. The Respondent believes she is owed "F" fee for professional services rendered that day. The Complainant also contends that a mechanic's lien of "L" amount placed on the property by the Respondent for nonpayment of the "F" fee was filed wrongly.

The parties did not enter into a written contract, nor are there any witnesses to their discussions. Statements made by both parties during the pre-hearing conference call were consistent with the information presented in the Complaint and the Response, and no new evidence was submitted during the call.

Near the end of the pre-hearing conference call, the Hearing Officer asked if there would be

additional evidence to present if a hearing were to be scheduled. The Complainant requested 30 days to verify this and to confirm with the Institute's Associate General Counsel whether or not to request a hearing. The Respondent was given the same opportunity and both of the parties agreed to try to settle the case. A hearing date was tentatively scheduled for the spring of 2005. Both parties ultimately declined the opportunity to proceed with a hearing.

This Decision is based entirely on the written submissions and evidence received from the parties and the statements and clarifications provided during the pre-hearing conference call.

## **Background**

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### *1. The Initial Contact Between the Parties*

The Complainant and her husband are the owners of an apartment. She had retained a contractor to provide a design for renovations to the apartment. Construction work on the unit had already begun, although no permit had been issued, prior to the Complainant's contacting the Respondent. During the course of the construction, the Complainant and her husband discovered that they would need the services of an architect to fulfill the requirements of the cooperative and of the city's permit department in order for construction to continue. They sought an architect who would begin quickly and who could provide services within a very limited time frame.

At the beginning of July 2001, Complainant contacted three architects, including the Respondent, to inquire as to whether they would be interested in providing architectural services for her project. She had obtained the Respondent's name from one of her former clients and had an initial discussion with the Respondent by telephone. The Respondent informed the Complainant that even though the time frame mentioned for the meeting was less than optimal, she would be able to meet with the Complainant in person



at the apartment to discuss the project. The Complainant offered to meet at an alternate location, but the Respondent insisted they meet at the apartment.

The Respondent states that, during their initial telephone conversation, she informed the Complainant that she was available to meet with her to discuss the scope of work and the possibility of being retained to provide professional services. She further states that she informed the Complainant that she normally requires a client to sign a Letter of Agreement prior to meeting. The Respondent maintains that she nonetheless told the Complainant she would forgo this requirement and proceed with an oral agreement “due to (1) [the Complainant’s] immediate and urgent need for a site visit consultation, (2) that [the Complainant] was referred by good clients, and (3) that I was extremely pressed for time (I was approaching my ‘Nth’ month of pregnancy).” The Respondent also asserts that she told the Complainant that she billed at “H” per hour and would follow up with a proposal for providing architectural services beyond the initial appointment, if the services were necessary. The Respondent states that the Complainant agreed to these terms during the telephone conversation and that the Respondent agreed to go to her apartment in early July.

## 2. *The Appointment*

The Complainant and Respondent disagree as to the purpose of the meeting in July at the apartment. The Complainant maintains that the purpose was to determine “whether or not we want to work together” and that the Respondent was not hired, orally or in writing, to work on the project. In addition, she asserts that the Respondent was one of three architects consulted regarding the project. The Complainant states that her “final words to the Respondent at the end of the interview were that ‘we [my husband and I] would review the type of services required and would then get back to her if we wanted to hire her.’”

The Respondent states that when she met with the Complainant, demolition of some walls in the apartment had already started, apparently without any plans or permits. She adds that, during the appointment, she looked at the work that needed to be done and explained to the Complainant the types of professional tasks that might be required in order for the permit to be obtained. She contends that, at the end of the appointment, the Complainant requested a proposal from her for architectural services for the apartment alteration.

After the appointment, with an e-mail message to the Complainant, Respondent submitted a Letter of Agreement outlining a proposed scope of services that she was prepared to provide. The e-mail message did not summarize any conclusions or recommendations resulting from the initial appointment (*i.e.*, meeting minutes). She also inquired about gaining access to the Complainant’s apartment on one of two proposed dates to perform survey work. During the pre-hearing conference call, the Respondent stated that she was not aware until after the appointment that other architects were being interviewed for the job.

The Complainant disputes this version of the events and states that the Respondent was never hired, either orally or in writing. She also asserts her understanding that she was not being charged for the initial appointment, since its purpose was to determine whether she and the Respondent could work together. The Complainant states that the invoice she received from the Respondent claimed that she was owed monies for services provided during the appointment, *i.e.*, “Identification of structural/mechanical walls,” “Explanation of state building code including handicap accessibility and Kitchen ventilation,” and “Design advice [*sic*].”

She further states that the Respondent did not bring any examples of prior work to the appointment for the Complainant to see, but that they did discuss architectural styles during the appointment. Based on their conversation, the



Complainant concluded that the Respondent's design style was incompatible with her vision for the work. During the pre-hearing conference call, the Complainant indicated that the "renovations were cosmetic" and therefore did not require special analysis. Furthermore, she stated that the Respondent's fee was higher than those of the other architects interviewed. The Complainant maintains that she and her husband decided not to retain Respondent.

### *3. The Invoice and Mechanic's Lien*

The Respondent submitted an invoice in the amount of "F" to the Complainant in late July. The invoice was resubmitted three months later and once again four months later. The last invoice stated: "IF THE ABOVE TOTAL IS NOT RECEIVED BY [“D” DATE], A MECHANIC'S LIEN WILL BE PUT ON YOUR BUILDING."

A Notice of Lien in the amount of "L" was sent to Respondent by certified mail in mid-February of the following year. According to the Respondent, this amount included the "F" the Respondent believed the Complainant owed for professional services rendered during the appointment, plus "C" to cover the cost of filing the lien. The Respondent stated that she had placed the lien on the Complainant's property because the invoice she sent after the appointment was unpaid. According to the Complainant, because the apartment was located in a cooperative building, the lien applied not only against the Complainant's apartment but also against the entire cooperative. The Complainant states that, "[i]n a phone call from an attorney, [the Respondent] said 'she would not go away for anything less than [S amount] when asked if some small fee—not as compensation or agreement to her claims—would settle the issue and have her relieve the Co-Op of the lien.'"

During the pre-hearing conference call, the Complainant stated that she had researched the lien process and inquired of the city whether or

not the Respondent had the right to file a lien for unpaid professional services. The staff person with whom she spoke indicated this could be done, and that her options were either to pay the Respondent the amount requested or pay the City the amount allegedly owed until the dispute could be resolved in an action in small claims court. The Complainant paid the City so that the lien could be lifted as quickly as possible, since it was affecting the ability of other cooperative owners to obtain permits for work they wished to have performed on their units.

### *4. Disciplinary Charges*

The Complainant contacted the state disciplinary office in an attempt to file a regulatory case against the Respondent for professional misconduct. The licensing board indicated that the alleged offense did not fall under its jurisdiction; therefore, it could not make a ruling on aspects of the case involving fraud or misrepresentation.

### *5. Pre-hearing Conference Call*

During the pre-hearing conference call, both parties indicated they did not want this process to turn into a "she-said/she-said" discussion. The Hearing Officer inquired whether or not there might be any more evidence that could be presented by either party. The Hearing Officer indicated she had the option of writing the Report and Recommendation based on the evidence submitted and on the outcome of the pre-hearing conference call if both parties agreed.

At first they both indicated they did not have any other evidence to present or witness to bring forward, but then the Respondent asked if she could have some time to think about this prior to relinquishing her right to a hearing. A hearing date was tentatively scheduled for March 2005, pending the parties' decision to proceed with the hearing or not. In November 2004, the Respondent notified the AIA's Associate General Counsel that there was no additional evidence to submit and that the record and the



pre-hearing conference call gave the Hearing Officer sufficient information to submit a Report and Recommendation to the National Ethics Council. Therefore, no hearing was held in the case.

### **Findings of Fact and Analysis**

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The consideration of this case must begin with a review of the Respondent's alleged violations, as stated in the Complaint. (*See Rules of Procedure, Section 3.2* ("A Complaint must allege violation of one or more Rules of Conduct stated in the Code [of Ethics]".)) According to Section 5.13 of the 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.

#### *Rule 2.104*

Rule 2.104 prohibits Members from engaging in "conduct involving fraud or wanton disregard of the rights of others." The commentary to that Rule states:

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 violation of the law by a court of competent jurisdiction or an administrative or regulatory body.

The Complainant contends that the Respondent violated this Rule by (a) deciding to charge a fee for an appointment, although no fee had been agreed upon by the parties; and (b) filing a Mechanic's Lien in the amount of "L"—more than double the amount of her original invoice—even though she was never hired, either orally or in writing, to do any work.

In order to prove a violation of Rule 2.104, the Complainant's first option is to cite a finding by a court or administrative or regulatory body that the Respondent has committed a violation of law. The absence of such a finding precludes that approach in this case.

The other option is to prove that the Respondent's conduct constituted fraud or "wanton disregard" of the rights of others. In prior decisions involving violations of this Rule, the Council has addressed the concept of "wanton disregard." In that regard, it has held that in the law wanton disregard is considered to be something more than simple negligence, but something less than intentionally damaging action. In other words, wanton disregard is "action taken in disregard of a high degree of danger that is apparent or would be apparent to a reasonable person."

Applying these criteria to the facts in this case, we were unable, based solely upon the evidence in the record, to determine that the Respondent's conduct was in wanton disregard of the Complainant's rights. The key issue is whether the Respondent's conduct in charging a fee for the appointment in July and then filing a mechanic's lien represents action taken in "wanton disregard" of the rights of others. It is beyond question that the parties failed to execute a written agreement. They offer dramatically different accounts as to the existence or terms of an oral agreement. If such an agreement did exist as claimed by the Respondent, and if a meeting had taken place, then her actions in sending several invoices to the Complainant and ultimately placing a mechanics' lien to protect her interests were not unreasonable. Because the evidence provided by Complainant on this issue is not sufficient to establish her version of events as superior to that of the Respondent, the NEC concludes that the Complainant has failed to satisfy her burden of proving a violation of Rule 2.104 by Respondent.



*Rule 3.301*

Rule 3.301 states that “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 states:

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 Complainant alleges that the Respondent violated this Rule by falsely representing that she was hired for two hours to provide the services in her invoice and by not stating in advance that there were fees associated with the initial appointment in July. The Complainant further maintains that she told the Respondent that she would contact the Respondent if she and her husband decided to hire her. Ultimately, professional services were provided by another architectural firm.

The NEC has cited several key elements as essential to establishing a violation of Rule 3.301. These include a determination as to whether the Member: (1) engaged in explicitly reckless conduct (*see NEC Decision 88-14*); or (2) made reckless or illegal representations in the course of soliciting a client or while performing work on a project (*see NEC Decision 93-4*).

There is obviously a disagreement between the parties as to whether the Respondent provided services during the appointment for which she is entitled to be paid, and whether she informed the Complainant in advance that she would be charged for services provided during the appointment. However, the Complainant failed to provide any evidence demonstrating that any consequences occurred as a result of these claims, and therefore none of the statements

presented can be found to be “dishonest, reckless, or illegal.” The NEC concludes, based on the evidence presented, that the Complainant has not borne her burden of proving a violation of Rule 3.301.

*Rule 4.103*

Rule 4.103 provides that “Members speaking in their professional capacity shall not knowingly make false statements of material fact.” Thus, in order to establish a violation of Rule 4.103 by the Respondent, the Complainant must prove the following three elements: (1) the Respondent, speaking in her professional capacity, made a false statement; (2) she knew the statement was false; and (3) the statement was one of material fact.

The Complaint offers the following four factual allegations in support of her claim that the Respondent violated Rule 4.103:

- The Respondent claimed that she was owed monies for services (an interview). The invoice claimed that the Respondent: identified structural/mechanical walls; explained handicap building codes; and provided design advice.
- At the time of the interview, construction had already begun and all structural and mechanical walls had already been identified by both the contractor and the building superintendent. Thus, it was unnecessary for the Respondent to provide these services.
- Handicap building codes were not applicable to this job as there were no major structural changes being made to the apartment. Therefore, the Respondent offered this information without being asked about it.
- The Respondent brought no materials with her that would illustrate her previous work and thus was asked about style (a typical question when interviewing architects and contractors). Her design advice was totally



incompatible with the Complainant and her husband's style and was ultimately part of the reason she was not chosen. (The Respondent refused to pursue discussion on any other course or style.)

At the heart of the Complainant's allegation that the Respondent violated Rule 4.103 is whether or not the appointment was an interview or a meeting for which the Respondent was entitled to compensation.

The NEC concludes that the appointment was an interview, not a meeting, based on the following:

- a. The Complaint states: "in [Respondent's] words, the meeting was intended to 'determine whether or not we want to work together.'" The Respondent does not dispute this statement in her Response, but she did refute it in the pre-hearing conference call.
- b. At the conclusion of the appointment, the Complainant informed the Respondent that she and her husband needed to decide whether or not they planned to retain Respondent.
- c. The Complainant calls the appointment an "interview" throughout the Complaint and in all accompanying documents.
- d. Whether or not other architects were being interviewed is not grounds for determining if an appointment is an interview or a meeting.
- e. There is no evidence that minutes or other documents summarizing the outcome of the discussion were prepared or distributed by the Respondent.
- f. In addition, interviews are not listed in the series of AIA Contract Documents as a professional service. An interview is a form of marketing, which is considered by the profession as overhead, not as a direct cost.

Further, there is no substantiated evidence that a fee was agreed upon or warranted for this

appointment. Also, the evidence seems to suggest that:

- a. The Complainant did not offer to compensate the Respondent prior to the appointment.
- b. During the initial phone conversation, the Respondent did not make it clear to the Complainant that the "H" per hour rate applied to the initial appointment.
- c. During the initial appointment, the Respondent did not inform (or reaffirm to) the Complainant that the "H" per hour rate applied to the initial appointment.

Based upon the above, we believe that the Respondent's insistence that the appointment was a meeting—when in fact, the evidence seems to corroborate the Complainant's belief that it was an interview—is a false statement, which the Respondent knew was false. As a licensed architect, practitioner, and AIA Member, the Respondent is knowledgeable on whether an appointment with a client qualifies as a meeting, for which the architect is entitled to receive compensation, or an interview. Since she had the professional experience to know that the appointment was an interview and not a meeting, the Respondent knew that she was not entitled to compensation for the time spent at the Complainant's apartment during the meeting.

Moreover, there is nothing in the record to indicate that she informed the Complainant that the "H" per hour rate would apply to the appointment. However, the Respondent filed a lien claiming that she was owed "F" for services rendered that day, although we believe that she was fully aware that she was not entitled to be compensated for the meeting. Thus, we agree with the Hearing Officer's contention that the Complainant has met the burden of proof regarding the first and second elements (*i.e.*, the Respondent speaking in her professional capacity knowingly made a false statement) necessary to prove a violation of Rule 4.103.



Although the Complainant has proven that the Respondent made a false statement, the NEC is not persuaded that the evidence in the record is sufficient to establish the third element—that the statement was one of material fact. Previously, the NEC has ruled that a statement is not one of material fact unless there is some consequence or outcome occurring as a result of the statement. In that case, the Complainant was unable to prove that statements made by the Respondent were material to a decision made by planning authorities to approve a project. We believe this analogy is applicable in this case. Although the City placed a lien on the Complainant's cooperative, it is unclear from the evidence in the record whether that decision was based solely upon the statements made by the Respondent or was done as a matter of course.

Finally, as practicing architects reviewing the circumstances surrounding the Respondent's appointment with the Complainant, we believe that it may be reasonable to assume the Complainant's position that a violation of Rule 4.103 may have occurred in this case. But the evidence provided by the Complainant, who has the burden of proof under Section 5.13 of the Rules of Procedure, is not sufficient to prove it. Therefore, we are unable find a violation of Rule 4.103 in this case.

#### *Rule 4.201*

Rule 4.201 provides that Members "shall not make misleading, deceptive, or false statements or 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 for this rule provides that it "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."

Based upon the review of the record, the NEC concludes that the Complainant has not met her

burden of proof regarding the alleged violation of Rule 4.201. There is nothing in the record to suggest that there was more than minimal discussion of the Respondent's professional qualifications, experience, or performance, or that she made misleading, deceptive, or false statements or claims about her qualifications and experience. Moreover, nothing in this case indicates an attempt by the Respondent to claim credit for work performed by others. Rather, it reflects a dispute over the nature of the parties' appointment and over whether the Respondent is entitled to receive compensation for it. Therefore, the NEC finds no violation of this rule.

#### **Conclusions**

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Based on the facts and analysis set forth above, the NEC has concluded as follows regarding the alleged violations of the rules reference above:

- Rule 2.104 - No violation
- Rule 3.301 - No violation
- Rule 4.103 - No violation
- Rule 4.201 - No violation

Although no violation of the Code of Ethics was found in this case, the NEC notes that a primary problem in this case appears to have been that there was a lack of communication between the parties regarding the nature of their appointment, and whether the Respondent was entitled to be compensated for it. The Respondent does not appear to have made sufficient attempts to understand why the Complainant felt so strongly that the appointment on that date was simply an interview, and why she felt she should not be required to compensate the Respondent for her time. The Respondent also did not reconsider her position or offer alternate means of closure or resolution when she became aware that the lien had an effect on individuals and events far beyond the bounds of the Complainant's project. While these factors might have been better managed, however, they did not give rise to violations of the Code of Ethics.



THE AMERICAN  
INSTITUTE  
OF ARCHITECTS

Code of Ethics and  
Professional Conduct  
DECISION 2002-04

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

**September 20, 2005**