



## ***Payment to a Public Official with the Intent of Influencing the Official's Judgment; Taking into Account Applicable Laws and Regulations; Materially Altering the Scope of a Project Without the Client's Consent***

### **Summary**

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The National Ethics Council ("Council" or "NEC") found no violation of Rules 2.102, 3.101, or 3.103 of the Institute's 1997 Code of Ethics and Professional Conduct ("Code of Ethics") in connection with design work performed by the Respondent to convert the Complainants' four-story brownstone into a multi-family residence. The NEC ruled that the Complainants had not proven that the Respondent's use of an "expediter" to obtain a building permit resulted in a payment to a public official with the intent of influencing the official's judgment. The NEC also ruled that the Complainants had not proven that the Respondent's addition of a fire escape, which the Complainants believed was unnecessary, demonstrated that the Respondent had not taken applicable laws into account or had materially altered the scope of the project without the Complainants' consent.

**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 2.102 Members shall neither offer nor make any payment or gift to a public official with the intent of influencing the official's judgment in connection with an existing or

prospective project in which the Members are interested.

*Commentary: This rule does not prohibit campaign contributions made in conformity with applicable campaign financing laws.*

*1997 Code of Ethics and Professional Conduct, Canon III, Obligations to the Client*

Rule 3.101 In performing professional services, Members shall take into account applicable laws and regulations. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations.

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

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

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The Respondent was retained by the Complainants to design the conversion of an existing four-story brownstone into a three-family residential dwelling. The professional services that the Respondent was retained to provide in connection with the project are described in an agreement prepared by the Respondent that was signed by the parties in February 2004 ("Agreement"). The services described in the Agreement consisted of: (1) preparing "plans and drawings to show existing and or proposed construction"; and (2)



preparing “applications and forms to be filed with the Building Department to obtain approval.” The agreed-upon compensation was to be paid in three installments with the final payment due upon approval of plans by the Building Department.

The building had been owned by the Complainants’ family for two generations. Two years prior to contracting with the Respondent, the Complainants began the project to convert the building into a three-family dwelling. Originally, they had hired another architect to design the project. The first architect prepared plans and made application for approval to the Building Department. By February 2004, approval had not been granted. At that time, the Complainants decided to engage another architect to move the project along. The Complainants indicated they found the Respondent on the Internet. The Complainants subsequently contacted the Respondent, and the Agreement was executed.

The Respondent visited the property on one occasion and requested and received copies of the documents prepared by the previous architect. Using these drawings as a starting point, the Respondent prepared a set of documents indicating modifications to the building and adding an emergency fire escape. The Complainants maintain that they questioned the Respondent about the need for the fire escape since there was already an existing fire sprinkler system.

The application for approval by the Building Department was filed in June 2004. The design, showing both the fire escape and the existing fire sprinkler system, was approved by the Building Department that month. Following approval of the plans, the Respondent requested and was paid \$500.00 above the amount originally indicated in the Agreement. The Respondent stated that the additional compensation allowed him to utilize the services of an expediter in order to speed up the approval process. The expediter was identified as the “Filing Representative” in the application.

The Complainants subsequently received proposals to construct the project from two contractors. The Complainants and Respondent met both contractors at the property in July 2004, prior to the contractors submitting their proposals. One of the contractors informed the Respondent that he needed additional information, including specifications, to complete his bid and to complete construction. The Complainants state that the Respondent did not provide the requested information and was difficult to reach by phone. Following a disastrous telephone conversation on in July 2004 between the Complainants and the Respondent, communications between them ceased to be timely, productive, respectful, professional, or even civil, and the Respondent provided no further services to the Complainants. The Complainants subsequently selected one of the contractors (“General Contractor”) to renovate the building. The Respondent was not involved in the decision as to which contractor to use.

The General Contractor began work on the project and was able to secure a permit based upon the drawings prepared by the Respondent, even though during the construction process, the General Contractor came to believe that the drawings did not allow for adequate room sizes and included an unnecessary fire escape. The General Contractor recommended that the Complainants engage another architect to assist them. The Complainants contracted with a third architect to prepare revised plans without the emergency fire escape. The Complainants stated that the Building Department has approved the revised plans, although revised plans were not submitted into evidence in this case. The Complainants claim to have incurred substantial costs for these additional services and delay costs from the General Contractor. Construction is not yet complete.

#### *The Complainants’ Allegations*

The Complainants allege that the Respondent violated Rules 2.102, 3.101, and 3.103 of the Code of Ethics by billing them for questionable



services, providing incomplete and inadequate designs, and failing to communicate with them in a professional manner. During the hearing, the Complainants further alleged that the Respondent lied to them and has failed to provide architectural services with integrity and in a professional manner as required under the Ethical Standards of the Code of Ethics.

The Ethical Standards are specific goals toward which Members should aspire in professional performance and behavior, while the Rules of Conduct are mandatory, and violation of a Rule of Conduct is grounds for disciplinary action. According to Sections 3.2 and 5.13 of the Council's Rules of Procedure, a Complaint must allege violation of one or more Rules of Conduct stated in the Code of Ethics, and 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." (*See NEC's Rules of Procedure, Section 5.13.*) Based upon our review of the evidence in the record, including the testimony provided at the hearing, we have determined that the Complainants have failed to prove that the Respondent violated the Rules of Conduct cited in the Complaint. Therefore, the Complaint is dismissed.

#### *Rule 2.102*

Rule 2.102 provides that

Members shall neither offer nor make any payment or gift to a public official with the intent of influencing the official's judgment in connection with an existing or prospective project in which the Members are interested.

The Complainants maintain that the Respondent must have violated Rule 2.102 by charging them an additional \$500 for Building Department approval because they do not understand how an expediter could actually get plans approved more quickly. However, the Complainants were unable to provide any specific evidence that a

payment or gift was made to any public official with the intent to influence his or her judgment in connection with their project.

The original contract between the Complainants and the Respondent indicated a total fee for services with final payment due upon Building Department approval of the plans. Upon approval, the Respondent requested an additional \$500 payment, and payment was made, apparently for additional services to expedite acquiring the permit. Evidence from the permit application indicates that an expediter actually filed the application. The Complainants maintained they did not understand how the use of the expediter could possibly result in a permit being issued more quickly—that something else must have been going on.

The Respondent stated that he had originally intended to make the application personally, but he became busy at the time of application and used the services of the expediter instead. Thus he had not included the cost of this service in his original fee request. The Respondent further stated that he expected to receive rapid permit approval because he had a good reputation with the Building Department and they often allowed him to "jump the line."

While there was certainly misunderstanding between the parties as to the exact work of the expediter and the permit approval process, no credible evidence of improper payments or gifts was offered either in written materials or in testimony. Therefore, no violation of Rule 2.102 is found.

#### *Rule 3.101*

Rule 3.101 provides that

[i]n performing professional services, Members shall take into account applicable laws and regulations. Members may rely on the advice of other qualified persons as to the intent and meaning of such regulations.



The Complainants essentially maintain that the Respondent violated this Rule by failing to personally measure the existing building, by failing to design rooms of adequate size, and by adding an unnecessary fire escape to the design of their project.

The Complainants' General Contractor testified that there were a number of details not spelled out in the plans, including the elevations. He also stated his belief, based on his understanding of the current building code, that a fire escape was unnecessary if the building had a sprinkler system. In addition, he indicated that his company had constructed numerous brownstone renovations that were four stories in height and did not require a second stair as a means of egress. He further acknowledged, however, that these were typically single-family homes and might not have the same requirements as a multiple-unit project such as the Complainants'.

As support for his contention that a fire escape was necessary, that the size of the rooms met code requirements, and that he had adhered to the laws and regulations applicable to the project, the Respondent in his Response cited specific laws and regulations. He also discussed and provided copies of the pertinent provisions during the hearing and referenced the original plans submitted by Complainants to identify specific notes and drawings related to smoke detector and accessibility requirements, although it is unclear where in the project these accessibility requirements should be applied.

To further support his contention that the fire escape was necessary because the building was a multiple-unit dwelling, he directed the Hearing Officer's attention during the hearing to several provisions of the laws and regulations from the applicable building code. One provision states:

Exits from floors: There shall be at least two independent exits, remote from each other, from every floor of a building, except that only one exit may be provided [in certain buildings]....

Based upon review of the evidence, the NEC believes that the Respondent has presented coherent references to building code provisions supporting his design, although the testimony and other evidence presented are inconclusive to make a determination as to whether a fire escape was actually required as one of the means of egress. If it was not, the Respondent would have erred, not by ignoring applicable regulations, but by going beyond them. The Complainants failed to carry their burden of proving that the Respondent failed to take into account applicable laws and regulations. Therefore, no violation of Rule 3.101 is found.

#### *Rule 3.103*

Rule 3.103 states that "Members shall not materially alter the scope or objectives of a project without the client's consent." The Complainants allege that the Respondent violated this Rule by adding an emergency fire escape to the plans submitted to the Building Department for permit without their consent.

From the evidence presented it is impossible to determine whether or not the Complainants were aware of the inclusion of the fire escape in the plans that were submitted to and approved by the Building Department prior to the issuance of the approval. The Complainants maintain that they asked the Respondent about whether it was necessary because of the existing fire sprinkler system and he told them he would remove the fire escape from the plans. The fire escape was indicated and detailed on the approved plans, and the Respondent denies he agreed to remove it from the drawings as he believes it is required by the applicable building code, given the 3-family, 4-story nature of the project. He further maintains that the scope and objectives of the clients' project required the emergency fire escape. Again, the Complainants failed to carry their burden of proving that the Respondent altered the scope or objectives of their project without their consent. Therefore, no violation of Rule 3.103 is found.



### Conclusion

Under the NEC's Rules of Procedure, the Complainants have the burden of proving the facts upon which a violation may be found. In the event the Complainants' evidence does not substantiate a violation, the Complaint should be dismissed. Based upon our review of the evidence in this case, the National Ethics Council finds that the Complainants have not met the burden of proving the Respondent has violated Rules 2.102, 3.101, or 3.103 of the Code of Ethics.

The heart of the dispute in this case clearly grew from miscommunication by all parties regarding the nature and extent of design services, the complexity of the governmental approval process, requirements under the pertinent codes, and respect for the other parties involved in the project. None of the parties consistently presented their arguments clearly or succinctly nor did they take the time or give the respect necessary to establish clear understanding of each other's points of view or objectives. The relationship simply ceased to exist in or about the middle of July 2004. However, this did not translate into conduct on the Respondent's part that violated the Rules of Conduct cited by the Complainants.

Accordingly, based on the written record in this case and testimony provided at the hearing, the National Ethics Council finds no violation of the cited Rules by the Respondent and determines that the Complaint be dismissed.

#### Members of the National Ethics Council

Ronald P. Bertone, FAIA  
Brian P. Dougherty, FAIA  
A.J. Gersich, AIA  
Phillip T. Markwood, FAIA  
Kathryn T. Prigmore, FAIA  
Bill D. Smith, FAIA

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

**July 14, 2005**