



# Failure To Demonstrate a Consistent Pattern of Reasonable Care and Competence and Technical Knowledge and Skill; Failure To Take Applicable Regulations into Account; Materially Altering the Scope or Objectives of a Project Without the Client's Consent; Disclosure of Information That Would Adversely Affect Client; Making False Statement of Material Fact

## Summary

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The National Ethics Council (“Council” or “NEC”) dismissed a Complaint that alleged that an AIA Member violated Rules 1.101, 3.101, 3.103, 3.401, and 4.103 of the Institute’s 2004 Code of Ethics and Professional Conduct in connection with architectural services provided by the Member to the Complainants for the design of a new single-family residence. The Council dismissed the Complaint because the Complainants did not meet their burden to prove any of the alleged violations.

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

## References

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*2004 Code of Ethics and Professional Conduct, Canon I, General Obligations*

Rule 1.101 In practicing architecture, Members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing practicing in the same locality.

*Commentary: By requiring a “consistent pattern” of adherence to the common law standard of competence, this rule allows for discipline of a Member who more than infrequently does not achieve that standard. Isolated instances of minor lapses would not provide the basis for discipline.*

*2004 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.

Rule 3.401 Members shall not knowingly disclose information that would adversely affect their client or that they have been asked to maintain in confidence, except as otherwise allowed or required by this Code or applicable law.



*Commentary: To encourage the full and open exchange of information necessary for a successful professional relationship, Members must recognize and respect the sensitive nature of confidential client communications. Because the law does not recognize an architect-client privilege, however, the rule permits a Member to reveal a confidence when a failure to do so would be unlawful or contrary to another ethical duty imposed by this Code.*

*2004 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 statements in all professional contexts, including applications for licensure and AIA membership.*

### **Procedural Background**

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The Complainants, who were residents of Pleasantville, State A, filed a complaint with the National Ethics Council (“NEC”) of the American Institute of Architects (“AIA” or “Institute”) against the Respondent, also of Pleasantville, State A, in connection with a residential project located in a nearby development.

The Chair of the NEC deferred the ethics case because the Complainants had also filed a licensing complaint against the Respondent with the State A Licensing Board. The Board later concluded its proceeding and sent letters to the parties. Upon receiving notice that the Board proceeding had concluded, the Chair of the NEC determined that it was appropriate for the ethics case to proceed and appointed a Hearing Officer.

Upon sending notice to the Complainants of the Hearing Officer’s appointment, the NEC learned that the Complainants had moved to Sunnyvale, State B. At that time, the Complainants informed the NEC that it was unlikely that they would appear in person at a hearing if it were held in the vicinity of Pleasantville instead of the vicinity of Sunnyvale.

The Hearing Officer scheduled a pre-hearing conference call. Participating in the call were the Complainants, the Respondent, and an associate general counsel of the Institute.

During the pre-hearing conference call, the Hearing Officer indicated that the location of a hearing would be in the vicinity of Pleasantville. The Complainants stated that they would not attend a hearing in person at that location due to the travel time and expense involved. Some discussion was held regarding the possibility of the Complainants attending the hearing by telephone. The Complainants and Respondent stated that they would waive their rights to a hearing and that the Hearing Officer could prepare a Report and Recommendation based solely on the parties’ written submissions. No hearing was scheduled during the pre-hearing conference call, and the Hearing Officer stated that she would take the matter under advisement and subsequently notify the parties how the case would proceed.

After consultation with the Chair, the Hearing Officer’s determination was communicated to the parties by letter as follows:

Under the Rules of Procedure of the National Ethics Council, the Hearing Officer has full authority to issue instructions and make decisions for the fair and orderly presentation of evidence and conduct of a hearing. (*See NEC Rules of Procedure, Section 5.5.*) The Rules of Procedure provide that the Hearing Officer will prepare her Report and Recommendation after conducting a hearing. (*See NEC Rules of Procedure,*



*Section 5.14.*) Although the Hearing Officer may, under specific circumstances, dismiss a complaint or take certain other actions without a hearing, the Rules of Procedure do not generally provide for disposition of a case without a hearing. (*See NEC Rules of Procedure, Sections 5.5 and 5.8.*) Even though a party to a case may be willing to forgo a hearing, holding a hearing provides the Hearing Officer and the National Ethics Council the benefit of any evidence and other information submitted by any party that does attend the hearing.

The Rules of Procedure also do not provide for a party's attendance by telephone at a hearing. A party may, however, designate someone to act as counsel (lawyer) or advisor (non-lawyer), and that person may attend the hearing in addition to or in place of the party. (*See NEC Rules of Procedure, Section 5.10.*)

In order for this case to proceed, the Hearing Officer has determined that:

- A hearing will be held that will give any party who attends the opportunity to offer evidence and other information relevant to the allegations in the Complaint.
- The hearing will be held in the vicinity of Pleasantville, State A.
- The parties will not be permitted to attend the hearing by telephone but may, if they choose, designate a counsel or advisor to represent them at the hearing.
- The hearing will be scheduled to take place on a date to be arranged in subsequent communications with Institute staff.

- The parties will be permitted to submit additional written evidence in advance of the hearing as part of the pre-hearing exchange that will be due approximately three weeks before the hearing date. (*See NEC Rules of Procedure, Section 5.7.*)

The Complainants bear the burden of proving an ethics violation. (*See NEC Rules of Procedure, Section 5.13.*) Unless the Complaint is withdrawn, the Hearing Officer will prepare a Report and Recommendation and will consider the information that has been submitted by the parties in accordance with the Rules of Procedure and the instructions issued in this case.

After the parties received this letter, the Complainants informed the NEC that they would not attend a hearing in Pleasantville and that the hearing could be scheduled without regard to their availability. The hearing was then scheduled.

The Hearing Officer conducted the hearing in Pleasantville, State A. The Respondent was present and testified. The Complainants were not present and were not represented at the hearing, but they had submitted additional information in writing. No other witnesses testified at the hearing. An associate general counsel of the Institute was also present.

Neither party submitted written comments on the Hearing Officer's Report and Recommendation or requested to appear before the NEC, as permitted by Section 6.2 of the NEC's Rules of Procedure.

### **Findings of Fact**

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#### *The Parties*

The Complainants retained the Respondent in 2005 to provide architectural services for a home



they intended to build in the Pleasant Hills development in Pleasantville, State A. At that time, they resided in State C. When they filed their Complaint in 2008, they resided in Pleasantville. At the time the hearing in this ethics case was held, they resided in Sunnyvale, State B.

The Respondent practices architecture through his firm in Pleasantville, State A. He began working in the field in 1965, became licensed in State A in 1985, and since then has practiced as a sole practitioner or with several employees. He was the only individual involved in provided his firm's services on the Complainants' residence.

#### *Design of the Complainant's Residence*

Sometime prior to 2005, the Complainants purchased a lot in Pleasant Hills, which is a residential subdivision that operates under various private regulations, including an Architectural Review Committee ("ARC") of the Pleasant Hills Property Owners Association. ("Homeowners Association"). In early 2005, the Complainants contacted the Respondent about providing architectural drawings for the construction of a house, and he provided a Statement of Qualifications and a proposed contract for architectural services. At that time, he had worked on a prior project at Pleasant Hills and was familiar with the community's design requirements.

Although the copy of the architectural contract that was provided as evidence in this case was not signed by the Complainants, the Council assumes that it reflects the parties' understanding because it was submitted by the Complainants. In that document, which is a modified 1993 AIA Document B155, Standard Form of Agreement Between Owner and Architect for a Small Project, the architect's scope of work is described as:

develop a design solution based on the approved project requirements [and]

upon the Owner's approval of the design solution, prepare Construction Documents indicating requirements for construction of the project.

This work is further described in Section 7.2 of the contract as follows:

The Architect shall provide the following:

Design Development Documents – site plan, floor plans, exterior elevations, interior elevations as required and roof plan.

Construction Documents – site plan, floor plans, exterior elevations, interior elevations as required, electrical lighting and power plan and roof plan.

The architectural contract does not include services during the bidding and negotiation phase or construction phase.

The Respondent met with the Complainants, visited the site with them to locate where the project's elements would be placed, and proceeded with design work. The Complainants planned to retain John Anderson of Urbanna, State A, as the general contractor. Mr. Anderson had done other residential construction for the Complainants, including in State C, and, according to the Respondent, the Complainants said they and Mr. Anderson worked together somewhat informally and would start a project with only floor plans and make decisions as the work progressed.

The Respondent produced a six-sheet set of construction drawings dated November 16, 2005, which the Complainants submitted to the Pleasant Hills ARC. According to the Complainants, the Respondent told them that he was then informed by the ARC that the drawings needed to be revised to show roof pitches, and the Complainants told him to proceed. He revised the drawings, added a revision date of "11-26-



05” on each sheet, and sent copies to the ARC and to the Complainants. In a subsequent letter, the ARC informed the Complainants that their “house and barn plan submittal is approved for construction subject to the following comments and conditions” and listed 14 items. The letter indicates that a copy was sent to Anderson Construction.

Apparently construction began shortly after. According to the Complainants, several months later they discovered that the Respondent had made additional revisions to the November 16 drawings in the November 26 set. Those revisions form part of the basis for their Complaint and are described in more detail in the analysis of the applicable ethical rules.

#### *Construction of the Complainants’ Residence*

The Respondent had discussed with the Complainants whether they wanted him to be involved in the construction phase, but they did not. The Complainants did not contact him during construction. He called them about the time the foundations were placed and asked if they wanted him to take a look at anything, but they said “no.”

The Homeowners Association or ARC contacted the Complainants in late 2006 about discrepancies between the approved plans and what was being constructed. Some of those discrepancies are described in more detail in the analysis of the applicable ethical rules.

The Homeowners Association demanded the Complainants revise their construction, but they refused, as described in a petition the Homeowners Association prepared for filing in state court. By that time, the project was largely completed, and the Complainants moved in.

#### *The Arbitration*

The dispute between the Complainants and the Homeowners Association ultimately went to arbitration. The Respondent complied with a

subpoena and testified as a witness in the arbitration hearing.

The arbitration panel set out its findings in a 16-page award. The panel used the Respondent’s plans dated November 16, 2005, as the benchmark for measuring deviation and compliance in the construction. The panel generally found in favor of the Homeowners Association.

By late 2007, the Complainants were unable to obtain permanent financing for the house, and the credit union that had financed its construction assumed ownership.

### **Conclusions**

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#### *Burden of Proof*

Under Section 5.13 of the NEC 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 1.101*

Rule 1.101 states:

In practicing architecture, Members shall demonstrate a consistent pattern of reasonable care and competence, and shall apply the technical knowledge and skill which is ordinarily applied by architects of good standing practicing in the same locality.

The commentary to Rule 1.101 states:

By requiring a “consistent pattern” of adherence to the common law standard of competence, this rule allows for discipline of a Member who more than infrequently does not achieve that standard. Isolated instances of minor lapses would not provide the basis for discipline.



The Complainants allege that the Respondent's set of drawings contains 10 discrepancies between the way a building element is shown on one drawing and the way that same element is shown on another drawing. In the following analysis, the sheet numbers refer to the November 26, 2005 set of drawings.

*(1) Stone or stucco on front porch walls:*

The plan (Sheet 2) shows stone. Section A-A (Sheet 3) shows stone on the east wall. The south elevation (Sheet 4) does not show a material on the north wall of the porch. No drawing depicts an elevation of the west wall. There is no discrepancy in what is shown.

*(2), (3), (8), and (10) Window size drawn as compared to window schedule:*

The scaled dimensions of the front bedroom windows, front porch window, west elevation windows, and second dining room window as drawn on the elevations (Sheets 4 and 5) vary by 6 to 12 inches from the dimensions listed in the window schedule (Sheet 4). It is standard practice to provide dimensions only in a schedule and not to rely on scaling a drawing to determine a dimension. The variations in the drawings do not show lack of care or competence or lack of technical skill.

*(4) Type of front door at dog trot:*

Both the plan (Sheet 2) and door schedule (Sheet 4) show an atrium door, which contains an active leaf and a fixed leaf. There is no discrepancy in what is shown.

*(5) Divided-lites in powder and utility room windows:*

The north elevation (Sheet 4) shows these windows with divided lites. The window schedule (Sheet 4) does not state whether they have divided lites. This does not constitute a discrepancy.

*(6) Type of exterior doors at family room and office:*

The Complainants have acknowledged that there is no discrepancy in the

drawings, only that they did not understand the type of doors shown.

*(7) Type of side windows at master bedroom:*

The east elevation (Sheet 5) shows windows with an arched top, but the window schedule (Sheet 4) does not list these Type F windows as arched.

*(9) Stone or stucco on south end of west elevation:*

The plan (Sheet 2) shows stone. The west elevation (Sheet 5) shows stucco.

This is a builder's set of drawings that were minimal, at best. Even so, there does not appear to be a lack of care or competence in the drawings. Of the allegations made by the Complainants, only two discrepancies in the drawings could be shown. (*See items 7 and 9 above.*) The minimal detail in the drawings and any miscommunications that occurred were compounded by the lack of the architect or his advice during construction.

The National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated Rule 3.101 because the minor discrepancies in the drawings did not show a lack of care or competence or a lack of technical knowledge or skill.

*Rule 3.101*

Rule 3.101 states:

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.

There is no commentary to Rule 3.101.

The Complainants argue that the Respondent's drawings did not comply with the ARC requirement that the exterior wall surface be at least 75% masonry.



Pleasant Hills sent a letter to the Complainants stating that the plans that had been submitted had been approved. The Respondent testified that, during the “arbitration hearing, a representative of Pleasant Hills clearly stated that they had approved the plans as they were drawn.”

The NEC concludes from this evidence that the Respondent’s drawings were approved to meet the ARC’s minimum requirements. Changes made during construction were so substantial that the blame for the final built house no longer meeting the requirement cannot be attributed to the Respondent’s drawings.

The National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated Rule 3.101 because any violation of the ARC requirement for exterior masonry was due to changes made to the design during construction.

*Rule 3.103*

Rule 3.103 states:

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

There is no commentary to Rule 3.103.

The Complainants argue that the revisions the Respondent made in the November 26, 2005 set of drawings altered the scope or objectives of the project as shown and approved by them in the November 16, 2005 set. The Complainants provided a list of differences between the two sets of drawings.

The plans dated November 16 were submitted to the Complainants for review. The Respondent has stated that he “clearly explained” to them that the set of drawings was “not complete” and was “not to be issued for construction.” Between November 16 and November 26, he added additional notes, dimensions, labels, and detail to complete the drawings. The Respondent testified

that changes made to the windows were approved by the Respondents.

The National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated Rule 3.103 because the differences between the two sets of drawings did not alter the scope or objectives of the project.

*Rule 3.401*

Rule 3.401 states:

Members shall not knowingly disclose information that would adversely affect their client or that they have been asked to maintain in confidence, except as otherwise allowed or required by this Code or applicable law.

The commentary to Rule 3.401 states:

To encourage the full and open exchange of information necessary for a successful professional relationship, Members must recognize and respect the sensitive nature of confidential client communications. Because the law does not recognize an architect-client privilege, however, the rule permits a Member to reveal a confidence when a failure to do so would be unlawful or contrary to another ethical duty imposed by this Code.

The Complainants argue that the Respondent voluntarily communicated with the Homeowners Association after the dispute arose about compliance with ARC requirements. Their Complaint alleges that, after they were sued by the Homeowners Association:

He looked at pictures taken of the house by the ARC and pointed out items that were not the way he had intended them to be. Disclosing this information had an



adverse effect on us. Also, he testified for the ARC at the arbitration.

In response, the Respondent has stated:

I was subpoenaed by Pleasant Hills's attorney to appear and testify at the arbitration hearings. I consulted an attorney, Nancy Parker, and was advised to attend the hearing and answer the questions asked of me. That is what I did, nothing more.

The National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated Rule 3.401 because his communications with the Homeowners Association occurred in his role as a subpoenaed witness in a formal arbitration in which his attorney advised him to participate.

#### *Rule 4.103*

Rule 4.103 states:

Members speaking in their professional capacity shall not knowingly make false statements of material fact.

The commentary to Rule 4.103 states:

This rule applies to statements in all professional contexts, including applications for licensure and AIA membership.

The Complainants argue that the Respondent testified falsely at the arbitration hearing that he did not have a particular telephone conversation with one of the Complainants regarding adding stone to a barn that was part of the project.

In order to find a violation of Rule 4.103 based on the circumstances alleged by the Complainants, the Council would need to determine each of the following: that the telephone call took place, that the Respondent testified to the contrary at the arbitration hearing, that he testified

that there was no call when he knew that there had been a call, and that the fact that the call took place was "material."

As defined in Black's Law Dictionary, a "material fact" is a fact that is necessary to determine the outcome of an issue or goes to the merits of an issue. (*See NEC Decision 2008-20.*) It is unclear what significance that the existence of the telephone conversation has for any issue. In addition, there is insufficient evidence to conclude that the call took place or that the Respondent knowingly testified falsely about it.

For the foregoing reasons, the National Ethics Council concludes that the Complainants have not met their burden to prove that the Respondent violated Rule 4.103.

#### **Dismissal**

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Having found no violations of the Code of Ethics by the Respondent, the National Ethics Council has dismissed the Complaint.

Members of the National Ethics Council

Victoria Beach, AIA, Chair  
Paul Davis Boney, FAIA  
Tricia Dickson, AIA  
Cornelius DuBois, FAIA  
Clyde Porter, FAIA  
Benjamin Vargas, FAIA  
Bradford C. Walker, AIA

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

March 23, 2012