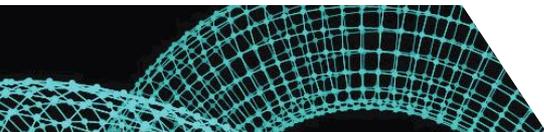


Core Principles of the Fiduciary Duty for Licensed Design Professionals

Ujjval Vyas



The Impact of the A/E Fiduciary Duty on the Construction Industry

SubEXCEL

American Subcontractor's Association

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Fiduciary Duty

A fiduciary duty exists in relationships that are not at arm's length, or where there are asymmetries of power, knowledge, or prestige, and the principal lacks meaningful capacity for oversight to prevent opportunistic behavior of the agent. An affirmative duty from the agent to the principal is created via common law equity principles, contract, or by the sovereign by a state-conferred status.

Fiduciary Duty

The principal engages the agent (a licensed learned professional provided a state-conferred monopoly for the provision of such services) to use his/her knowledge and judgment for the benefit of the owner before any benefit to him or herself. In addition, the duty of loyalty and care that is part of the fiduciary duty necessitates revealing ignorance and all possible conflicts of interest.

Special Status of Learned Professionals

It is worth recalling why lawyers are regulated at all . . . for present purposes the more relevant, problem is abuse of the client for the lawyer's benefit. Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Shapiro v. Kentucky Bar Association; 466 U.S. 466 (1988)

Perception vs. Reality

Perceived Context for the Provision of Design Services by a Learned Professional

	STATE	TORT	CONTRACT
Duty	Duty to obey	Duty to deliver non-negligent services	Duty to fulfill the terms of the contract
Pertinent Attributes	Active duty to protect health, safety, and welfare of the public	Fulfill the standard of care	Fulfill the standard of care outlined or imputed in the contract
Current Approach to How Fiduciary Duty Arises	Fiduciary duty is not applicable	While fiduciary duty is sometimes confused with negligence, they are not at all the same.	Courts use a contract-based approach to fill “gaps” in the contract post facto, relying on facts specific to each case to impute a fiduciary duty.

Perception vs. Reality

Relevant Attributes for Licensed Learned Professionals*

	PHYSICIAN	ATTORNEY	ACCOUNTANT	ARCHITECT
Client Dollars at Risk, Other Risk	High	High	High	High
State-Granted Monopoly	Yes	Yes	Yes	Yes
License Required	Yes	Yes	Yes	Yes
Duty to the State	Yes	Yes	Yes	Yes
Exercise of Independent Judgment	Yes	Yes	Yes	Yes
Significant Information Asymmetry	Yes	Yes	Yes	Yes
Fiduciary Duty	Yes	Yes	Yes	No

*Adapted from Ujjval K. Vyas, "Matching Owner and Architect Expectations: Green Advocacy and the necessity for Informed Consent" in *Green Building and the Construction Lawyer: A Practical Guide to Transactional and Litigation Issues*, ABA Forum on Construction Law, 2014, p. 126.

Perception vs. Reality

Relevant Attributes for Licensed Learned Professionals*

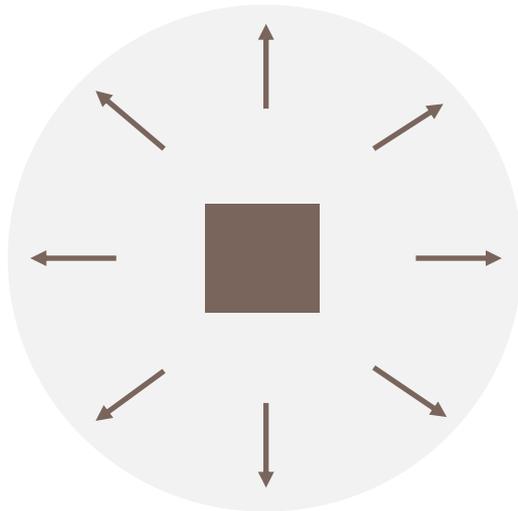
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Visualizing the Relationships

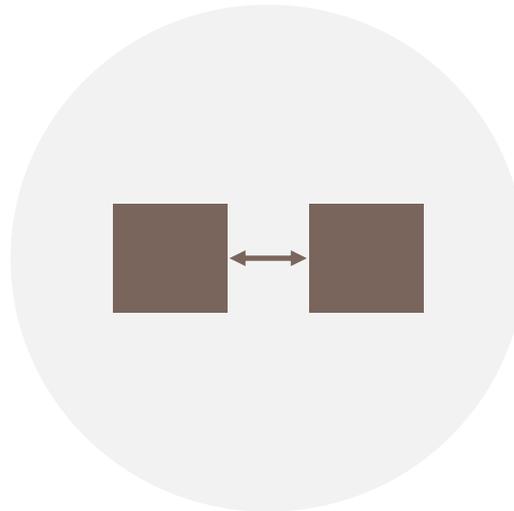
Distance, Asymmetry, and Role of the State

Tort



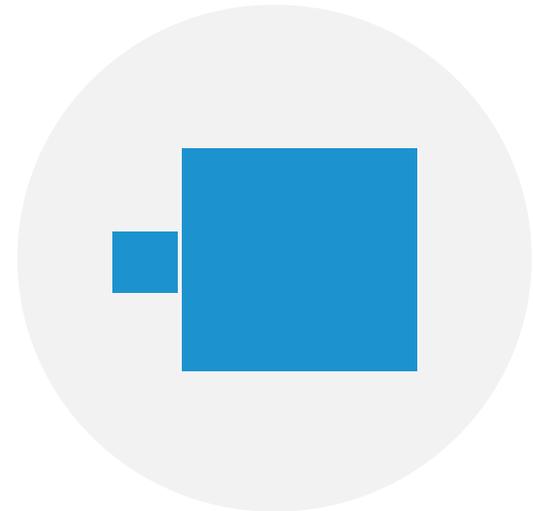
Distant Relationship
Low Asymmetry

Contract



Arm's Length Relationship
No Asymmetry

Fiduciary



Close Relationship
Very High Asymmetry

Perception vs. Reality

Actual Context for the Provision of Design Services by a Learned Professional

	STATE	TORT	CONTRACT	FIDUCIARY
Relationship	Extremely distant (out of sight)	Distant (wave)	Arm's length (handshake)	Close (embrace)
Asymmetry	Very high	Low	None	Very high

Perception vs. Reality

Actual Context for the Provision of Design Services by a Learned Professional

	STATE	TORT	CONTRACT	FIDUCIARY	
Relationship	Extremely distant (out of sight)	Distant (wave)	Arm's length (handshake)	Close (embrace)	
Asymmetry	Very high	Low	None	Very high	
Duty	Duty to obey	Duty to deliver non-negligent services	Duty to fulfill the terms of the contract	Duty of loyalty	Duty of care
Pertinent Attributes	Protect public health, safety, and welfare	Fulfill the standard of care	Non-breach of provisions; fulfill the standard of care	<ul style="list-style-type: none"> • Provide informed consent • Affirmatively assure no conflict of interest 	<ul style="list-style-type: none"> • Defined by contract • Inferred by context • Imputed by court in equity
Approach to Fiduciary Duty	Professional has a passive duty to inform the state or to recuse.	While fiduciary duty is sometimes applied in tort, it is technically incorrect.	Determination of the duty is based on facts specific to the case, not on state-conferred status.	Ample case law exists to understand how liability can be assigned for failure to fulfill any or all of the duties above.	
Order of Duty	Tertiary	Secondary	Secondary	Primary	

Statutory Language Already Exists in Six States

- Illinois
- Massachusetts
- North Carolina
- Nebraska
- Arkansas
- West Virginia

Illinois

§13. Qualifications of applicants. Any person who is of good moral character may apply for licensure if he or she is a graduate with a first professional degree in architecture from a program accredited by the National Architectural Accrediting Board, has completed the examination requirements set forth under Section 12 of this Act, and has completed such diversified professional training, including academic training, as is required by the rules of the Department. . . .

225 ILCS 305/13

Illinois Architecture Practice Act of 1989

Illinois

Good moral character means such character as will enable a person to discharge the fiduciary duties of an architect to that person's client and to the public in a manner which protects health, safety and welfare. . . .

225 ILCS 305/13

Illinois Architecture Practice Act of 1989

Nebraska

(1) The Legislature hereby finds and declares that a code of practice established by the board by which architects and professional engineers could govern their professional conduct would be beneficial to the state and would safeguard the life, health, and property and promote the public welfare of the citizens of this state.

(2) The code of practice established by this section shall include provisions on . . .

(f) Professional conduct and good ethical character standards . . .

81-3434 - Code of practice; contents, Neb. Rev. Stat. § 81-3434

Nebraska

Good ethical character means such character as will enable a person to discharge the fiduciary duties of an architect or professional engineer to his or her client and to the public for the protection of the public health, safety, and welfare.

81-3416 - Good ethical character, defined, Neb. Rev. Stat.
§ 81-3416

Implications for Construction

- In all relationships where the constructor must provide various types of design services and engage licensed A/Es, the primary duty of A/E will be to owner, not constructor
- Independent judgment of the design professional cannot be compromised or they will be subject to fiduciary liability
- Design builders will see the advantage of simply offering a fiduciary duty to the owner themselves and folding A/E in

Implications for Construction

- Owners will demand the fiduciary duty from A/Es in all states thus changing the whole landscape of AEC industry
- AIA contracts will be obsolete
- Insurers of A/Es and Construction Professional Liability will have to accept this new landscape; they already cover fiduciary duty in the six states we mentioned
- Oversight entities in construction will disappear; no need for Owner's Rep, CMs, or others to protect owner

Implications for Construction

- Architects will not be at the apex on the design professional pyramid
- All design professionals will have to affirmatively admit what they do not know
- A/Es cannot escape substantial familiarity with cost, schedule and means and methods
- All government owners will demand fiduciary duty and in fact all government projects in six states already have this

Implications for Green Advocacy

- Licensed design professionals who do not provide both the requisite indices of fiduciary care and informed consent are subject to liability on an independently pleaded basis.
- Therefore they should not engage in advocacy—green or otherwise.
- Advocacy is based on a subjective notion of the principal's benefit by the agent

Limitation of Liability Clauses

- LOL clauses will not be operative for licensed design professionals for fiduciary breaches
- Limitation of liability will also be curtailed for negligence as fiduciary duty becomes the base standard of care, and as public policy changes
- This will have vast implications for education and licensure

Specifications as an Example of Potential Breach

- Specifications are the best example of current systemic fiduciary failures by design professionals.
- They also represent a hidden opportunity to improve practice by fulfilling the fiduciary duty.
- Owners are kept in the dark about many basic choices that could affect the cost, schedule, and risks, eliminating the possibility of informed consent.

Contractor and Subcontractor Opportunities

- Those constructors that are first to offer a fiduciary duty directly to owner will have a powerful initial advantage in the markets and displace their competitors of any size
- Subcontractors that are willing to offer a fiduciary duty will be disproportionately selected for by owners via RFPs
- Construction industry will be fundamentally changed as constructors and especially DBs become the primary way to deliver projects in a fiduciary duty environment