# Fiduciary Duty

Fiduciary duty is a legal concept in which a special relationship of trust is deemed to exist between a person who has offered his or her expertise and judgment, and the individual or entity relying on that expertise. A fiduciary relationship requires that the party who serves as the fiduciary act solely in the best interest of his or her beneficiary in matters related to that role, even when such actions run counter to the fiduciary's personal interests. Examples of fiduciary relationships include those between a trustee and the beneficiary of the trust, a guardian and his or her ward, and a director and shareholders.

A fiduciary relationship represents the highest duty of care recognized in the American legal system, much stricter than the professional standard of care. If a design professional fails to meet the ordinary professional standard of care, he or she can be held negligent. (Remember, to prove negligence, a claimant must establish the professional standard of care, establish a design professional's duty to adhere to that standard of care, establish his or her failure to do so—and then prove that this failure proximately resulted in injury or damage to the claimant.) However, because a fiduciary duty imposes a much higher standard of performance, negligence doesn't necessarily have to be proven in order for the fiduciary to be liable. (See **Standard of Care**.)

Although ordinary, arms-length business relationships—such as those between design professionals and their clients—involve a certain degree of trust and duty of good faith, they are not typically thought of as fiduciary. According to one court, fiduciary liability "transcends the ordinary business relationship."[1]

However, fiduciary relationships between a design professional and client have, by some courts, been found to exist. Several factors come into play, including the specific facts alleged by the plaintiff, the contract language, whether fraud has been alleged, whether a conflict of interest is perceived, and the relative power of the contracting parties. If a design professional is clearly the agent of the client and is found to be managing the contractor, there's a greater probability the theory of a breach of fiduciary duty will prevail.

The jurisdiction is critical too. The majority of courts seem to be reluctant to allow a breach of fiduciary claim, but some—most notably in California—have been less hesitant. For example, in a 1997 decision, a California court concluded that a fiduciary relationship existed between an architect and an owner. The developer/owner claimed that the project architect failed to properly monitor and report upon the work—which proved to be faulty—of a curtain wall designer and contractor.[2]

Breach of fiduciary claims have been more prevalent against architects than engineers because architects are more likely to contract directly with a project owner and often have a broader range of duties than an engineer. But in in late 2010, a California jury determined that an engineering company had breached a fiduciary duty to a city and ordered the engineering firm to compensate the city for "professional negligence, misrepresentation, and breach of contractual and fiduciary duty" over a failed project.[3]

## The Problem

Some client-written contracts contain language that may create a fiduciary relationship between the owner and the design professional. Some explicitly refer to the consultant as a fiduciary, with language such as the following:

> *…in light of the high degree of confidence and trust that the Owner has reposed in the Design Professional, the Design Professional is a fiduciary of the Owner and, as such, has the duty to act in the Owner's best interests at all times...*

Other owner-written clauses are more subtle. At first glance, the language seems "warm and fuzzy," but if you look carefully, you realize the clauses might be interpreted to change the standard of care.[4]

> *The Design Professional accepts the relationship of trust and confidence established between it and Owner and agrees to furnish its best skill and judgment and to perform its Services in the most expeditious and economical manner consistent with the interests of Owner.*

A court faced with either of these clauses might decide that you were agreeing to the very highest level of trust. This decision would not only translate into increased liability exposure but also jeopardize your professional liability coverage.

Here's why: As we've pointed out, fiduciary duty liability normally doesn't exist for design professionals. However, if you accept fiduciary duty in your agreement with the client, it represents an assumption of additional liability for which you would not otherwise be responsible. Therefore—while every case is different—it is unlikely to be covered by your professional liability insurance. (There's another issue, too: the question of whether assuming the role of fiduciary to the client might place you in conflict with your role as an impartial project claim arbiter or your professional responsibility to the public.[5] See also **Claims Arbiter/Initial Decision Maker.**)

Design firms are seeing more claims that allege breach of fiduciary duty (in addition to negligence and other causes of action). While the majority of breach of fiduciary duty claims against architects and engineers are unsuccessful, when they do prevail, they can be very expensive and may include punitive damages. What's more, in some jurisdictions, a breach of fiduciary duty claim may be subject to a longer statute of limitations than other types of claims. (See **Statutes of Repose and Limitation.)**

In addition, be aware that under the 2013 Dodd-Frank Wall Street Reform and Consumer Protection Act, registered municipal advisors—which could conceivably include some engineers—owe a fiduciary duty to their municipal clients.[6]

## The Solution

There are several measures you can take that may help you lessen the risk of breach of fiduciary duty claims against you.

First, meticulously review any client-written contracts to make sure that they don't create a fiduciary duty. Such language often lurks in unexpected places, such as Confidentiality or Scope of Services provisions. Be on the lookout for clauses that state that the design professional recognizes a "special relationship of trust" with the client. If an owner insists on a contractual provision that describes the parties' relationship, revise to define it as one of "good faith and fair dealing."

Delete, too, any language that raises the standard of care to a higher level, including any extreme words of promise, such as "highest, best, strictest" and other red-flag words, and revise the standard to an "ordinary" or "normal" or "reasonable" level of skill and care. (Be sure to watch for similar overblown language in your own communications with clients, too, including proposals or responses to RFPs.)

Your goal is a clause that affirmatively defines the standard of care to which you will perform. We've provided one variation below. (See the **Standard of Care** chapter for other options and more information.)

**STANDARD OF CARE**

**In consideration of the benefits to the Client of employing the fast track process In providing services under this Agreement, the Consultant shall perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances at the same time and in the same or similar locality.**

Next, consider adding the following language to your Standard of Care provision:

**Nothing in this Agreement is intended to create, nor shall it be construed to create, a fiduciary duty owed by either party to the other party.**

Note that currently, neither the AIA B101™ nor the EJCDC E-500 owner-design professional standard form agreements specifically address fiduciary duty. If you use these documents, ask your attorney about amending them to incorporate language specifically disclaiming any fiduciary duty.

You can also add language to the effect that you make no warranty, either express or implied, as to your findings, recommendations, plans, specifications, or professional advice:

**The Consultant makes no warranty, express or implied, as to its professional services rendered under this Agreement.**

In addition:

- Delete, as always, provisions that would have you certifying, warranting, or guaranteeing anything. (See **Certifications, Guarantees and Warranties.**)
- Don't agree to language that the client is "relying" upon your specific design expertise or the specific expert reputation of your firm, as this might be construed as raising your standard of care.
- Avoid cost-estimating duties. If that's not possible, define them in your contract as estimates of probable construction costs, and include appropriate disclaimers. (See **Estimates of Probable Construction Costs.**)
- Consider including Entire Agreement and Interpretation provisions to your agreements. (See those chapters for more information and suggested language.)
- Make sure to clearly delineate exactly what you are—and are not—responsible for in your scope of services. (See **Scope of Services** and **Excluded Services.**)
- Try to include a **Limitation of Liability** provision and make sure you have a waiver of **consequential damages** in your contract. (See those chapters for more information and suggested language.)

- Talk with your attorney, professional liability agent or broker, and insurance company about how best to address the issue of municipal advisor under the Dodd-Frank Act.

You'll want to discuss all of these measures with your attorney.

Finally, remember that as a design professional, you have a responsibility to uphold the standards of your profession. Go out of your way to avoid any potential or actual conflict of interest and anything that could appear to be less-than-honest conduct.

## References


1. *Carlson v. Sala Architects, Inc.*, 732 N.W.2d 324, 330–31 (Minn.App.2007)
2. *Lake Merritt Plaza v. Hellmuth Obata + Kassabaum (HOK).* The court relied upon language in a 1976 AIA B141™ agreement to find that a fiduciary relationship existed between the owner and HOK. The agreement required HOK to represent the owner, review the work of the contractor, and report to the owner any deviations from the contract documents. The court ruled that these obligations rendered HOK an agent of the owner and thus the owner's fiduciary, and directed the jury to abide by this ruling in determining liability and assessing damages. The jury awarded $7 million to the plaintiff.
3. *Carter & Burgess v. City of Victorville*. The engineering firm had been hired for turnkey services on three city utility projects, including the $22 million Foxborough Power plant that a Carter & Burgess feasibility study had recommended. Construction costs soared to $60 million before the city stopped the project in 2006. Carter & Burgess sued the city for $106,000 in unpaid fees, and the city responded with a countersuit. After a seven-week trial, the jury awarded the city $52.1 million. Carter & Burgess appealed the decision but settled the case in November 2012 for $54 million.
4. This clause is similar to language found in some of the ConsensusDOCS agreements—language that also may be regarded as implying a fiduciary duty.
5. For example, the American Society of Civil Engineers' (ASCE) Code of Ethics and Guidelines remind members that the "lives, safety, health, and welfare of the general public" are dependent upon the judgment of engineers and that the engineer's obligation to the public welfare is "paramount."
6. See the Municipal Securities Rulemaking Board's Rules to Protect Municipal Entities and Obligated Persons, http://www.msrb.org/MSRB-For/Archive-ssuers/MSRB-Rules-that-Protect-Municipal-Entities.aspx.


## Related Topics (See also)


Certifications, Guarantees and Warranties

Claims Arbiter/Initial Decision Maker

Conflicts of Interest

Consequential Damages

Entire Agreement

Estimates of Probable Construction Costs

Excluded Services

Interpretation

Limitation of Liability

Scope of Services

Standard of Care

Statutes of Repose and Limitation

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