



Standard of Care for Design Professionals

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TYPES OF DUTIES

Contract

Tort

Fiduciary

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CONTRACTUAL DUTY

The Design Professional will fulfill in good faith the terms and conditions of this contract.

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CONTRACT DUTY – To WHOM



Person/entity with whom you contracted



Third-parties to whom the parties to the contract specifically intended to confer a benefit

CONTRACTUAL DUTIES – To WHOM

- City hired engineer to evaluate slope stability above private homeowner's property.
- Landslide causes damages to homeowner's property.
- Homeowners sue engineer for failing to inform them of the slope stability recommendations.

Burg v. Shannon & Wilson, Inc.,
110 Wash App. 798 (2002).

CONTRACTUAL DUTIES – TO WHOM

- Architect contracts with owner.
- Owner hires Construction Manager and General Contractor.
- Extensive delays on project and owner blames General Contractor
- Contractor sues architect for causing delays, alleging it is a third-party beneficiary under Owner-Architect contract

CONTRACTUAL DUTIES - STANDARD

§2.2 The Architect shall be responsible for the performance of the Architect's Services as an independent contractor and in a good and workmanlike manner (i) consistent with the Agreement; (ii) consistent with the instructions, guidance and direction of the Owner; (iii) consistent with the prevailing applicable professional or industry standards; (iv) consistent with sound architectural practices; and (v) as expeditiously as is consistent with such professional skill and care the orderly progress of the Project, the instructions of the Owner and this Agreement (the standards of this Section §2.2 shall be referred to herein as the "Architect's Standard of Care").

AIA B101 - 2017

CONTRACTUAL DUTIES – STANDARD

The *Standard of Care* for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with any services performed or furnished by Engineer.

EJCDC® E-500, *Agreement between Owner and Engineer for Professional Services* (2014).

-
- Architect's plans meet ADA standards.
 - Contractor's build does not meet standard – dimensions are off.
 - Owner sues architect (with help from the contractor) and argues there was a duty to measure/notice during site visits - but what does the contract require?

CONTRACTUAL DUTY: SURFSIDE CONDOS

- A 2018 structural engineering analysis report on behalf of the homeowners association uncovered concrete spalling or cracking on the concrete slab edges of balconies.
- The report also found abundant cracking and spalling in the concrete columns, beams and walls of the parking garage.





NEW CONTRACTS

Scope of engagement
Time of engagement

I Agree ☐

TORT DUTY

A tort denotes a breach of duty imposed by law.

TORT DUTY – To WHOM

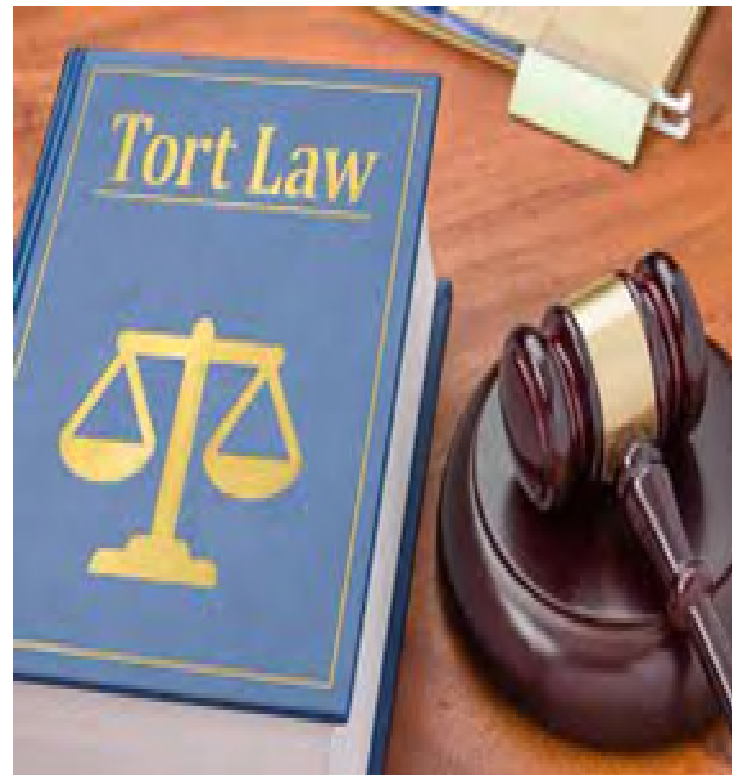
The duty owed under tort concepts could be to the other party in a contractual relationship, as well as to any third party who, it is reasonably foreseeable, would be affected by the actions of a person.



TORT DUTY - STANDARD

Absent contract language to the contrary, the standard of care is established by cases, statutes and regulations.

In other words, if your contract is silent with regard to the standard of care, state law will supply the negligence standard.





TORT DUTY - STANDARD

In performing services, an architect/engineer must possess and apply the knowledge and use the skill and care that is ordinarily used by reasonably well-qualified architects/engineers. A failure to do so is a form of negligence that is called malpractice.

TORT DUTIES – ECONOMIC LOSS

Design Professionals have a duty to members of the public with respect to personal injuries and property damage resulting from breaches in the professional standard of care.

Historically, Design Professionals in many jurisdictions have been protected by the “economic loss rule,” which holds that an engineer cannot be sued for negligence by a third party for purely economic losses.

TORT DUTY - FORESEEABILITY

- In tort negligence lawsuits, foreseeability asks whether a person could or should reasonably have foreseen the harms that resulted from their action.



TORT DUTY

Is climate change foreseeable?



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CLIMATE CHANGE

While tort law generally does not attach liability for harms that were not foreseeable, parties argue that the effects of climate change are increasingly foreseeable.

Adhering to applicable codes and following industry customs typically satisfies the standard of care for design professionals. Many building codes in the United States, however, are based on historical data and do not account for future risks related to climate change, such as sea level rise.

HOW CLIMATE CLAIMS MIGHT ARISE

- **FORESEEABILITY**
- Unforeseeable → No tort claim
- What is foreseeable may vary geographically
 - Rising sea levels in Denver?
 - Multiple-foot increase in average snowfall in Miami?
- Past performance not an indicator of future results
- Can't hide behind contractual requirements
- Can't hide behind applicable codes
- Can't hide behind industry custom

CONSERVATION LAW FOUNDATION V. EXXONMOBIL, INC.



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TORT DUTY: CLF V. EXXONMOBIL

- Clean Water Act claim alleging that ExxonMobil failed to consider imminent increases in rainfall, severity of storms, and sea levels. Did not engage in “good engineering practice.”
- Court found that CLF had standing to make such a claim against ExxonMobil for present and imminent storm-related risks because of the substantial risk that severe weather could cause the terminal to release pollutants in an amount greater than it was allowed under its CWA permit.
- While design professionals were not named directly in this suit, their work is certainly implicated in the way this lawsuit is framed.

FIDUCIARY DUTY

It is an affirmative duty from the professional to the client and requires the fulfillment of its own *duties of care and loyalty to the principal.*

FIDUCIARY DUTY

The Design Professional understands and acknowledges that the primary relationship between the Owner and Architect/Engineer is fiduciary in nature and characterized by the trust, reliance, and confidence the Owner places in the Design Professional.

FIDUCIARY DUTY — TO WHOM

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 or by contract.

FIDUCIARY DUTY – CONSENSUSDOCS

The Associated General Contractors of America's Consensus DOCS 240, Standard Form of Agreement Between Owner and Architect/Engineer, provides:

“The Architect/Engineer accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate and exercise the Architect/Engineer's skill and judgment in furthering the interests of the Owner. The Architect/Engineer represents that it possesses the requisite skill, expertise, and licensing to perform the required services.



Consensus DOCS 240 ¶ 2.2.

FIDUCIARY DUTY – WHAT IS REQUIRED

A duty to protect the owner's interest. The design professional needs to avoid conflicts of interest and not advocate solutions contrary to the owner's stated positions, even if architect/engineer believes it is required by canons of ethics.

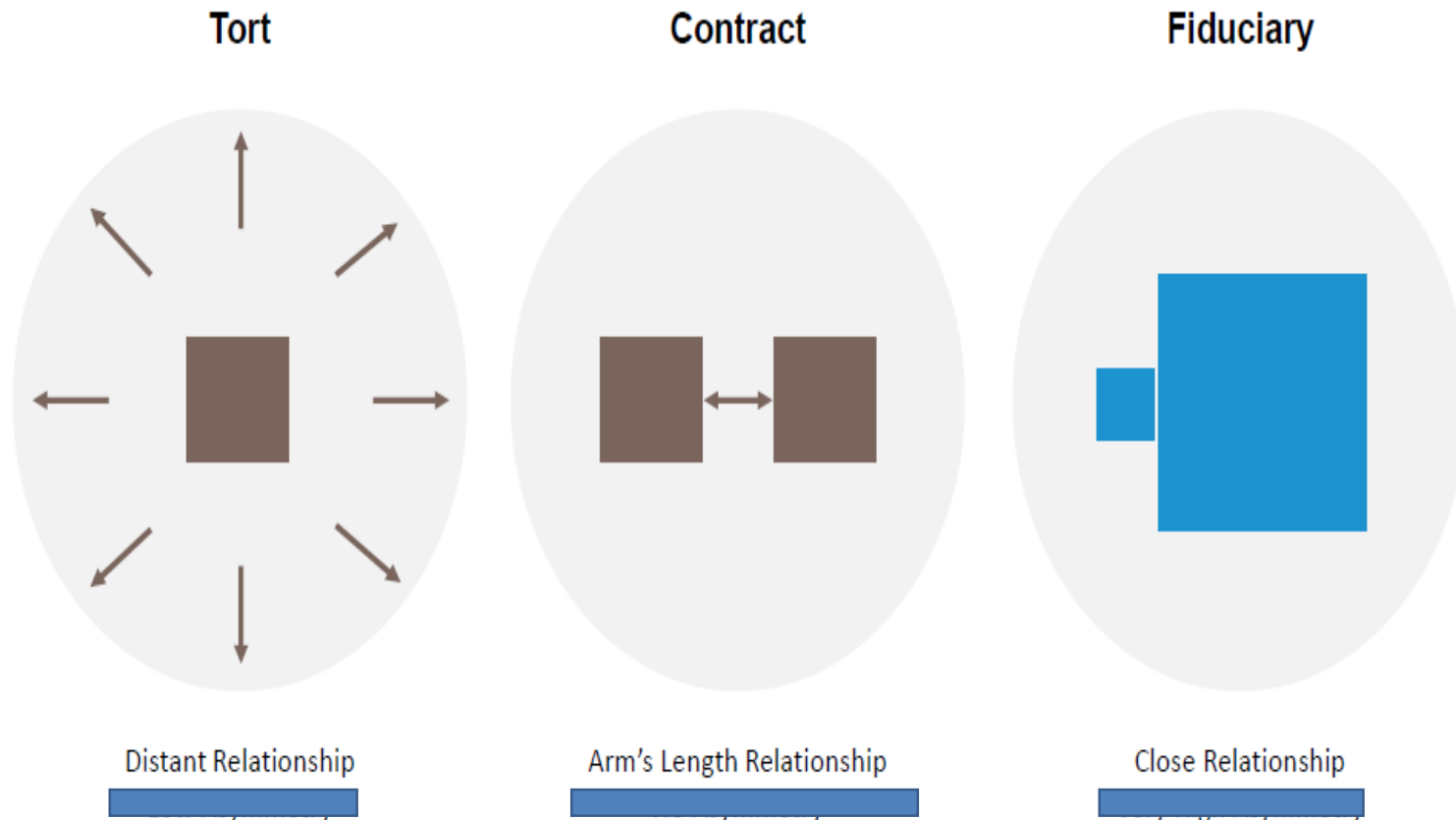
A duty to meet the owner's project requirements, schedule, and budget, thereby requiring the design professional to understand how their design decisions impact the owner's risk profile and long-term goals.

FIDUCIARY DUTY – WHAT IS REQUIRED

A duty to disclose how the design professional is providing design services, including a duty to disclose when design services are outside the design professional's expertise.

A duty to protect the owner's decision-making capability to make decisions with material impact to the project.

Summary of Duties of Care



THANK YOU!

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