





### **Code of Ethics Preamble** (*Emphasis added to highlight the duty to the public.*)

Engineering is an important and learned profession. As members of this profession, engineers are expected to exhibit the highest standards of honesty and integrity. Engineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and **must be dedicated to the protection of the public health, safety, and welfare**. Engineers must perform under a standard of professional behavior that requires adherence to the highest principles of ethical conduct.

#### **I. Fundamental Canons**

Engineers, in the fulfillment of their professional duties, shall:

- 1. Hold paramount the safety, health, and welfare of the public.**
2. Perform services only in areas of their competence.
3. Issue public statements only in an objective and truthful manner.
4. Act for each employer or client as faithful agents or trustees.
5. Avoid deceptive acts.

#### **II. Rules of Practice**

- 1. Engineers shall hold paramount the safety, health, and welfare of the public.**

**If engineers' judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate.**



### **2020 Code of Ethics and Professional Conduct**

FROM THE OFFICE OF GENERAL COUNSEL

### **Code of Ethics Preamble** (*Emphasis added to highlight the duty to the public.*)

The Code applies to the professional activities of all classes of Members, wherever they occur. **It addresses responsibilities to the public**, which the profession serves and enriches; to the clients and users of architecture and in the building industries, who help to shape the built environment; and to the art and science of architecture, that continuum of knowledge and creation which is the heritage and legacy of the profession.

E.S. 1.5: Design for Human Dignity & **the Public HSW**

Canon 2: Obligations **to the Public**

Rule 2.105: Refuse & Report Adversely Affecting **the Public HSW**

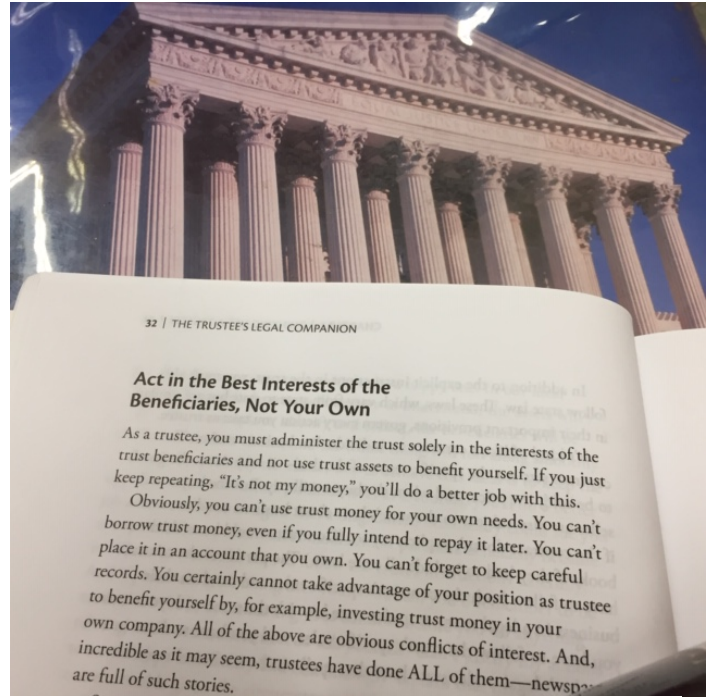
E.S. 6.5: Climate Change & **Public Health**

Should an A/E's client attempts to put their interests ahead of the HSW of the citizenry, in the form of a contract clause in an A/E – client agreement, that A/E would run afoul of their duty to the public. Protecting the HSW of the public is uppermost, even if doing so requires that an A/E be at odds with the directions of a client or employer. Furthermore, great effort is taken in the design professions to make sure that clients understand these limits, and no result is guaranteed by a design professional's services. Comparable with other learned professions, architects and engineers also do not guarantee an outcome, only that they will meet the applicable standard of care (a common aspect of all learned professions).

### **THE BASICS OF A "FIDUCIARY DUTY"**

- A person or organization that acts on behalf of another person or persons, putting their clients' interest ahead of their own, with a duty to preserve good faith and trust for the other person or persons.
- Being a fiduciary thus requires being bound both legally and ethically to act in the other's best interests.
- A "fiduciary duty" is the highest duty of trust and confidence recognized by law.

- A fiduciary is held to something stricter than the morals of the market place. *Justice Cardozo (1870 – 1938), US Supreme Court.*
- Consider these examples as a duty to put the interest of their own for the benefit of an other:
  - ✓ Lawyer to client, even though the lawyer cannot guaranty a verdict at trial;
  - ✓ Financial planner to client, even though a financial planner cannot guarantee portfolio or market performance;
  - ✓ Doctor to patient, even though the doctor cannot promise a cure;
  - ✓ Directors of corporation to shareholders, even though the directors cannot guarantee profit;
  - ✓ In the law, one that has a duty designated as a “trustee” for a trust, for the benefit of a “beneficiary.”



“Not Your Own” Photo by Eric O. Pempus, DesignPro Insurance Group, 12.27.2021

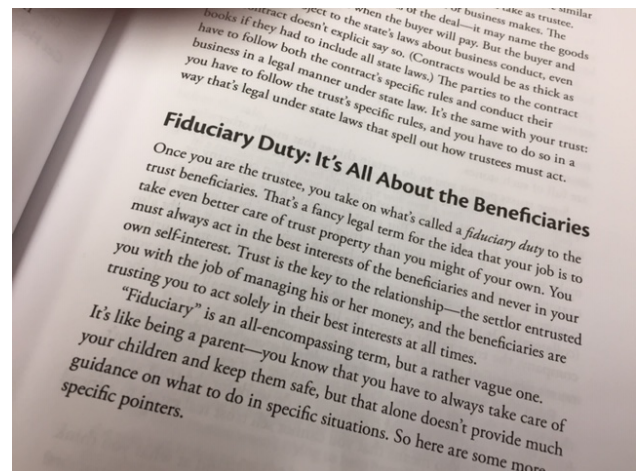
## CONTRACTUAL TERMS & CONDITIONS

Should an architect or engineer deemed a “fiduciary,” then they failed to protect himself or herself from their client’s contractual overreaching, and created a substantial risk management blunder. As an example, the American Institute of Architects’ Standard Form of Agreement Between Owner & Architect, ARTICLE 2, ARCHITECT’S RESPONSIBILITIES could be modified by an A/E’s client (actually the client’s lawyer) as follows, without using the actual words “fiduciary duty:”

**§ 2.1.1 Architect covenants and warrants that it will provide the highest and finest duty of faith and mutual trust, confidence and undivided loyalty in the best interest of Owner, at all times. Owner has retained Architect based on and in reliance on Architect’s specialized experience, knowledge and expertise, and relies upon on Architect’s complete and highest level of skills necessary to qualify the Architect to perform the scope of services. (Actual contract clause proposed to one of my clients, with emphasis added creating a fiduciary duty.)**

An A/E’s client suing on a fiduciary duty theory would derive an immense advantage, both psychological and tactical. Placing a design professional in a fiduciary relationship will create more problems than any benefits for an A/E and the construction industry as a whole. Thus, when negotiating a professional design services agreement, an A/E should push back to their client (and its lawyer) with the following:

§ 2.1.1 Architect’s obligations to the Owner shall be limited to the Architect’s scope of services, without any other responsibilities or obligations, express or implied. Furthermore, Architect’s obligations to Owner, and Architect’s consultants obligations on the Project should not be construed to create any fiduciary duty towards Owner. And lastly, Architect and its consultants make no warranty, either express or implied, for services provided for this Project.



“It’s All About the Beneficiaries” Photo by Eric O. Pempus, DesignPro Insurance Group, 12.27.2021



## IN CONCLUSION

Rather than citing cases where a design professional had been found liable for breaching their fiduciary duty, the following are two examples of cases where a fiduciary was not found by a court of law.

### **Appellate case - Winsted Land Development v. \_\_\_\_\_ Architects, P.C. , Conn. (1999)**

- Although the architect's duties were extensive, the trial court did not find the architect's superior knowledge sufficient to give rise to any fiduciary relationship.
- Rather, there was only a business relationship, and not one that involved sufficient loyalty or trust which characterizes a "fiduciary relationship."
- While the court did find the design professional liable for malpractice, breach of contract, and negligent misrepresentation, no fiduciary duty was found.

### **Appellate case - Cinque v. \_\_\_\_\_ , New York (2002)**

- Summary judgement was granted to the architect in a breach of fiduciary case for lack of proof of a fiduciary duty.

### **About the Author**

*Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 17 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 35 years. As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.*

*The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.*

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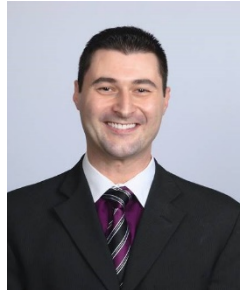
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