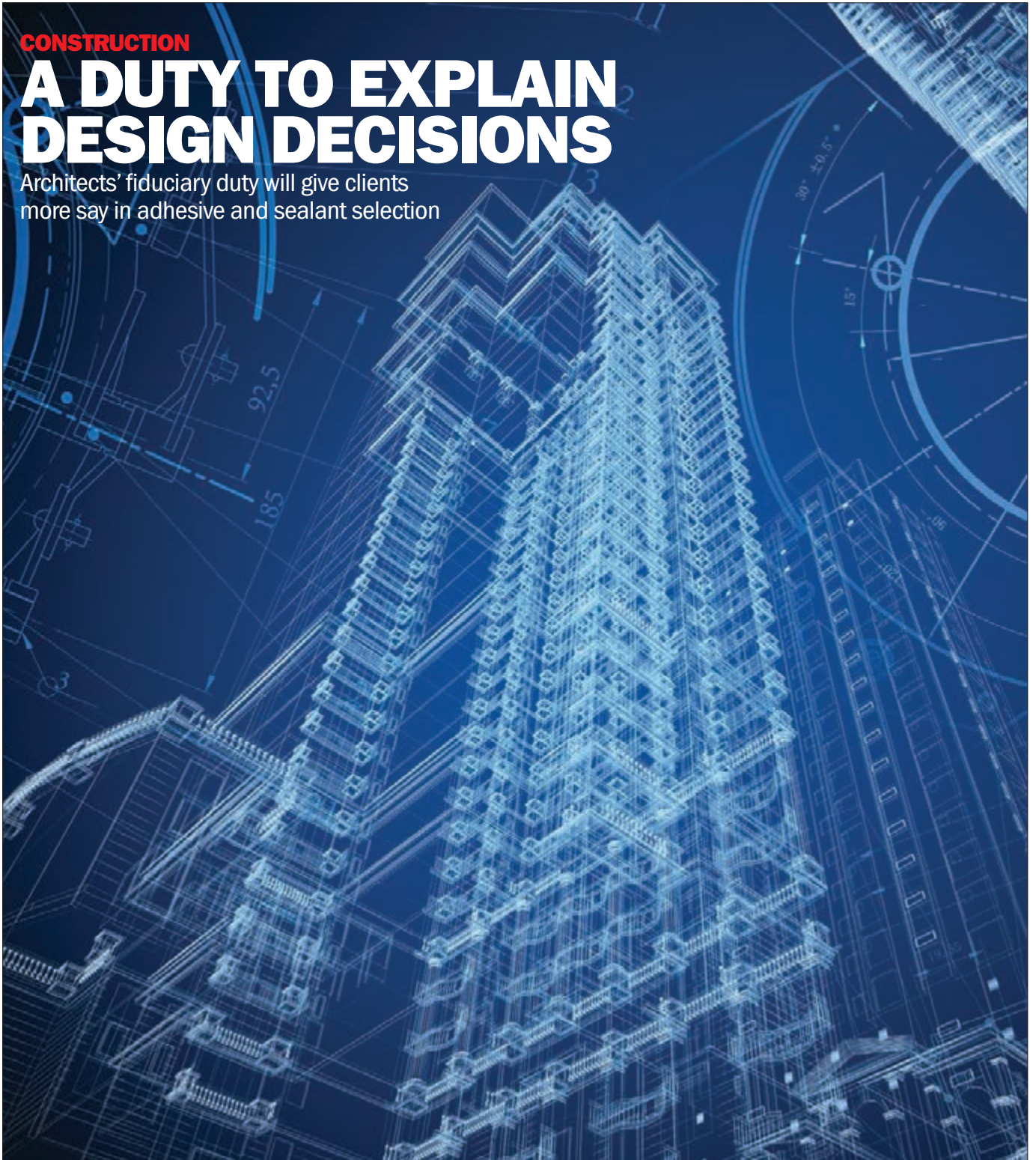


Adhesive & Sealant Convention 2019

CONSTRUCTION

A DUTY TO EXPLAIN DESIGN DECISIONS

Architects' fiduciary duty will give clients
more say in adhesive and sealant selection





The primary duty of the architect should be to serve the interests of the client

Putting the client back in control

If architects begin to observe the rules of fiduciary duty, it will give clients more say in what materials are used in buildings. As a result, they will need to be better educated about what is available and the risks and benefits of materials to be specified

CYNTHIA CHALLENGER VERMONT

Like doctors and lawyers, architects and engineers are learned professionals. Similarly, like doctors and lawyers, architects and engineers, including specifiers, have a fiduciary duty to protect their clients' interests.

Both the theory and law regarding this

issue are fairly straightforward, although they have not been well understood in the past, according to Ujval Vyas, principal at Alberti Group.

"Architects and engineers cannot advocate for their own personal causes or openly or covertly make any decisions that are not in the best interests of their clients," he states.

Unfortunately, the practice of architecture

has become one focused on negotiating contracts with clients based on standards established by the American Institute of Architects (AIA).

"In many cases today," observes Frederick Butters, attorney at law, "critical decisions that should be made by the client are being made by architects and engineers without educating or consulting the client."

Specifications for adhesives and sealants, for instance, are often set with regard to the architect's preference for "greener" materials, even though they may not perform as well and could have significant long-term negative impacts.

The fundamental economic value of a transaction between a client and a doctor, lawyer or architect is destroyed if the professional has an arms-length relationship with the client, according to Vyas.

"This type of relationship is characterised by massive information asymmetries, which place the client at a distinct disadvantage and provide the opportunity for the professional to take advantage.

NEED FOR INFORMED CONSENT

"These transactions only work if the primary duty of the professional is to use knowledge and expertise to exercise judgment and serve the interests of the client. In the world of architecture, that means educating the client and gaining informed consent for all material aspects of the project," he explains.

Building projects involve many more decisions than even very complex lawsuits, adds Butters. "Architects are not expected to confer with clients on basic choices like the types of nails that will be used, but they do need to educate clients about major building systems and let the client decide," he says.

UJJVAL VYAS
Principal, Alberti Group

"Architects will no longer be able to select adhesives and sealants simply because they perceive them to be greener"



While the structure exists with respect to both procedural and substantive law – six states have legislation containing fundamental language regarding the fiduciary duty of architects to their clients – these laws have been largely ignored, and the practice of architecture has continued as usual.

"Until the mindset of architects is changed and they come to understand that their role is not to 'take care' of their clients, but to act as the outsourced brain power for particular services rendered to society, the required legal shift won't occur," states Vyas.

The way architects are taught must change. Architecture schools need to communicate the importance of serving the best interest of clients rather than focusing primarily on the design process, according to Vyas.

Butters adds, "The common approach today is for architects to spend a large amount of time



Existing laws established for doctors, lawyers and accountants can equally be applied to the architectural profession

in a design studio learning from an experienced architect. But architecture and design are not interchangeable. Design is the ability to create something that would be useful if constructed – this is not unique to architecture.

"The architect provides a total package of services to the client including the design and all information necessary to construct that design. Much more time should be spent teaching architects how to practise – how to deliver quality services for their clients."

In addition, Butters notes, they also need to understand that fiduciary obligations are equitable in nature and there is no fix in the form of a contract clause.

Furthermore, says Vyas, architects need to be taught about the physics and chemistry of common construction materials. Most architects today have little knowledge about the physical materials used to construct the buildings they design – from basic materials such as glass and steel to complex technical materials such as adhesives and sealants – and do not believe they need it.

Specifiers are also typically not trained sufficiently. What information architects do have on materials generally comes from the manufacturers, who clearly have a vested interest in selling their products and not necessarily in helping the architect determine the pros and

cons of all options.

The situation is complicated by the fact that AIA has policy statements, including canons of ethics, that place obligations on architects, according to Butters. "One of those obligations is to advocate for sustainable design," he notes.

FREDERICK BUTTERS
Attorney at law

"Much more time should be spent teaching architects... how to deliver quality services for their clients"



"Since architects have a fiduciary duty to educate their clients and do what is in their clients' best interests, they in fact can't advocate for particular causes in a manner consistent with that duty," he explains.

He adds that form contracts promulgated by AIA, some of which are 40–50 pages long, exculpate architects and limit their liabilities, all of which runs contrary to the notion that architects are professionals.

"These types of clauses in attorneys' contracts would never be accepted, but

» architects use them as a matter of course and at least as often as clients allow it,” comments Butters.

So new thinking must take hold in the architectural arena. “This concept is clearly not new – it will simply be applied to a different profession. Architects cannot be recognised as learned professionals unless they shoulder the obligations that come with that appellation. The existing law established for doctors, lawyers and accountants can be applied to the architectural profession,” says Butters.

“And while there is limited case law that supports this legal shift, there doesn’t seem to be any that runs contrary.”

GOOD MORAL CHARACTER PROVISION

In addition, he observes that most states in their licensing statutes for architects have a “good moral character” provision. In some, these licensing laws actually state that the purpose of the good moral character obligation is to ensure that architects take on their

fiduciary responsibilities.

For adhesives and sealants, the most pertinent aspect of this discussion relates to the common practice of architects to select “green” products without educating the client about these decisions.

Says Vyas, “Adhesives are complex products, and to make proper product selections it is necessary to understand at a minimum their chemistry and toxicology. Architects and engineers, however, often deselect sealants and adhesives based on little information and certainly without any risk assessment because they see themselves as beneficent experts that can make the right choice for the client, while at the same time using their clients’ money to serve their personal views.”

Regulations, such as the US Department of Commerce green marketing rules, do not have an impact because if an issue arises, action is taken after the fact. They are appropriate for standard commercial, arms-length transactions, but not for the asymmetrical relationships

between architects and clients that necessitate an affirmative duty, according to Vyas.

For adhesive and sealant manufacturers, the eventual acceptance by architects of their fiduciary duty will have a revolutionary impact and result in a reconfiguration of the marketplace, according to Vyas.

“Architects will no longer be able to select adhesives and sealants simply because they perceive them to be greener or more sustainable and without any proof as determined by a proper risk analysis,” he asserts.

“Architects who refuse to provide an affirmative duty will eventually go away. No lower court will rule against the clear legislative language that exists today in important states such as Nebraska and Illinois, where many large A&E firms are headquartered and their architects are licensed – and thus subject to fiduciary duty.

“Because these firms practise all over the world, any legal decisions will have global implications,” he concludes. ■

SOFTWARE CYNTHIA CHALLENGER VERMONT

DOCUMENTING DESIGN AND EXECUTION FOR FIDUCIARY COMPLIANCE

CONSPECTUS, AN independent specifications consulting firm, is trying to address some of the practical aspects architects must address when pursuing that affirmative fiduciary duty.

The company is putting together two existing documentation systems to enable the tracking of all aspects of a design and construction project, according to founder and owner David Stutzman.

MasterFormat, a standard for organising specifications and other written information for commercial and institutional building projects, is a widely used tool for describing construction work results.

For the early phase of a project, *Uniformat*, which is systems-based by functional element, not material or product, allows designers to describe solutions so the owner, contractor, and estimator can understand the design intent.

“The advantage of *Uniformat* is that the design and performance criteria and owner project requirements can be captured before the design is even started, or at least concurrent with the design – and this information can be tracked through to completion of the project,” Stutzman says.

Conspectus has developed *ConspectusCloud*, enabling web-

based access to a single version of both programmes for all of the people involved in a project.

“This new web-based tool provides a transparent, proactive process and access to a unified project documentation database to effectively fulfill fiduciary duty obligations,” asserts Stutzman.

The software records the owner’s project requirements, performance criteria, design criteria, design decisions, system selections, product specifications, commissioning and operations requirements.

The owner can observe, comment and edit project requirements and specifications developed throughout the design and construction process, ensuring that the owner’s interests are preserved.

CONFIRMING COMPLIANCE

In addition, the software allows the design solution to be continuously and proactively measured and evaluated against the owner’s project requirements, including budget, to confirm compliance, according to Stutzman. It also provides documentation of all decisions and the owner’s informed consent.

Stutzman notes that as a specifier he has seen many things go horribly wrong, resulting in the need for extensive rework and much

wasted effort. These issues can arise due to a change made by the design team or a switch in materials as part of a cost-cutting effort to get a project back on budget.

As an example, he notes that at the outset of a project architects often specify the most expensive rubber flooring as a means for building cost into the project,

DAVID STUTZMAN
Founder and owner, Conspectus

“We often end up challenging architects on behalf of their clients”



knowing that it will eventually be replaced with a less expensive material, but not explaining to the owner these intentions.

The owner expects a rubber floor but gets vinyl, and from his/her perspective believes the value of the project has been decreased. The same situation could be applied to any material, including adhesives and sealants.

As a specifier, Conspectus’ clients are the architects, but Stutzman is in a difficult position, because he is also a registered architect and recognises his fiduciary duty to the owner.

“We often end up challenging

architects on behalf of their clients,” he observes.

With *ConspectusCloud*, the company is trying to make the entire process transparent, inviting the entire project team including the owner to participate in conversations about the selections and choices being made – and keeping a record of them.

The software is still under development, but is in active use on current projects. At the present it is capable of document version control, but will eventually also include a complete audit trail of who did what when.

Stutzman is focused on educating owners and design builders about its benefits because he believes the system can provide them the greatest value because they bear the ultimate risk of any project.

“We still have a ways to go, but we are actively discussing the concept of fiduciary duty with all groups involved in building projects and are generating a lot of interest,” Stutzman concludes. ■

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