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Pacific Northwest Design Professional Legal Update

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Defeating Breach of Fiduciary Duty Claims Against Design Professionals

Over the past two decades, design professionals have achieved considerable success in containing damage awards in litigation. Through aggressive advocacy, close monitoring of developments in case law and careful contract drafting, design firms have developed powerful defenses – chiefly, limitations of liability and the economic loss doctrine – that offer substantial protection against unreasonable financial exposure on risky construction projects. In general, design professionals and the attorneys who represent them endeavor to litigate disputes under contract theories. When it is necessary to litigate tort claims, they seek to apply the standard of care of a reasonably prudent design professional practicing within the same specialty in the community. Tort liability attaches only when the design professional fails to perform his or her duties in a manner consistent with the standard of care.

Claimants, however, are now resorting to nontraditional tort theories in an attempt to expand the scope of design professional liability. Asserting that an architect or engineer has "breached a fiduciary duty" is one way in which creative parties seek to sidestep risk allocation provisions in construction contracts or circumvent the economic loss doctrine. The remedy in a successful breach of fiduciary duty claim can include punitive damages in some jurisdictions, attorneys' fees or both, if the plaintiff prevails in proving the existence of a fiduciary relationship, the breach of that duty and the resulting loss.

While most breach of fiduciary duty claims appear to have been unsuccessful to date, design firms, their insurers and attorneys have noted that these claims are being alleged by owners with greater frequency. This article outlines a basic legal strategy for defending against a breach of fiduciary duty claim.

Argue that No Fiduciary Duty Exists

A design professional's first argument should be that it owed no fiduciary responsibility to the claimant, who is typically the project owner. This argument should be presented in two parts, with the first emphasizing relevant legal and policy factors and the second addressing factual considerations specific to the parties.

As a threshold matter, it is important to understand the distinction between the heightened requirements of a fiduciary duty and the traditional standard of care that is anticipated in commercial contracts between design professionals and their clients. Black's Law Dictionary defines "fiduciary duty" as "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of

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duty implied by law (*e.g.*, trustee, guardian)." A court in Delaware recently explained the importance of respecting the distinction between fiduciary and ordinary duties:

> [I]t is vitally important that the exacting standards of fiduciary duties not be extended to quotidian commercial relationships. This is true both to protect participants in such normal market activities from unexpected sources of liability against which they were unable to protect themselves and, perhaps more important, to prevent an erosion of the exacting standards applied by courts of equity to persons found to stand in a fiduciary relationship to others.
>
> Bargained-for commercial relationships between sophisticated parties do not give rise to fiduciary duties. In addition, this Court is chary of expanding the scope of fiduciary duty to a broad set of commercial relationships which traditionally has been regulated by normal market conditions, rather than the scrupulous concerns of equity for persons in special relationships of trust and confidence.

Addy v. Piedmonte, et al., Del. Ch., No. 3571-VCP (March 18, 2009).

Like the Delaware court, many courts are mindful that they stand as guardians against unwarranted incursions of fiduciary law into commercial transactions. Blurring the distinction between fiduciary and commercial relationships would have the untoward effect of putting all professional and trade services on a slippery slope. As one court aptly recognized, "If we were to agree with the plaintiff, all parties that possess a superior, technical skill, including electricians, plumbers and mechanics, would owe a special duty to their clients." *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 43, 761 A.2d 1268 (2000). Viewed in the proper light, "[f]iduciary relationships are generally defined by a level of trust *beyond* that in ordinary business relationships." *Munn v. Thornton*, 956 P.2d 1213, 1220 (Alaska 1998) (emphasis added). "The fact that one business person trusts another and relies on the person to perform its obligations does not rise to the level of a confidential relationship for purposes of establishing a fiduciary duty." *Garrison Contractors, Inc. v. Liberty Mutual Ins. Co.*, 927 S.W.2d 296, 301 (Tex. App. 1996). Design professionals must, therefore, zealously argue that fiduciary relationships are unique under the law and should not be imposed on the architectural or engineering firms who have entered into bargained-for commercial relationships with clients.

Establishing that a design professional had no fiduciary duty in a particular case requires an examination of the relationship at issue. Simply placing trust or confidence in an engineer or architect is not sufficient to establish a fiduciary relationship. A true fiduciary relationship involves an imbalance of power, such that there is trust and confidence on one side and dominance, influence and a duty of loyalty on the other. These hallmarks typically are not present in commercial relationships between owners and design professionals.

Put the Claimant to Its Proof

In several states, a party claiming the existence of a fiduciary duty where such a relationship does not exist as a matter of law must prove the existence of the relationship by clear and convincing evidence. This evidentiary standard imposes a heavy burden on a claimant. If faced with a breach of fiduciary duty claim, a design professional should marshal evidence that its dealings with its client fail to reflect the degree of control and influence required to establish a fiduciary relationship.

For a design professional, it is helpful to muster evidence that the parties were merely participants in business transactions, dealing at arm's length. Where possible, it is advantageous to show that the other party is a sophisticated business entity. Courts have held that no special relationship is created when two sophisticated business entities enter into an arm's length trans-

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action. In addition, because the most common source of a fiduciary duty is an agency or other special relationship, the design professional should present evidence in support of an argument that it did not assume any duties as the agent of the project owner.

Also relevant is any evidence that the architect or engineer did not consciously assume a fiduciary duty. In many states, one party cannot unilaterally impose a fiduciary duty upon another without the other party's conscious acceptance of such a duty. A clause in the parties' contract to the effect that "the architect/engineer assumes no fiduciary duties to the owner" would carry significant weight in this regard.

If the professional services contract includes an integration clause, the design professional can cite that language as evidence that the parties intended to order their relationships and to allocate all of the risks by the written agreement, leaving no room for claims outside the four corners of the document. In short, the overarching theme in defending against a breach of fiduciary duty claim should be that the parties entered into a standard arm's length commercial relationship.

Refute Arguments that Statutory Licensing Standards Create a Fiduciary Duty

Some claimants have attempted to argue that a fiduciary duty may be imposed on design professionals by statute or other regulatory requirement. Courts do not appear especially receptive to the argument that licensing standards can serve as a surrogate for the actual control, dominion and influence traditionally necessary to prove a fiduciary relationship. However, because this argument has at least some superficial appeal to judges, design professionals should be prepared to address it.

For example, in Washington, RCW 18.42 and WAC 196-27 impose licensing standards and requirements on professional engineers to ensure the public that registered engineers have received proper and uniform education and training. The rules of professional conduct in WAC 196-27 also obligate the engineer to conduct business ethically. It is important to note that the obligations imposed by the professional engineering licensing statute run to the state, rather than to individual third parties. A fiduciary duty, in contrast, is owed to a specific entity and is not a general duty. The regulations, by their terms, exist "in order to safeguard life, health, property and promote the public welfare." WAC 196-27-010. Nothing in the regulations prescribes specific conduct, gives clear directives to a design professional or identifies affirmative duties. Therefore, design professionals should argue that the statutory rules of professional conduct do not give rise to any duty, much less a fiduciary duty, owed by the design professional to third parties.

The Restatement of Torts, generally regarded as persuasive authority, lends support to the argument that a licensing statute cannot create a fiduciary duty for the benefit of a specific person or entity:

> Many legislative enactments and regulations are intended only for the protection of the interests of the community as such, or of the public at large, rather than for the protection of any individual or class of persons. Such provisions create an obligation only to the state, or to some subdivision of the state, such as a municipal corporation. The standard of conduct required by such legislation will therefore not be adopted by the court as the standard of a reasonable man in a negligence action brought by the individual.

Restatement (Second) of Torts § 288, comment b. Just as the rules of ethical conduct do not provide a basis for establishing negligence, they cannot create a fiduciary relationship where one otherwise does not exist.

The language of the licensing statute may be used as a shield against a breach of fiduciary duty claim. For example, a design professional may argue that it lacks authority to elevate a client's interests above its own statutory duty to safeguard life, health, property and promote the public welfare. In other words, a fiduciary

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duty may be fundamentally incompatible with a design professional's obligations under an applicable state licensing statute.

Cite Favorable Fiduciary Duty Cases and Distinguish Unfavorable Cases

The following is a summary of some of the cases that have discussed breach of fiduciary duty claims against design professionals. In many cases, courts are reluctant to resolve breach of fiduciary duty claims on dispositive motions, because each of the elements involves factual issues that must be resolved by a trier of fact. However, courts have repeatedly expressed skepticism toward the argument that a fiduciary relationship exists between a design professional and its client.

Carlson v. Sala Architects, Inc., 732 N.W.2d 324, *review denied* 2007 Minn. LEXIS 524 (Minn. Aug. 21, 2007) (reversing a trial court's holding that an architecture firm owed its clients a fiduciary duty, that it breached that duty and that it had to return the fees paid for the design of a single family home). Plaintiffs alleged that they retained the architectural firm because of the expertise of a particular architect, but a different architect was assigned to the project. The appellate court held that a fiduciary relationship generally did not exist as a matter of law between architects and their clients. It explained that a fiduciary relationship was one in which one party held a superior position in terms of knowledge and authority and in which the other party places a high degree of trust and confidence. The court noted that although Minnesota law had not recognized these elements in an architect-client relationship, the requisite facts could exist in a relationship between an architect and its client that would give rise to a fiduciary duty. The court concluded that the existence of such a relationship is highly fact-specific and, therefore, inappropriate for determination on summary judgment.

MWSPA, Inc. v. Achek, 2007 Phila. Ct. Com. Pl. LEXIS 77 (March 23, 2007) (rejecting claim for breach of fiduciary duty against architect). This case arose out of contracts to provide architectural and engineering services for the design of a restaurant. The owner alleged that the architectural drawings were defective and that the architect was not licensed in the state. It sought rescission of the contracts. Among other allegations was a claim for breach of fiduciary duty. The court dismissed the claim, recognizing that a fiduciary relationship only exists where there is "overmastering influence" on one side or "weakness, dependence, or trust, justifiably reposed" on the other. The court reasoned that a fiduciary relationship cannot arise just because one party has greater skill and expertise than another in a particular field, because such a ruling would give rise to a fiduciary duty whenever one party has marginally greater skills and expertise than the other.

RCDI Construction, Inc., et al. v. Spaceplan/Architecture, Planning & Interiors, P.A., et al., 2001 U.S. Dist. LEXIS 13202 (W.D.N.C. 2001) (recognizing statutory basis for fiduciary duty of architect to client). In addressing a claim for tortious interference with business expectancy by a contractor against an architect, the court cited to several North Carolina statutes which appear to establish that a fiduciary relationship exists between an architect and its clients. *See* N.C.G.S. § 83A-1(5). While not at issue in the case, the court noted that a right exists for clients to pursue separate claims against architects under theories of professional negligence (malpractice) or breach of fiduciary duty established by statute. We found no other reported cases in which this theory has been pursued in North Carolina.

Will & Cosby and Assocs., Inc. v. Salomonsky, 48 Va. Cir. 500, 1999 Va. Cir. LEXIS 128 (1999) (denying demurrer re claim for breach of fiduciary duty against architect because fact question existed as to existence and scope of agency). This case arose out of a contractor's claim against an architect, who was hired by the project owner to render architectural services on an apartment construction project. The court refused to dismiss the breach of fiduciary duty claim against the architect because fact questions existed regarding whether the architect was an agent of the owner. Since the contract at issue was not in the record, the court could not resolve the issue. It does, however, suggest that the courts may recognize a breach of fiduciary duty claim when the architect is an agent of the owner.

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Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd., 946 P.2d 589, 596, 1997 Colo. App. LEXIS 212 (Co. App. 1997) (affirming dismissal of breach of fiduciary duty claim against engineer; recognizing that a fiduciary relationship can exist between engineer and owner under some circumstances). An owner brought suit for both negligence and breach of fiduciary duty against an engineering consultant, who had been hired to advise on slope subsidence. The engineer failed to inform the owner that he previously provided advice and assistance to the abutting landowner and knew that the base of the shared hillside had been excavated and could be causing the slope failure. The trial court directed a verdict in favor of the engineer on the breach of fiduciary duty claim, and the appellate court upheld the ruling. But the court noted that while the engineer-client relationship did not "in and of itself" trigger fiduciary duties, "a fiduciary relationship can also arise between individuals through a relationship of trust, confidence, and reliance." The court then defined the characteristics of a fiduciary relationship in terms that could apply to many design professional-client relationships: "A fiduciary relationship generally arises when one party has a high degree of control over the property or subject matter of another, when the benefiting party places a high level of trust and confidence in the fiduciary to look out for the beneficiary's best interest, or when one party relies on another's high degree of expertise in an area." The court also noted that a fiduciary relationship can be created when one party imposes a special trust or confidence in another, "so that the first party relaxes the care and vigilance that he or she would normally exercise in entering into a transaction." Nonetheless, the court ultimately concluded that the engineer's relationship with the owner did not rise to the level of a fiduciary in this case for three reasons: First, the engineer did not exercise the degree of control over the project necessary to create a fiduciary relationship; he was "just one member of a team of people" hired by the owner to assess the slope and he rarely spoke directly with the owner. Second, the owner did not "relax its vigilance" or exhibit full trust in the engineer; the engineer's role was limited to making recommendations, which an on-site engineer reviewed and approved or rejected. Third, no evidence existed that the engineer "undertook to advise [the owner] in any capacity other than in his capacity as an engineer in a typical professional relationship."

Hartford Casualty Ins. Co. v. Town of Mansfield and Schoenhardt Architects, Inc., 1993 Conn. Super. LEXIS 2754 (1993) (recognizing claim for breach of fiduciary duty against architect arising from payment certification decision). This case involved a contract for the design of a school, under which the architect was responsible for certifying payment for the contractor's work. The court noted that the law allowed flexibility to permit new claims for fiduciary duties depending on the circumstances. The architect, by assuming the professional responsibility for certifying the contractor's pay applications under the contract, created a relationship of superiority and influence on one side and justifiable reliance on the other sufficient to permit a claim for breach of fiduciary duty to be passed to the jury.

Getzschman v. Miller Chemical Co., Inc., 232 Neb. 885, 443 N.W.2d 260 (1989) (affirming rejection of request for breach of fiduciary duty instruction against architect and recognizing that claim for design professional liability can be based on contract or tort, but not expanding claim for fiduciary duty). The case was brought by an architect against clients who failed to pay his fees for the design of a home. The clients counterclaimed for breach of fiduciary duty. The trial court rejected a proposed instruction on the breach of fiduciary duty counterclaim. The court did not specifically discuss the fiduciary duty claim. Instead, it discussed the recognized legal bases for claims against design professionals, recognizing the principle that "accompanying every contract is a common-law duty to perform the thing agreed to be done with care, skill, reasonable expediency, and faithfulness, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract."

Strauss Veal Feeds, Inc. v. Mead & Hunt, Inc., 538 N.E.2d 299, 1989 Ind. App. LEXIS 397 (Ind. Ct. App. 1989) (finding that an architect's duties to its employer are circumscribed by contract and do not include a fiduciary duty). This case involves a claim that an architect of

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a veal feed processing plant failed to warn its client about possible industrial waste disposal problems associated with the production of liquid veal feed. The court rejected the plaintiff's argument that a duty to investigate and warn arose from the architect's status as a fiduciary. Because the client never requested design services with respect to industrial waste treatment or disposal, the court held: "An architect does not owe a fiduciary duty to its employer; rather, the architect's duties to its employer depend upon the agreement it has entered into with that employer. An architect is bound to perform with reasonable care the obligations for which it contracted and is liable for failing to exercise professional skill and reasonable care in preparing plans and specifications according to its contract."

The following unpublished cases (which may nor may not be cited as authority in their respective jurisdictions) also contain instructive discussions of breach of fiduciary duty claims:

E-Med, Inc. v. Mainstreet Architects, 2007 Cal. App. Unpub. LEXIS 4277 (Cal.App. 2 Dist., May 26, 2007) (unpublished decision) (recognizing that fiduciary duty existed between architect and client, but finding no breach of that duty). This case arose out of a high-density development design. The owner claimed that the architect should have advised him to develop single-family detached residences instead of high density housing and that the architect failed to develop this more profitable option. The jury found in favor of the architect. The appellate court appeared to adopt the position that an architect owed a fiduciary duty to a client; however, it held that the architect's failure to urge an owner to develop affordable housing did not constitute a breach of that duty.

Thier v. Kenyon, 2006 Conn. Super. LEXIS 2576 (2006) (unpublished decision) (trial court denied motion to dismiss claim of breach of fiduciary duty against architect arising from allegations of conflict of interest in architect relationship with contractor). This case arose out of an owner-architect agreement for residential design services. The owner alleged that the architect failed to advise of problems on the project, failed to properly oversee the contractors and failed to disclose its relationship with contractors. The architect moved to dismiss the breach of fiduciary duty claim, asserting that no such claim exists against design professionals. The court recognized that not all business relationships give rise to a fiduciary duty. A fiduciary relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. The court recognized a distinction "between cases where the fiduciary was either in a dominant position, thereby creating relationship of dependency, or was under a specific duty to act for the benefit of another and those cases in which the parties were either dealing at arm's length, thereby lacking a relationship of dominance and dependence, or the parties were not engaged in a relationship of special trust and confidence." *Thier*, at *5 (citing *Biller Associates v. Peterken*, 269 Conn. 716, 723-24, 849 A.2d 847 (2004)). The mere fact that one party trusts another in a business transaction is not sufficient to create a fiduciary relationship. Nonetheless, the court did not foreclose the possibility that a fiduciary relationship could arise between an architect and its client where there was "a unique degree of trust and confidence between the parties with the [architect] being in the dominant position." The court's refusal to dismiss the claim was based in part on the fact that it was required to view the plaintiff/owner's allegations in the light most favorable to the owner. It thus leaves open the possibility of a breach of fiduciary duty claim against design professionals in Connecticut.

Winsted Land Development et al. v. Design Collaborative Architects, P.C. et al., 1999 Conn. Super. LEXIS 2180 (1999) (unpublished decision) (holding that client did not meet its burden to establish fiduciary relationship between design professional and client). The case arose out of the construction of a shopping plaza in Winchester, Connecticut. One issue in the case was whether the design professional breached a fiduciary duty to the owner by failing to advise it of the need for permits before allowing the owner to fill wetlands during the construction. The court recognized that the law on fiduciary obligations was well settled:

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> A fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him. *Murphy v. Wakelee*, 247 Conn. 396, 400, 721 A.2d 1181 (1998). [A] breach of fiduciary duty implicates a duty of loyalty and honesty. *Beverly Hills Concepts, Inc., v. Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 57, 717 A.2d 724 (1998).

Winsted at *47-48. The court determined that the design professional's superior knowledge in site planning and development did not, by itself, give rise to a fiduciary relationship. Rather, the design professional's obligations to the owner stemmed from a business relationship that did not impose any level of loyalty or invoke the kind of trust characterizing a fiduciary relationship. Without evidence of fraud, self dealing or conflict of interest, there was no basis to impose a fiduciary duty on the design professional under the circumstances.

Going Forward: Incorporate Contractual Protection against the Imposition of Fiduciary Duties

Because the applicable standard for design professional liability remains the subject of litigation, contract language can be used to address the issue. To minimize disputes, design professionals should consider including language in their contracts to establish that no part of the agreement shall be interpreted as establishing a fiduciary duty on the part of the architect or engineer. In addition, it is wise to steer clear of contract language that requires performance at "the highest level" or of "the highest skill;" such terms may needlessly increase the potential liability of a design professional. There is no reason for such terms to appear in any contract for professional services. After all, "[t]hose who hire [experts] are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance." *Gagne v. Bertran*, 275 P.2d 15, 21 (Cal. 1954).

Design professionals and their contract administrators should in particular examine any confidentiality provisions in proposed contracts to ensure that they do not unwittingly create a fiduciary duty. These clauses often state that the design professional recognizes a "special relationship of trust" with the client. If this language needs to remain in the confidentiality clause, make it clear that the provision does not otherwise create any fiduciary duties to the owner.

Problematic language may lurk in form documents and templates. For example, a California court has held that a fiduciary relationship was created by implication by virtue of language in the 1976 version of AIA Document B-141 Standard Agreement between Owner and Architect. The language in question required the architect to represent the owner, review the work of the contractor and report to the owner any deviations from the contract documents. The court concluded that these obligations rendered the architect an agent of the owner. Under California law, every agent has fiduciary duties to its principal. Thus, once an agency relationship was found, the architect became the fiduciary of the owner by operation of law and was saddled with a host of duties that the architect never bargained for in its contract. ConsensusDOCs Form 240 contains language that also may be regarded as implying a fiduciary duty: "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." If an owner insists on a contractual provision that describes the parties' relationship, then it is advisable to characterize the relationship as one of "good faith and fair dealing" or, alternatively, to simply state that the parties accept a "contractual relationship for the provision of A/E services."

These measures will strengthen a design professional's

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protection against contract-based claims of a fiduciary relationship, notwithstanding the design professional's technical expertise and close relationship with the owner. As design professionals assume greater responsibilities in design-build contracts and other alternative project delivery systems, they should take care to ensure that their relationship with the owner does not result in unwanted legal consequences.

Regrettably, some ethical codes that have been self-generated by the engineering profession have led to less than ideal contract provisions. For example, the widely regarded Code of Ethics for Engineers promulgated by the National Society of Professional Engineers contains the following in two places: "Engineers shall act for each employer or client as faithful agents or trustees." Canons such as this can undermine efforts to defend against breach of fiduciary duty claims.

Conclusion

Various courts have grappled with allegations that a design professional breached a fiduciary duty. The majority of courts still reject such claims, holding that design professional liability is based on traditional analysis of the standard of care. On the other hand, a minority of courts have recognized the potential for a breach of fiduciary duty claim if adequately supported by the facts.

These cases demonstrate that owners continue to try to enlarge the design professional's duties beyond contractual duties and what the design professional actually does on the project. What owners want, in essence, is for the design professional to guarantee the project. Although owners generally do not pay architects or engineers for such guarantees, they are increasingly asking courts to award the functional equivalent of a guarantee. Design professionals can help to prevent any further expansion of liability by carefully drafting contract language and diligently monitoring cases that grapple with non-traditional breach of fiduciary duty claims.

Kara R. Masters
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Upcoming Events

September 8, 2009

Skellenger Bender attorney David K. Eckberg has been invited as speaker during the 2009 Risk and Insurance Management Society Kick-Off Luncheon. The presentation will focus on business transactions and the risks associated with such transactions.

September 17, 2009

Skellenger Bender attorneys David K. Eckberg and Pamela S. Tonglao will deliver a joint presentation entitled Environmental Considerations at the 16th Annual Construction Law Seminar. Both Mr. Eckberg and Ms. Tonglao hold engineering degrees and previously worked at engineering consulting firms. The presentation focus is on construction compliance issues within government environmental regulations.

Announcements

Home Foreclosure Legal Aid Project
Lawyers Helping Homeowners
WASHINGTON STATE BAR ASSOCIATION

Pamela Tonglao is participating in the Washington State Bar Association's Home Foreclosure Legal Aid Project (HFLAP). This new statewide project, which started accepting referrals in June 2009, offers free legal assistance to moderate income homeowners who are facing foreclosure issues. The need in Washington State is tremendous, with over 3000 new foreclosure filings each month. Ms Tonglao joins HFLAP's growing team of volunteer lawyers who are helping to help preserve homes and neighborhoods in Washington.