

From the desk of

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## *What (and Who) is a Fiduciary?*

Boiled down to its essence, my law practice is about helping clients maintain control over their personal and financial affairs. Owners of a family business want to discuss ways to pass down control. Entrepreneurs need advice on protecting assets or safely bringing in a partner. Parents of youngsters want to provide for their children if orphaned, and children of seniors want to care for their parents if incapacitated. Of course, many call when it's too late to plan and the pressure is on. Regardless of the context, though, the ultimate goal is to have the client's wishes control the personal or financial matters at hand.

There are common threads running through all of the various matters that come across my desk. One of them is the concept of fiduciary duty. In virtually every case in my office, I have at least one conversation with a client on the topic. So, I thought it worthwhile to spend some time discussing what it means to be a fiduciary. In fact, I am willing to bet that you are most likely a fiduciary in some respect.

A "fiduciary" is one who holds a special position of trust, confidence and responsibility to another. The classic example is a trustee who holds and manages assets for a beneficiary. Attorneys are fiduciaries to their clients. Corporate directors and officers are fiduciaries to the company. Executors of a decedent's estate are fiduciaries to those entitled to receive the estate. Guardians are fiduciaries to their wards. Agents under a power of attorney owe a fiduciary duty to the principal. A child who can co-sign on a parent's account as a matter of convenience is a fiduciary with respect to that account. Egad – even spouses are fiduciaries to each other!

Other relationships *may* be fiduciary in nature but are not necessarily. If you allow another person to place their trust in you, to the extent that it is reasonable for that trusting person to expect that you will act in their best interest, you are a fiduciary to that person. For instance, just because you have a job does not necessarily make you a fiduciary to your employer. If your boss sends you to negotiate an important business deal, however, you are likely negotiating as a fiduciary for your company. If you cut a secret side deal that

benefits yourself to the detriment of the company you may find yourself with more problems than mere unemployment.

A parent is definitely a fiduciary to his minor children, but may be a fiduciary even to adult children if they have reason to trust that parent to act in their best interest. I once represented two sisters, ages 18 and 20, whose father had tricked them into relinquishing half of their deceased sister's estate. They learned later that he had filed and settled a lawsuit on behalf of himself and the estate for close to \$1 million. Dad didn't exactly deny the deception; he just blamed his lawyers for not telling him it was illegal.

Generally, corporate shareholders are not owed a fiduciary duty directly. If directors breach their fiduciary duty to the corporation, however, the shareholders may have the right to sue for that breach on behalf of the company. On the other hand, majority shareholders of privately held corporations have been successfully sued for "oppressing" minority shareholder interests (eg. refusing to distribute profits) and the courts have applied a fiduciary analysis.

Partners were traditionally considered fiduciaries to one another, but our legislature recently passed a law rejecting the automatic application of the duty to partners. The reasoning was that partners typically may pursue their own self interest and not solely the interests of the partners or partnership. There remain so many duties, such as good faith, owed between partners that courts still tend to treat them as being "in the nature" of fiduciaries.

"So what?" you ask. "What does it mean to owe a fiduciary duty to someone?" Well, we'll get into the answer to that question next. For now, suffice it to say that the beneficiary's interests must be placed ahead of the fiduciary's own interests. If there is any complaint, the burden is always on the fiduciary to prove that all actions were fair to the beneficiary. When a breach of duty occurs, even if unintentional, it can often get ugly for the fiduciary. In other words, there is good reason to ask "*What the heck is in this for me?!*" before you take on fiduciary responsibilities.