Fiduciaries and Due Diligence

Many people don't have a comprehensive understanding of the role and responsibility of a fiduciary. Hopefully, this article will bring clarity to you, the beneficiaries of the fiduciary, while shining a spotlight on those that hold themselves out as a fiduciary but are not.

Representing the insurance component, I work with many different professionals and levels of wealth in the areas of retirement, estate planning, and elder insurance planning. I also vet professionals (attorneys, CPAs, and those in investment and insurance), building teams throughout the United States for the Retirement Education Resource Center of North America, Inc., a financial awareness organization. Fiduciary and due diligence responsibility are areas of great concern to me.

This article will, first, define fiduciary and due diligence. Second, it will explain what someone should expect from a person that claims to be a fiduciary.

What Is a Fiduciary?

The definition of a fiduciary is state specific and has a wide range of uses. The title fiduciary and its reference can oftentimes be misunderstood as a level of authority and influence. Since many people are unclear as to the fiduciary's duties and responsibilities, the lines of authority can be inadvertently and easily misrepresented. The word *fiduciary* is oftentimes used as a broad brushstroke without clarity and definition.

Cornell's Law School's website defines a fiduciary as "the highest standard of care. The person who has a fiduciary duty is called the fiduciary, and the person to whom he owes the duty is typically referred to as the principal or the beneficiary."[1]

McCombs School of Business, University of Texas at Austin, defines the duties of a fiduciary as "the legal responsibility to act solely in the best interest of another party. 'Fiduciary' means trust, and a person with a fiduciary duty has a legal obligation to maintain that trust. . . . Some examples of fiduciary duties include duties of undivided loyalty, due diligence and reasonable care, full disclosure of any conflicts of interest, and confidentiality."[2]

Relative to this article, fiduciaries include attorneys, CPAs, financial advisors, and anyone paid to perform the duties of representing the party for a fee. Trust, loyalty, ethics, transparency, integrity, duties, best interest, due diligence, and legal obligation are among the more popular terms when defining a fiduciary.

What Is Due Diligence?

The word *due* within the term *due diligence* is defined as a person's right, what is owed to someone. *Diligence* means careful, attentive and persistent work or effort.

With that said, here are some of the legal definitions of due diligence from several dictionaries:

Merriam-Webster Dictionary defines due diligence as "the care that a reasonable person exercises to avoid harm to other persons or their property."

Cambridge Dictionary defines due diligence as "action that is considered reasonable for people to be expected to take in order to keep themselves or others and their property safe."

Dictionary.com defines due diligence as "reasonable care and caution exercised by a person who is buying, selling, giving professional advice, etc., especially by law to protect against incurring liability. The process of gathering and disclosing relevant and reliable information about a prospective sale, purchase, contract, etc."

All the above definitions include "reasonable," but what does that mean for your fiduciary to do to protect you and your property? Some fiduciaries feel that "reasonable" is a simple discussion of a subject and no further investigation is needed. Others feel "reasonable" means to investigate a subject matter to enable an informed discussion and a sound decision.

After reviewing the definitions, experiencing the different ways the term *due diligence* is used, and putting it in the perspective of the world of finance and estate planning, I conclude that reasonableness in due diligence is the act of examining and investigating the needs of the client and available options to protect the interest of the client first and anyone else's interest last. Evidence from the investigation will help determine a well-thought-out decision that will minimize client risk and liability.

A fiduciary practicing due diligence must thoroughly examine and present issues and opportunities to protect the interest and/or property of the fiduciary beneficiary, you, the client. This definition leads to a distinction between what I call a true fiduciary and a partial fiduciary (which is defined later in this article). Thus, I have done due diligence to educate the readers of this article with a reasonable amount of information so they can make their own decision.

True Fiduciary

A true fiduciary is what everyone should have—one who is comprehensive and places the best interest of the client above everything, researches options, and can substantiate recommendations with evidence, not hearsay or general consensus. The investigated information (due diligence) is specific to each situation, and its recommendations cover all angles. While reviewing information, a true fiduciary explores all facets of every topic and does not ignore topics that would be counter to his or her best interest.

Does this always happen? No. I see too often fiduciaries that research a minimal amount of information.

Signs of a True Fiduciary
A true fiduciary will ask extensive questions, will visit each of the topics, will never have enough information, will include professionals in all areas—legal, tax, investment, and insurance—and will provide concrete, concise research and feedback in each area. Regardless of your wealth and income, you can find a true fiduciary.

Upon preparing or creating documents, whether for an estate plan including Medicaid planning, business succession, income, capital gains taxes and or estate taxes, or a financial plan (whether sophisticated or not), a true fiduciary will ask to see all agreements, licenses, proprietary material, financial and insurance documents, tax returns, government certificates, and anything else that may be pertinent. This is important since it allows the fiduciary to see all the pieces of information and how they interact or conflict with each other. True fiduciaries have exposure to all areas of expertise, enabling them to have a sense of when other professionals are needed. You, as the client, should not exclude information that was not requested. Present everything and anything, regardless of how irrelevant you may think it is.

A true fiduciary will examine each piece of information and include vetted professionals to examine documents he or she is not completely familiar with or discover areas that may be in question of need or necessity. Fiduciaries have the responsibility to present what is, in their professional opinion, needed for the client and will benefit the client or determine what is required and necessary.

Due Diligence, Need or Necessity?
Recently, I was asked to review an insurance file for a fiduciary's client. The fiduciary, while performing due diligence, recognized a life insurance policy, reviewed it, and then felt the need to bring in an insurance professional (me) for further review and analysis. In this case, the client had a twenty-year-old permanent cash-value life insurance policy paying a monthly premium. After my examination (due diligence) and recommendation, the client was able to replace the policy with the same type of policy with twice the face value and half the premium. This was obviously in the best interest of the client.

On another occasion, a fiduciary while establishing a trust was examining a deed. While performing due diligence, he discovered that a mortgage was paid off and the discharge document was not recorded in the registry of deeds. It is necessary for this executed document to be filed so there's no delay in the future sale of the property.

If the fiduciaries had turned a blind eye to these issues, they would not have been fulfilling their true fiduciary duty and the client would not have received the full benefit of having a fiduciary.

How do I find true fiduciary professionals?
Typically, true fiduciaries work with other true fiduciaries. Once you identify one, the others will fall in place. For example, if you have a CPA that is a true fiduciary and ask for a reference for an

estate planning attorney, the CPA, knowing your financial status and needs, would provide a list of reputable attorneys, not one in particular. You would then have the opportunity to interview and consult with each attorney before deciding which one to introduce to your team. To maintain ethical standards, attorneys and CPAs are required to recommend several professionals within the category of expertise, whether it is an attorney, CPA, or financial or insurance advisor.

When interviewing a professional to choose fiduciaries, you can refer to questionnaires provided by the Retirement Education Resource Center of North America, Inc. (RERCNA) through its book, *Positioning 4 Retirement*, which discusses team building. Simply go to https://positioning4retirement.com, scroll down to STEP 4 - FIND A PROFESSIONAL, and if there isn't one already vetted in your area, download the questionnaire CHOOSING YOUR TEAM PROFESSIONAL. If you have questions or need assistance, we are available for you by telephone (617-982-3692) or email (info@rercna.com). We will do our best to help you find the true fiduciary professional you need.

Partial Fiduciary

I define a partial fiduciary as one who does not fully function in the manner of a true fiduciary. Components of what should be included in a comprehensive plan are not explored. The partial fiduciary may fail to investigate the unknown or fail to introduce another professional with knowledge in the unknown area. One who fails to introduce another professional is oftentimes afraid of losing control over the file and ultimately a percentage of his or her fee. The phrase "you don't know what you don't know" holds true when discussing a partial fiduciary.

It is understood that a partial fiduciary can legally fulfil his or her duties since there is leeway in a state's definition of a fiduciary. This imprecision leads to subjective interpretation of the law. Although legal, are the practices of a partial fiduciary ethical and right? In this sense, a partial fiduciary is open for tremendously more liability than is a true fiduciary. Areas of concern include estate, Medicaid planning, long-term care, business succession, and financial planning.

Blended Fiduciaries

I define a blended fiduciary as a type of partial fiduciary that shares a commission. It is not unusual where a partial fiduciary that is blending services will ask the client to sign a disclosure regarding the blending of fiduciary duties, therefore creating transparency and avoiding what could be a conflict of interest. This allows blended fiduciaries to provide their service as an attorney, CPA, and financial and insurance advisor and then collect fees and applicable commissions for each service.

Commission sharing is legal, but here, also, we must ask if it is ethical. And is it acting solely in the interest of the client—the definition of fiduciary provided by the McCombs School of Business? This practice limits exposure to other professional advice and creates a monopoly with nowhere for the client to turn for comparative consultation.

The following stories are examples of professionals that I consider partial or partial-blended fiduciaries.

Story #1
Several years ago, I was invited into a law firm specializing in estate and Medicaid planning. Upon the introduction, the attorney stipulated that I would share commissions with him since he had his life insurance license and he was presenting the client. The attorney explained that his clients sign waivers and disclosers that allow him to participate in sharing commissions. Although legal, I felt that this practice was creating a fiduciary fog with unclear fiduciary responsibilities.

Oftentimes, people sign documents without completely reading them or understanding the consequence of what they are signing, especially when under pressure to perform or complete a task. It could be a last-minute document verbally referred to as "no big deal" or quickly explained under the pressure of signing many documents. These are waivers or disclosures that may allow a fiduciary to participate in commission sharing, creating a blended fiduciary. In my opinion, trust is compromised; therefore, I respectfully declined the opportunity to work with this fiduciary.

The attorney later found an insurance professional that was comfortable with this arrangement, and the attorney continues to practice today.

Story #2
In the process of vetting an attorney for the Retirement Education Center of North America, Inc., I concluded my research and did not accept him when I found out that the attorney attracts his clients through legal education seminars, which in my opinion are for the purpose of selling securities.

Story #3
I was referred to a financial advisor to represent clients in a state where the Retirement Education Center of North America, Inc. needed representation. The initial vetting of the website and character interviews went well. But the financial advisor failed the process during a phone interview when he told me that he represents securities and insurance products. His website mentioned nothing about selling insurance, and the professionals I had interviewed were under the impression he represented securities only. He failed the transparency test. I asked if he offered his clients a choice of using him or a professional specializing in insurance. He told me that his clients feel comfortable with him and trust him. Why would they go elsewhere? Inadvertently, he then told me that referring his insurance business would hurt his profits. He does not represent the Retirement Education Center of North America, Inc.

Such practices appear among all types (legal, tax, investment, insurance) of fiduciaries. Do these stories fit the definition of due diligence? Are these actions considered reasonable? Does commission sharing open potential risk exposure? If so, to what avail? Why would someone want to place so much control with one fiduciary? The only answer I can think of is lack of knowledge.

How do I identify a partial fiduciary?
Knowing the difference between a true and a partial fiduciary is the first step. Partial fiduciaries feast among the less fortunate, those that don't know the difference. True fiduciaries are at all levels of wealth; having a lower income does not mean having to make do with a partial fiduciary.

Partial fiduciaries are not interested in gathering comprehensive information or do not look at information, other than what they need for their function. They do not touch all areas—legal, tax, investment, and insurance. They provide waivers and disclosures in order to cross sell or collect commissions, rarely bring in other experts, and are not fully transparent.

Now that you have the knowledge, you have no excuse for being content with a partial fiduciary.

Do you have true fiduciaries?

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To learn more about Mark, go to https://rercna.com.

References

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