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Acting As Fiduciary Is Always In An Atty's Best Interest

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As an attorney, you already understand the meaning of the word fiduciary, because you always act in that capacity for your clients. That means putting your clients' interests first with communication, conflict avoidance, confidentiality and competence in all the work you do for them.

As a lawyer who works in the financial services industry, I often think about the implications of being a fiduciary as we grapple with the U.S. Department of Labor's Conflict of Interest Rule (commonly referred to as the "DOL Rule" or "Fiduciary Rule") currently scheduled to go into effect early next year, although the DOL is currently looking to delay implementation until July 1, 2019.

The DOL Rule

The gist of the new regulation is that any professional who provides any kind of retirement-related advice, including something as simple as a suggestion to rollover a 401(k) from a former employer to a self-directed IRA, must do so in a fiduciary capacity. It's something that many financial advisors, particularly those whose compensation is wholly or partly based on commissions, never had to consider in the past. (Keep in mind that for those financial advisors impacted by the Fiduciary Rule, the change would have no impact on the advice they give on non-retirement accounts.)

That made me think of some of the areas where, outside of providing legal counsel, an attorney also acts in a fiduciary capacity, such as when acting as a trustee of a client's trust or their own firm's 401(k) plan, or when asked to act as the executor of a client's estate, but may not understand all the risks and responsibilities that entails.

Be Aware

An attorney who acts as a trustee of their firm's 401(k) plan will likely fall under the strictures of the DOL Fiduciary Rule. But they may also be taking on personal liability for whatever actions they take as a trustee of the plan, which is why this responsibility should not be taken lightly. Certainly ensuring that the appropriate insurances for those responsible to the plan would be a basic step in many of these scenarios.

To further minimize risk and in order to demonstrate that they are following accepted best practices, plan trustees should ensure that there are regular meetings of the plan's investment committee — quarterly at a minimum — and that the minutes of such meetings are recorded. Trustees should also monitor the plan's expenses to make sure they are within industry norms and that the investment menu includes both active and passive strategies.

These practices would potentially reduce the possibility of liability for the trustees, since those fiduciaries have now compared their plan expenses to the market, and it would be the plan participants taking on the responsibility to choose whether their equity investments will consist of index or stock picking strategies. At the end of the day, the proliferation of lawsuits in the 401(k) arena in recent years has at least likely provided some decent benchmarks for fiduciaries to be mindful of in navigating the associated political and liability minefields within corporate retirement plans.

Trustees, Executors and Fiduciaries

As a trustee of a charitable or grantor trust, an attorney would have similar responsibilities, but would likely also need to maintain an active relationship with other professionals who do work for the trust. For example, the trust's financial advisor will have responsibility for constructing and managing the trust's risk profile and investment objectives, along with the actual investments and asset allocation for the trust's investment portfolio, but it's probably beneficial to also have the trustee monitor the trust portfolio's expenses, along with how it's invested.

Ultimately the trustee has a fiduciary obligation that has different nuances than the financial advisor, in particular when the advisor does not yet act as a fiduciary on their client portfolios as per the delay on the DOL's Fiduciary Rule — this is true for the financial advisor whether the portfolios are owned in retirement accounts that would be affected by the DOL Rule, or personal and trust accounts that would not be impacted as of yet.

Another area where attorneys might assume an unanticipated fiduciary role is as the executor of a client's estate. Once again the role is similar to that one might play as a trustee, but the service is of a much shorter duration. The primary duty of the executor is of course to wind down the estate and see that the assets are distributed in accordance with the wishes of the testator.

I've seen several instances where corporate attorneys who had a long-term, trusted business relationship with a client are asked to take on this very personal responsibility. Because of the extreme singular nature of this relationship, there could be scenarios where blurred lines can affect the perspectives of all the fiduciaries involved. In these instances where there is a close personal relationship between the executor or executors and the testator, full and transparent communication between fiduciaries is paramount to be sure that intentions and results are delivered upon.

Be Yourself

In conclusion, it is of course beneficial for an attorney to assume a fiduciary obligation in every aspect of their professional life. Most of you already think this way; the point is that there could be situations where you may need to focus — the likelihood of a fiduciary breaching their duties of loyalty and care when they are continuously acting in their client's best interest is quite low.

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