



FIDUCIARY DUTY AND CPAS IN PUBLIC PRACTICE

By Joseph Wolfe and Cathy Whitley

CPAs in public practice are often approached about assuming a role or rendering services that generate a fiduciary duty to the client. While the courts have not defined fiduciary duty, it is the highest standard of care. Fiduciaries are required to act solely in the best interests of the business or individual they serve.

The legal definition of a fiduciary listed in the Merriam-Webster dictionary is:

*"one often in a position of authority who obligates himself or herself to act on behalf of another (as in managing money or property) and assumes a duty to act in good faith and with care, candor and loyalty in fulfilling the obligation: one (as an agent) having a fiduciary duty to another"*¹

The operative term in this definition is "...who obligates himself or herself to act on behalf of another."

Ordinarily, CPAs do not obligate themselves to act on behalf of a client when rendering professional services. Consulting services involve providing advice and recommendations to clients, for their consideration and action. CPAs likewise do not act on the client's behalf in preparing tax returns, accounting records or financial statements for clients. CPAs do not act on the client's behalf when performing auditing and attestation services; in fact, CPAs are required to remain independent in fact and appearance when providing these services.

However, CPAs and other professional staff may undertake a fiduciary obligation to clients when they assume specific roles.

Power of Attorney for Tax Matters

Many CPAs have clients sign IRS form 2848, Power of Attorney and Declaration of Representative. While this may be required for the CPA to represent a client in an audit of previously filed tax returns, sometimes the form is signed for the convenience of the client to receive and transmit communications to and from the IRS.

Upon signing this form as the client's representative, the tax practitioner is assuming a fiduciary duty by agreeing to act on the client's behalf in these communications. In the event the practitioner failed to timely respond to an IRS communication, this could result in the disallowance of a tax return position taken by the client and the imposition of taxes, penalties and interest. Note that the client's failure to timely respond to the practitioner's requests regarding these communications does not relieve the fiduciary duty; however, it can serve as a defense in the event of a claim.

Risk Management: It's important to require the client to sign an engagement letter that acknowledges his/her duty to promptly respond in writing to any communications received under the power of attorney, holding both the individual and the CPA firm harmless from any claims or damages that result from the client's failure to timely provide specific instructions in response to these communications.

Consider the need before submitting federal or state power of attorney forms to clients for signature. Unless a client is under audit, clients should remain responsible for receiving all written notices from taxing authorities and promptly transmitting them to their accountant for review. Explain this responsibility to clients and consider including this information on your firm's website and with the annual tax organizer provided to clients.

Investment Adviser

An investment adviser assumes a fiduciary obligation to his/her clients. Investment advisers are subject to registration and oversight by federal or state regulators. *The Investment Advisers Act of 1940* defines an investment adviser as a person who, for compensation, is engaged in the business of providing advice to others or issuing reports or analyses regarding securities.²

While most CPAs do not render such services, the analysis needed to determine whether registration is required can be complex. Additionally, CPAs may unwittingly undertake this role by agreeing to access online client investment accounts or communicate with securities brokers on behalf of clients to buy or sell securities (including mutual funds). In addition to exposing themselves to potential claims of breach of fiduciary duty, CPAs may run afoul of laws and regulations applicable to investment advisers. Undertaking this activity for an employee benefit plan also requires maintenance of a fidelity bond in accordance with ERISA Section 412.14.³

Risk Management: Investment advisers are subject to extensive regulatory oversight. Consult with industry experts regarding compliance. *The CPA's Guide to Investment Advisory Business Models*, a useful reference piece that discusses fiduciary duty and details investment adviser registration requirements, is available at no charge from the Personal Financial Planning Section of AICPA.⁴ Both investment advisers and individuals who provide occasional investment advice should utilize these and other resources available to members of the Personal Financial Planning Section of AICPA.

Before agreeing to serve as a registered agent for a client, consider the situation and related risks.

Only investment advisers who are registered with federal or state regulators as required and have the requisite knowledge, experience, training, oversight and controls should provide advice regarding securities. Avoid accepting electronic access to client investment accounts or communicating with securities brokers on behalf of a client to authorize the sale or purchase of securities.

Registered Agent

A registered agent receives legal documents and service of process for a business registered in that

state. In some states, this role is defined as resident agent or statutory agent. CPAs sometimes agree to serve as a registered agent for a client who has established a business in the state where the CPA resides, for the convenience of the client. Like assuming power of attorney for tax matters, the client's failure to timely respond to the inquiries of a registered agent does not relieve the fiduciary duty.

Risk Management: Before agreeing to serve as a registered agent for a client, consider the situation and related risks. Confirm the citizenship of the client and his/her state of residence. Clients who are not U.S. citizens or reside outside of the U.S. may present unique problems. Why is the client requesting this service and why isn't he/she utilizing a professional registered agent service? This is a service that can be obtained online quickly and inexpensively from established national providers.

Are there potential legal or tax concerns surrounding the registration of the business in the state? How difficult would it be to promptly establish written contact with, and receive a response from, the client in the event a legal document was received? It's important to conduct sufficient inquiry and investigation to reach a satisfactory conclusion before agreeing to serve in this role. Depending on the circumstances, it may be necessary to consult with legal counsel.

Be sure to include loss limitation language in the client engagement letter like that described for power of attorney for tax matters when assuming this role.

Attorney in Fact

A person is appointed as an attorney in fact through a durable power of attorney signed by the individual providing this authority. An attorney in fact has overall responsibility for managing the financial affairs of that individual, including a wide variety of activities, such as managing real estate and other financial assets, paying bills and home maintenance expenses, and selecting and purchasing insurance.

Typically, this responsibility is only assigned when the individual in question is seriously ill or disabled. A person serving as an attorney in fact has a clear fiduciary duty to the individual granting the authority and can be held liable for any breach of these broad duties.

Risk Management: Serving as an attorney in fact is a significant responsibility. A person appointed as an attorney in fact often hires accountants to render various services, such as bill payment and tax return preparation. Accountants should have the attorney in fact sign an engagement letter defining the scope of service, terms of engagement and billing arrangements.

An accountant serving as an attorney in fact may face a conflict of interest in hiring his/her own firm to render services on behalf of the individual under Rule 102-2 of the AICPA Code of Professional Conduct, Conflicts of Interest for Members in Public Practice (Rule 102-2).⁵ While such conflicts can be resolved by obtaining the written informed consent of the client and other affected parties, this becomes more complicated when a client is disabled. Professionals who have clients they believe are incapable of managing their financial affairs should consult with experts in elder care and elder law before undertaking any action. The AICPA Personal Financial Planning Section provides related resources.⁶

Trustee of a Testamentary Trust

It is not unusual for clients to request that their CPA serve as a trustee for a trust they have created for estate planning purposes. A trustee has overall responsibility for managing the assets in a trust, administering the trust and making trust distributions to beneficiaries. While a trustee can hire other professionals to assist in this process, the fiduciary duty of the trustee cannot be delegated to other professionals. Additionally, as discussed above, a trustee hiring his/her own CPA firm to render services to the trust faces a potential conflict of interest under Rule 102-2.

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Serving as a trustee is often time consuming and complex, and can be problematic when there are assigned co-trustees or trust protectors, and disputes or disabilities impacting trust beneficiaries.

Risk Management: Tax practitioners often assist clients in formulating estate plans and establishing trusts. It is typical that both the settlor of a trust and the trust beneficiaries are tax clients, presenting potential client confidentiality and conflict of interest problems upon the death of the settlor.

Serving as a trustee can also present legal liability and insurance coverage problems. Trust agreements should include a provision to defend and indemnify the trustee against claims, provided they act in good faith and in accordance with its requirements.

Practitioners who are designated as trustees for a client's trust or who are considering undertaking this role should read the *Journal of Accountancy* article, "The Unexpected Risks of Trustee Services."⁷

Executors and Personal Representatives

An executor is designated in a will or assigned by a probate court to manage the assets and liabilities of the estate of the decedent. An executor has a fiduciary duty to all the beneficiaries of the estate, regardless of the extent of the benefits assigned to them under a will.

Some states have established statutes based on the Uniform Probate Code, which allow for the designation of a personal representative. A personal representative serves in the role of an executor or administrator of the estate of the decedent and owes a fiduciary responsibility to the beneficiaries of the estate.

Risk Management: Ordinarily, a family member or an attorney with extensive knowledge and experience in estate law serves as an executor or personal representative for an estate. An executor or personal administrator often hires accountants to prepare estate tax returns and perform accounting services. A signed engagement letter should be obtained prior to initiating services to an executor or personal representative.

An executor or personal representative wishing to hire his/her own CPA firm to render these services faces a conflict of interest, which would require him/her to obtain the written consent of both co-trustees and estate beneficiaries prior to rendering services, in accordance with Rule 102-2. Such engagements present elevated risk to both the executor or personal representative and his/her CPA firm. Consult legal counsel with experience in estate planning and the firm's professional insurer prior to undertaking such engagements.

INSURANCE COVERAGE

Professional liability insurance policies are designed to provide coverage for exposures faced by accounting firms in the practice of public accountancy. Insurance coverage for the various fiduciary roles discussed in this article varies by policy.

Obtaining a power of attorney for tax matters is an ordinary role fulfilled by CPAs in the practice of public accountancy, as is bill payment. However, insurance coverage may be limited or excluded when serving in some of these roles. Consult with the firm's insurance agent or broker prior to agreeing to undertake these fiduciary duties.

Trustee in Bankruptcy and Receiver in Bankruptcy

A trustee is appointed by the bankruptcy court to manage the liquidation or reorganization of assets for a business in bankruptcy. The role and responsibilities of the trustee are defined by the order issued by the bankruptcy court. A trustee generally has immunity from civil liability when appointed by a bankruptcy court, but only when acting within the scope of the court's order.

A receiver is appointed by a bankruptcy court to manage the assets of a business to attempt to restructure a company and bring it into recovery. The role and responsibilities of the receiver are defined by the order issued by the bankruptcy court. A receiver generally has immunity from civil liability when appointed by a bankruptcy court, but only when acting within the scope of the court's order.

Risk Management: Specialized knowledge and training are required to serve as a trustee or receiver in bankruptcy. To obtain more information, consult with an attorney with expertise in bankruptcy law prior to pursuing services as a bankruptcy trustee or receiver.

In addition to the above roles, a CPA may otherwise gain access to a client's money or property in rendering professional services and undertake a fiduciary obligation.

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A common example of this is performing bill payment services for a client.

Risk management for these services includes engagement letters that specify the scope of services and define the authority provided by the client to review and pay specific bills, acknowledging the client's responsibility to review and approve bills for payment that are outside of this authority.

Mitigating the Risks

It is important to recognize that situations arise that can create a fiduciary duty while rendering professional services. It may be necessary to assume a fiduciary duty to perform some professional services. The related risks can be mitigated through training, supervision, effective communication and written documentation.

When in doubt, consult with your peers, legal counsel and your professional liability insurer prior to proceeding. Remember that in some situations, however, it may be best to "just say no" to requests from clients to assume a fiduciary role.

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FOOTNOTES

¹<https://www.merriam-webster.com/dictionary/fiduciary>

²Regulation of Investment Advisers by the U.S. Securities and Exchange Commission, https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf

³Department of Labor Issues Guidance on ERISA Bonding Requirements, Bradley Benedict, Pillsbury law firm, December 10, 2008 <https://www.pillsburylaw.com/images/content/2/0/v2/2063/59012A092AFB9BB3BB344FA03CE45FB7.pdf>

⁴The CPA's Guide to Investment Advisory Business Models <https://www.aicpa.org/content/dam/aicpa/interestareas/personalfinancialplanning/resources/pfppracticemanagement/pfppracticeguides/downloadabledocuments/cpa-guide-investment.pdf>

⁵<https://www.aicpa.org/InterestAreas/ProfessionalEthics/Community/ExposureDrafts/DownloadableDocuments/2014/2014SeptemberOfficialReleases.pdf>

⁶<https://www.aicpa.org/interestareas/personalfinancialplanning/resources/elderplanningservices.html>

⁷<https://www.journalofaccountancy.com/issues/2016/jul/trustee-services-risks.html>