

The Lawyers' Fund
for
Client Protection

October 30, 1998

M E M O R A N D U M

To: Frederick Miller
From: Paulette DeTiberiis
Subject: Fiduciary Duty

Fiduciary Duty Defined

"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 duty implied by law." *Black's Law Dictionary*, 625 (6th ed. 1990).

"A fiduciary is generally thought to be that person in whom another person reposes trust." *Fordham Law Review*, 62 *Fordham L. Rev.* 1357, March 1994.

General Rule

"Generally, a fiduciary duty arises between individuals through a relationship of trust, confidence, and reliance." 18K 7 *FRAUD* (West Key Search). Also see, *Bailey v. Allstate Insurance Company*, 844 P.2d 1336 (1992).

"A fiduciary duty arises when one party has a high degree of control over the property or subject of another, or when the benefitting party places a high level of trust and confidence in the fiduciary to look out for the beneficiary's best interest." *Id.*

"A fiduciary's obligation to the beneficiary include, among other things, a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with the beneficiary." *Id.*

"Relationships of attorney-client, principal-agent, and trustee-beneficiary give rise to general fiduciary duties as a matter of law, as the very nature of their relationships

encompasses an extensive line of duties that are performed for the total benefit of only one of the parties to the relationship." 45K 129(B) *Attorney and Client*, 308K 48 *Principal and Agent*, 390K 173 *Trusts* (West Key Search).

"Relationship of confidence and trust which exists between insurer and insured is not a fiduciary one; insurer has a right to protect its own interest along with those of the insured, and those interests run parallel to each other, neither being superior." 217K 866 *Insurance* (West Key Search).

Enforcement

Fiduciary law is enforced by different state and federal statutes and rules that define the term "fiduciary duties" and categorize persons who can hold a fiduciary capacity.

Some jurisdictions have a more extensive list of fiduciaries. For example, under a Wisconsin statute, named fiduciaries extend all the way to prime and subcontractors. *WI ST Sec. 112.01, Uniform Fiduciaries Act*. A Michigan statute distinctly defines three categories of fiduciaries (conservator, personal representative, and guardian). *MI ST Sec. 700.5, Definitions*.

"Certain relationships give rise to general fiduciary duties as a matter of law (i.e.) attorney-client, principal-agent, and trust beneficiary." *Allstate* at 1339. However, regulation of these different categories of "[f]iduciary relationships is difficult in part because the relationships themselves are neither static nor easily definable." *Fordham Law Review* at 1361-1362. Since the "[u]nderlying premise of fiduciary law is to protect the trusting person against any abuse of position, or trust, by the fiduciary... [j]udge-made law has developed by analogy, constructing rules that have sought to prevent fiduciary abuse." *Id.* at 1362. Courts have some discretion to interpret the definition of "fiduciary duty" and apply its meaning to a broad spectrum of relationships between parties.

One interesting trend in the judicial arena is courts acceptance of claims alleging malpractice and breach of fiduciary duty against clergymen.

In a recent U.S. Circuit Court of Appeals case, the court validated a claim by two women who charged malpractice, breach of fiduciary duty, and sexual abuse and harassment against their pastor who had begun a sexual relationship with each while he was counseling them for marital problems. The court returned a \$230,000 verdict in favor of plaintiffs. The court determined that a clergyman can be held to a "[s]ecular standard of care in counseling if he held himself out to be a competent marital counselor." *The National Law Journal*, Volume 20, Number 47

(July 20, 1998) citing Sanders v. Casa View Baptist Church (N.D. Texas).

Plaintiffs' attorney, Herbert Friedman, stated that to prove a fiduciary duty "[y]ou just have to establish an unequal power relationship... Anything that is not ecclesiastic in nature can be covered by fiduciary duty." *Id.* Friedman also noted that jurisdictions such as Colorado and Washington have upheld breach of fiduciary duty in a similar context.

Lawyer As Fiduciary

No Attorney-Client Relationship:

Some jurisdictions have held that even when privity is lacking between an attorney and client and third person, an attorney may still be liable to the third party. In Lucus v. Hamm, 364 P.2d 685 (Cal. 1961), "[t]he Supreme Court of California held that the intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligation under his contract with the testator, may recover as a third party beneficiary... (the court) developed a balancing test to determine, as a matter of policy, a lawyer's liability to third persons not in privity. The test factors include: the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm." *Fordham Law Review* citing Lucus at 1365.

In Fickett v. Superior Court of Prima County, 558 P.2d 988 (Ariz. Ct. App. 1976), "[t]he court determined that when an attorney undertakes to represent the guardian of an incompetent, he assumes a relation not only with the guardian but also with the ward."

Also, in Advance Finance v. Trustees of Clients' Security Trust Fund of Bar of Maryland, 337 Md. 195, 652 A.2d. 600 (1994), the court held that "[u]nder a professional conduct rule stating that a lawyer shall promptly deliver to the client or third person any funds such person is entitled to, attorney acted as a fiduciary for non-client within the meaning of the Clients' Security Trust Fund statute, such that the fund might be liable to the non-client.

Unrelated to the Practice of Law Client-Attorney Loan:

In Watkins v. St. Paul Fire, 376 So.2d. 660 (1979), the court tackled the question of whether the client's losses arose out of the "attorney's performance of professional services in

his capacity as a lawyer." The attorney received a personal loan from his client and defaulted in his obligation for repayment. Although the court ultimately held that there was sufficient proof to find an attorney-client relationship, the dissent makes an interesting argument that the attorney was acting personally and individually when he received the loan. The dissent also argues that there was no indication of an attorney-client relationship at the time of the loan.

On the other hand, in Tabak v. Lawyers' Fund for Client Protection of the State of New York, 166 Misc.2d. 502, 634 N.Y.S.2d. 351 (1995), the court found a rational basis to support the Fund's conclusion that the money involved was a loan to the attorney and did not arise in the context of an attorney-client relationship, and therefore was not a reimbursable loss. The court found that the relationship was one of a "lender/borrower." *Id.* at 505.

New York Jurisprudence, Lawyers' Fund for Client Protection, Sec. 148, states, "Reimbursement for losses will occur only in situations involving the misappropriation or willful misapplication of law clients' funds within an attorney-client relationship and the practice of law."

American Jurisprudence incorporates the term "fiduciary relationship" into its section regarding Clients' Security Fund. The section reads, "[e]ligibility for compensation from a clients' security fund is limited to persons in an attorney-client relationship with a defalcating attorney, or a person to whom that attorney owes a fiduciary relationship."