

Your Fiduciary Legacy

Will It Be

A Constellation That Radiates Caring Conduct and Honorable Stewardship
or
A Black Hole Where Shameless Selfishness and Arrogant Indifference Lurk

by
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INTRODUCTION

Black's Law Dictionary describes a fiduciary relationship as "*one founded on trust or confidence reposed by one person in the integrity and fidelity of another.*" A 401(k) plan fiduciary has a duty to act exclusively in a plan participant's interest in all matters connected with the undertaking, and never for the fiduciary's own personal interest.

Indeed, scrupulous good faith and candor are always required. Fiduciaries must always act in complete fairness and may never exert any influence or pressure, take selfish advantage, or deal with a plan participant in such a way that it benefits themselves or prejudices the participant.

Business shrewdness, hard bargaining, and taking advantage of the forgetfulness or negligence of a plan participant or beneficiary is fiduciary behavior that is absolutely prohibited.

What is so hard about this? Why do so many fiduciaries seek to avoid fiduciary responsibility; unfortunately (and falsely) thinking that by avoiding fiduciary responsibility they will somehow avoid fiduciary liability? All agree that parents should not abuse their children. At the same time few parents actively seek to avoid the risk of being charged with child abuse! What should one think of friends who enroll in an adult-education course designed to teach parents how to avoid responsibility for child abuse?

CARING CONDUCT AND HONORABLE STEWARDSHIP

Before the February 20th, 2008 LaRue decision by the United States Supreme Court, employee benefit plan participants who sued plan fiduciaries for investment losses faced near insurmountable legal hurdles. In LaRue the Court removed most of these hurdles, and may have opened floodgates releasing a tsunami of new 401(k) lawsuits! As fiduciaries of employee benefit plans governed by ERISA are personally liable for losses, this single decision represents the most significant expansion of potential liability faced by fiduciaries since ERISA became law in 1974.

Caring conduct and honorable stewardship are now, as never before, fiduciary obligations whose time has come. The purpose of this paper is to set forth a methodology designed to enable a fiduciary to be worthy, based in large measure on the moral virtue Adam Smith wrote about so eloquently 17 years before he penned *The Wealth of Nations* (see Smith's *The Theory of Moral Sentiments*).

We start our journey with a question: how should a fiduciary think about fundamental best practices? That is, the practices which a fiduciary should viscerally sense as clearly as those a parent intuitively feels with regard to raising children. Perhaps the best single book to aid in this quest is *The Effective Executive* by Peter Drucker. Don't be too surprised by our belief that a fiduciary will materially enhance the opportunity to live up to his/her fundamental responsibilities by being an effective executive.

The following 6-Step Program is designed to assure that basic fiduciary responsibilities are not just met, but exceeded. Harmonize these steps to fit personal preferences so long as the end result is not affected.

Value:	what is the primary value essential to our 401(k) plan?
Vision:	what is our vision of success that will enable us to achieve this value?
Metrics:	what metrics will tell us if we are making progress toward our vision?
Strategy:	what strategies will enable us to achieve our vision?
Projects:	what projects will enable us to implement our strategies?
Tasks:	what tasks need to be performed in order to complete each project?

Once a fiduciary fully comprehends how to navigate through these six interconnected steps, s/he will have done most of the heavy lifting mentally required to meet basic fiduciary responsibilities. The remainder of this paper will explore these six steps.

The following examination is not intended to suggest that this 6-Step Program is best responded to in a single rigid and inflexible manner. As with raising children, there are many honorable pathways that lead to successfully accomplishing ones fiduciary responsibilities. Just remember: a person guided by the glow of moral virtue is unlikely to become lost along the way.

- VALUE: The basic "value" of a retirement program may be measured by how well it provides plan participants with a reasonable opportunity to achieve an adequate retirement income proportional to their years of plan participation. Our plan value is simple: a reasonable opportunity for a full-time career employee to achieve a dignified retirement.
- VISION: To attain this value, our fiduciary's vision will be that over 90% of eligible employees will participate in the plan; that plan participants will contribute an average exceeding 9% of their annual pay, thus capturing over 90% of the company matching contribution; and that funds allocated to these participants will earn over 90% of the market's average return. Soon a fiduciary will start thinking of this as a Triple 90% vision.
- METRICS: To know how we are progressing, our fiduciary will utilize an age and service matrix, banded into cells at 5 year intervals, to annually measure three things regarding each matrix cell: (1) the percentage of eligible employees participating in the plan; (2) average *match capture* rate; and (3) average participant investment returns.
- STRATEGY: Our fiduciary will recognize that default elections control plan attributes for most participants. Thus, enrollment will be automatic; participant contributions will begin at 5% of pay and will be automatically increased 1% of pay each year; and participant accounts will be automatically invested in a passive total market index fund conforming to MPT. Total plan fees and expenses will be controlled at less than 1% when all plan auto-pilot features are used (any sum that is greater than 1% will be reimbursed annually to the plan by the company).

PROJECTS: First, a fiduciary will work tirelessly and cheerfully to make certain that an Independent Participant Advocate (IPA) is appointed by the Board of Directors. In essence, an IPA will serve as a super fiduciary.

Second, our fiduciary will make certain that a targeted communications program is launched to inform plan participants as to their likely retirement income benefit based on their current age and account balance, projected contributions and investment returns, and assumed retirement age.

Third, our fiduciary will also encourage long term business planning focused on raising company contribution levels to 6% of the total annual payroll for all plan participants within ten years.

Fourth, at least every three years an economic analysis of costs will be conducted by an independent expert having no connection to the plan in order to verify that total plan costs (i.e., total economic impact) are (and have been) less than 1% regarding funds that are automatically invested. If the audit reveals that total plan costs have exceeded 1% the plan will be made whole in a manner approved by the IPA (to which the Board of Directors will have agreed in the Resolution appointing the IPA).

Fifth, annually a yield disparity analysis will be conducted by the IPA to identify the gap between those plan participants whose funds are automatically invested and those participants who have elected to personally direct investments in their plan account. That is, as some participants may reject the automatic investment plan feature and choose to personally direct the investment of their account, with plan fees and expenses that will thus likely exceed 1%, the yield disparity gap will be identified and published each year by the IPA.

TASKS: First, a fiduciary will cause to be placed in nomination before the Board of Directors 30 days prior to the next scheduled Board meeting the names of at least three persons deemed by the fiduciary to be qualified to serve as an Independent Participant Advocate (IPA). The fiduciary shall include biographical information on each nominee, as well as a proposal from the nominee outlining fees, terms, and conditions if appointed.

Second, as in the case of the IPA, the fiduciary will recommend at least three target communications programs designed to inform participants as to the level of their future retirement income. With regard to each recommendation, the fiduciary will include examples of communications that have been used by the provider; a client list; and a brief proposal from the provider outlining fees, terms, and conditions if hired.

Third, the fiduciary will schedule a series of quarter-day meetings with the CFO to develop a business plan designed to increase company contributions to 6% of the total participant payroll within ten years.

Fourth, once s/he has been selected, the IPA will recommend the tasks that will be required to complete the fourth Project (see above).

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CONCLUSION

This brief Paper is not believed to be an end-all regarding this vital issue. At the same time, it is the sincere opinion of the author that most fiduciaries are simply straw men. That is, that too many good men are innocently serving as legislatively mandated fiduciaries, yet are legally deaf, dumb, and blind.

Mark Twain famously said: *It ain't what you don't know that gets you into trouble; it's what you know for sure that just ain't so!* That piece of wisdom explains far better than I the fiduciary's basic quandary. Now add Voltaire's *Le mieux est l'ennemi du bien*, which translated means *The best is the enemy of the good* and we see the insidious snare that has trapped most fiduciaries.

That is, as fiduciaries begin to see the light and realize that much of what they have been told and thus have absolutely known, for sure, just ain't so, they too often strive, too fast, to fashion a solution with *best* positioned as the keystone. As the light dawns, they overreact. And in short order, simple ignorance gives way to a complex folly!

The word *hope* has been prevalent of late. Hopefully, I will not appear too audacious to trust that this 6-Step Program will help ERISA fiduciaries re-focus on fundamental Values, Visions, Metrics, Strategies, Projects, and Tasks which cumulatively will enable them to excel as a morally virtuous and prudent fiduciary!

For fiduciaries who fail in this noble calling will ultimately fall prey to what they have most ardently sought to avoid; the fiduciary Black Hole of liability from which there will be no escape. And once sucked in their character and honor will be forever tarnished by their shameless selfishness and arrogant indifference.