

Fiduciary Duties

and the Modern Lawyer

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Claude E. Ducloux

- 40-year seasoned attorney
- Board Certified in Civil Trial Law and Civil Appellate Law – Texas Board of Legal Specialization
- Former President, Austin Bar Assoc.
- Received Gene Cavin Award for Lifetime Achievement in Teaching Continuing Education



4 What we will cover

- What is a fiduciary?
- Types of fiduciaries? Who can serve?
- Implications of such service on liability
- Duties imposed on lawyers
- Confidentiality of information
- Office practice



Definitions and Elements

6 What is a fiduciary?

A fiduciary can be:

- A person
- A trust
- A capacity between entities
- A duty
- A relationship
- A doctrine

7 Common elements and characteristics

High degree of fidelity

Scrupulous candor

Scrupulous good faith

Putting the benefit of
another person above
the actor's own benefit

8 Why is this important?

- **Fiduciary duty** touches every segment of a lawyer's practice and interaction with clients, the courts, and the administration of justice.
- The **penalties** for breach of duty can be devastating to a lawyer and the lawyer's firm.
- Understanding and appreciating these duties and liabilities will **improve** your client relationships and your professional reputation.
- Suing lawyers is a growth industry!

How is the fiduciary relationship created?

- By statute or common law
- By contract
- By the facts

A high degree of confidence and reliance imposed or implied by law creates the fiduciary relationship.

“Informal” creation of fiduciary relationship

All states acknowledge that the relationship of the parties may create an “informal” fiduciary relationship (not supported by written documents), shown by:

- Trust and reliance upon another
- Acquisition of high degree of trust, influence, or confidence
- Dominance by one and weakness and dependence by the other



Special fiduciary relationships

CAVEAT:

It can exist as a matter of law upon proof of a duty (assumed or imposed) of good faith and fair dealing

(Thus, many contracts have such disclaimers)

Types of fiduciary relationships

- Attorneys
- Partners in a business
- Associates of law firms
- Agents (escrow and insurance agents)
- Spouses—growing area of law: interspousal breach
- Holders of Powers of Attorney
- Corporate officers

- Joint venturers
- Executors, estate administrators, and trustees
- Securities brokers (weakly imposed)
- Class representatives
- Mineral rights holders
- Condo or HOA association board members

Attorneys as fiduciaries

Integrity and fidelity required of this duty includes:

- Duty of full disclosure of all important information
- Duty of loyalty to your clients' interests
- Duty to avoid conflicts of interest

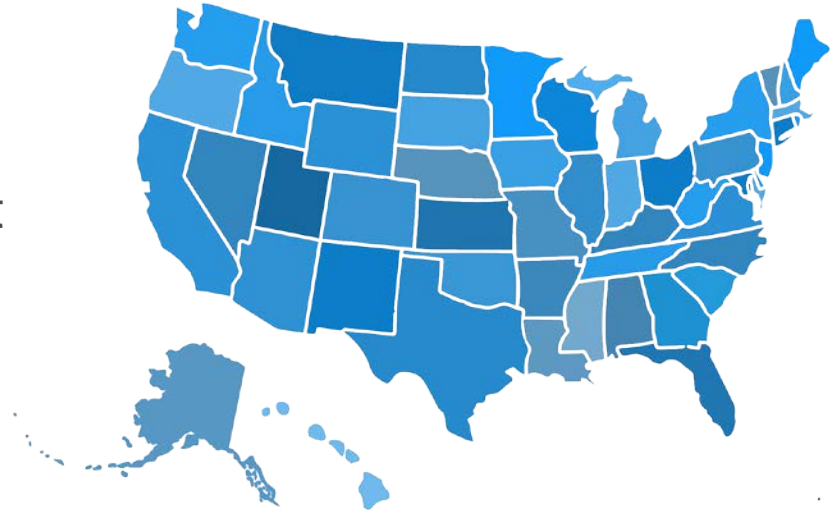
Latin term: "*Uberrima Fides*" overriding faithfulness

Fiduciary duty changes burden of proof!

In many states, being sued as a fiduciary requires the *defendant* to prove he/she didn't breach the duty upon proof of fiduciary relationship. (See, eg., TX PJC 104.2)

- The burden of showing fairness and reasonableness is on the attorney
- Statute of limitations may be subject to "Discovery Rule"

Bottom line: Check your own state's jury charge.



The new frontier: forfeiture of fees

- Many states now permit the court to assess total fee forfeiture (including disagreement of previously paid fees) for breach of fiduciary duty. See, eg., *Campagnola v. Mullholland, Minion and Roe*, 76 N.Y.2d 38 (1990). In *Burrow v. ARCE*, 997 S.W.2d 229, 237 (Tex. 1999) the court set out parameters for fee forfeiture of attorney who breaches fiduciary duty.
- The client does not need to prove damages. Forfeiture is due to the violation of the fiduciary relationship. The jury answers fact questions; judge decides on extent and amount of forfeiture. Must be “clear breach.”

Jury factors in fiduciary/fee forfeiture cases

- Did the conduct occur?
- When did it occur?
- What was the attorney's state of mind?
- What was the value of attorney's services?
- Was there harm to client?
- What was the amount of harm?

Depending on facts: forfeiture permitted as “equitable remedy”

Considerations!

Most lawyers readily agree to serve as a client's fiduciary: trustee, manager, executor, administrator, etc.

No lawyer should do so without considering the wisdom, ramifications, dangers, and liabilities.

Advice: Unless you're fully capable, don't do it.



Fiduciary Duty in Fee Contracts

Your first attorney duty: a fair conduct

- Must not be unconscionable: “A competent lawyer can not form a reasonable belief that the fee is reasonable.”
- Each state has similar rules describing factors on determining if fee is reasonable: See ABA Model Rule 2-106(B), TX Rule 1.04; Calif Rule 4-200, Fla. 4-1.5
- Contingent fees must be in writing; state percentage: before or AFTER calculation of fees
- Referral fees require PRIOR CLIENT approval in most states

New requirements for your attorney-fee contracts!

- **Privacy policy:** so many state and federal laws now require holders of PHI, or SPI, or sensitive data to have a policy, and to train your staff.
(Private health information, sensitive personal information)
- Can't force client to send SPI information over unencrypted mail. Must protect info like SSNs, driver's license numbers, and D.O.B. It may be a breach of fiduciary duty to disclose if result of violation of privacy statutes.



Medical records privacy

Primary statutes:

HIPAA: Health Insurance Portability and Accountability Act

www.hhs.gov/hipaa/

- HITECH: stands for Health Information Technology for Economic and Clinical Health (2009) <https://www.hhs.gov/hipaa/for-professionals/special-topics/HITECH-act-enforcement-interim-final-rule/>
- “Omnibus Rule” (2013) protecting patients’ health data www.hipaasurvivalguide.com/hipaa-omnibus-rule.php

What should lawyers do?

How to keep PHI, and other sensitive issues private, yet advise clients of legal duties of some types of disclosures:

1. Include in client intake sheet and/or client contract language regarding a lawyer's duty to report child abuse or elder abuse
2. Have a written privacy policy which clients acknowledge
3. Train staff on privacy issues



Can you modify your fee contract “mid-stream”?

Answer: Yes, if it is based upon new issues and parties which were not contemplated in the original fee agreement. But, again, the courts look very, very closely at modifications mid-stream.

Best to ***get independent counsel*** to advise client and approve any modification.

Some states consider such modification “doing business.” At least advise client to have a modification reviewed.

Two more good ideas for your contract

- **Add a file destruction clause:**

- i.e., “You agree that after four years from the conclusion of this matter, I may safely and securely destroy this file.”

- **Copy cost clause (new ABA opinion 471, 7/1/15):**

- “During our representation, we will be sending you copies of [x, y, and z]. You should keep these in a secure manner for your own use and reference. Should you desire additional paper copies, our firm can make those at your expense.”

ABA Opinion 471 (2015)

What if the lawyer has a “paperless” office? If client wants “everything printed out,” who pays?

Opinion 471, although not directly addressing this, agrees with DC Bar Opinion 357 (2012), saying lawyers and clients are free to enter into agreements concerning: a) how file is maintained, b) how copies will be provided, and c) who will bear costs, so as to avoid misunderstandings in the future. (See, Footnote 28)

26 Duty of confidentiality

A primary duty of every attorney-client relationship is to keep client information confidential. ABA Rule 4-101; TX Rule 1.05(b); Calif Rule 3-100; Fla. 4-16, etc.

General rule: A lawyer shall not reveal confidential information or use confidential information unless the client consents, nor use confidential information of a former client or use privileged information of a client for the advantage of the lawyer or a third person, unless the client consents.

When are you allowed to disclose confidential information?

- Each state has specific rules allowing or compelling disclosure to preserve human life.
- When a lawyer has “...information clearly establishing that a client is likely to commit a **criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person**, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.”

What do you need to do before you reveal confidential information?

1

You must form a reasonable belief in the nature of the threat, violation, or fraud.

2

Rules generally require the lawyer to make reasonable efforts to dissuade the client from committing the crime or fraud.

3

If the threat is from a corporate action or policy or fraud: lawyer must go “up the ladder” when you discover fraud.

What if a client won't listen?

If bodily injury may be involved, including damage to the public, you may reveal to prevent loss.

If it's some piece of evidence which lacks authenticity, you may make a “noisy withdrawal” from the case.

If, however, you are lawfully subpoenaed, you may follow the court's order to testify in most cases.

Best policy: vibrant, active client communication

A lawyer's best defense against charges of breach of fiduciary duty is:

- Active, truthful communication of facts, circumstances, progress, setbacks, and ongoing strategies
- Always respond truthfully (and patiently) to client communications which attempt to change or misstate facts
- Bill for services intelligently and regularly
- Invite client to ask questions if there are any issues



Cyber Security

Lawyers as targets for cyber attacks

Why is this important for lawyers?

1. Lawyers have a fiduciary duty to keep client information secure
2. Constant handling of confidential information:
 - Financial
 - Health care
 - Family
 - Business
3. Law offices are the path of least resistance to obtain sensitive information



Insider threats and mistakes

Train your employees on these threats

- ✓ **In-house mistakes:** losing or disclosing passwords, losing laptops, iPhones, etc.
- ✓ **In-house mischief:** The “insider threat” is the most significant risk that companies face. Limit employees’ access to systems they need to complete their jobs. Do not allow everyone to be an administrator with full access.

Inventory all electronic devices

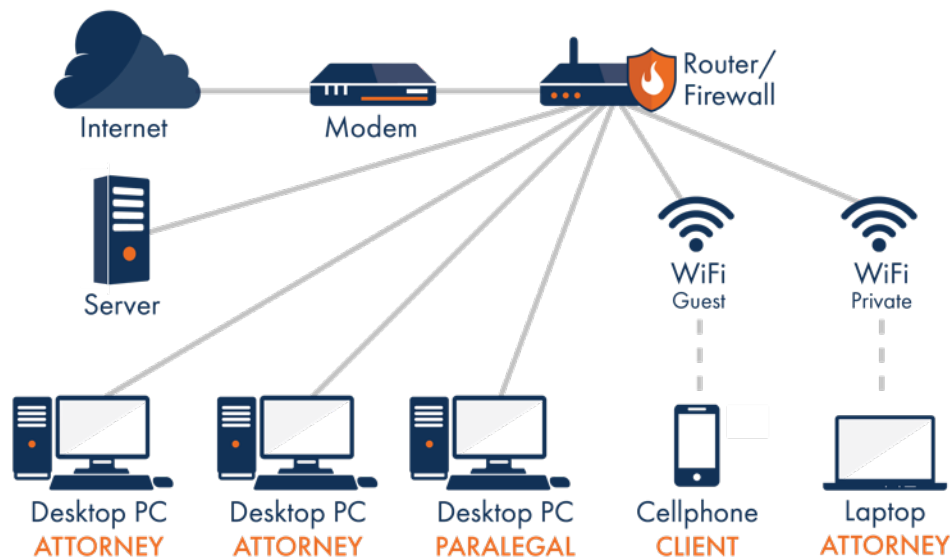
1. Document the electronic devices you use in your practice
 - Use our template to get started
2. Necessary in the event of a data compromise
3. Covers your:
 - Networks
 - Software and data
 - Computers and hardware
 - Users and accounts

IT Asset Inventory				
Last Updated: 6/15/2016				
Name	Make	Model	Owner	Users
Attorney Laptop	Lenovo	T430	Chris	Chris
Attorney Smart Phone	iPhone	6S	Chris	Chris
Assistant Computer	Lenovo	T430	Ericka	Ericka

Office Map

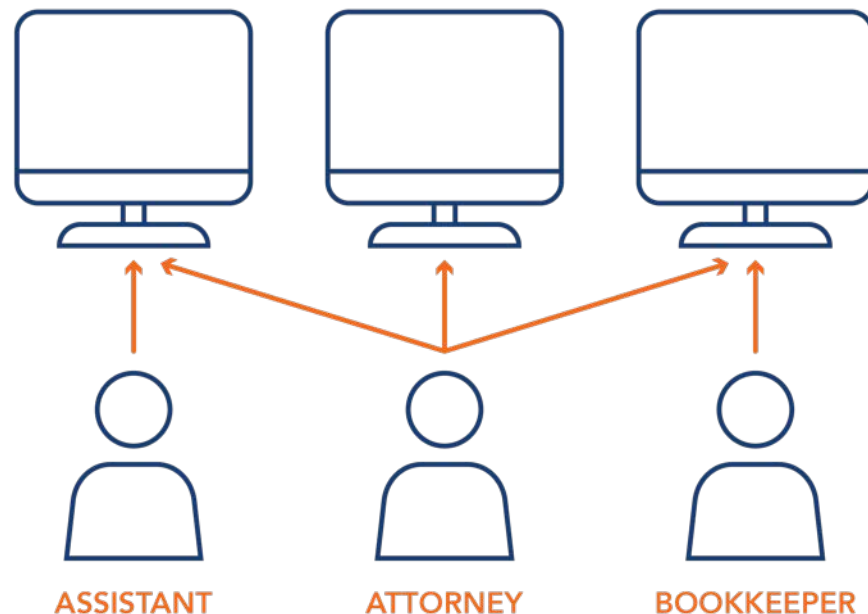
Your network

1. How do you connect to the internet?
2. Who else connects to the internet?
3. Who originally installed your computers?
4. Do you offer clients a guest Wi-Fi?
5. Who has Wi-Fi access?



Inventory: users and accounts

1. Identify all the users with accounts on your system
2. What privileges does each user have?
3. Are these privileges necessary?



Protect your office: update passwords

1. Each electronic device in your office can be strengthened
 - Update the password
 - Only allow people to access who have a need
2. Examples of strengthening include:
 - Replacing weak passwords
 - Updating Wi-Fi configuration and securing connections
 - Ensuring systems are up-to-date and less prone to viruses



Modern password protection

1. Enable 2-step authentication whenever possible
 - Email accounts and bank accounts are a great place to start. This puts a hurdle in front of hackers and even if you lose your password there is another security block in place to prevent them from getting into your account.
2. Use a password manager
 - Provides secure storage for all your passwords
 - Depending on which you choose
 - Works on single computer only, no sharing
 - Secure shared access across computers and devices

39 Protect office systems

Your office computers can be a treasure trove for an attacker, and there are multiple routes in, from open network connectivity to targeted malware. Fortunately, there are a few key tools at your disposal to counter these threats.

1. Automatic updates
2. Antivirus/anti-malware
3. Firewall

Lawyers have both an ethical responsibility and a legal responsibility to secure confidential information

- 1. Use of HTTPS addresses:** When handling sensitive information within a web browser, always make sure the address starts with “https.” Data transmitted over a properly-secured connection is encrypted and prevents an attacker from tampering with or accessing the information sent.
- 2. Whole-drive encryption:** Data stored on your computer also needs to be secured. Most modern operating systems support whole-drive encryption. Once enabled, you can be comfortable that if your computer were lost or stolen, the data stored on it cannot be accessed by anyone else.

Proper configuration of office Wi-Fi

1. **Use your password manager** to generate a strong passphrase for your wireless network.
2. **Require network authentication**, selecting WPA-Personal (Wi-Fi Protected Access 2) for most small practices
 - May appear as WPA2-PSK or just WPA2
 - Do not use WEP or plain WPA
3. **Use a separate guest Wi-Fi network** for clients or visitors who need Internet access
 - Most Wi-Fi routers today support one or more guest networks
 - Enable WPA2-Personal authentication for your guest network as well
4. **Provide access** to your private network (as opposed to guest network) and intranet/LAN only to those with a clear and ongoing need

Always remember that insider threats and human error are the prime avenues of data breach and privacy loss

Train your staff:

1. Use 2-step authentication
2. Use a password manager
3. Never disclose confidential information over the phone
4. Immediately report any possible disclosure of confidential information

Prepare for emergencies

How do I ensure my clients can obtain their digital assets?

- **ULC-Fiduciary access to digital assets committee:** Since 2014, the “Fiduciary Access to Digital Assets Committee” of the Uniform Law Commission (ULC) has worked with companies to try to craft a model act that would vest first of all lawyers with at least the authority to manage or distribute digital assets or copy or delete those assets as appropriate
- **Lawyers need to advise clients** always to have their own safe and secure location or a fiduciary who knows what his or her digital passwords are in case of an emergency

Cyber advice summary

1. Take inventory of all electronic devices
2. Start using 2-step authentication
3. Research a password manager to store and generate passwords for you automatically
4. Enable automatic updates to all your systems
5. Enable whole-drive encryption
6. Train staff on security practices

Final takeaways on fiduciary duties

- Communicate, communicate, communicate
- Have a clear fee agreement
- Don't "do business" with client without appropriate documentation
- Candor and honesty in everything
- Treat everything with courtesy as a professional should
- Don't offer to serve as trustee for a client's entity unless you really know what you are doing and appreciate the substantial risks



Communication



Contracts



Cyber Security



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Claude E. Ducloux

866-376-0950

claudel@lawpay.com

Thank You!