Wealth-Health Executive Network

A "Holistic" View of the Fiduciary Landscape

A duty of **loyalty is the most fundamental fiduciary duty.** It is owed by an Agent to a Principal. Fiduciary duties include the duty to **avoid conflicts of interest**, as well as duties of **care**, **competence**, **confidentiality, good faith**, **obedience**, and **accounting**.

1. Questions of: Who is the agent? Who is the principal? Who are the beneficiaries? What is the duty? and Where are the conflicts? are interwoven and complex.
2. Fiduciary relationships commence early and can start with interactions about personal finance and managing it, employment and benefits, or a health condition and managing it. It can occur with
    a. An inheritance, insurance, or legal settlement.
    b. An initial job or job change,
    c. A marriage, birth, accident, disability, or death.
3. When it involves **personal finance**, three sectors, despite silo walls, are involved.
    a. The **Financial** sector is at the intersection, where income, expense, assets, and liabilities are managed.
    b. The **Employment** and benefits sector, where income and assets are earned and accrued. (Productive/quality time is traded for money.)
    c. The **Health** (physical, emotional, and mental), where fitness, longevity, and care are earned and paid for. (Money is traded for quality time.)
4. The "silo walls" between these sectors make it difficult for a Financial Fiduciary to operate in a holistic manner. Without an understanding the other two perspectives, it is difficult to "know what you don't know". That significantly increases the risk of flawed advice.
5. Family offices, executive employment contracts, and concierge medicine all recognize and validate these facts.

Financial advisors and financial firms' employees have this obligation relative to their clients and/or customers.

1. If an "advisor" (regardless of product) is not clear they are solely a salesperson, then a person may believe they are a "trusted advisor" (i.e., RIA, Trust Officer, Financial Planner, etc.) and are ethically required to meet a fiduciary standard. Transparency and disclosure are only basic prerequisites for any defense.
2. If an employee provides a service or product where their firm is a fiduciary, then the employee or delegee may be bound by that duty, regardless of other contractual arrangements.

3. These are the two basic fiduciary business principles, and they apply in the financial, employment, and medical spheres.

If, for example, the employer's firm is an Executor of a trust or estate, then some or all employees may have a fiduciary responsibility too. Managing an estate or trust can be rife with potential conflicts of interests. The administrative duties can be extensive. Inadequate performance of either can breach a fiduciary duty of competence.

In the Estate or Trust example, even presuming extensive prior planning, there can be numerous beneficiaries and relationships to complicate the duties further. In this example normal steps (administrative and decision making) of the process may include:

- Finding and organizing estate documents
- Filing the will with the Probate Court
- Deciding whether probate is necessary
- Notifying Interested parties and agencies of the death
- Claiming benefits during probate
- Taking inventory and valuing assets in the estate
- Determining ownership of assets in the estate
- Filing a petition with Probate Court
- Notifying interested parties of a probate case
- Proving the will
- Managing assets in the estate
- Transferring property outside probate
- Paying debts and taxes from the estate
- Distributing estate assets and closing the estate

While this may be a typical situation that wealth managers encounter, it is essentially limited to a single "end of life event". The primary fiduciary duty is to the deceased and once the Estate is settled, the duty terminates. (Question #1)

Similar processes, and an underlying fiduciary duty, are embedded in the employer-employee relationship and in the doctor-patient relationship.

1. In the employment context, ERISA sets out numerous processes for managing employment benefits.
2. In the medical context, "Continuity of Care", "Informed Consent", and HIPPA provide the framework for the doctor-patient responsibilities.

Employers legally have extensive fiduciary obligation under ERISA, which covers any welfare plan they provide. These obligations cover formal and informal arrangements. They can range from retirement, health, and disability plans to vacation benefits, daycare centers, apprenticeship/training programs, scholarship funds, stock options, unemployment benefits, severance pay and more. The requirements of the act are specific, detailed, and require documentation. A part of the fiduciary duty is that all the requirements are met.

ERISA stipulates the penalties for a fiduciary in the event of a breach. It requires making the plan whole, disgorgement of any profit, and penalty rising to 100% for not correcting the breach in less than 90 days.

As a rule, employers are obligated to pay employees as agreed. Because employers compete for talent in numerous ways, compensation plans involve accrued and deferred benefits that in fact belong to employees. So long as the employer is managing those benefits, they have a fiduciary duty to employees to manage that money for the employee's benefit. (Note #1)

For employer health insurance plans, fiduciary responsibilities are like, but distinct from, those of defined benefit or contribution plans. For health plans the record keeping and complexity are compounded by limited transparency, numerous parties involved in the design and administration of a plan, and the range of treatments across the health spectrum. Furthermore, any given claim may require adjudication, each of which requires a fiduciary decision

Physicians' fiduciary responsibility begins with medical care. But a breach can have significant health, financial, and reputational consequences for a patient, as well as financial, and reputational consequences for themselves and their health system.

Foremost is the obligation to support continuity of care for their patients. [Note: Continuity of care is both; over time, medical specialties, and settings.] The physician must disclose to the patient any foreseeable impediments to continuity of care. (Question #2)

Continuity over time extends to a "medical home", The concept includes the medial record, a plan of care, chronic and preventative care, medication management, as well as patient and caregiver engagement in care and decision-making. It requires coordination across both clinical and mental health care teams. A logical focus of these activities is the family or primary care physician. In the highly specialized, fee for service, world of medicine gaps can easily cause mistakes and cost money. (Question #3)

Coupled with this is the obligation to obtain "Informed Consent", which has been defined by case law over decades. Informed consent is difficult whenever a doctor and patient have a communication gap. The more specialized the procedure and the less 'personal' the context, the greater is the likelihood of inadequately informed consent.

The penalty for failure typically comes in a "Malpractice" case or a "Breach of Trust" suit. Medical Malpractice focuses on the physician's competence. A Breach of Trust case alleges the physician violated the trust a patient put in them. Both have potential penalties that are expensive and not mutually exclusive. (Question #4)

Conflicts of interest can arise in a wide range of situations. A doctor who developed a drug, surgical device, or treatment technique may receive royalties for it, and also employ it in their practice. They have a duty to maintain independence and impartiality in their judgments and put the well-being of their patients first.

However, research indicates at least two problems with resorting to disclosure as a cure. First, when a person discloses a possible conflict, it may enhance trust and may lead to ignoring a real conflict. Second, when doctors have a vested in research and development, they develop a bias to use and prescribe the resulting device or drug. The bias may be justified or not. Also, patients may prefer the doctor with the most experience with a device, drug, or treatment. (Question #5)

The duty of confidentiality is important to encourage disclosure of facts that help in diagnosis or treatment. The mere disclosure of private information gives rise to an expectation of confidentiality. There are exceptions for issues related to health insurance claims or court orders. But a breach of that duty can cause reputational damage, loss of a job or income, or other discriminatory or financial damage to a patient.

Confidentiality obligation covers all medical records, opinions, and communications with medical staff. It is covered by State law, and a breach can give rise to a malpractice or invasion of privacy suit. The duty survives death.

HIPAA adds a federal dimension. Its intention was to extend confidentiality within and beyond healthcare facilities to a broader 'medical umbrella'. It contains five titles that touch on job changes, healthcare fraud and liability reform, MSAs, group health plans, and more. It covers everyone in a health facility, plan, billing company and records company. It specifies details down to password protocols, encryption, and fax machines.

More importantly it attempts to create a secure environment for exchange of medical data between need-to-know parties under the umbrella to foster efficient growth. (Question #6)

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Questions (and a note) to Ponder

Question #1: Financial Planning is an exercise in "continuity planning" over a lifetime, and actively seeks to cloak its practice with a fiduciary duty. It aims to help people manage their finances though multiple major life events, both expected and unexpected. The example above is about everyone's final, often unpredictable, "health event". It is about the last step in a plan that reflects a lifetime of events (health, care, and financial). The preparation required is comprehensive and detailed, including medical directives, POLSTs, medical power of attorney, et al. The exercise of a fiduciary duty is in fact triggered by the health event.

If financial planning is done over lifetimes, how integral should health and care be in all the steps prior to the final step?

Question #2: One might posit there is a responsibility to check and disclose the insurance covered and uncovered costs of all treatment paths to enable an assessment of potential financial impediments. Health insurers could do this do this, but it may breach confidentiality to involve them in developing a person's plan of care.

How might patients get cost information as it pertains to their specific situation?

Question #3: One can posit that this is a shared responsibility of doctor(s) and patient. But no one is stepping up to educate patients, employees, or clients about how to do this, how to take control of their medical records, and who participates on their care team.

Given the financial (as well as medical) consequences of mistakes, who might logically help bridge that gap?

Question #4: One might posit in a fee for service world, driven by volume and speed to achieve scale and reduce cost, the likelihood of a mistake is increased (i.e., a hand surgeon who doesn't know it is a pianist's hand, or the eye doctor who doesn't pick the right lens for a cataract operation.)

Given the financial aspects of a mistake, where might someone turn for 'due diligence' on the specialist, the payment process, the practice/hospital's financial and human resource pressures, etc., rather than resorting to legal remedies afterwards?

Question #5: Much of the burden to disclose conflicts has been placed on the companies who pay for research or visibility, yet the name of the payer is redacted. The CMS Open Payments Database is searchable by name, provider type, specialty, and geography. But it does not connect that to the device, drug, or treatment involved.

Should there be a database like the SEC's EDGAR or FINRA's Broker Check to readily access the information that highlights the problem area. If so, who should/could provide it?

(Question #6) While medical records are subject to HIPAA, employment records that include medical information are not. HIPPA also has pragmatic exceptions for imminent threats, treating a patient, public health and safety, notification of family and caregivers, or notifying the media. HIPAA doesn't apply to firms that aren't under the "medical umbrella" such as life insurers or non-medical DNA analysis firms. HIPPA does not include information from wearables, fitness trackers or the IoT generally.

Given the complexity and burdens of the interwoven state and federal regulations coupled with the increasing amounts of personal data outside the medical umbrella, is HIPPA irrelevant or should it be updated, expanded, or simplified – and how?

Note #1: The potential conflicting interests across the workplace have generated extensive regulation, including ERISA. Fiduciary relationships are not unidirectional. Employees also have a fiduciary obligation of loyalty to employers. The standards of loyalty are governed by state law, can be demanding, and vary from state to state. Regardless of the state however, that obligation is tempered by society's interests in; competition, people with disabilities, family leave requirements, diversification, environment, et. al. Many of these tempering interests intersect with ERISA interests as well.