

Sempre Avanti!

Always forward...

Welcome to the **Fall 2010** issue of **Sempre Avanti!**

Creighton Law Offices represents a number of clients who serve as “**fiduciaries**” in one capacity or another. But just what is a **fiduciary**? In this issue of **Sempre Avanti!**, we give examples of types of fiduciaries and explain their duties. And, if you find yourself in the role of a fiduciary, here are a **few simple guidelines** to help you avoid some of the more common mistakes and pitfalls we have witnessed over the years.



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WHAT IS A FIDUCIARY?

A **fiduciary** is usually a person (but can be a company, such as a bank) who is appointed by another person to manage and protect the money or property that is used for the benefit of another person or persons, who are typically referred to as beneficiaries. Types of fiduciaries include the **Trustee** overseeing a Trust holding property for the benefit of another, the **Executor** under a decedent's Last Will & Testament, the **Agent** appointed under another person's Power of Attorney, the **Guardian** of the estate of a minor child (under 18 years), and the **Conservator** of an incapacitated adult's estate.

California law requires that anyone serving as a fiduciary demonstrate the high-

est level of **good faith**, **loyalty**, and **diligence** in the discharge of his or her duties, higher than the common duty of care that we all owe one another.

To help guide you through your duties as a fiduciary (or to be aware of the duties that are required of someone who is acting as a fiduciary on your behalf), we have compiled the following **Ten Commandments for Fiduciaries**. All of these commandments, except the Tenth Commandment, are codified in the California Probate Code or have been established by California case law. While the explanations (and even some of the commandments, themselves) refer to “trusts,” and “trustees,” the principles behind each commandment are the

same for all fiduciaries, whether you are serving as an **Executor** under your mother's Last Will & Testament or as **Guardian** of the Estate of your brother's minor son.

Note: The following Commandments apply to you **if** you are serving as the Trustee of **another person's Trust** that holds property used for the benefit of **other persons**. These Commandments do not apply to you as Trustee of your own revocable living Trust. However, upon your death or incapacity, these Commandments **will apply** to whom ever you have named to succeed you as Trustee of your Trust.

The First Commandment:***Thou shalt be faithful to the interests of the Trust and its beneficiaries.***

Your duty as Trustee is to administer the Trust **solely** in the interests of the beneficiaries of the Trust. You are required to follow the terms of the document governing the Trust. **For example**, you cannot change the distribution scheme that is set forth in the trust document, regardless of whether or not you think it seems “fair” to all of the beneficiaries. Additionally, you shall not enter into any transaction that could result in a conflict of interest between you and the Trust or a beneficiary of the Trust. **For example**, you cannot arrange to sell trust property to your boss for a price below fair market value hoping that, in return, you will be promoted to the position of Vice President of the company where you work. Such a transaction would clearly create a **conflict of interest** between you and the beneficiaries of the Trust, who would receive more were you to sell the trust property at fair market value. What’s more, if you are also a beneficiary of the Trust, you have to be particularly careful in how you discharge your duties so as to avoid even giving the **appearance** of unjustly or improperly benefitting yourself at the expense of the other beneficiaries.

The Second Commandment:***Thou shalt not use the office of Trustee to take out thy aggressions on thy siblings.***

As Trustee, you have a duty to deal **impartially** with **every** beneficiary of the Trust, **even those beneficiaries you do not like, never have liked, and never will like**. So, for example, if you find yourself serving as the Trustee of parents’ Trust, and you and your brother have not spoken to each other for 15 years, you **CANNOT** abuse your power as Trustee by holding his share of the trust property “hostage,” and continuing to refuse to speak to him; rather, you must “**take the high road**” and treat him fairly and with as much courtesy as you would any other beneficiary, as difficult as that may be.

The Third Commandment:***Thou shalt not use Trust assets for thy own benefit.***

This probably represents the most common of all “sins” of Trustees. It is not uncommon for our parents to periodically (or sometimes continuously) rain favor upon us in the form of cash or other gifts during their lifetimes. And why not? It is their money and they may do with it as they wish. Or they might make periodic donations to some organization or another. That’s fine while they’re in control of their own money, but once your parents have passed away or become incapacitated and you’re serving as Trustee of their Trust, you should not continue making such gifts or donations unless the Trust document **specifically** allows you to make such gifts or donations. . “**But**,” you say, “**Mom always paid for my weekly manicures and I’m certain she would want me to continue to make such payments out of her Trust.**” Well, the way the law sees it, if she really wanted you, as Trustee, to have the power to continue paying for your weekly manicures from trust funds, she would have put it in writing and included such a power in her trust document.

The Fourth Commandment:***Thou shalt not comingle Trust assets with the assets of others.***

This Commandment is fairly straightforward. You must not put cash belonging to the Trust into your own bank account or the bank account of anyone else. Likewise, you must not put cash or other property that belongs to you or any other person into the Trust’s accounts—unless a gift is being made to the Trust for the benefit of the Trust’s beneficiaries, or a loan is being made to the Trust to provide liquidity to pay the taxes or other expenses related to the property of the Trust.

The Fifth Commandment:***Thou shalt not hire thy kids.***

If you are the Trustee of another person’s Trust (including your parents’ Trust), it is **NOT** a good idea to hire friends or close family members to provide services to the Trust because doing so usually results in a **conflict of interest**, whether it is an actual conflict or a *perceived* conflict. Imagine the hard feelings and questions of propriety that would arise amongst the trust beneficiaries if you hired your 14-year-old son to water the lawn of a house owned by the Trust, paying him \$300 per week from trust assets to do so. After all, he needed a summer job, didn’t he? While this may seem to be an exaggeration, we were involved in an actual case where this occurred. The Trustee’s siblings, who were beneficiaries of the Trust, were **FURIOUS** and threatened to sue. **Please** do not hire your children or close friends to provide services to the Trust.

The Sixth Commandment:**Thou shalt keep all Trust beneficiaries informed.**

As Trustee, you have a duty to keep all of the Trust's beneficiaries "*reasonably informed as to the trust and its administration.*" This duty includes such things as providing the beneficiaries with copies of the Trust's governing terms (e.g., the trust document), an annual account of what you've done as Trustee (and an account and report at the termination of the trust administration), and other information throughout the period of the trust administration. This does not mean that you need to provide the beneficiaries with a detailed weekly report of what you have been doing as Trustee. However, "*It's none of your business*" is **NEVER** an appropriate response to a beneficiary's question about the Trust or the status of its administration. Remember that you can always refer questions from beneficiaries to your attorney for him to answer.

The Seventh Commandment:**Thou shalt keep proper and complete records.**

This duty is related to **The Sixth Commandment** in that it is difficult to report to beneficiaries the "goings-on" of the Trust's administration in any detail if you have not kept good and organized records. Besides, your records will be the only things upon which you can rely in court if ever any disgruntled beneficiary decides to sue you for allegedly breaching your fiduciary duties simply because he's mad Aunt Betty left more of her trust estate to his sister than to him. Proper record-keeping includes not only tracking (in detail) expenditures you make as Trustee, but also tracking trust income and receipts.

The Eighth Commandment:**Thou shalt not take exorbitant trustee fees.**

Sometimes a trust document will state that a Trustee shall receive no payment for his or her services or that payment will be in a specific amount or as a specific percentage of the trust estate. However, if the trust document is silent as to trustee fees, California law provides that you are entitled to "*reasonable compensation under the circumstances.*" As is often the case with statutory law, this language is conspicuously vague. However, despite the ambiguity in the statute, be assured that paying yourself anything over **\$40 per hour** (unless you are a professional Trustee) is likely to raise some eyebrows... and even that may be considered excessive in your county. Taking exorbitant fees as Trustee may be seen by a court as stealing from the Trust's beneficiaries. Courts don't generally look favorably upon such actions. Your attorney should be able to tell you what the probate judge in your county thinks is a "reasonable" hourly fee for a non-professional Trustee.

The Ninth Commandment:**Thou shalt make Trust property productive.**

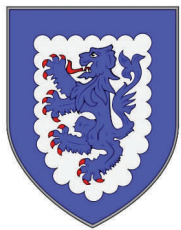
This simply means, for example, that whenever possible, rental property shall be rented; cash exceeding the amount needed for the ongoing, day-to-day administration of the Trust shall be held in as high an interest-earning account as possible (e.g., a money market account or certificate of deposit as opposed to a basic checking account); investment accounts shall be monitored and managed to provide the best returns possible, without investing in excessively risky holdings; and so forth. **Remember**, as Trustee, you are holding money and other assets for the benefit of other persons. It is your job as Trustee to ensure that that money grows as much as possible without being invested in overly risky investments.

The Tenth Commandment:**Thou shalt keep thy attorney informed.**

Your attorney is your legal "safety net." Before taking any substantial actions or making any significant decisions as Trustee, always let him or her know, **IN ADVANCE**, what you are planning to do. Likewise, if you ever have any questions about the propriety of an action you are considering, ask your attorney **first**. Always send him or her monthly account statements as soon as you receive them so that s/he may monitor your actions and help keep you on the right path as you administer the Trust. If you are concerned about the cost of contacting your attorney with questions, we can tell you from experience that it is much more difficult and time-consuming – and, therefore, more expensive – to try to "undo" an errant Trustee's actions than to avoid making the mistakes in the first place. By adhering to these commandments, in addition to seeking the advice of an experienced and licensed attorney, you can alleviate or even avoid altogether the many problems that typically arise during the administration of a trust.

Now, go forth...and sin no more.

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*In May my heart was breaking-
Oh, wide the wound, and deep!
And bitter it beat at waking,
And sore it split to sleep.
And when it came November
I sought my heart and sighed
“Poor thing, do you remember?”
“What heart was that?” it cried.*

*Autumn Valentine
By Dorothy Parker*

The Fine Print

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Creighton Law Offices is located in San Mateo, California. The firm specializes in providing exemplary estate planning, trust administration, probate, and long-term care planning services to its clients.

Visit our new website!

Creighton Law Offices has launched a new website that features, among other things, more information on **Trust Administration** and other estate planning topics. We encourage you to contact us with suggestions for what you would like to see on the site or in our newsletters.

If you would like additional copies of this or previous newsletters, or know someone who would benefit from receiving this information directly, please contact **Peter** at (650) 344-0700.