Do the CFP Board and SEC Really Support Fiduciaries?

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by Allan Roth

As a Certified Financial Planner and registered investment advisor, I'm bound by law to act as a fiduciary to my clients. Yet the CFP Board and SEC, overseers of the standards that guide fiduciary responsibility, aren't always serving the investors they are intended to protect.

Merriam Webster's dictionary defines a fiduciary as "a person or entity responsible for acting in the best interests of others — typically an investment client, a company's shareholders or a beneficiary."

Every advisor *should* put their clients' interests first. I don't buy the argument that small investors would be squeezed out if all advisors and brokers were forced to be fiduciaries. It would be a good thing if nobody could sell products with 10% commissions.

However, to *say* one is a fiduciary doesn't mean you *act* as such. Clients may easily be lulled into a false sense of security if they hear their advisor say, "as a fiduciary, I must always put your interests ahead of mine," particularly when their advisor isn't actually held to this standard. If fiduciary standards aren't enforced, and they typically aren't, it's the client who loses. This also results in the financial advisory profession being viewed by the public as a sales vocation, rather than a true profession.

Two examples of so-called fiduciary duty fulfilled

Several years ago, I wrote about a case where a CFP, claiming to be a fiduciary, sold an annuity to his client, double dipping by taking both commission and annual ongoing fees. The client was paying — between the commission, the planner's fees, and the ongoing annuity costs — about 5.29% a year. Because of the fees and false information that the client and I documented, the insurance company and broker dealer quickly (and without an attorney or complaint filed) generously settled.

The consumer didn't want others to be duped by this so-called fiduciary, so he made sure his settlement allowed him to file complaints with regulators and the CFP Board against this advisor. None found any wrongdoing. But Kevin Keller, now the CEO of the CFP Board, claimed that since that case, standards were stronger and a different outcome would have been likely had it been a more recent case. He invited me to be part of a panel on disciplinary hearings and to write about the CFP Board's disciplinary process. Though I agreed to keep facts (like names) confidential, the CFP Board also demanded the right to approve the entire piece, including my opinion of the process. That was unacceptable to *The Wall Street Journal* and didn't strike me as a sincere effort in being transparent.

I wrote about the issue in *The Wall Street Journal,* which titled the piece Is the Fiduciary Standard a Joke? and Keller responded with a piece Why Our Fiduciary Standard is No Joke.

A second case of a so-called fiduciary can be seen with mutual fund managers. Since 1940, mutual fund board members have had a fiduciary duty to shareholders rather than the fund company. According to the Investment Company Institute (ICI), "Directors have the fiduciary duty to represent the interests of the fund's shareholders." Thus, they must put the interests of the fund shareholder first. Yet, when I presented Joseph DiMartino, the independent board chair of Dreyfus funds, with an opportunity to guarantee higher shareholder returns by rolling its expensive S&P 500 index fund into a lower cost S&P 500 index fund, he consistently declined the move. Apparently, the SEC agreed that leaving shareholders with guaranteed lower returns met their definition of fiduciary.

These are just two examples of "fiduciaries" not acting in their beneficiaries' best interest. Unfortunately, the CFP Board and Dreyfus examples are not unique.

Telling the consumer that their interests come first and fostering the belief that there are standards in place that protect them is no good unless those standards are enforced. One could argue that the advisor or broker who discloses he is not acting as a fiduciary might be better, as the consumer would be more skeptical of recommendations. But that argument may also be flawed.

Moral licensing

Advisors working under the less rigorous suitability standard don't act as fiduciaries. It turns out that disclosing one is not acting in the best interests of the consumer may not be a good thing either. This is according to research on moral licensing by George Lowenstein of Carnegie Mellon University, who demonstrated that disclosing a conflict of interest can undermine the advisor's motivation to adhere to professional standards. Research suggests that after engaging in moral behavior (i.e., disclosing a potential conflict) people feel "licensed" to act immorally in subsequent interactions. Amazingly, the consumer may also end up trusting the advisor *more* since they were honest enough to make such a disclosure.

This could be as bad, or worse, than the legal fiduciary not acting in the client's best interests.

My take

I'm torn as to which is worse. The advisor who claims fiduciary duty but doesn't work in the client's best interests, or the advisor who discloses he is not required to act in the client's best interest and then feels licensed to act even more in his own self-interest.

If financial advisors are ever to become true professionals along the lines of doctors and lawyers, then they must walk the fiduciary talk. Saying the word "fiduciary" is much easier than practicing putting the client's interests ahead of one's own. Over the past few years, I have paid my CFP license fee to the CFP Board but asked that none of my fees goes toward any advertising campaign touting "the highest standard" and instead go toward enforcing those high standards. Every year, Mr. Keller politely tells me no.

I've noticed that it's the advisors who most often tout that they put their clients first who are the worst offenders of doing just the opposite. That may be due to a lack of fiduciary understanding, a lack of self-awareness, or an unwillingness to think about the conflicts.

My advice to advisors is to always think about the many conflicts we have with our clients. Being aware of these conflicts will help us navigate the fiduciary waters. For example, for many clients, paying down their mortgage is risk free and, under the new tax-law, possibly the equivalent of a tax-free return since less than half of those who will itemize in 2017 will now do so in 2018. But telling the client to pay down their mortgage is not generally in our best interest as it leaves us with less money to charge fees.

Putting clients first benefits them and moves financial planning toward being viewed as a profession. But there is the added positive outcome of building the trust that leads referrals of the clients' friends and family.

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