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Attention Fiduciaries: Do You Know Your Duties?

By Taylor D. Tarvestad-Sztainer

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No matter who you are or what you do, the odds are you have been a part of a fiduciary relationship—maybe even without knowing it. For instance, have you ever sold a house with assistance from a broker? Have you ever been a director or officer of a corporation, a partner of a partnership, or a shareholder of a closely-held corporation? Have you ever employed others or purchased insurance? The relationships formed by taking the foregoing actions are just a few of those recognized as "fiduciary relationships" under Minnesota law.

It is important to be familiar with the recognized fiduciary relationships because not only are they extremely prevalent in the business world, they are the source of significant legal obligations and enforceable rights. All fiduciary relationships impose legal duties on the fiduciary to do and not do certain things and to always act in the best interests and for the benefit of the beneficiary. A breach of those duties could result in serious consequences for the unsuspecting fiduciary.

When Do Fiduciary Relationships Arise?

The key components of the typical fiduciary relationship include trust, confidence, superior knowledge, and influence. Although each component need not be present to create a fiduciary relationship, these components generally work together so that when one person places trust and confidence in another with superior knowledge, influence over that person can often result.

Fiduciary relationships also arise in business transactions where a disparity in business knowledge or experience exists between the parties. When such a disparity exists, it often results in one party confiding in and relying on another with adverse interests. In this situation, whether or not a fiduciary relationship arises depends, in part, on whether the party with superior knowledge or experience knows of the other party's inferior understanding of the matter at hand.

Importantly, not all relationships involving trust, confidence, superior knowledge, and influence result in fiduciary duties. A prime example of this is the physician-patient relationship. It is axiomatic that patients place trust and confidence in their physicians. It is also clear that physicians exercise superior medical knowledge over their patients such that the patient's medical decisions are easily influenced by the physician. Despite all the indications of a fiduciary relationship, Minnesota courts have declined to categorize the physician-patient relationship as fiduciary in nature.

Thus, when examining your own relationships to determine your respective duties and rights, it is important to be aware of those relationships that have been expressly acknowledged as fiduciary in nature by the legislature and courts.

What Are the Duties of A Fiduciary?

A fiduciary's duties depend on the type of fiduciary relationship that exists.

A. Corporate Directors and Officers

Corporate directors and officers owe two fiduciary duties to the corporation and its stockholders: a duty of care and a duty of loyalty. The duty of care requires directors and officers to discharge the duties of their positions with the care an ordinarily prudent person in a like position would exercise under similar circumstances. They should also act in the best interests of the corporation at all times. Despite these seemingly broad duties, Minnesota courts rarely impose liability on corporate directors or officers *solely* for duty of care violations and usually will not do so absent fraud, collusion, or similar misconduct.

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By Mark B. Peterson & Shanna L. Strowbridge

Succession Planning for Family-Owned Cabins

Mark Peterson is a shareholder and a member of our business law practice area. He assists companies and their owners with a wide variety of business matters, including corporate governance, contracts, stock and asset transactions, real estate/leasing, and litigation. He is also a second-generation cabin owner and has counseled clients relating to the management and transition of family-owned properties. Mark can be reached at 612.877.5428 or at PetersonM@moss-barnett.com.

Shanna Strowbridge is a member of our real estate and business law practice areas. She assists clients with the acquisition, financing, leasing, and sale of real estate. Additionally, she assists corporate clients with mergers and acquisitions and contract negotiation and provides advice on financing arrangements, business structuring, and management matters. Shanna can be reached at 612.877.5259 or StrowbridgeS@moss-barnett.com.

"Going to the lake" is a summertime ritual enjoyed by many Minnesota families. Memories of idyllic time spent with the family at the cabin, however, often give way to conflicts, especially as parents age and ownership, use, and upkeep of the cabin turn over to the next generation, which may involve multiple siblings (and in-laws). The changed dynamic and inherent complication of the differing expectations of multiple and multi-generational co-owners can create many problems for families as to how the cabin will be used in the future and how expenses and upkeep will be shared. The more common issues faced by families include:

- Not all family members live in proximity to the cabin or share the same ability or interest in continuing to own or use it.
- Not all family members have the financial resources to maintain the cabin.
- Family members may not get along and have no interest in cooperating regarding the use and responsibilities of a shared cabin.
- Sharing the cabin interest with spouses of family members and the complications arising in the event of divorce or death.
- Concerns over joint and several liability regarding the acts of others.

Shared ownership is fraught with challenges that can turn the cabin from a family retreat to a sibling battleground. In order to preserve family harmony and continued enjoyment of the family cabin, it is important for families to carefully plan how the cabin will pass to, and continue to be enjoyed by, the next generation(s).

The Need to Plan

It is important to have a clear succession plan in place for a cabin, such as having a trust or entity established to own the property (which allows it to pass to named beneficiaries or members) or even placing title to the cabin into joint tenancy (which provides a right of survivorship and transfer of property to the other co-owners at death). When there is no succession plan and the cabin owner dies without having designated in his or her will one or more individuals to receive title to the cabin upon that owner's death, then all of the deceased's heirs will receive equal shares of ownership in the cabin property as "tenants-in-common." This means that they will each own an undivided and indistinguishable interest in the entire property which results in no owner having a clear right to use, sell, or pledge his or her portion of the property to the exclusion or without the consent of the other owners. It also results in all owners being equally responsible for the expenses relating to the property and all owners being equally liable for events at the property, but without creating any fiduciary duty responsibilities among the owners.

Another risk is that the "tenants-in-common" are continually subject to potential claims of the other owners' creditors and the potential transfer of interests to an owner's spouse as a consequence of divorce or death. Considering that jointly owning property requires all the parties to agree on decisions relating to the property, it is easy to see how problems can occur and tensions rise. If emotions are running high, people often have difficulty separating those emotions from the real issue at hand. When an impasse occurs, the results can be outright conflict. The only legal remedy for a tenancy-in-common ownership dispute is a partition action, which involves the court forcing a buyout of the disgruntled owner or a forced sale of the property to a third party with an apportionment of the proceeds. Involving the judicial system leads to an expensive and time-consuming mess, and hurt feelings are inevitable.

Cabin Co-Ownership Agreements. The simplest way to preserve goodwill and harmony among co-owners of a family cabin is to prepare, in advance, a written agreement to cover the various issues that may arise during the course of owning the cabin. It is easier to have an agreement worked out in advance, when family members are amenable to it and when there are few frictions that can make reaching an agreement difficult.

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A co-ownership agreement should address at least the following topics:

A. How will decisions be made among the owners? A cabin may need an addition or remodeling, and it is certain to need repair and maintenance. Does everyone get an equal vote in making these decisions? In the case of siblings who own a cabin together, do their spouses get a vote? What about subsequent generations?

B. How will the cabin be funded and expenses paid? As a cabin passes to the next generation, so will the obligations to cover the expenses, such as maintenance, property taxes, insurance costs, and debt service payments. The agreement must answer the question of how expenses will be paid and what happens if a co-owner cannot or will not contribute money. The agreement also should address whether and how the owners who contribute "sweat equity" will get credit for their labor.

C. Scheduling Use of the Cabin. It is important to establish a system to ensure that use can be shared and scheduling decisions can be made easily. Depending on the number of co-owners and the relationship among them, it may be necessary to allocate certain days that each co-owner receives. Even if a complete calendar is not necessary, many co-owners plan in advance to alternate use for certain hardships.

D. Establishing General Rules and Regulations. Preparing a set of rules in advance is one of the most effective ways that co-owners can establish expectations and make sure that those expectations will be met. Such rules can cover everything from use of watercraft by minors to restocking the refrigerator. Such rules should be revisited and updated regularly as circumstances and situations dictate.

E. Expectations for Sharing of Chores. Anyone who owns recreational property knows well that such properties require a lot of upkeep. Thus, the agreement should address the sharing of labor for such tasks as putting in the dock and boats and "closing up" the cabin at the end of the season.

F. Transfer of Ownership. There are many situations in which one owner may need or want to sell his or her share of the cabin, and it is vital to lay out a plan for the transfer of future ownership. Such agreement also should address other events that would automatically trigger a transfer of an owner's interest, including incapacity, divorce, or even the failure to contribute to expenses. It is also appropriate to determine whether a deceased co-owner's share will be transferred to his or her heirs or sold or offered under a right of first refusal to the surviving owners.

G. Purchase Price of an Owner's Interest. The agreement should establish how the purchase price for a co-owner's share will be determined. The price could be based on an agreed-upon formula or on a fair market appraisal. Provisions for financing the purchase of a departing owner's share also can be established, such as cash at closing, use of a promissory note for an established period, or purchasing life insurance to make cash available to purchase a deceased owner's share. Of course, the agreement also can establish the terms of selling the cabin if the owners are forced to sell or if they agree that they no longer want to own the cabin.

H. Dispute Resolution. There is always the possibility that a dispute will come up that parties cannot solve according to a prior agreement. If the owners are unable to work things out through a simple discussion, it is helpful to have an agreement for dispute resolution. By establishing a process for resolving disputes, the parties are one step closer to reaching an amicable solution quickly.

Setting up a cabin co-ownership agreement gives those involved an opportunity to consider the most legally appropriate way to own and use the cabin and protect it as a long-term asset for their family. The agreement can stand on its own as a written contract or can be included in the provisions of a more formal arrangement, such as a specifically created trust or through the formation of a limited liability company.

Limited Liability Company. Depending on the owners' individual situations and goals, it may be worthwhile to transfer ownership of the cabin to a limited liability company ("LLC"), in which the co-owners are "Members" and all contribute their individual ownership interests to the entity, which will become the property owner.

The Operating Agreement or Member Control Agreement of the LLC can address the transfer of ownership and purchase price issues addressed above. Other matters typically covered in the Operating Agreement or Member Control Agreement are how decisions are made about improvements, how operating funds will be contributed, and what happens when a member cannot afford to make contributions. Utilizing an LLC to own the cabin allows for a majority of members to decide how to resolve issues. In contrast, when family members own the cabin individually, they are not required to resolve issues and can force a sale. An LLC also offers its members limited liability. This means that if there is an accident that causes property damage or personal injury to a third party, the family members typically cannot be sued personally in their capacity as owners. Finally, an LLC can last forever. Title to the property is held in the name of the LLC, which allows members to leave or be added, subject to the terms of the Operating Agreement. Continuity of title in the name of the LLC avoids having to update title records as owners come and go.

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Jana Aune Deach, Rick Johnson, and Brian Grogan

Election News

Rick Johnson and **Brian Grogan** were recently re-elected to three-year terms as members of the firm's board of directors. Rick serves as the firm's Chief Financial Officer and is chair of our communications practice area. Brian chairs the firm's Associates Committee and is also chair of our infrastructure and municipal communications practice areas. They will each continue practicing law on a full-time basis in addition to handling their management responsibilities. Rick and Brian join returning directors, **Kevin Busch**, **Susan Rhode**, **Dave Senger**, and **Tom Shroyer**.

Jana Aune Deach, a member of our family law practice area, has been appointed as adjunct director for 2012. Adjunct directors are shareholders who serve as non-voting members on our board of directors for one year. The adjunct director program is intended to train future leaders of the firm.

Jennifer Reussé, Kim Bonoumo, and Valerie Means

New Shareholders

We are pleased to announce that three attorneys have been elected shareholders: **Kim Bonoumo**, **Valerie Means**, and **Jennifer Reussé**. Kim, who is a member of our family law practice area, started her legal career with the U.S. Army Judge Advocate General's Corps before going into private practice in North Carolina in 1993. She joined our firm in 2009. Valerie, who is a member of our regulated entities practice area, came to the firm in 2010 from the Minnesota Attorney General's Office. From 1995 to 2005, Valerie was in private practice in Illinois, concentrating on civil litigation in state and federal court. Jennifer, who is a member of our real estate practice area, has been practicing real estate law since 1997, initially with a Washington, D.C. firm, then as in-house counsel for a housing developer. She has been with our firm since 2005.

Two New Attorneys Have Joined the Team

Clayton Chan has joined our wealth preservation and estate planning practice area. Clayton works closely with individuals and families to craft customized and holistic estate plans that address their personal, emotional, financial, and tax-driven goals and objectives. He also works with owners of closely-held businesses regarding succession and family legacy planning. Clayton received his law degree, *cum laude*, from the University of Minnesota Law School, has completed the major degree requirements for a Master of Business Taxation from the University of Minnesota Carlson School of Management, and received his B.S., *cum laude*, in Economics from the University of Minnesota, Honors College. Prior to practicing law in the private sector, Clayton served as law clerk to Minnesota Tax Court Chief Judge Diane L. Kroupa, Judge George W. Perez, and Judge Raymond K. Krause. He also interned for the Probate Court of the Second Judicial District of Minnesota under Judge Michael T. DeCourcy.

Patrick Zomer has joined our business law and regulated entities practice areas. He helps clients navigate business and corporate laws, obtain or facilitate financing, and address data privacy issues. Pat's regulated entities practice focuses on state and federal regulation of the energy and telecommunications industries. Pat received his J.D., *summa cum laude*, from the University of St. Thomas School of Law and his B.A., *magna cum laude*, in Economics from Middlebury College. While at the University of St. Thomas School of Law, Pat served as the Publications Editor of the *University of St. Thomas Law Journal* and published an article examining the constitutionality of Minnesota's Next Generation Energy Act.

Patrick Zomer and Clayton Chan

ALERTS:

Plan Now for Huge Tax Increases in 2013!

Major changes in federal and state tax laws, scheduled to take effect on January 1, 2013, make it *imperative* to plan ahead now! The biggest impact will be the rise in the federal capital gains tax rate from the current 15% to a possible maximum of 23.8% (the final 3.8% of which is to help fund the new federal health care law) and the federal qualified dividends tax rate, which will almost triple, from the current 15% to a possible maximum of 43.4%. In addition, the highest federal ordinary income tax rate will increase from 35% to 39.6% and up to 43.4% on unearned income for certain taxpayers. This is expected to cause acquisitions and business sales activity to spike over the next six months, putting a premium on getting deals into the pipeline early.

In addition, on January 1, 2013, the federal estate and gift tax exemption will decrease to $1,000,000, and the top federal estate and gift tax rate will increase to 55%. The prospect of even higher death tax liability looms in states which have no estate tax this year, such as Arizona, Florida, South Dakota, and Wisconsin, which will add top estate tax rates of 16% to this burden. As a result of these scheduled changes, it is important to review your business and personal succession plans to ensure that you have maximized your current year transfers and gifts.

Enforcement Guidance on Consideration of Arrest and Conviction Record

The Equal Employment Opportunity Commission issued a long-awaited Enforcement Guidance on April 25, 2012, updating the EEOC's position on how an employer's use of criminal records can constitute discrimination based on race, national origin, religion, or gender. The Enforcement Guidance emphasizes the importance of a narrowly tailored exclusion and the opportunity for the applicant or employee to provide additional information as part of the process. The Enforcement Guidance also cautions that reliance on a state or local law requiring screening is not a defense if the law imposes a restriction that is not job related and consistent with business necessity.

If you would like assistance in assuring best practices in either of these areas, please contact your attorney at Moss & Barnett.

By Patrick T. Zomer

Pat Zomer is a member of our business law and regulated entities practice areas. He helps clients of all sizes navigate business and corporate laws, obtain or facilitate financing, and address data privacy issues. Pat can be reached at 612.877.5278 or ZomerP@moss-barnett.com.

Data Privacy: What's It to You?

Unless you have been the victim of identity theft or have been recently prompted (yet again) to approve Google's or Facebook's newly revised terms of service, you probably spend little time thinking about data privacy. For many, data privacy is a problem for Internet giants (Google or Facebook) or big companies that hold millions or billions of data records (think Sony, TJX, or Global Payments). It is becoming clear, however, that all businesses, regardless of size, face risks associated with data privacy. Failing to adopt appropriate protections can lead not only to significant monetary penalties, but also undermine the trust that serves as the foundation of all commercial interactions.

Data Breach – The Cost of A Breach When You Do Not Have Adequate Protections

The announcement that Global Payments, a third-party processor of Visa and MasterCard transactions, suffered a data breach probably had many of you channeling your inner Yogi Berra, saying, "It's déjà vu all over again." Global Payments is only the latest headline-grabbing data breach, a list that includes Hartland Payment Systems, TJX, Sony, and Epsilon. For each of these companies, direct breach costs likely exceeded $100 million, a number only eclipsed by the indirect damage from diminished reputations, class action lawsuits, and falling stock prices.

While incidents at large companies attract headlines, smaller organizations are more likely to suffer data breaches than industry titans. According to a Verizon study, data breaches primarily occur at organizations with 100 or fewer employees. With direct breach costs of approximately $200 per record, data breaches at these smaller organizations can significantly impact the bottom line, in addition to eroding customer or employee trust.

These trends are magnified by the evolving understanding of what information is private. Modern American privacy law can trace its roots to the seminal 1890 law review article, *The Right to Privacy*, by Samuel Warren and Louis Brandies. Laws requiring the protection of data held by modern business, including Social Security numbers, account or credit card numbers, state identification or driver's license numbers, and Personal Health Information (PHI) can be directly traced to "the right to be let alone," in that each of these items can be used to dramatically intrude upon the data-subject's life. As technology changes the way we interact with the world, however, another principle from *The Right to Privacy* appears to be ascending: the right of an individual to control the extent to which his or her "thoughts, sentiments, and emotions" are communicated to others. The best example of this may be the Epsilon breach mentioned above, where the unauthorized release of names and email addresses was perceived as being as harmful as breaches involving data elements traditionally earmarked for protection. As privacy expectations evolve, more and more information held by businesses, including things as apparently innocuous as contact information, may require protection.

Policies and Codes of Conduct: The First Line of Defense

So what is a business to do? While there is no shortage of splashy new systems, technology, and software that can be directed at the problem, data privacy and security policies and employee training may be your best line of defense. Nearly four in ten data breaches are caused by the actions of negligent individuals inside organizations. Appropriately crafted policies and procedures can help employees

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avoid the mistakes that can lead to a data breach. Furthermore, with consumers increasingly using privacy as a metric with which to evaluate different companies, data privacy and security policies can become an important means of communicating an organization's values to the broader public.

Luckily, businesses looking to implement data privacy and security policies do not need to start with a clean slate. In 1973, the Department of Health, Education, and Welfare developed a Code of Fair Information Practices designed to protect information held by the federal government. Now commonly referred to as Fair Information Practice Principles (FIPPs), this framework was enacted into law in 1974 and governs the federal government's handling of personal information about individuals. Furthermore, the FIPPs have served as the foundation of several international data privacy frameworks. While expressed slightly differently depending on the context, the FIPPs generally address seven topics: focused collection, respect for context, individual control, transparency, security, access and accuracy, and accountability. Businesses with FIPP-based policies only collect data that is needed to fulfill specifically articulated purposes, restrict employee access to sensitive information based on business need, and make non-disclosure their default position.

Compliance Obligations

In addition to acting as a strong line of defense against potential data breach, policies are increasingly becoming a matter of legal or regulatory compliance. For example, 46 states have adopted data breach notification laws. Implementing data privacy and security policies can help organizations manage the timeline imposed by applicable notice statutes and fulfill their legal obligations to contact affected individuals. There is also a growing list of federal statutes that mandate certain data privacy and security protections, including those implemented through the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, the Health Insurance Portability and Accountability Act (HIPAA), the Health Information Technology for Economic and Clinical Health (HITECH) Act, and the Sarbanes-Oxley Act. By formalizing policies regarding the collection, use, and disposal of sensitive data, companies can protect themselves against the leading cause of data breach and meet their compliance obligations.

Consumer Privacy Bill of Rights

The Obama Administration recently released a proposal that, if adopted, may begin to harmonize data privacy regulations into a single framework. The so-called "Consumer Privacy Bill of Rights" is designed to supplement existing statutes, including those federal statutes mentioned above, and establish a baseline level of protection that would apply broadly across the economy. The baseline draws heavily from the FIPPs and would govern commercial uses of any data that is linkable to a specific individual. In addition to giving consumers certain rights, including increased control over how their data is collected and used, the Consumer Privacy Bill of Rights includes a national data breach notice standard. It is clear that, if adopted, this proposal could dramatically realign the legal and regulatory protections afforded personal data.

Why Me? Why Now?

Even without a dramatic realignment of public policy triggered by the Consumer Privacy Bill of Rights, there are several reasons why modern businesses should be proactive in addressing issues of data privacy and security. With insider negligence remaining the most common cause of data breach and the universe of data entitled to protection growing, implementing appropriate data privacy and security policies continues to be the first and most effective line of defense against data breach. Furthermore, even in the absence of overarching federal policy, existing laws impose substantial data privacy and security compliance obligations—obligations that apply to more than the Googles and Facebooks of the world. Finally, the Federal Trade Commission continues to bring enforcement actions against companies that do not adhere to their published privacy practices. In the modern economy, businesses that dismiss or ignore issues of data privacy and security do so at their own (and their investors') peril.

Ultimately, data privacy and security is about trust. Customers who cannot trust a business to protect data will not be customers for long. Employers that cannot be trusted to protect data will find it increasingly difficult to process payroll or administer health plans when employees rightfully become squeamish about sharing pertinent information. The exchange of information that acts as the foundation for the modern economy is predicated upon both sides upholding the trust they mutually vest in each other. Proactively managing issues of data privacy and security demonstrates a business that is worthy of that trust and empowers the business to act in ways that reinforce the faith vested in them.

Moss & Barnett can help businesses identify their data privacy needs and find solutions before problems arise.

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The duty of loyalty requires directors and officers to discharge their corporate duties in good faith and in a manner reasonably believed to be in the best interests of the corporation. Generally, the duty of loyalty prohibits directors and officers from assuming positions in conflict with the corporation's interests and from engaging in self-dealing by usurping corporate opportunities. Directors with personal interests in corporate transactions still may engage in such a transaction as long as doing so is fair and reasonable to the corporation, the transaction is disclosed to the shareholders, and the transaction is approved by the shareholders or ratified by the directors.

B. Managers and Governors of Limited Liability Companies

The fiduciary duties owed by managers and governors of limited liability companies ("LLCs") are identical to those of directors and officers of corporations.

C. Partners

Partners in a partnership owe duties of loyalty and care to the partnership and to the other partners, with one exception: In limited partnerships, only general partners owe fiduciary duties. Both duties must be discharged consistently with the obligation of good faith and fair dealing. In the partnership setting, the duty of loyalty includes:

- Accounting to the partnership and holding as trustee for it any property, profit, or benefit received by the partner;
- Refraining from dealing with the partnership as or on behalf of a party having an interest adverse to the partnership; and
- Refraining from competing with the partnership.

Courts have limited the duty of care in the partnership setting to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

Although not specifically considered a fiduciary duty, partners must also disclose material facts to each other. In limited partnerships, this disclosure requirement includes, upon demand of another partner, providing full information regarding the partnership's state of activities and financial condition. In other partnerships, the disclosure duty includes providing access to the partnership's books, records, and information concerning its business and affairs.

D. Shareholders in Closely-Held Corporations

In a closely-held corporation (defined in Minnesota as corporations with *35 or fewer* shareholders), shareholders owe duties to other shareholders that can be considered fiduciary in nature.

Shareholders are held to the highest standard of integrity and good faith in their dealings with each other. They must deal openly, honestly, and fairly and must disclose material information to each other about the corporation. Finally, those in control of closely-held corporations must refrain from acting in a manner that is unfairly prejudicial or in a manner that frustrates the reasonable expectation of the minority shareholders. If they do, the prejudiced shareholder may be entitled to equitable relief, and the corporation may even face involuntary dissolution.

E. Agents

Agency is the fiduciary relationship that results from manifestation of consent by one person to another that the other shall act on his or her behalf and subject to his or her control, and the consent by the other party to so act. Agency principles are often used by courts when considering whether to impose fiduciary duties upon a party to a transaction. If a party is deemed to be an agent, that party has a duty to act for the benefit of the principal in all matters related to the agency relationship. Agents also owe the duty of full disclosure and must exercise utmost fidelity toward the principal.

F. Employees

Employees have a fiduciary duty to act in the interest of the employer and not as an adversary. Employees must not solicit business of the employer before leaving the employment relationship, must not disclose or misappropriate the employer's trade secret information, and must refrain from engaging in serious misconduct akin to embezzlement or referring customers to competitors. The fiduciary duties of an employee are heightened if the employee is also an officer, director, shareholder, or partner in the employing entity.

G. Insurers

An insurer owes its insured a fiduciary duty to represent the insured's best interests, and to defend and indemnify the insured. The insurer's duty is measured by the "good faith" standard. To exercise good faith, the insurer must view a situation as if there were no policy limits applicable to the claim and give equal consideration to the financial exposure of the insured.

H. Trustees

An individual having legal title to property held in trust for the benefit of another owes fiduciary duties to that beneficiary. If there are multiple beneficiaries, the trustee must deal impartially with the beneficiaries and manage the trust with equal consideration for the interests of all beneficiaries.

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A trustee's other duties include:

- Preserving trust property;
- Keeping trust property separate from the trustee's own property;
- Disclosing to the beneficiaries all facts pertaining to the trust;
- Keeping complete and accurate records;
- Administering the trust solely for the benefit of the beneficiaries; and
- Dealing fairly with all beneficiaries.

Further, a trustee having trust powers under wills, agreements, court orders, or other instruments owes a duty to invest and manage the trust's assets prudently. This duty includes considering the purposes, terms, distribution requirements, and other circumstances of the trust and considering the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. In satisfying the "prudent" investment standard, the trustee must exercise reasonable care, skill, and caution. Finally, trustees must refrain from investing or managing trust assets in a manner that defeats the settlor's intent or the trust's purposes.

I. Real Estate Brokers

Residential real estate brokers' duties to their principals arise out of agency principles. Brokers owe their principals the duties of good faith and loyalty. Part of the duty of loyalty requires brokers to divulge all material facts of which the broker has knowledge that could adversely and significantly affect an ordinary purchaser's use or enjoyment of the property or any intended use of the property. The duty to disclose also requires brokers to make full disclosure of a prospective buyer's financial status. Further, from the outset of the relationship, brokers are required by statute in Minnesota and many other states to set forth the type of agency relationship that will exist in an agency disclosure form (*i.e.*, seller's broker, buyer's broker, subagent, dual agency broker, or facilitator).

Conclusion

Whenever embarking on a new relationship, purchasing shares in a closely-held corporation, accepting employment, or becoming a trustee, be sure you know exactly what is expected of you and the other parties to the transaction or venture. This article merely brushes the surface of an area of law that affects us all in a variety of ways. Obtaining the advice of counsel is the most efficient and reliable method of becoming informed and avoiding potentially devastating consequences that may result from even the smallest deviation from your legal duties.

Succession Planning for Family-Owned Cabins continued from page 3

However, despite the increasing use of LLCs as a cabin ownership tool, many insurance carriers struggle with the concept of using an LLC and may charge higher premiums for the "business" operation.

Cabin Trust. Another option when multiple generations are involved is to use a trust. A trust is a vehicle for holding title to the cabin and transferring it between generations without the requirement of probate, and the trust agreement can set forth the terms governing use of the cabin. Using a trust to hold title to a cabin has the advantages of keeping the terms of the agreement private, and allows a long-term savings that avoids costs, delays, and attorneys' fees associated with probate.

Estate tax planning is still a valid issue for many families, and potential changes in federal estate tax may make it an issue for many more. A common estate tax-minimization technique to use with cabins is the qualified personal residence trust ("QPRT"). With this technique, an owner creates a QPRT, then gifts the cabin to the trust. The owner retains the use of the property for a set term of years, after which the property then passes directly to the beneficiaries (usually the owner's children). The owner who retains only a partial interest in the property is treated as making a gift of less than the full value of the property. At the end of the term, however, the full value of the property passes to the beneficiaries without being included in the owner's estate. This allows many families to pass a family cabin to the next generation for a significantly reduced transfer tax cost.

A QPRT can be a good tax planning device. However, it does not solve the management problems associated with family cabins. In addition, if the owner does not survive the term of the trust, the tax planning goals will not be realized. Perhaps most importantly, if the owner does survive the term, he or she has to lease back the property to be able to continue to use it. Thus, although a powerful tax planning tool, an owner must carefully decide whether a QPRT is appropriate for a family cabin.

Conclusion

Family-owned cabins can be a great bonding experience or can tear a family apart. Proper planning can minimize the strife and preserve the original and paramount goal of owning a cabin—having it available as a relaxing family retreat.

Sharon Artmann Named Paul Van Valkenburg Service Award Recipient

Moss & Barnett established the Paul Van Valkenburg Service Award* in 2001. It is awarded annually to a Moss & Barnett team member in recognition of his or her outstanding volunteer contributions to the community. The award is named after our retired colleague, Paul Van Valkenburg, whose volunteer career set an example of the spirit of service and dedication that we seek to promote and recognize throughout our firm.

Sharon Artmann, a legal assistant in our family law practice area, was the 2011 recipient of the Paul Van Valkenburg Service Award. Sharon was given this award based on her work with a wide range of charitable organizations, including:

Sharon Artmann

Loaves and Fishes – Sharon has been a volunteer at Loaves and Fishes for 18 years. Once a month, Sharon goes to the Loaves and Fishes dining site in North Minneapolis to help serve meals to guests. The organization has eight other dining sites in the Twin Cities metro area. Its mission is to provide nutritious meals to people who are hungry in an atmosphere of hospitality at site locations where the need is greatest. It also works with other organizations to assist guests with additional basic needs that are key to becoming self-sufficient.

Salvation Army – Sharon is a "Toy Shop Elf" who greets and escorts parents of disadvantaged families while they select Christmas gifts for their families at a Salvation Army toy shop. She also has been a Salvation Army bell-ringer and wrapped gifts for children of prisoners.

Ridgeview Medical Center Hospice – Sharon has been a hospice-trained volunteer in the program since 2005. She volunteers at the Marie Steiner Kelting Hospice Home visiting with patients, answering the phones and door, and delivering food to patients. Sharon also provides respite care to caregivers and their families in patients' homes.

Sharon has also volunteered for **Habitat for Humanity**, **Feed My Starving Children**, and her local **public library**.

Past recipients of the Paul Van Valkenburg Service Award include **Chuck Parsons**, **Tom Keller**, **Adrienne Summerfield**, **Kevin Busch**, **Cheryl Riggs**, **Marcy Frost**, **Bill Haug**, and **Jennifer Reussé**. We are proud to recognize Sharon and our other award recipients for their willingness to be a part of organizations focused on improving the lives of others.

**The Paul Van Valkenburg Service Award includes a cash donation by the firm to the recipient's chosen charity, a special recognition ceremony, and a commemorative piece of pottery created by Minnesota artist, Steve Hemmingway. For 2011, the firm's donation was made to Loaves and Fishes.*

Minnesota Estate Administration Deskbook

The recently published fourth edition of the *Minnesota Estate Administration Deskbook* provides a central resource for courts, attorneys, and others to answer estate administration questions. **Cindy Ackerman** has been a co-author of the Deskbook since the first edition in 1991. Cindy's chapters, *Miscellaneous Procedures* and *Ancillary Administration*, provide practical solutions to messy estate administration problems.

Cindy Ackerman

We've Got You Covered

Moss & Barnett is a member of Business Counsel, Inc. ("BCI"), an organization of law firms located in 36 states in the United States and the District of Columbia, with additional firms located in Belgium, Canada, China, France, Germany, Israel, Japan, the Netherlands, Poland, Puerto Rico, Russia, Singapore, Ukraine, United Arab Emirates, and the United Kingdom. The members of BCI are all focused on providing high-quality legal services to the corporate business community.

The members of BCI meet twice annually to discuss and explore various issues of common interest to each other and to their clients. At these meetings, representatives of the various firms have a valuable opportunity to discuss specific legal trends and developments and to exchange ideas and information on important and often fast-developing issues confronting the business and legal community. Importantly, attendees are afforded the valuable opportunity to meet and interact with representatives of firms from throughout the network.

BCI is not a formal or informal arrangement for client referrals, but rather affords members with a high-quality roster of firms to consult in other parts of the United States or throughout the world whenever that is appropriate or desirable. Member firms do not share or split fees or pay any other consideration for any client referrals.

As a result of our membership in this prestigious affiliation, Moss & Barnett has been able to seamlessly and instantaneously transition clients requiring services in other geographic areas to the highest-quality law firms sharing Moss & Barnett's dedication to client success and satisfaction. To learn more about Business Counsel, Inc., visit their website at businesscounsel.org.

Moss & Barnett Teams Up with Dave Lee and WCCO Radio for Dave Lee's Gutter Bowl 6

Dave Lee Gutter Bowl 6 (February 16, 2012). From left to right: Moss & Barnett attorneys Dave Biek and Taylor Tarvestad-Sztainer, WCCO Radio and Minnesota Law host Steve Thomson, Moss & Barnett attorney Kim Bonoumo, Moss & Barnett CEO and Minnesota Law host Tom Shroyer, and Moss & Barnett Marketing Coordinator Debbie Weinstock.

Moss & Barnett was proud to once again team up with Dave Lee and WCCO Radio for Dave Lee's Gutter Bowl 6 which was held on February 16, 2012. The Dave Lee Gutter Bowl is an annual bowling tournament to benefit the University of Minnesota Amplatz Children's Hospital. The University of Minnesota Amplatz Children's Hospital is affiliated with the University of Minnesota Medical School and provides a broad spectrum of pediatric programs and services ranging from pediatric general surgery, imaging and neonatal and pediatric intensive care to cardiac and oncology services and blood and marrow and organ transplantation. The hospital also is home to Minnesota's only children's behavioral inpatient unit and programming exclusively devoted to children ages 12 and younger. To learn more about the University of Minnesota Amplatz Children's Hospital, visit uofmchildrenshospital.org.

MINNESOTA LAW, Presented by Moss & Barnett
Saturdays at 11 AM on WCCO 830AM

This one-hour program focuses on interesting facts about the law and important new developments in the law and features a different Moss & Barnett attorney and topic each week. Past *MINNESOTA LAW* shows this winter included Moss & Barnett attorneys Cindy Ackerman on "Making Gifts in 2012" (January 21, 2012); Kim Bonoumo and Maj. Lyndsey Olson, Deputy General Counsel/Judge Advocate of the Minnesota National Guard, on "Should the Family Law Courts Give Special Protection to Deploying Military Parents" (February 11, 2012); and Jennifer Reussé on "Legal Issues for Residential Landlords" (February 25, 2012); as well as shows about the Minnesota State Bar Association's Mock Trial (March 10, 2012) and Wills for Heroes (May 5, 2012) programs. Our upcoming programming this summer will include Moss & Barnett attorney Pat Zomer on data privacy issues (June 9, 2012) and special guest, Michele Timmons, Revisor for the Minnesota Office of the Revisor of Statutes (June 16, 2012), in addition to many of our other Moss & Barnett attorneys on a variety of topics. To learn more about our upcoming programs and to listen to any of our past broadcasts, visit our *MINNESOTA LAW* website at mossandbarnettonwcco.com. You can also follow us on Twitter @MinnLaw.

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