

# AVOID LITIGATION BY HELPING PLAN SPONSORS BECOME BETTER FIDUCIARIES



Retirement plans, especially 401(k)s, have been getting more attention lately in the press as well as from regulators and litigators. When a problem or issue arises or is suspected, regulators and litigators have always “thrown a wide net” to include service providers. Because of this, as a service provider, you can get caught defending yourself and your actions even when you have done nothing wrong. This means higher costs and difficulties for not only the plan sponsor, but also for you.

Investment fiduciaries are in a unique position to help educate plan sponsors because they understand what it means to be a fiduciary. Most other service providers aren’t fiduciaries and thus don’t truly understand a fiduciary’s role and importance.

### NOT ALL FIDUCIARIES ARE CREATED EQUAL

Even though plan sponsors are fiduciaries, they’re also different from you, the investment fiduciary. An argument can rightly be made that a fiduciary is a fiduciary no matter what. But the way in which plan sponsors view themselves often differs from how they approach their responsibilities. You and the plan sponsor must legally do what’s in the best interest of your clients or, in the case of a retirement plan, of participants/beneficiaries.

You both must also follow the written document (the plan as well as

the investment policy statement [IPS]) and document your decision-making process. This documentation becomes a very big benefit if a regulator or litigator questions why a decision was made. It allows fiduciaries and regulators to rely less on memory and more on specifics.

But after this, the approaches to being a fiduciary begin to differ.

First, you, as an investment fiduciary, think of yourself as a “full-time” fiduciary. No matter the day or time, anytime you are conducting business, you are a fiduciary and must act as such. The typical plan sponsor fiduciary is a business owner or HR employee wearing multiple hats with numerous business-related priorities. These fiduciaries (even up to the board of directors) usually think they’re conducting fiduciary duties only a couple of hours a week or month. Their regular, full-time jobs are usually outside of the retirement or investment industry. Those who are on plan committees meet quarterly or less often.

Given this, it’s not surprising that they consider themselves to be “part-time” fiduciaries. It’s rare they understand that they wear the retirement plan fiduciary hat all day, every day.

This is a dangerous misconception on the part of these fiduciaries. The truth is that they are full-time fiduciaries—with full-time liability—whether they like it or not.

### KNOW YOUR SOURCES

Many plan sponsors rely on and often have been “educated” by non-fiduciaries like securities brokers or record-keepers who don’t know what it’s like to be a fiduciary. Because they aren’t fiduciaries, their advice about what a fiduciary must do is often flawed and incomplete. In the worst cases, they are simply telling plan sponsors what they want to hear in order to close the deal.

Our firm found this out first-hand. We had a consulting client who’d been instructed by the company president to hire service providers for the 401(k) plan. For investments, she knew a securities broker and asked for help. The broker “educated” her that it was okay to allow the broker to help prepare the request for proposal, so he went ahead and did the documentation for the research.

Our client was head of human resources, but she had never been involved in a company that had a 401(k) plan. Her 8-to-5 job was hiring, dealing with personnel issues, supervising, business development—anything but being a plan fiduciary. In fact, she was the named fiduciary, but the board had given her no education or guidelines. She (and the broker) didn’t know she had violated her fiduciary duty until we educated her.

Second, and more importantly, while the investment fiduciary is a fiduciary in a single area—namely, investments—the plan sponsor’s fiduciaries must be fiduciaries in all aspects of the retirement



plan, including custody of assets, directing of investments, recordkeeping, and benefit decisions.

The Department of Labor and the courts have mandated that if the plan sponsor does not have expertise in any of these areas, then it must hire experts, but it remains the primary fiduciary and still must monitor all activities. (This is similar to when a registered investment advisor hires a sub-advisor—you are still the primary advisor/fiduciary on the account. But it's harder for the plan sponsor because it is not hiring a firm in its own industry, where it has expertise).

Unfortunately, many plan sponsors are told by sales people that, when they hire a third-party (fiduciary or not), they're no longer responsible. It's not true, but because plan sponsors either don't see themselves as fiduciaries or don't realize the scope of their responsibilities, they listen to the "experts" and are steered in a direction that could breach their fiduciary duty.

## FIDUCIARY RESPONSIBILITY

The majority of plan sponsors feel that all their service providers take on a fiduciary role with their plans. They don't realize that being a fiduciary is what you are and how you do business and make decisions. They don't realize that they have to keep their own minutes, make their own decisions, and document how and why they made those decisions.

There are many ways that, as an investment fiduciary, you can support plan sponsors without accidentally creating compliance issues of your own. You're in a position to talk as one fiduciary to another. You're a full-time fiduciary and understand the problems, issues, mindset, and, in some ways, how to make the process easier for them. You shouldn't consult in this area and tell them specifically what to do with their plan, but you can help them understand the importance and responsibilities of being a fiduciary.

This education includes:

### **Being a Fiduciary.**

**Do:** Remind them that being a fiduciary is a full-time job and that they can't delegate or contract their

responsibilities. Every action and decision for the fiduciary is important and can cause a breach of fiduciary duty. They are responsible for monitoring anyone they hire (fiduciary or non-fiduciary) and what happens in their plan.

**Don't:** Assume they understand the importance of being a fiduciary.

### **Documentation.**

**Do:** Tell them that retirement fiduciaries need to follow documentation, such as the plan document and the IPS. Inform them that all fiduciaries must also document their decisions, what they considered to make their decisions/choices, and any monitoring and reviewing of activities they perform. You can talk generally about the types of documentation you create as a fiduciary, such as file notes and minutes.

**Don't:** Be specific in identifying exactly what they need to do. This is the job of the board of directors or plan committees.

### **Policies and Procedures.**

**Do:** Tell them about the need to have policies and procedures in place to make sure there are internal controls and that tasks are done in a compliant manner and to a standard. Let them know that these policies and procedures are usually approved by the board of directors.

**Don't:** Write their policies or procedures or tell them the types of procedures that need to be done. This is the job of the board of directors or plan committees.

### **Communication.**

**Do:** Inform them of the importance of client communications for a fiduciary. If you're the current advisor on the plan, you can talk to them about any plan-related investment information that needs to be communicated to the participants and beneficiaries.


**Don't:** Tell them specifically what they must communicate, except for investment-related issues. They have specific regulations per the Department of Labor and IRS that their ERISA attorney, qualified plan consultants, or other service providers will advise them to provide.

## MORE THAN INVESTMENT CHOICES

You can also help plan sponsors make the right investment choices; after all, you are the investment expert.

The first place to start is to educate the plan sponsor on the importance of an IPS and the types of investment choices that can help participants save for retirement. It is more than just picking the investments—you must remember that the plan sponsor is still the primary fiduciary. Even if you are a Section 3(38) (i.e., investment manager), they still need to understand several things, including why certain investment classes are being included, and they must approve the IPS. They don't need to understand why one ETF or mutual fund was chosen over another, but they're still going to be responsible for approving the IPS and making sure that the assets chosen match those defined in the IPS.

Admittedly, getting a plan sponsor to understand and accept its responsibilities as a fiduciary can be difficult. To help change this attitude, you need change their perception that "good enough" is sufficient for a fiduciary—it isn't. You can do this by providing them with third-party articles, whitepapers, and webinars, or even by bringing in a qualified plan consultant or letting them use a 401(k) fiduciary compliance tool like The FIRE System ([thefiresystem.com](http://thefiresystem.com)).

RIAs are in a unique position to help plan sponsors. You can talk first-hand about what it means to be a fiduciary, a full-time fiduciary, and how they can fulfill those commitments on behalf of their plan's beneficiaries and participants. In doing so, you will become a trusted advisor. 

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