

## Ask a Lawyer

By Steven Leskin

Q~ What is a fiduciary?

A~ There is a lot of confusion about what a fiduciary is and what a fiduciary can do. To explain the term, I want to start with a legal concept called "agency." Agency is a contract principal. There are two parties to an agency contract: the principal and the agent. An agent acts on behalf of the principal. The agent can only act within the scope of his or her agency. The scope of the agency is determined by the two parties.

For example, a real estate agent works for either the buyer or the seller. The agency can make and accept offers to sell a home. The ability to make or accept an offer is within the scope of the agent's authority. The agent cannot make an offer above what he or she is authorized to make by the seller. The agent owes the principal a duty of loyalty, in other words, in the real estate setting, the agent could not work for both the buyer and seller. Any decisions made by the agent are made within the scope of the agreed agency relationship.

A fiduciary is a type of agency. Someone who has a fiduciary responsibility can make decisions on behalf of someone else. Unlike an

agent, a fiduciary has to act with the best interest of the principal and the decisions the fiduciary makes must be objectively reasonable and free of any personal gain. For example, a fiduciary relationship might exist when a child takes care of an elderly or mentally incompetent parent. The child could decide where the parent lives, where and when to sell a house, or what social services are appropriate to the parent.

Fiduciary does not mean financial. A fiduciary relationship might be imposed as a matter of law, eg, a conservator, or it might develop over the course of a relationship. There are very few fiduciary relationships in business. Most business relationships are agencies relationships.

Q~ I got a speeding ticket. I went to court and brought with me a printout showing that my speedometer was incorrectly measuring my speed. It was about ten percent to slow. When it said I was going 55 mph, I was really going closer to 68 mph. Why was I still convicted of speeding if the speedometer was wrong and I could prove that the speedometer was malfunctioning?

A~ This is a deeper issue than it appears and gets to the heart of criminal law.

In order to be guilty of a crime, there must be both an intention and an act. The best example is a pre meditated murder. In pre meditated murder, a person plans and kills someone. If the killing was in a fit of rage or happened as the result of carelessness, then there is less intent, though there is still an action that resulted in someone's death. Since the intent to kill is considered a more heinous crime, it is punished more severely.

When a driver does not conform his or her driving to the motor vehicle code, it is considered a violation of law, not a misdemeanor or felony. A violation of law does not require an intent. What matters with the motor vehicle code is that a driver observes the code, not that he or she intends to or not. For example, if someone runs a stop sign, it is not a

defense to say, I intended to stop the car. The only act that is required is the action to stop the car in response to the stop sign.

It is the same thing with violating the speed limit. It does not matter how fast you intended to drive your car, it only matters how fast your car was going. It is not relevant for a conviction that you intended to observe the speed limit. The proof that you had that the speedometer was incorrect only confirms that your car was traveling too fast and that you were violating the motor vehicle code.

Q~ What's the hardest case you ever tried?

A~ Several years ago, an attorney friend in Eastern Oregon called and he asked me to take a case of his. Bill was a down-winder. He was born blind and suffered various cancers most of his life. His health was never good. When Bill asked for a favor, it was always the better part of grace to say yes.

The case he had for me involved an immigrant family who bought some property in Ontario. I forget how much they purchased, but it might have been about a hundred acres. The family then hired a local farmer to farm the land. They had a common sharecropping arrangement. The landowner paid for the seed and chemicals, the water and the mortgage on the land. The sharecropper farmer supplied the labor and equipment. If I recall correctly, the farmer received one third of the gross receipts from the sale of the crop.

The problem came at harvest time when everyone was settling up. As it happened, the sharecropper had multiple accounts with several co-ops. When crops came in from the landowner, they were transported to one of the co-ops. However, once a truck containing the crop left the farm, there was no proof where the crop came from. And, once the crop was delivered to the co-op, there was no way to prove where the crop came from, except by what the drivers told the co-op.

When it came time to settle up,

the landowner received a very small sum. The farmer, who had multiple farms, received a lot of money from various sources. It was impossible to account for the crops which left the landowners property.

It turns out that the main street in town was named after the farmer. It turned out that the farmer's daughter worked in the court house. It turns out that the farmer had dealings with most of the members of the jury pool. (To the courts credit, they forbid the daughter from working on the case, and brought in a judge from out of the county.) And, it also turned out that the landowner had an attorney from Portland (me).

The landowner had kept notes on the number of trucks leaving his property and the crops. He knew about how much potatoes should have come off each acre of his land. However, he just did not have sufficient proof to convince a jury. And, further, he was sued by the sharecropping farmer for lost profits when he ended the contract before the end of the growing season.

The landowner lost because he did not have sufficient evidence to prove with reasonable certainty how much money he lost- his calculations were considered speculative. Despite proving in court that the suit against the landowner was based on fabricated data, the landowner still lost. He was required to pay the sharecropper money.

This one case has always bothered me as a profound injustice. The landowners were required to declare bankruptcy. I think the courts failed. Going to court is always a risk, and the results are never certain. And, some times the historical reality of what actually happened is far different than what results at trial.

*Steven Leskin is an attorney in North Portland. He has been in practice since 1992. You can submit a question to him through [www.ModestMeansLawOffice.com](http://www.ModestMeansLawOffice.com) or through the Vernonia's Voice website.*

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