

# No Mingling with Commingling

## Fiduciary Duties and Accounts

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**B**ail Agents are accustomed to dealing with other people's money and property. They normally deposit cash received into one or more fiduciary accounts. The fact that may escape many agents is that there are all sorts of legal consequences and considerations arising out of the way they handle this common process. Since the key to controlling the risk is in understanding the risk, it makes sense to briefly examine the legal aspects of these arrangements.

A Bail Agent needs to understand what it means to be a fiduciary. The term fiduciary is frequently used by courts and lawyers. The word is often defined in these terms: a fiduciary is one who owes to another, duties of good faith, trust, confidence and candor. A second view, more closely related to the bail bond business, is that a fiduciary is one who must exercise a high duty of care in managing another's money or property.

Most people who understand the duties of a fiduciary are not eager to accept that status. Inevitably, bail agents become fiduciaries whether or not they want to do so. The burden of being a fiduciary comes with the territory. The problem with being a fiduciary is that it involves a liability risk if fiduciary duties are not properly fulfilled.

Every bail agent isn't necessarily an agent as that term is defined in law. The common law of agency is that an agent owes fiduciary duties to his principal. Consequently, if a bail agent is hired or appointed to execute bail bonds for a particular surety, that bail agent is likely to be viewed by lawyers and courts as an agent owing fiduciary duties to the company for whom he or she is executing bail bonds. That company will be viewed by the courts as the bail agent's principal.

Similarly, when an agent accepts collateral from a person seeking a bond (a bond customer) the agent normally will be a fiduciary as to that bond customer. Whether the deposit of collateral with the bail agent is seen as a bailment, a security agreement, a trust arrangement or some other type of transaction, the result is likely to be the same. Fiduciary duties will descend upon the bail agent, and he will owe duties to the bond customer regarding the way the collateral is handled.

Some states have addressed the subject of customer collateral deposits by statute. Indiana offers an example. Indiana's bail law includes a provision stating that when a bail agent accepts collateral the collateral shall be considered to have been taken in a fiduciary capacity. Bail agents should check to see if their individual state's

laws contain a similar provision.

The next fact an agent needs to understand is that there is a commonly recognized legal cause of action (i.e. basis for complaint) known as a breach of fiduciary duty. This type of lawsuit allows a surety or bond customer to sue a bail agent who fails to handle the premium (in the case of a surety) or the collateral (in the case of a bond customer) with the level of care, honesty and loyalty required of a fiduciary. If a bail agent mishandles or mismanages funds entrusted to him, even temporarily, he may find himself liable for any resulting losses.

It may be useful to illustrate the fiduciary duty problem by considering the practice of using a single fiduciary account for all bond customer cash collateral. Such an arrangement means that a bail agent might owe fiduciary duties to every customer who provided cash collateral for deposit into the account. If a creditor of any of these bond customers managed to freeze or get access to the account proceeds, the bail agent might owe explanations or more to all of the bond customers whose money went into that account. If the agent was unable to account for all of the deposits, withdrawals, expenses and income related to the account, multiple lawsuits could result.

The most effective strategy available to a bail agent to deal with these fiduciary rules is to use comprehensive documents to minimize the agent's risk. A well

thought out collateral deposit agreement is one example of such a document. Courts will typically defer to an agreement made by two parties so long as it appears to be fairly reached (no fraud, oppression or unfair advantage) and not illegal. This fact gives a bail agent a chance to sharply define in his collateral agreement exactly how the collateral will be handled. Risks which would normally attend the particular method used by a bail agent can often be shifted to the bond customer, but this requires insight and planning. In most cases, it will be time well spent.

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Laws vary from state to state, so the preceding article may not be directly applicable to every reader. Before making any significant decision on the basis of this article you should discuss the matter with your local attorney.

