

Avoiding Litigation as a Fiduciary

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Keys to Avoiding Litigation as a Fiduciary

- Effectively communicate with interested parties
- Understand your duties under the governing document and the law
- Act in accordance with your duties
- Seek counsel and/or court instructions when necessary
- Document your work
- Effectively communicate with interested parties

It Starts and Ends With Effective Communication

- Obvious but often overlooked.
- Explain your role, set expectations, and follow through.
- Written communication is good/necessary, but phone calls/in person meetings often go further in establishing trust and building rapport.
- Communication is a two-way street. Beneficiaries and interested parties need to feel heard, understood, and respected.
- Don't shy away from tough conversations.

Get to Know the Interested Parties

- Start this process early.
- Know them as people (kids, birthdays, occupations, hobbies, etc....) and show them you care, even if you can't honor their requests.
- Understand their concerns and what drives them.

Understand the Governing Document

- Know the players, the distribution standards, the required disposition of assets, and other obligations
- Appreciate definitions within the instrument, and that commonly used language likely has been interpreted by Courts. For example:
 - HEMS Standard
 - Child, heir, descendant
 - Shall vs. may
- Understand the procedural administration requirements
 - Tie-breaker provisions for multiple trustees
 - Removal and appointment terms
 - Accounting / reporting to interested parties

Understand the Common Law Duties of a Fiduciary

- Duty to administer the document in good faith and in accordance with its terms
- Duty of loyalty, to avoid conflicts of interest, and not to commingle
- Duty of impartiality
- Duty of prudence and to diversify
- Duty to incur only appropriate and reasonable costs
- Duty to use exercise reasonable care, skill and caution in delegation
- Duty to control and protect trust property
- Duty to keep adequate records, and to inform and report to interested parties
- Duty to exercise discretion in good faith

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Accounting and Recordkeeping

- Fiduciaries have a duty to keep interested parties reasonably informed on the administration of the trust/estate and the material facts necessary for them to protect their interests.
- Fiduciaries typically must respond to beneficiaries' requests for information regarding the administration promptly or within a prescribed period of time.
- Frequency of regular accountings / reports will depend on the governing instrument and applicable law.
- Must be able to show your work and account for all transactions. Maintain records of time spent, receipts, disbursements, etc...

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Preventative Steps and Remedies

- Seek court approval of annual accountings and activities
- Seek court approval or direction on disputed issues
 - To construe, interpret or reform an instrument
 - To approve fees paid to trustee or professionals retained by trustee
 - To confirm an act taken by a person with respect to the trust/estate
 - To appoint a successor or special fiduciary
 - To encumber or dispose of assets in manner that may conflict with governing document
 - To approve a nonjudicial settlement

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The Painful Remedies

- Surcharge
- Disgorgement / return of property
- Loss of profits / use of asset
- Unjust enrichment
- Exemplary / punitive damages
- Civil theft

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When and Why to Involve Outside Counsel?

- Outside counsel can help fiduciaries navigate and mitigate conflict
 - Provides a new and fresh set of eyes on challenging issues
 - Provides a new voice in dealing with interested parties
- Don't wait too long to get outside counsel involved
 - At the first sign of trouble or before
 - If court action has already been filed, you've waited too long
- Find counsel suited to the challenges you face
 - Do you need advice on administration, litigation or both?
 - Hiring the wrong counsel will only add expense and set you back

Wrap Up

- Communication is key!!
- Understand your duties, fulfill them, and be prepared to show your work
- Seek court approval of your actions or instructions on when necessary
- Don't wait too long to get outside counsel involved