



LEGAL UPDATES

# Ten Top Tips for Fiduciaries to Avoid Litigation

09/22/2022 | 4 minute read

Fiduciaries sometimes find themselves in the unenviable position of facing conflict, whether with or among beneficiaries. In this article we offer some tips for preventing and managing conflicts and approaching the role and demands of a fiduciary with an eye toward avoiding litigation involving fiduciary roles.

## #1 – Communicate Early and Often

While it may seem obvious, communication can go a long way to avoiding or resolving conflicts. A fiduciary should set expectations for his or her role with beneficiaries early in the appointment. Along the way, it is also important to keep beneficiaries informed about the trust’s or estate’s progress and any issues or questions that may arise. Fiduciaries should also be willing to have tough conversations with beneficiaries, and listen to beneficiaries who need to feel heard, understood, and respected. While written communication is always a good practice to document your actions, in-person calls or meetings can also be crucial to building rapport.

## #2 – Know the Parties

A fiduciary should get to know the beneficiaries and other interested parties. This starts with knowing who the current and remainder beneficiaries are and keeping contact information current for everyone. A fiduciary should also understand what concerns parties may have and what drives them. The fiduciary should show care and concern for beneficiaries, their families, and their interests.

## #3 – Understand the Document

The fiduciary should fully understand the trust or will terms. Distribution standards, reporting obligations, and other required duties of the fiduciary likely will be contained in the governing document. Commonly used language likely has been interpreted by Courts, defined in statutes, or in the document itself and the fiduciary should understand those interpretations. For example:

- “health, education, maintenance and support” distributions

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- “child, heir, descendant” distributees
- “shall vs. may” standards

The fiduciary should also understand procedural requirements for fiduciary votes (e.g. majority or unanimous), for removal and appointment of fiduciaries, and for accountings to beneficiaries.

#### **#4 – Know the Duties of a Fiduciary**

In addition to requirements stated in the document, statutory and common law duties exist that bind fiduciaries, and fiduciaries should be familiar with them. These include:

- Duty to administer the trust or estate 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; and
- Duty to exercise discretion in good faith.

#### **#5 – Attend to Accounting and Recordkeeping**

Fiduciaries have a duty to keep interested parties reasonably informed about the administration of the trust or estate and the material facts necessary for them to protect their interests. Fiduciaries must also respond to beneficiaries’ requests for information regarding the administration within a reasonable time. The required frequency of regular accountings and reports will depend on the governing instrument and applicable law, and the fiduciary should adhere to these requirements. The fiduciary must also keep sufficient records to explain and track all transactions, showing time spent, receipts, disbursements, etc.

#### **#6 – Take Preventative Steps and Remedies**

A fiduciary can take some other preventative steps to prevent conflicts and litigation while also protecting itself. For example, a fiduciary can seek court approval of its accountings and activities. In advance, a fiduciary can seek court approval or direction on disputed issues such as modifying the document, approving fees, and confirming proposed actions. Seeking court assistance is permitted and even encouraged as a means of reducing conflict and risk.

#### **#7 – Understand Tax Implications**

A fiduciary should be cognizant of how the trust or estate may be affected by tax concerns. Currently, possible changes to taxation of capital gains might impact a trust investment portfolio or decisions regarding realization of gains. A generation skipping tax-exempt trust may be managed very differently and have different investment goals than a non-exempt trust. Determining whether to accumulate or distribute income may have tax implications for the trust versus its



beneficiaries that need to be considered. Thus, a fiduciary should have competent tax advice at its disposal to advise about these considerations, recognizing the duties are more than filing an income tax return.

## **#8 – Understand the Costs of Litigation**

A fiduciary that breaches a duty can be liable for damages caused by that breach. The fiduciary may be subject to a personal surcharge for monetary damages for loss of profits, loss of use of property, unjust enrichment, civil theft, or punitive damages. In addition, the fiduciary may be ordered to disgorge or return property or profits. Beyond monetary damages, a fiduciary's reputation or relationships can also be adversely affected by litigation.

## **#9 – Understand the Role of Legal Counsel**

Legal counsel can help fiduciaries navigate and mitigate conflict. Counsel can provide proactive advice about administration questions all along the way or can be a fresh set of eyes on challenging issues. Counsel can be a new voice and perspective in dealing with interested parties. Fiduciaries should not hesitate to involve legal counsel. It is better to obtain the advice of counsel at the first indication of trouble, or even before, than to wait until a court action has already been filed, when it may be harder to contain costs and manage the relationship and reputation.

Following the above tips can help a fiduciary better discharge his or her duties and manage the relationship with the trust's or estate's beneficiaries and other interested parties. Where being a fiduciary can be fraught with potential issues, conflicts, and liabilities, avoiding management of those issues – prior to litigation – is of critical importance. If you have questions or need advice in connection with a fiduciary role in which you are serving, please contact us!