Fiduciaries Under Fire: Minimizing Litigation Risk

Related Attorneys

Elizabeth E.W. Weinewuth

Related Industries

Financial Institutions

AUTHORED ARTICLE | 1.6.2014

The Bankers' Statement – Winter 2014

Published in the Winter 2014 issue of *The Bankers' Statement*

Serving as a trustee, particularly in times of economic recession and uncertainty, can be not only trying, but, at times, also risky. The law allows beneficiaries a mechanism for questioning your every move. While both the Ohio Trust Code and the trust language may limit your liability, the risk of litigation — and the costs, time and aggravation that come with it — persists.

But there are ways to minimize this risk and prepare yourself (and your file) for the battle should it come.

Effective communication with beneficiaries can mean the difference between a lawsuit and no suit. If litigation is initiated, the history of communication can mean the difference between winning and losing. That is, communication between trustee and beneficiary may control expectations and reduce distrust, thereby reducing the likelihood of a beneficiary lawsuit in the first place. Effective communication may also eliminate claims entirely, as a matter of law. For example, communications can trigger the statute of limitations. The Ohio Trust Code provides statutes of limitations (which completely bar claims, if applicable) that are triggered by formal reporting to beneficiaries (RC 5810.05) and also when a beneficiary "knew or should have known" of any alleged breach of trust (RC 5810.05(C)(4)).

But not all communication is created equal.

Beware of Email

Email correspondence, with its instant-message-like efficiency, can lull the drafter into a false sense of informality. When drafting, always consider that the document you are creating may become an exhibit in a courtroom one day.

Trustees should be particularly vigilant with their communications when the trust is depleting, or making regular distributions from principal rather than from income. This sets up a tension between the current beneficiary (for example, a widow of the settlor who seeks to maintain the lifestyle to which he or she has become accustomed) and the remainder beneficiaries (such as the biological children of the settlor of a prior marriage who would like something to be left for them). Of course, rely on the trust document for guidance concerning distributions, but communicate with the beneficiaries about the process you employ for making decisions regarding distributions. Explain the terms of the trust to them.

Before you put it in writing:

Before you put anything in writing, whether in email or in internal documentation tools:

- Make sure you understand the question you are answering.
- If you document a complaint, document the response.
- If you document action items that need to be accomplished, document the actions when they are taken.
- Know your audience.
- Remember: what you write today may find its way into evidence years later.

Calls from Behind the Lines . . .

Lawyers who represent beneficiaries may not identify themselves as lawyers right away and it may not be immediately clear who they represent. Lawyers who contact trustees may represent a current beneficiary, remainder beneficiary, contingent beneficiary, spouse of beneficiary, charitable organization, grantor, or some combination of these.

What do you do when a lawyer calls, and it's not your lawyer?

Pause. Be aware that this may be a routine contact or it may be a moment that you relive on a witness stand in several years.

Know your caller. Who does the caller represent? What is that person's interest in the trust? You can be casual in your tone (no need to sound defensive, even though your guard should be up). But, you should be prepared to ask follow-up questions (politely), such as asking for the name of a specific person who engaged the attorney.

Understand the questions. Get as much information from him or her as possible so that you can respond effectively, as well as document the call and relay the caller to in-house counsel, if needed.

Read between the lines. Do the questions or tone suggest the lawyer feels the trustee is not acting in the best interests of the beneficiary? Is he or she making suggestions about what ought to be done? Are any demands for information "as required by law"?

Get enough time. Agree to look into the matter or review the file and get back to the attorney promptly. Do not make any promises about a specific date for a comprehensive response until you fully understand the extent of the request and the complexity of complying.

Document the call. Emails to in-house counsel are one option. The communication is likely to be privileged and less likely to get lost in a file.

Consult with in-house counsel. Inform him or her of the background of the client relationship and the players. Prepare an action plan for responding to the attorney's inquiries that you both feel comfortable with. One step should be the timely response to the lawyer's questions (don't delay). Another might be engaging outside counsel to review the situation or analyze the position the lawyer may have hinted at (or come right out and said).

If consultation with higher-level executives is needed, do so with counsel present or at counsel's advice or request to preserve privilege.

It is never too early to consult with in-house counsel, if you have one, or outside counsel for advice concerning communication with beneficiaries. An email to counsel seeking legal advice or in anticipation of litigation is privileged and therefore protected from discovery in litigation. The same cannot be said for emails among trust officers or other executives. If you have concerns, trust your instincts. Just don't put your initial analysis of situation in writing. It may end up in litigation. Walk down the hall (or pick up the phone) and discuss with your team whether it's time to call for backup.