

# NYSSCPA

## LITIGATION AVOIDANCE TECHNIQUES FOR CPA'S SERVING AS TRUSTEES

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# SERVING AS A TRUSTEE ON YOUR CLIENTS' TRUSTS IS A REWARDING EXPERIENCE

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Cement	Cement your professional relationship with the client.
Impact	Make a real impact on the lives of the trust's beneficiaries.
Commissions	Receive an annual commission.

# THERE'S NO FREE LUNCH

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Risks abound when serving as a trustee. More and more, beneficiaries are suing their trustees for breach of fiduciary duty and other claims alleging nonfeasance or malfeasance by the trustee.

# MASTERING THESE THREE FUNDAMENTAL PARTS OF YOUR TRUSTS WILL SIGNIFICANTLY MINIMIZE RISK

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THE SUREST WAY TO GET  
TANGLED UP IN A TRUSTEE  
DISPUTE IS TO IGNORE YOUR  
BENEFICIARIES.

# KNOW YOUR BENEFICIARIES

# KEEP THE LINES OF COMMUNICATION OPEN

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- Meet with your beneficiaries.
- Talk with them on the telephone.
- Email with them.
- And be certain to document all of your touches with your beneficiaries.



# BENEFICIARY RED FLAGS:

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- Blended families, which are becoming more and more common. Different needs for beneficiaries of the family trust.
- Estranged family members, a very ripe source of disputes.
- Quirky family members, which may foretell substance abuse or other problems.



# REMAIN AWARE OF YOUR BENEFICIARIES

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All families have some level of dysfunction, so this cannot be the hurdle that you must clear before taking on the role of trustee. Indeed, a trustee is often needed in precisely difficult family situations. But, being aware of the potential issues lurking with your beneficiaries and proactively managing them minimizes the risk.



# KNOW YOUR CO-TRUSTEES

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Often times you will serve alongside a co-fiduciary. You are easily tarred with the same brush as a bad-acting co-trustee. So, spend some time getting to know her, him or it.

# PUT IN PROCEDURES TO MINIMIZE RISK

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Institutional co-trustees are preferred.

Why? Because institutions already have procedures in place to minimize risk.

Individual co-trustees, however, are not so constrained and the opportunities for them to breach their fiduciary duties are greater.

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## **WHAT ABOUT A FAMILY MEMBER OR MEMBERS AS A CO-TRUSTEE?**

The automatic tension here is that the co-trustee was specifically elevated to a position of managing the assets, and thus the affairs, of another family member.

What if the family members who are co-trustees with you do not get along with each other? This gums up the work of the trust.

# IF NEED BE, DISSENT

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- If you see your co-trustee acting in a way that you disagree with, and if you are powerless to stop it, either because you are out-voted or the co-trustee has more rights under the trust instrument, then dissent from the act.



# KNOW YOUR ASSETS

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Fiduciary litigation oftentimes arises when an allegedly aggrieved beneficiary conflates managing assets with care and maintenance of assets. The latter – care and maintenance – is your job as trustee no matter what the asset. But management can be delegated and, indeed, often should be.

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## TO REAP THE PROTECTION OF DELEGATING YOU MUST FOLLOW A PROCESS



Interview, check references, etc. before hiring the manager.



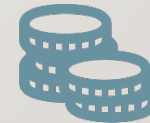
Meet regularly to discuss the assets entrusted to the manager.



Diversify managers if the assets are significant enough to warrant this.



Change managers if performance does not measure up against a reasoned yardstick.



Monitor costs against a benchmark.



Contemporaneously document all of the foregoing.

# NON-TRADITIONAL ASSETS RAISE RISK

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Traditional assets are easy. Stocks and bonds can be managed by many excellent service providers and benchmarks are easy to come by.



What about non-traditional assets? This requires more work by the trustee.

# FAMILY BUSINESS IN TRUST

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Be particularly aware of family business assets where some but not all family members are charged with running the business. Always a heightened risk here because the non-management family members are resentful from day one that a relative or relatives were viewed as more worthy of running the family business.



# WHAT SHOULD YOU DO AFTER YOU HAVE BEEN SUED, OR OTHERWISE CHALLENGED, BY A BENEFICIARY?



Trust administration becomes significantly more difficult during litigation.

# CONTINUING FIDUCIARY DUTIES TO BENEFICIARIES AFTER THEY SUE YOU

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- It is critical that you recognize that your fiduciary duty to the beneficiary continues even after they have challenged or sued you.
- Our natural reaction after someone hits out at us is to hit back. But, you must control this reaction.
- Indeed, I have seen otherwise meritless actions turn into a problem for the trustee because they reacted badly after being sued by a beneficiary.

# ALLOCATING LEGAL FEES IN FIDUCIARY LITIGATION

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Beating back your beneficiary on the merits but at the fiduciary's own expense turns a win into a loss. Accordingly, a fiduciary needs to ensure that its defense is at the expense of the trust.

# CONCLUSION

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THERE IS A LOT TO BE EXCITED ABOUT WHEN YOU GET THE CHANCE TO BE A TRUSTEE. BUT PROCEED VIGILANTLY.



# JAY W. FREIBERG

## PARTNER

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Jay is laser-focused on efficiently obtaining wins for his clients, who hire him for his seasoned judgment in dispute resolution both in and out of the courtroom. A trusted counselor, he has deep expertise representing all types of stakeholders in all manner of sophisticated and complex trust and estate disputes. As part of this practice, he counsels private clients in potentially contentious business and personal matters regarding, among other areas, closely-held businesses, real estate, tax and insurance. An aggressive advocate, Jay's clients look to him for their thorniest matters.

Jay is admitted in numerous courts, and understands the hurdles, pitfalls and opportunities within the courtroom setting. Partnering with local counsel, notably in Delaware and in Florida, Jay is able to provide seamless counsel to his multi-jurisdictional clientele.

Jay is an adjunct professor at Fordham University School of Law, where he has taught legal writing for over 10 years.

Prior to forming Elman Freiberg, Jay was the chair of Katten Muchin Rosenman's New York Fiduciary Litigation practice. He also served as a law clerk for the Honorable Diane Weiss Sigmund, judge for the US Bankruptcy Court in the Eastern District of Pennsylvania.

Jay resides in Manhattan with his wife and two children. When not with his family or in the office, he can be found training for his next race. Jay is a veteran of numerous road races and triathlons and, on occasion, makes the podium.

