

There's Still Time to Make that New Year's Resolution: Get Your Records Retention Plan in Place

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Melissa E. Darigan, Esq.

No one wants to start the New Year thinking about conflict but fiduciaries balance many, often competing, interests every day and the potential for conflict is real. Fiduciaries can minimize the likelihood for conflict by institutionalizing regular communications with beneficiaries, advisors and other third parties. Keeping detailed documentation of these communications is equally important and may mitigate the potential for liability if litigation cannot be avoided. Moreover, preserving these documents is required when a fiduciary has notice of the potential for litigation.

Often, the value of records retention plans becomes apparent too late – for example, after a lawsuit has been filed or a subpoena has been served. Planning now for these events can save you countless hours searching for and collecting records, not to mention the expense of professional help or the prospect of sanctions if records that should be retained are lost or destroyed.

It's not too late to make a New Year's Resolution to review your records-keeping practices and policies.

There are many practical, business and risk management reasons for a fiduciary to keep detailed records, but often-overlooked is the requirement to retain records when there is reason to believe that a dispute may lead to litigation. This obligation applies to fiduciaries planning to initiate litigation, in addition to those made a defendant to

a suit. In both events, you must (i) preserve all records relating to the dispute and (ii) if litigation does result, produce those records upon request. Failure to comply with either requirement can result in sanctions.

Today, the need to preserve extends beyond official documents and traditional correspondence or memoranda to electronically generated and stored information, including email, whether used to communicate internally, with third parties (such as consultants) or with beneficiaries.

Having a plan in place to preserve, collect and produce documents and information should be a risk management priority for all fiduciaries. The contours of a plan will vary, but two key elements are universal – understanding the information systems used to create, store or transmit documents and having a “litigation hold” on all documents so that nothing is lost or destroyed.

At a minimum, you should know who has information and documents and how they can be accessed and preserved (not only paper records, but all kinds of computer data including email, databases, spreadsheets, network files and website information, on desktops, home computers and PDAs). Corporate fiduciaries have the benefit of technology specialists, risk managers and legal departments which should collaborate on designing a preservation plan to address these issues. Individual fiduciaries should understand their personal computers, email transmission systems and storage capabilities and should seek professional or technical assistance as necessary. All fiduciaries should ensure that records are preserved when there is notice of litigation. Corporate fiduciaries must ensure that notice of a litigation hold is communicated so that employees are aware of their compliance obligations and that normal document retention policies are suspended for the records subject to the hold for the duration of the litigation.

Throughout the course of the litigation, it may be necessary for you to collect and produce information and documents requested by another

party in discovery. Photocopying a file is, in almost all circumstances, no longer sufficient for responding to requests for documents in litigation. In today's complex digital environment, complying with even basic document production requests usually involves a corporate fiduciary's close collaboration with litigation counsel, the IT team and management. Individual fiduciaries may need consultants with computer expertise to work with counsel to advise on proper preservation and collection procedures.

Developing a plan to address records management and retention (or dusting off and reviewing an existing plan) should be among a fiduciary's primary goals for 2011.