TRUST & ESTATE LITIGATION:

A Guide for Trustees

From the Law Offices of
Daniel A. Hunt

Table Of Contents

5 Tips for Trustees Facing a Lawsuit

If you're a trustee facing a lawsuit, you may be wondering what you should do next. Getting sued by a beneficiary is every trustee's worst nightmare, but there is hope. While litigation is expensive and stressful, it probably isn't the end of the world. Our law firm has defended countless trustees from lawsuits over the past decade. Here are two tips on what to do (and avoid doing) if you're a trustee facing a lawsuit.

3 Things Trustees Facing a Lawsuit Should Do

1. Do hire an experienced trust & estate litigation attorney.

Did you know that most trust attorneys have little to no experience in litigated matters? Trust and estate litigation is a specialized niche. Just as you'd want to use the right tool to fix something that's broken, a trustee facing a lawsuit should find the right attorney to help fix a problematic trust administration situation.

Some attorneys will offer a no-cost consultation to review your case details and any relevant documents you may have. We created an instructional video on how to prepare for a trust litigation consultation. One of the tips we share in that video was to always be transparent with your attorney about your past actions as the trustee.

If mistakes have been made, be open about them in your first consultation. We do not recommend lying to your attorney because when the truth comes out (and it will eventually), this revelation will inevitably weaken your position. We encourage you to be honest from day one.

Consider using personal funds to pay the retainer when you hire your attorney. While it may be tempting to use trust assets to finance your legal representation, there's a downside to this strategy. If you pay for representation with trust funds and later are removed as trustee, the new trustee will receive your file. Financing with personal funds preserves your attorney-client privilege and keeps your file confidential indefinitely. Financing litigation with trust funds will pass the attorney-client privilege to any newly appointed trustee.

2. Do keep fastidious records.

We've discussed elsewhere on our blog the critical nature of keeping accurate trustee records. If a beneficiary brings a lawsuit against you, this becomes even more imperative.

3. Do put communication in writing – if you are in the right.

The opposite is also true: don't put communication in writing if you are in the wrong. Written communication as trustee can either vindicate or condemn you, depending on the nature of the contents. For example, if the communication reveals that you are breaching your fiduciary duties under the California Probate Code, it is not going to work in your favor. But as long as you are doing what you should be doing, written evidence provides support for your legal case.

2 Things Trustees Facing a Lawsuit Should Avoid

1. Don't ignore the lawsuit.

When confronted with danger, all humans tend to react instinctively with one of two responses: fight or flight. You can either stay and fight a predator off or run away. For trustees facing a lawsuit, the "flight" instinct tends to mean that they bury their heads in the sand, ostrich-style, and try to ignore the legal action.

Hiding from a lawsuit to try to avoid conflict or consequences will probably not work. Instead, try a proactive approach that addresses the problem directly. A high-quality trust litigation attorney will fight off the attack for you so you can breathe again.

2. Don't tell the beneficiaries, "I'm in charge!"

When threatened with a lawsuit, some trustees lean towards the instinct to fight off the attack. They may try to aggressively assert control or dominate the beneficiaries. Remember, the trust assets belong to the trust beneficiaries. You may have been appointed as the caretaker for these assets, but they're not yours. Your powers as a trustee do have limits under the Probate Code and using them unwisely will hurt your case.

Bottom line: Don't be a hothead. Stay humble and avoid unnecessary aggression. Let your attorney handle the fighting on your behalf.

Case Study: How We Defended a Trustee Facing Lawsuit

Our office has achieved favorable outcomes for many trustees who faced lawsuits over the years. One such client had been serving as successor trustee for their brother's trust, which contained several million dollars. The beneficiaries of the trust were the successor trustee's minor nieces and nephews.

This inexperienced trustee did his best to manage the assets but made a series of poor choices. Some bad loans and investments caused the trust to lose nearly $2 million over a 10-year period.

After a decade, several of the minor beneficiaries had become adults. They sued the trustee for the losses, many of which had occurred close to 10 years before. They sought damages for the entirety of the loss and a lien on the entirety of the trustee's home. The beneficiaries argued that the trustee had failed to apprise them of the losses and was

therefore personally liable for his poor investment choices and that the typical three-year statute of limitations did not apply for the failure to make a proper disclosure.

The trustee, aware that his poor investments had resulted in the losses, was distraught at the idea of his own family becoming destitute because his own nieces and nephews were unwilling to consider a compromise without trial. He sought counsel from multiple attorneys.

Finally, only days before a court-scheduled Mandatory Settlement Conference prior to trial, the trustee approached our office for help. In that small window of time, our litigation team discovered that while the trustee had made poor decisions at times, he had remained transparent over the years by providing the guardian of the beneficiaries with updates and reports by text and email.

Our office submitted a pleading to the court arguing that the statute of limitations did apply because the Probate Code provides:

(1) that an accounting or report sufficient to disclose a claim begins the statutory three-year period for contesting that account or report; and

(2) that a minor beneficiary is deemed to have received an account or report so long as a disinterested guardian or parent received the report.

That singular filing brought the minors to the negotiation table. The parties were able to reach a mutual agreement that saved the trustee from what could have been a multi-million dollar judgment against him, resulting in bankruptcy and potentially the loss of his home.

Our firm obtained a favorable outcome for that trustee and many others over the years. If you have questions about trust ligation or need defense against a lawsuit as a trustee, feel free to contact our office.

Mediation vs. Arbitration

Mediation vs. arbitration: what are they and which option is right for you? When conflict arises in a trust administration, some trustees and beneficiaries try mediation or arbitration before or instead of filing a formal lawsuit. Mediation and arbitration are two forms of alternative dispute resolution (ADR). Both provide a way to privately resolve the conflict outside of a public court proceeding. ADRs can be quicker and less expensive alternatives to an expensive formal lawsuit.

What is Mediation?

Mediation is an informal arrangement in which a neutral third party acts as a mediator between the two (or more) conflicting parties. Each party attends a scheduled mediation with their attorney (if they have retained one) and presents their side. The mediator offers suggestions to help resolve the dispute.

While most mediators are attorneys or retired judges, they are not supposed to give legal advice. Mediators do not issue orders, find fault, or make determinations. They do not have the authority to make legally-binding decisions for the parties, but rather serve as a guide for the negotiations.

Common Steps of Mediation

Mediation doesn't follow a formal process like arbitration or a court proceeding. But mediations often follow these basic steps:

1. The mediator introduces themself and explains the rules and goals of mediation.
2. Each party gets the chance to explain the conflict as they see it without interruption from the other party.
3. The mediator often meets individually with each party, going back and forth to work out the issues.
4. If an agreement is reached, the mediator writes it down and all parties sign the agreement, including attorneys if they've retained legal counsel.
5. If an agreement is not reached, the mediator may conclude by summarizing the points on which the parties did agree and advise them of their next steps.

Pros and Cons of Mediation

Mediation is usually the most cost-effective approach to dispute resolution. In California, the cost for mediation is around $3,000- $5,000 for a full day, while trust litigation in the form of a trial can cost many times more than that amount. The mediation process tends to be relatively quick, often lasting only a day or two.

Mediation invites both parties to actively participate in finding a solution they find acceptable. This offers the parties more control over the outcome than arbitration or a court proceeding, where an arbitrator or judge makes the final decision.

The downside to mediation is that it does not always yield a resolution to the conflict. Typically in mediation, there is no winner or loser. If the parties fail to reach a mutually-agreed-upon solution, then the matter may proceed to litigation.

What is Arbitration?

Compared with the informality of mediation, arbitration follows more formal rules of procedure. Both parties should agree on the chosen arbitrator, who should have some degree of experience with trust and estate law.

Like a mediator, an arbitrator is a neutral third party who listens to both parties present their side. Unlike a mediator, an arbitrator makes a decision that is typically legally binding to both parties.

Commons Steps of Arbitration

The arbitration process generally follows the following steps:

1. One party sends a document called “Request for Arbitration” or “Notice to Arbitrate” to the other party. This document sets forth the nature of the conflict in writing.
2. The other party has a period of time to respond in writing and indicate if they agree to resolve the dispute via arbitration. If so, the arbitration process begins.
3. Both parties should select a mutually agreeable arbitrator.
4. The arbitration will involve one or more hearings before an arbitrator. Both parties’ lawyers may present their arguments and have the chance to question the other party’s witnesses and experts.
5. After the hearing, the arbitrator offers a legally binding decision (assuming binding arbitration has been selected) that determines the rights and obligations of the parties.

Pros and Cons of Arbitration

Because the arbitrator's decision is final, arbitration eliminates the risk of a formal court proceeding. But the arbitrator may make a decision that is disagreeable to one or both parties. In our experience, both parties often walk away feeling that the decision made was unfair. The decision is often arbitrary, as the name indicates.

Arbitration is typically more expensive than mediation. Depending on the length of the arbitration, the cost could be tens of thousands of dollars. An arbitration may last anywhere from one day to a week or more.

Both mediation and arbitration offer benefits and risks to those experiencing conflict in a trust or estate administration. Our office typically recommends mediation as a superior option over arbitration, although individual circumstances may vary.

If you need a referral to an experienced mediator for a trust/estate matter, check out our Referral Hub or try the American Arbitration Association's Find a Mediator tool.


Let's compare
Mediation & Arbitration
Mediation
Arbitration
A neutral third party listens to both sides and helps the parties negotiate a compromise.
A neutral third party listens to both sides and makes a final, legally binding decision.
Cost: Around $3,000-5,000 in California.
Cost: Varies by length; could be tens of thousands of dollars.
Length: Usually 1-2 days.
Length: From 1 day to a week or more.
Risk: If no agreement is reached, the dispute may result in litigation.
Risk: The arbitrator's final decision may be disagreeable to one or both parties.
THE LAW OFFICES OF DANIEL A. HUNT
Learn more at dhtrustlaw.com

What is Discovery?

When a trust or estate conflict evolves into litigation, one of the first steps in preparing for a trial is formal discovery. Discovery is a legal procedure in which both sides of a lawsuit discover relevant facts of the case in order to prepare for trial. Whether you're the trustee who is being sued or a trust beneficiary suing a trustee, you'll need to understand what facts can and can't be discovered and how to best approach the discovery process.

Common Forms of Discovery in Trust Litigation

The basic rule of discovery is: You can request any information that is even remotely relevant to the issues within the lawsuit, so long as that information isn't "privileged" or otherwise legally protected.

Here are some of the common tools used in a formal discovery, divided into two categories of written and oral:

I. Written Discovery

- **Interrogatories:** Written questions directed to the other side. The other party must provide written answers under oath which can be used at trial.
- **Requests for production of documents:** Written requests for a specific document or a class of documents likely to be relevant to your case.
- **Requests for Admissions:** Written requests to the other party to admit that a statement is true so the case can focus on the main issues being disputed. Responses can be used at trial.
- **Subpoenas**: Written court orders requiring one side or a third party to testify or produce physical evidence for inspection, such as medical, bank, or business records.

II. Oral Discovery

- **Depositions:** Oral, in-person interviews with a party in the case or a third party directly involved in the case. The person being deposed must answer under oath. A court reporter typically writes down everything that is said and produces a written transcript.

What Is Excluded from Discovery?

Some "privileged" information remains off-limits during the discovery process. Generally, this includes:

- Attorney-client communication
- The attorney's work product in preparing their legal case
- Trial preparation materials
- Information that is irrelevant to the specific case at hand

California Attorneys are bound by the California State Bar's Rules of Professional Conduct to engage in ethical discovery methods.

Discovery Time Frame

The total length of the discovery process can vary widely. The following requirements must be met before the discovery process can begin:

1. One of the parties must file an action with the court.
2. That party must personally serve the court papers to the opposing party.
3. Ten (10) days must pass after personal service has occurred before discovery can begin.

For written discovery, the other party has 30 days to respond, plus 5 days to allow for mailing.

For subpoenas to third parties (like medical or bank records), the Petitioner must issue a document to the person whose documents are requested called "Notice to the Consumer". That person will have 15 days to object to the request. After that time period has passed, assuming no objections were made, most institutions typically respond within 15-20 days.

Cost of Discovery in Trust Litigation

All parties pay the cost of their own discovery. If a party later files a Motion to Compel (asking the court to enforce a request for information relevant to a case) and the court grants that motion, then the prevailing party may be entitled to attorney's fees.

For both parties, it's best to be forthcoming and provide the requested information; otherwise, you risk paying the opposition's attorney fees.

Discovery Can Save Money Later On

A full-blown court trial is often long and expensive. Discovery can be cost-effective in the big picture, especially if it leads to the parties settling. While discovery can be expensive, it can actually save money by leading the parties to settle the case either before the trial starts or before the end of a full trial.

If you think of the trial as a poker game, discovery is like getting to peek at the opposing player's cards before the game begins. Through discovery, both sides get a sense of the strength of their side's position. If you clearly have a winning hand, the opposition may opt to fold before the game even begins.

Discovery Tips for Trustees

If you are a trustee, we offer the following advice for discovery:

- Stay organized and keep accurate records of everything you've done in the trust administration.
- Always be honest and forthcoming! Provide all information to your attorney and the trust beneficiaries.

Remember that discovery often requires knowledge of evidence rules and other technical legal strategies. If discovery becomes necessary, you will want to hire an experienced trust and estate litigator to represent you and build your case.

What is a Mandatory Settlement Conference (MSC)?

If you're involved in a trust litigation matter, you may be surprised to discover that before a trial, you must first attend a court-ordered Mandatory Settlement Conference (MSC). Rest assured that an MSC is a normal part of the trust and estate litigation process. Before your MSC, you should understand the purpose of a Mandatory Settlement Conference, what to expect, and how it can help both parties.

What is the Purpose of a Mandatory Settlement Conference?

A Mandatory Settlement Conference is an opportunity for all the parties involved in a dispute to come together to try to resolve the issue without a trial. Trials are long, expensive, and emotionally taxing. It's in the best interest of everyone involved to avoid a trial if possible. An MSC is one last chance to try to find a solution without a trial.

California Rules for Mandatory Settlement Conferences

Not all states require an MSC prior to trial, but California is one state that does. This helps to reduce the strain on the overburdened court system in our state. California Rule of Court 3.1380 lays out the requirements for an MSC. Here's a summary:

Who Sets the Conference

The rule allows for the court to order one or more MSCs. Any party can also request one or more MSCs.

Who Attends the Conference

The attorneys, both parties, and any person with full authority to settle the case must personally attend the conference, "unless excused by the court for good cause."

Restrictions on MSCs

The rule prohibits the court from appointing a person serving as a mediator in the same action to conduct the MSC or to appoint a person to conduct mediation.

Settlement Conference Statement

No less than 5 days before the initial date for the settlement conference, both parties must submit a Settlement Conference Statement. This statement must include these 4 components at a minimum:

1. **Demand:** A "good faith" (honest or sincere) settlement demand.
2. **List of Damages:** An itemized list of damages, both economic and non-economic (such as emotional anguish, health issues due to stress, and so on).
3. **Offer:** A good faith offer by each defendant.
4. **Facts + Law:** A statement identifying and discussing in detail all facts and law pertaining to the issues of liability and damages involved in the case as seen by that party.

Local rules may impose additional requirements on the Settlement Conference Statement; these will vary by county.

Mandatory Settlement Conference Hearing

On the day of your Mandatory Settlement Conference, both parties will attend a hearing at the courthouse presided over by a judge. It may be the judge managing the case to this point or a temporary judge. The conference is generally shorter than mediation and less likely to produce an agreement. A judge will be less forceful than a mediator at attempting to resolve the case. But if the parties were already close to an agreement, it may still be possible to reach one at this stage.

Each judge will have their own method of conducting the conference, but most will discuss:

1. The facts on which all parties agree.
2. Any facts on which they disagree.
3. What each party needs and wants to settle the case.

Then the judge and the parties will try to find a solution that will be acceptable to both sides. The judge does not have the authority to make binding judgments but rather serves as a facilitator of the negotiation.

If the parties are able to find a solution, then a settlement agreement can be written (a court reporter is always handy to have ready) and signed by both parties, then submitted to the judge who can enter it as an order. If the parties do not reach an agreement, the case will proceed to a trial.

Cost

There is no cost for the settlement conference itself, but both parties will need to pay their attorneys for their time in preparing for and attending the conference.

What to Expect at your Trust & Estate Litigation Trial

If you're a trustee or a beneficiary involved in a trust or estate conflict that is heading towards trial, you may be wondering what to expect in a trust & estate litigation trial. Will it be like an episode of "Law & Order"? Some aspects of your trial may be similar to what you've seen in movies or tv shows. But trust and estate cases are unique in some important

ways from the criminal and civil cases often depicted in legal dramas. Before your trial begins, you should understand the format and stages of a trust and estate litigation trial.

Trust & Estate Litigation = Court Trial

Most legal dramas focus on criminal or civil legal cases. Both of these often utilize a "jury trial" format in which a group of peers hears the evidence and makes a decision at the end of the trial. By contrast, trust and estate cases are heard in probate court, which uses "court trials" or "bench trials". In a court trial, a judge hears the evidence and makes a ruling. (The exception is elder abuse cases, which can use a jury.)

Decoding Trial Terminology

Before we explain what happens in a trust & estate litigation trial, it will be helpful to learn the correct terminology for both parties. The plaintiff (person bringing the case) is called "the Petitioner" since they are petitioning the court for assistance. The defendant (person being sued or accused of wrongdoing) is called "the Respondent".

For example, in a trust or will contest, the Petitioner is usually the party challenging the validity of the document and the Respondent is defending the document's validity.

4 Stages of a Trust & Estate Litigation Trial

A typical court trial contains 4 main elements: opening statements, witness testimonies and introduction of evidence, and finally closing arguments.

Step 1: Opening Statements

The trial starts with each side offering an opening statement. Each opening statement presents an overview of the case facts as that party sees them. Your opening statement should stick to the case facts and your theory of the case. The goal is to depict your position as reasonable, logical, and legally sound so that the judge will side with you.

Step 2: Presenting Your Case

After opening statements, the Petitioner will present their case first. This may include evidence collected during the discovery process, such as written answers to questions they've asked the opposition; relevant documents they've obtained, written admissions from the opposition that certain facts are true; physical evidence obtained via subpoena; and deposition transcripts from interviews with the other party or a third party. These are all typically presented through the use of witnesses.

The Petitioner starts by calling their first witness for direct examination. The Petitioner's attorney will ask the witness questions designed to draw out relevant case facts. Once the direct examination ends, the Respondent's attorney can cross-examine the witness, challenging parts of their testimony or trying to elicit additional facts previously omitted. After the cross examination, the opposing party's attorney can question their witnesses again, allowing them to explain themselves more thoroughly.

Once the Petitioner has called their last witness and finished presenting evidence, the Petitioner will rest their case. If the court decides that the Petitioner hasn't met "their burden of proof" (meaning they presented insufficient supporting evidence), the judge in rare cases may decide in favor of the Respondent without requiring them to present a defense. But if the Petitioner has presented sufficient evidence to make a case, then the Respondent must now present their case and call their own witnesses.

Rest assured that attorney-client privilege protects any communications you have had with your attorney regarding the case. That information cannot be presented as evidence in a court trial.

Step 3: Closing Arguments

After both parties have finished presenting their cases, the trial concludes with closing arguments. A closing statement should be very persuasive, as this is your last chance to convince the judge that your side should win.

Step 4: Judge's Decision

Finally, the judge will make their ruling on the case issues. The judge may give a verbal ruling on the spot, or will "take the case under submission" and issue a decision within 90 days. The next chapter will explain what comes after trial.

What Happens Post-Trial?

What happens post-trial in trust and estate litigation? What happens next will depend on whether the judge sided with you or with the opposing party. If the judge sided with you, your attorney needs to file a Notice of Entry of Order and serve it on all parties. If the judge sided with the opposing party and you wish to appeal the decision, you need to understand the process and time frame for appeals.

Judge's Post-Trial Decision

If the judge didn't provide a verbal decision at the conclusion of your trust & estate litigation trial, they likely took the matter under submission. The procedure for communicating the judge's decision varies somewhat from county to county. In general, within 90 days, the judge will post their ruling on the court record. This is usually available online in most counties. After an order of the court has been issued, a courtroom clerk will also mail a copy to all parties.

Filing a Notice of Entry of Order in Trust & Estate Litigation

If the judge sided with you in their decision, your party should file a Notice of Entry of Order and serve it upon all parties within 60 days. This document informs all parties of the court's order or judgment and triggers important deadlines for post-ruling procedures, including filing an appeal.

When Will Changes Occur?

If the judge sided with the Petitioner, when will the changes they requested take place? This will depend on what changes they requested in their petition.

If the Petitioner requested that the trustee be removed and replaced, that will happen immediately, if granted. Collecting assets is usually more complicated, such as when a trustee or beneficiary stole trust assets that now must be returned to the trust. In order to do this, the Petitioner may need to:

- Seek for the trustee to turn over trust accounts to the new trustee or beneficiaries.
- Arrange for deeds to be drafted and recorded to transfer real property.
- Create a plan to collect money judgment against the personal assets of a trustee or beneficiary (for example, wage garnishments or seizing bank accounts).

Requirements to Appeal the Decision

What happens if the judge didn't side with you? Can you appeal that decision? If the judge didn't side with you in the trial, you may be able to appeal successfully if you meet two specific requirements:

1. **A court reporter was present for the whole hearing.** This means there is a written record of the court proceedings that can be referenced. If there is no record to appeal from, then your appeal is likely doomed before it even gets started.
2. **There is an appealable issue.** Appealable issues include an error in the stated law during the hearing, a procedural issue during the trial, or "overreaching" in the judge's discretion. Note that the latter is the most difficult to prove.

Steps to Appeal the Decision

In order to appeal a judge's decision post-trial, you should do the following things:

- Hire an attorney who handles appeals.
- File a Notice of Appeal within 60 days of the prevailing party filing a Notice of Entry of Order.

- Obtain a copy of the court records.
- Meet multiple deadlines to submit paperwork to the court and serve on the other party.

While it may be possible to appeal a judge's decision post-trial if you meet the requirements, should you? Our professional experience has shown that appealing a judge's decision after a trust & estate litigation trial is a difficult process, expensive, and carries a low probability of success.

This is why it's crucial to hire an experienced litigator who can guide you through the litigation process and help you achieve the best possible outcome in your situation. A good litigator will advise you to take actions that will benefit YOU, rather than encouraging you to spend the most money possible on attorney's fees.

Timing of a Trust & Estate Litigation Trial

Understanding the timing of a trust & estate litigation case can be challenging. But before your trial begins, it will be useful to establish realistic time frames for each step of the process, including court hearings, discovery, potential delays that may occur, and when you can expect to actually have your case heard. This will help you see the big picture when it comes to your trust & estate litigation case.

Before the Trial

All trust & estate litigation trials are preceded by several preliminary court hearings. After the Petitioner files their petition with the court, the court will give a hearing date for the matter to be heard. This date must be at least 30 days after the date the petition was filed but is often set for 45-90 days later (depending on court availability).

All interested parties have the right to appear at that hearing and object to the petition. If a party does come to the initial hearing and orally objects to the petition, then the court usually grants additional time (usually 60 days or so) for them to prepare and file a written objection.

Next, the court allows time for the parties to conduct discovery. This process can take another 3-6 months or more, depending on the complexity of the case.

Once it becomes clear that the parties will be unable to reach a resolution on their own, the court will either set a date for the trial or hold a "trial setting conference" where a trial date is selected. In total, it can take from 6-12 months before you receive a trial date. In the time of COVID, this can actually take much longer, depending on the county's criminal proceedings which take precedence over civil matters.

Finally, in almost every county in California, you will be required to participate in a mandatory settlement conference prior to your trial.

Timing of Your Trust & Estate Litigation Trial

In a previous chapter, we explained the difference between a jury trial and a court/bench trial. As we explained, trust and estate litigation trials are bench trials with the trier of fact being a judge, not a jury.

Jury trials tend to proceed nonstop from start to finish, out of sensitivity to the time constraints on the jurors involved. Court trials operate a little differently, and you may experience less continuity due to the court's schedule. Court trials are frequently broken up into multiple shorter court sessions over the course of several days or even weeks. If a department only hears trials on Friday afternoons, for example, it may take several weeks to complete your trial.

Potential Delays from the Court

Many more issues may arise during your case to cause delays. As mentioned, courts will give preference to a criminal trial. That's because the accused in criminal cases have a constitutional right to a speedy trial, while civil litigants do not have the same right.

The court will want to have a narrow scope of what issues are being tried, so this results in multiple hearings and motions typically before a matter is ready for trial. With so many litigants requesting trial dates, but many fewer actually using them, it results in a trial calendar that is constantly in flux.

The court procedures can seem taxing and the whole process can feel frustratingly slow to the parties involved. Keep in mind that the California Rules of Court exist to create a fair

playing field for both sides. Both the Petitioner and Respondent receive equal opportunity to present their evidence and argue their points on the issues at hand. That way, when the judge makes a final decision, no one can claim that the ruling was hasty or unfair.

Potential Delays from the Parties + Witnesses

Besides the court system, the involved parties and third-party witnesses may cause the process to be delayed. For example, if one party refuses to answer discovery properly, then the other party must file discovery motions in order to ask the court to compel the other party to divulge the requested information.

Typically, parties are required to resolve any discovery motions before trial. All discovery needs to be completed 30 days before the original trial date. Even if the trial is moved, discovery is to be completed 30 days before the original date set for trial.

Taking depositions from third-party witnesses can also cause delays. Take, for example, a witness who is hiding out and trying to avoid being served a subpoena, or a witness who lacks a permanent address. It takes extra time to track down and serve these kinds of witnesses.

If a witness or a party lives outside of California, then you'll need to take extra steps to arrange to take their deposition. Travel, lodging, transportation, and scheduling a court reporter from another jurisdiction to attend the deposition all require extra time and planning.

Total Timing of a Trust & Estate Litigation Case

If you were thinking that your California trust & estate litigation case would be resolved in a few months, you may want to reconsider that notion. From start to finish, a more realistic time frame would be a minimum of a year and possibly 1.5-3 years before a resolution is reached if a trial is required.

It's easy to understand why many clients use mediation as a quicker alternative to a trial. While mediation involves a great deal of compromise, mediation follows a more predictable time frame compared with a trial which could drag on for years.

When a settlement between two parties does not prove to be possible and a case does go to trial, mindset is everything. The best advice we can offer is to cultivate patience and flexibility and let the process unfold.

How to Stop Financial Elder Abuse

As older people begin to lose mental and/or physical capacity, they often need help from family or friends to manage their finances. This can leave them vulnerable to financial elder abuse. If you know an elderly person who is receiving help with their finances, it's important to learn the signs of financial elder abuse and how to stop it.

What is Financial Elder Abuse?

Discerning financial elder abuse can be tricky, with ample grey area. Is your 80-year-old father's new 40-year-old girlfriend just trying to help by paying his bills? Or might she be taking advantage of his vulnerability? Is it ok for your mother to make large monetary gifts to her caregiver who complains about financial challenges? Or is your mother's altruism draining her own financial resources?

The legal definition of financial abuse of an elder or dependent adult is found in the California Welfare and Institutions Code Section 15610.30. This section defines abuse as occurring when a person or entity "takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both." If an individual assists another person in taking these actions, they are also committing elder abuse.

In order to be considered elder abuse, the perpetrator must act "in bad faith". Bad faith means they knew or should have known that what they were doing was wrong.

Elder Abuse & Trust Law

Financial elder abuse can overlap in a number of ways with trust & estate law. Some caregivers exert undue influence on the older person to amend their estate plan to benefit themself. Usually, the caregiver's goal is to gain greater power and control over finances by being named a financial power of attorney agent and/or trustee of their trust.

Financial elder abuse may also occur when a trustee breaches their fiduciary duties in certain ways. Examples include fraud, embezzlement, self-dealing, making improper gifts, or commingling trust assets with personal funds.

Warning Signs

Whether you've noticed recent negative changes in an older adult's wellbeing or financial situation or just feel concerned that someone may be taking advantage of them, here are some warning signs to identify elder financial abuse:

- Unusual activity in their bank account, like unexplained large withdrawals/transfers/wires of funds.
- Sudden changes in banking practices. For example: adding new signatories to their bank signature card or ATM withdrawals by an older person who doesn't use an ATM card.
- Abrupt changes to a trust, will, power of attorney, or other estate planning or financial documents, especially if initiated by a caregiver.
- A caregiver who seems to be asserting excessive control over an older person's finances.

  Suspicious checks, especially if the signature appears to be forged or the check description is something like "loan" or "gift".
- New "best friends" accompanying an older person to the bank.
- Mysterious disappearance of cash or valuables.

- Lowered standard of care (like malnutrition or unsuitable housing), unpaid bills, overdrafts on bank accounts, or an eviction notice.
- Appearance of new, expensive, unnecessary items or services.
- The older person exhibits confusion or a lack of understanding concerning their financial situation.
- The older person exhibits shame or reticence to discuss the concerning situation with others.

If you notice any of these warning signs, there are actions you can take to protect the at-risk older person.

How to Stop Financial Elder Abuse

If you suspect that an elder is being financially abused, here are some suggested steps you can take to address the situation.

1. **Talk to the elderly person.** Discuss the concerning signs you've noticed with the person you wish to protect. Give them an opportunity to explain their perspective on what is happening with their finances. There may be a valid reason behind their choices. Explain the concerns you have and express care for them.
2. **Report the elder financial abuse to their bank.** Bankers can sometimes help stop or prevent abuse.

3. **Contact Adult Protective Services for assistance.** Every California county has an APS agency to help elderly and dependent adults who are victims of abuse, neglect or exploitation. APS also provides information and referrals to other agencies and educates the public about reporting requirements and responsibilities under the Elder and Dependent Adult Abuse Reporting laws.
4. **Seek professional counsel.** If the abuse involves an estate plan or trust funds, you may wish to schedule a consultation with a trust & estate litigator who has experience protecting seniors from financial elder abuse. They may be able to help you regain control over the situation and help protect the abused elderly person.

Finding Legal Solutions

If you decide to take legal action to stop financial elder abuse involving a trust, there are two main legal remedies or solutions you can seek:

#1 Breach of Trust Action: A breach of trust action is a request for compensatory relief when a trustee is found to have breached one or more of their fiduciary duties in a way that caused financial loss to the beneficiaries. If granted, the judge will order the trustee to personally reimburse the trust for any damages and potentially lost interest as well.

#2 Trustee Removal: An interested party may petition the court to remove the current trustee if a breach of fiduciary duty has occurred. If a judge rules in a court trial that a significant breach of fiduciary duty has occurred, they will remove the current trustee and install a new, more suitable person to act in this role.

Conclusion

As you can tell, trust & estate litigation is a detailed, complex niche, rich with nuance. Most situations are more gray than black and white, with room for a wide range of legal interpretations.

If you've found this eBook informative, check out all of the free educational resources on our website: dhtrustlaw.com.

If you have any questions about trust litigation or would like to schedule a no-cost consultation with one of our trust litigators, feel free to contact the Law Offices of Daniel A. Hunt.

A graduate of McGeorge School of Law, Daniel A. Hunt is lead attorney and owner of the Law Offices of Daniel A. Hunt. He is a State Bar of California Certified Legal Specialist in Estate Planning, Trust & Probate Law. He has been named Best of the Bar by Sacramento Business Journal and a Northern California Rising Star by Super Lawyers.

Mr. Hunt is a member of the National Academy of Elder Law Attorneys and the Sacramento Estate Planning Council. He has served as President, Vice President, and Secretary of the Probate and Estates section of the Sacramento County Bar Association. He has also served on the Board of Directors for the Sacramento County Bar Association.

Mr. Hunt serves in the Estate Planning Clinic run by the Voluntary Legal Services Program of Northern California. He also serves as court-appointed counsel for the Sacramento County Probate Court.

Outside of work, he loves spending time with his family, golfing, skiing, hiking, and traveling.