

Fiduciary Documentation: Not Exciting, but Crucial

"History will be kind to me, for I intend to write it." – Winston Churchill, amateur painter

Unfortunately, acting like a good fiduciary doesn't always mean so much if you can't demonstrate that you did it. Not only is appropriate documentation of a committee's meetings and decisions crucial preparation for the possibility of an audit or lawsuit, but it serves plan fiduciaries in more everyday ways as well. Documentation is a critical yet often neglected discipline.

SUMMARY

- Meeting and decision documentation form some of the most compelling evidence of a committee's diligence.
- Thoughtful documentation is crucial preparation for audit or litigation and helps committees to retain institutional memory and act with consistency.
- Committees should observe basic practices, such as assigning a qualified notetaker, carefully managing the level of detail contained in meeting minutes, and creating more detailed summaries for significant decisions.
- Many sponsors believe that their documentation practices are satisfactory, yet they fail to sufficiently document decisions that could be hot buttons for litigation (e.g., the use of active vs. index funds or the choice of money market vs. stable value).
- Major decisions, such as target-date glide path selection, that have not been adequately documented should be revisited and, if still valid, be documented as clearly and thoroughly as necessary.

DOCUMENTATION IS CRUCIAL

Meeting and decision documentation serve as testaments to a committee's good care and diligence. More specifically, careful and appropriate documentation assists committees in two key areas.

Preparation for audit and litigation

Every DOL investigation begins with a document request, and every request includes fiduciary committee meeting minutes. Similarly, plaintiff's attorneys will seek to obtain, through request or subpoena, committee meeting minutes. High-quality meeting minutes and documentation of committee decisions demonstrate adherence to and procedures and attest to a prudent and consistent approach to fiduciary duty.

As we've written about [before](#), ERISA litigation has grown more commonplace and has spread across plan types and sizes. While fiduciaries can take steps to make their plans less obvious targets, committees should act as though they could face a lawsuit at any time. Implicit in this preparation should be the idea that simply doing the right thing isn't enough; fiduciaries need to be ready to show a record of their diligence.

Wildman et al. v. American Century, 2019 is a prime example of how documentation can help plan fiduciaries during litigation. In this case, the plaintiffs asserted, among other things, that plan fiduciaries acted imprudently by offering a core menu composed mainly of American Century's own actively managed funds and failing to offer plan participants stable value fund and index fund options. You'd think that the plaintiffs, opposing an asset

manager using their own funds in their own retirement plan, might be in a good position to win or force a settlement. However, American Century’s fiduciaries prevailed. Key phrases in the court’s finding in favor of the defendants make plain the role that effective meeting documentation played in the decision:

- “The Committee meetings were documented through a set of meeting minutes. The meeting minutes were thorough, capturing the topic of discussion, who initiated questioning, and then the outcome of the vote or the Committee’s ultimate decision.”
- “... the record and testimony demonstrates [*sic*] Committee members made careful investigations of investment decisions and acted in the best interests of the Plan participants.”
- “the issue is whether the Defendants considered these options and came to a reasoned decision for omitting them from the Plan. The evidence shows the Committee did so.”

Institutional memory

Documentation can help committees in more mundane ways, as well. Maintaining institutional memory can be a challenge for plan investment committees:

- Plan committee members generally have day jobs and are often fully engaged in plan management only four times a year.
- Committees inevitably face membership turnover. Often, the lower that turnover is, the greater the impact when it does come.
- Once a decision is made, years can go by before the rationale behind that decision needs to be revisited.

Carefully crafted records create a unified recollection of what a committee did and why it did it. They promote better decision-making by, first, obliging a committee to formalize rationales for decisions and, secondly, by enabling an easy-access touchstone that can shape future decisions about the same subject.

DIFFERENT FORMATS FOR DIFFERENT NEEDS

Meeting Minutes

Meeting minutes are the most basic yet crucially important evidence of good fiduciary behavior. They illustrate commitment to both the mechanics of the fiduciary process (e.g., holding regular meetings) and the diligence with which a committee carries out its duties. Effective meeting minutes should include a few essential components:

- The date, time, and place of the meeting
- A list of attendees
 - Including committee members and non-committee members, such as committee staff, legal counsel, consultants, and other providers
- The matters discussed at the meeting
- The decisions made or actions taken at the meeting
- Meeting materials
 - Including investment reviews and recordkeeper reports. We also suggest that the plan’s investment policy statement be distributed in advance of each meeting.

When plan fiduciaries produce a well-organized, complete, and consistent set of meeting minutes at the inception of litigation or an investigation, demonstrates that they are aware of their fiduciary obligations and have taken



them seriously. Presentation of inconsistent or incomplete minutes (or the inability to do even that) does just the opposite.

Key Decision Summaries

When a committee makes a weighty decision in a more complex matter, such as target-date glide path selection, documentation beyond meeting minutes may be needed. Decision summaries memorialize the rationale for significant decisions, creating stand-alone, sophisticated expressions of the Committee's process, considerations, and reasoning.

The specific format of a decision summary may vary based upon topic, but the basic structure carries through:

- The date of the decision and a reference to the minutes of the meeting in which it was made
- A background summary of the matter at hand
- The process through which the Committee determined and studied options
- The ultimate decision and the rationale for it

Decision summaries provide certain advantages over simply using meeting minutes to describe decisions. Summaries allow for a complete explanation of the circumstances that gave rise to the need for a decision, which may have evolved over several meetings. As stand-alone documents organized by subject rather than by date, summaries are a convenient format for later retrieval and review. Lastly, summaries don't just prepare documentation for litigation or investigation; they help to prepare committee members as well. By facilitating an in-depth, collective understanding of process, considerations, and decisions, summaries make it more likely that a committee will be both educated and unified in understanding.

DOCUMENTATION COMMONLY FALLS SHORT

The fact is that most fiduciaries, even those who consider their documentation process satisfactory, fail to sufficiently document key decisions that are hot buttons for litigation. Examples of these decisions include:

- The selection of a target date glide path
- The incorporation of index funds into a plan menu
- The use of the proprietary funds of a recordkeeper
- The choice of stable value vs. money market

Committees should review these and other significant decisions they've made and ensure that documentation is up to snuff. If it isn't, committees should review the decision, make sure that their process and rationale still hold water, then document the decision clearly and as thoroughly as necessary.

CREATING EFFECTIVE DOCUMENTATION

The need to address several potential audiences guides the format and content of minutes and other record documents. Documentation should be useful to the Committee, but major consideration should always be given to potential external audiences, such as the Department of Labor and lawyers representing plaintiffs suing the plan.

The level of detail

The scope of meeting minutes should be managed carefully, with particular regard paid to how minutes and summaries might be misunderstood or used by external audiences (i.e., the DOL or plaintiff's counsel). Plaintiff's attorneys, especially, will seek to capitalize on what those minutes do or don't contain. Fiduciaries must take care not to create an opportunity for their own documentation to be used against them.



Meeting minutes are a record; they're not a transcript. Emphasis should be placed on the quality of the record rather than the volume of information it contains. Minutes shouldn't include specific remarks attributed to specific people, and documentation should focus on matters discussed and actions taken rather than detail a blow-by-blow account of the Committee's deliberations.

By their nature, decision summaries are more comprehensive, but their content should be managed similarly. Summaries should contain only enough information to effectively convey a thorough grasp of the topic, a prudent, sophisticated process, and a well-reasoned decision.

The notetaker

Committees sometimes assign notetaking to a junior member of a finance or HR team, but this may not be the best approach. Ideally, notes should be taken by someone who is very familiar with the subject matter being discussed, as well as investment and fiduciary concepts. The notetaker should also be free to concentrate on memorializing the meeting, which generally precludes them from being a Committee member or a presenter. Lastly, consistency is important; keeping a single individual (who is reliably available for meetings) as notetaker is preferable.

A committee may choose to name an experienced employee to their committee staff to act as secretary and many with internal legal groups name lawyers. In addition, sophisticated consultants often offer notetaking as part of their service.

The process

The committee secretary (or designated notetaker) should distribute meeting minutes to meeting attendees and request corrections as soon after the meeting as possible. Not only will recollections be at their freshest, but minutes that are finalized promptly may present more robust evidence of the Committee's care. As the first item of business at the next meeting, the Committee should vote to formally accept the previous meetings' minutes.

FINAL WORDS

Documentation is the most fundamental means of providing evidence of a committee's good fiduciary behavior, and could wind up being the most important. Committees should happily take the opportunity to record their excellent work through effective documentation and not treat this crucial activity as an afterthought.

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