



PROBATE DISPUTE RESOLUTION SERIES PRESENTS

Fiduciaries & Trustees: The Good, The Bad & The Ugly

August 10, 2022

Richard Collier, Esq.
Hon. Mary Schulte (Ret.)

Hon. Jamoa Moberly (Ret.)
Hon. Paul T. Suzuki (Ret.)



Hon. Mary Fingal Schulte



Richard Collier, Esq.

**ADRSM**
SERVICES, INC.
SPEAKERS



Hon. Jamoa Moberly



Hon. Paul Suzuki

OBLIGATIONS & DUTIES
OF THE FIDUCIARY
HON. MARY FINGAL SCHULTE



SELECTION OF THE
FIDUCIARY/TRUSTEE
RICHARD COLLIER, ESQ.



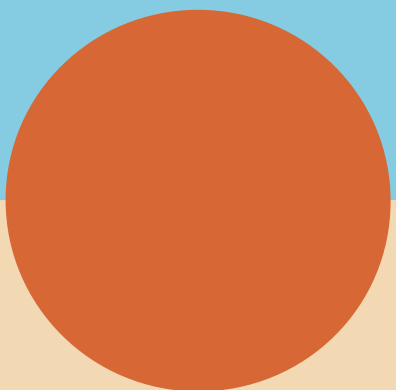

AGENDA

ROLE IN MEDIATION
HON. JAMOA MOBERLY



GROUNDS & PROCEDURES
FOR REMOVAL
HON. PAUL SUZUKI



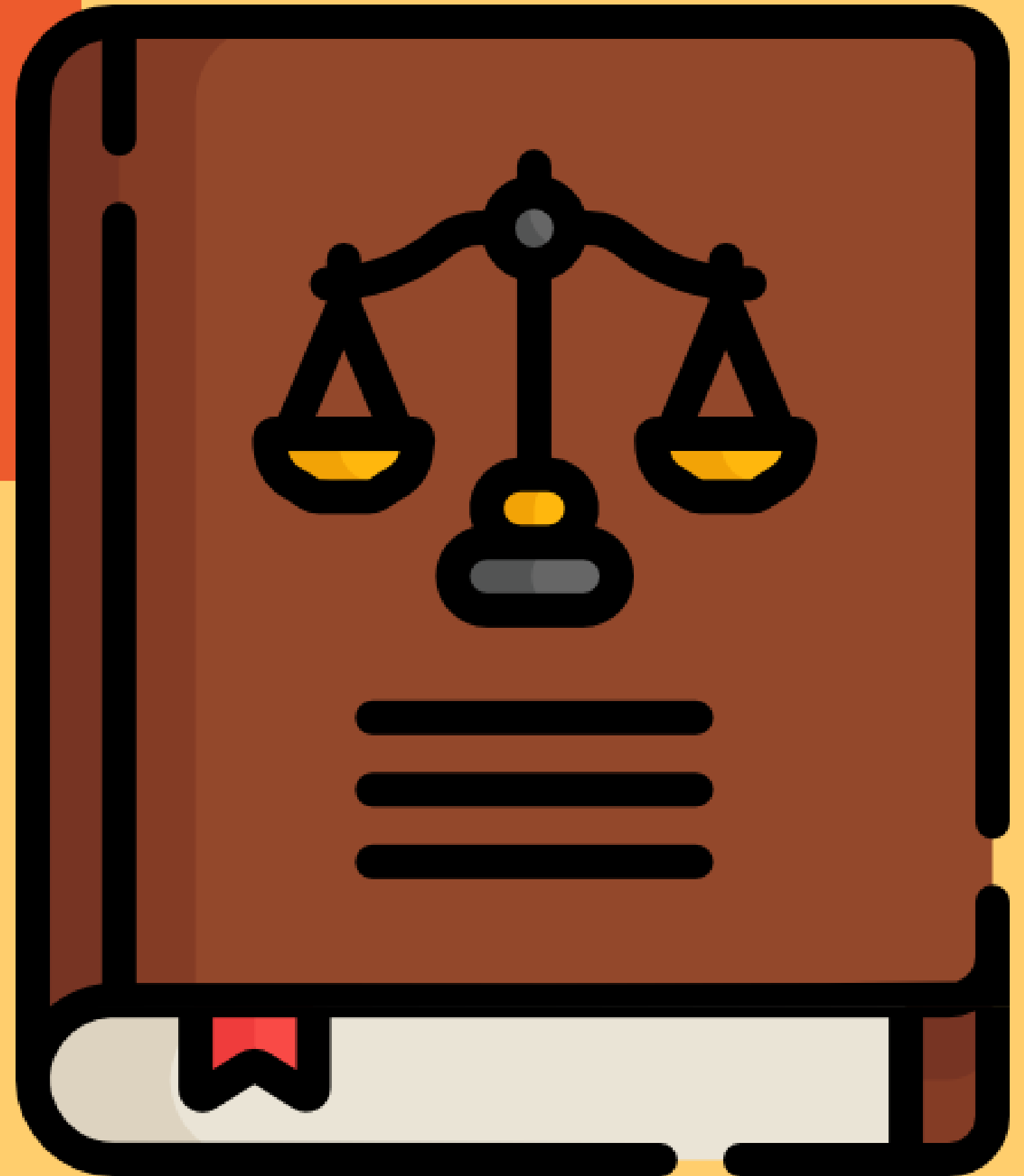


OBLIGATIONS & DUTIES
OF THE FIDUCIARY
HON. MARY FINGAL SCHULTE

PROBATE CODE §39



"Fiduciary" means personal representative, trustee, guardian, conservator, attorney-in-fact under a power of attorney, custodian under the California Uniform Transfer to Minors Act,... or other legal representative subject to this code.



LICENSURE REQUIREMENT
B&P CODE
§ 6530 ET. SEQ.

- Beginning Jan 1, 2009, no person, other than an attorney, shall act or hold himself or herself out as a professional fiduciary unless licensed.
- No professional fiduciary shall operate with an expired, suspended, or revoked license.

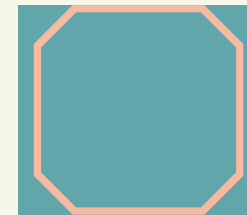




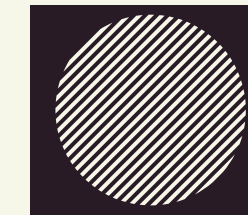
B&P CODE § 6501 PRIVATE PROFESSIONAL



Person who acts as a trustee, agent under a durable power of attorney,

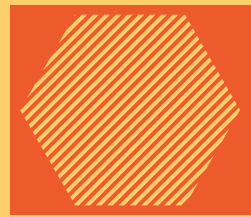


For more than three people/families at the same time,

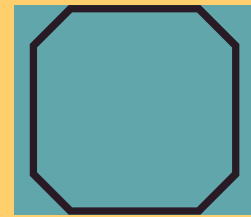


Not related to the professional fiduciary by blood, adoption, marriage, or regular Domestic Partnership.

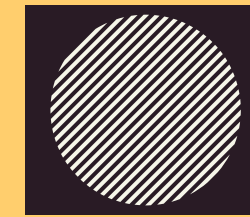
B&P CODE § 6501 PRIVATE PROFESSIONAL EXCEPTIONS



Trust Co/Bank,
their employees,



CA state/county
public agency
such as Public
guardian,



Broker-dealers
registered under
the securities
laws.

B&P CODE § 6563:

REQUIRED DISCLOSURE OF FEES



If a PPF has a website:

Post range of fees charged.



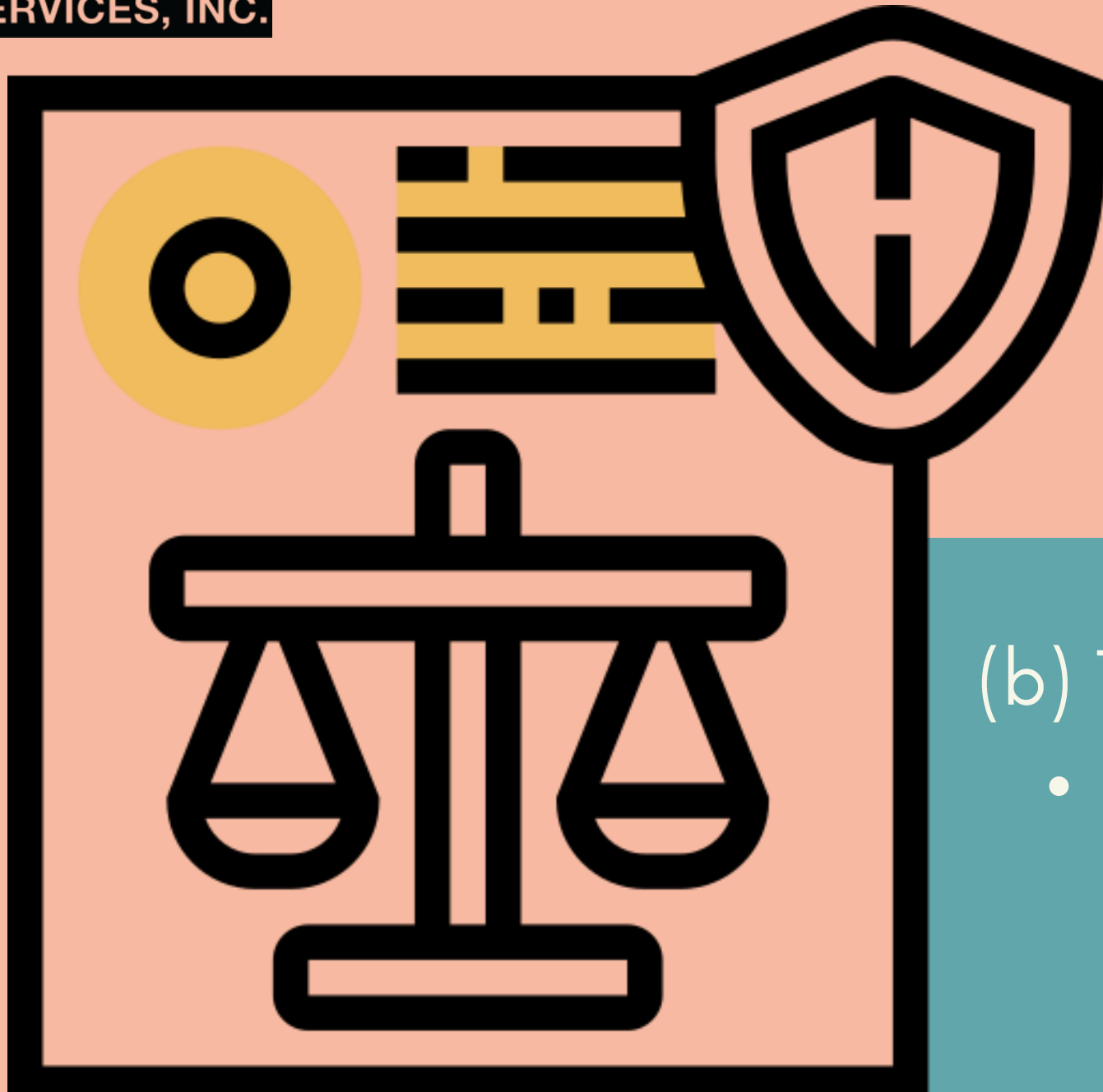
If a PPF does not have a website:

Provide prospective clients with written range of fees prior to contracting for services.

PERSONAL
REPRESENTATIVE
STANDARD OF CARE
PROBATE CODE
§ 9600

(a) The personal representative has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes ordinary care and diligence is determined by all the circumstances of a particular case.





PROBATE CODE
§ 9600 (CONT'D)

(b) The personal representative

- Shall exercise a power to the extent that ordinary care and diligence require that the power be exercised.
- Shall not exercise a power to the extent that ordinary care and diligence require that the power not be exercised.

TRUSTEE STANDARD OF CARE

PROBATE CODE § 16040

- (a) The trustee shall administer the trust with reasonable care, skill and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.
- (b) The settlor may expand or restrict the standard provided in subdivision (a) by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions.
- (c) This section does not apply to investment and management functions governed by the Uniform Prudent Investor Act...



UNIFORM PRUDENT INVESTOR ACT PROBATE CODE § 16047

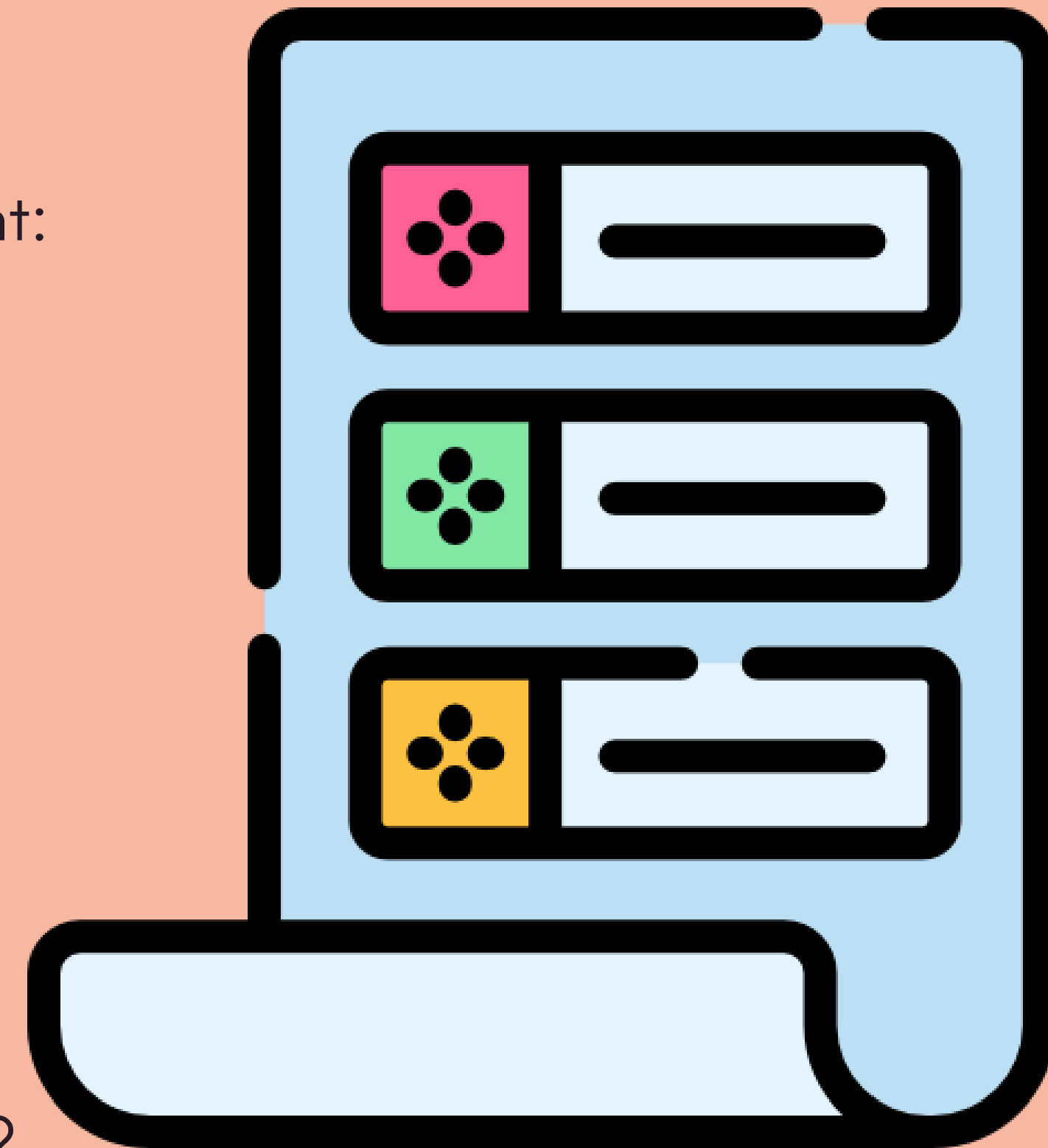
(a) The trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.

(b) A trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.



TRUSTEE'S DUTIES IN GENERAL


- Duty to administer trust according to the trust instrument: 16000
- Solely in the interest of the beneficiaries (loyalty): 16002
- Deal impartially with multiple beneficiaries: 16003
- Avoid conflicts of interest: 16004
- Control and preserve trust property: 16006
- Make trust property productive: 16007
- Duty to inform: 16060
- Duty to account: 16062
- Duties with regard to discretionary powers: 16080-16082



PROBATE CODE
§ 16202

The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties.





SELECTION OF THE
FIDUCIARY/TRUSTEE
RICHARD COLLIER, ESQ.



THE TRUSTEE SHOULD:

- Be competent to handle the trust's finances
- Have administrative capabilities and resources
- Be able and willing to follow the trust's instructions
- Be familiar with the beneficiaries' circumstances, personalities, and abilities
- Be unbiased and sensitive in making decisions
- Be alert to and unfazed by family conflict
- Have the time and the interest to serve as trustee
- Be sensitive to the costs of administration
- Have good judgment and common sense
- Have a sense of humor



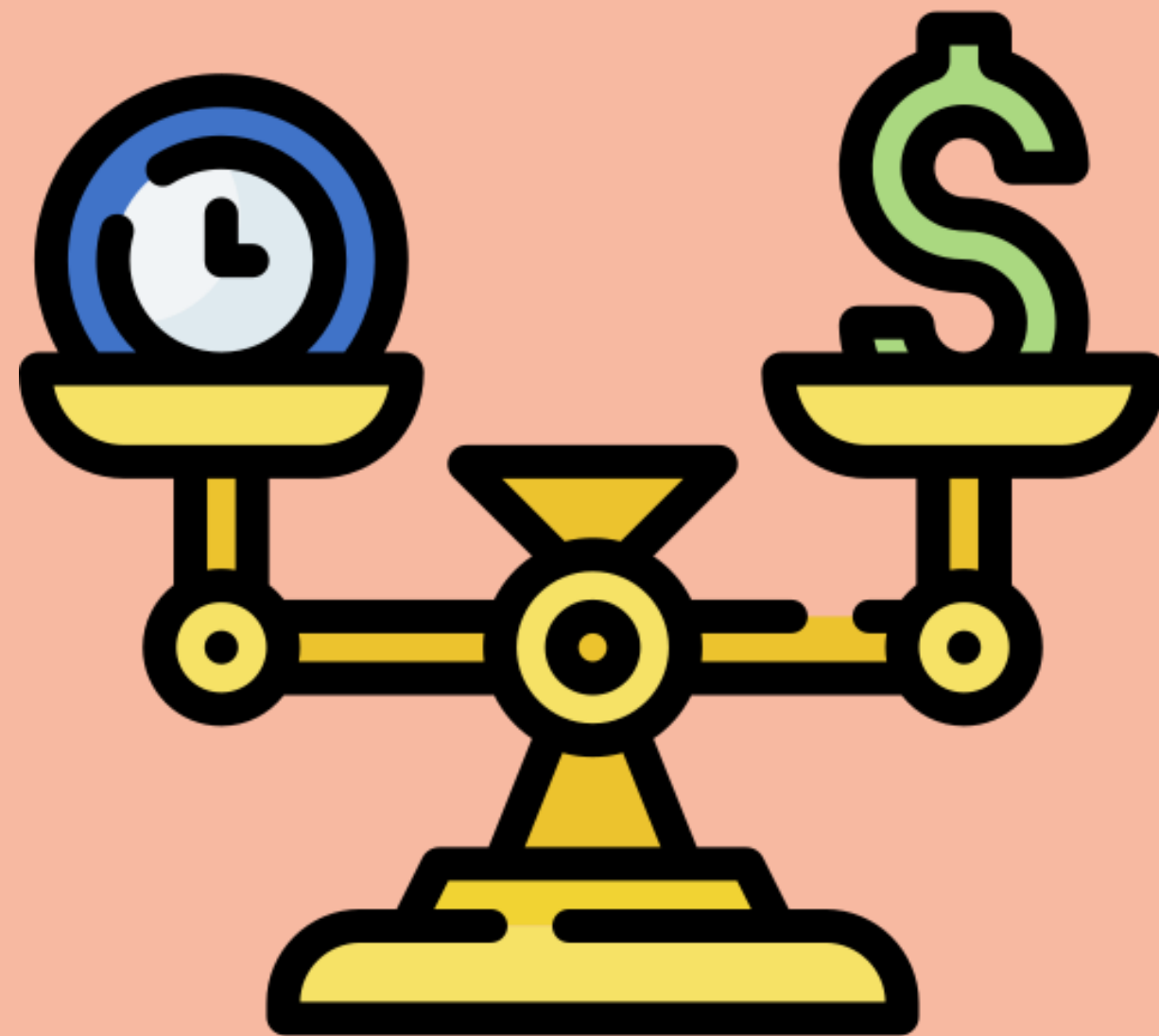
FAMILIARITY WITH TRUSTOR AND BENEFICIARIES







ADMINISTRATIVE ABILITIES AND RESOURCES

COST CONSIDERATIONS





ROLE IN MEDIATION
HON. JAMOA MOBERLY

PROBATE CODE §16040

UNDERLYING PRINCIPLE



- ◆ (a) The trustee shall administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.
- ◆ (b) The settlor may expand or restrict the standard provided in subdivision (a) by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions.
- ◆ (c) This section does not apply to investment and management functions governed by the Uniform Prudent Investor Act, Article 2.5 (commencing with Section 16045).

Do not waste trust assets by ill-timed or unprepared mediation.

Give notice to beneficiaries and opportunity to appear or object to mediation; *Breslin v. Breslin* (2021)62 Cal. App. 5th 801.

Before mediation: circulate a proposed plan of distribution or partial distribution; prepare draft settlement agreement.



TRUSTEE
MUST COME
PREPARED

What to Bring: current financials; pending attorney fees / other expenses; current appraisals; short list of potential realtors / professional managers; inventory of personal property; estimate for reserve.

Have trust accountant on call.

Wear your neutral hat.



While consent of both trustees usually is necessary to bind the trust it can double the attorney fees if co-trustees cannot communicate or otherwise work together.

- Two sets of attorneys.
- Some co-trustees only communicate through their attorneys.

On other hand, it can assure a voice for each faction of beneficiaries at the trust expense.

CO-TRUSTEES?

May present
mixed blessing.

PROFESSIONAL FIDUCIARY MAY BE GOOD SOLUTION



Not a beneficiary, no family history and assures one set of trust attorneys.



Can be reassuring to the unrepresented beneficiaries.




Obstacle: if trustee will not voluntarily step aside and/or estate is too small or not liquid.

TRUSTEE HAS OBLIGATION TO “DO NO HARM.” MEDIATION MANTRA.



To accomplish this the trustee should come to mediation with goals to achieve short of full resolution. Some low hanging fruit to pick off if full resolution not feasible. This will also build confidence in mediation process for future full resolution.

Whether a family member or a professional fiduciary, Trustee should evaluate relationships to determine which are salvageable. For those, seek to build bridges for future. May take years but peace with honor is goal. Future shared tasks such as a memorial or return of some memento or an apology may be enough.

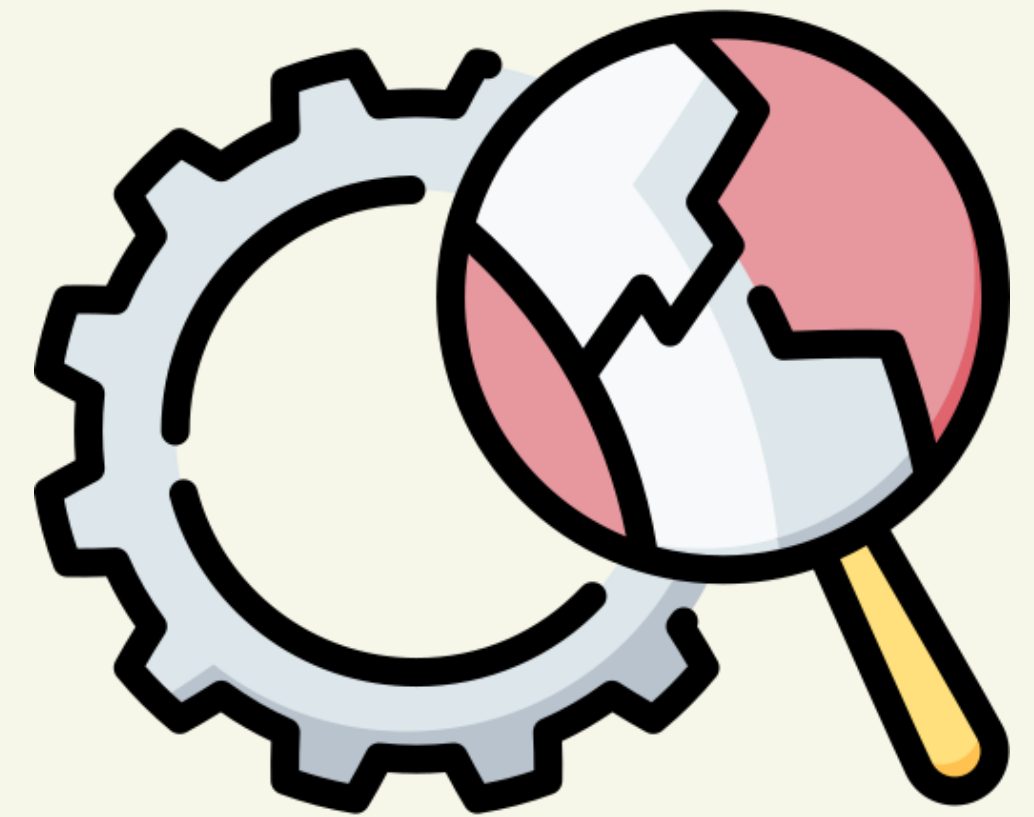


GROUNDS & PROCEDURES
 FOR REMOVAL
 HON. PAUL SUZUKI



GROUNDS FOR REMOVAL OF PROBATE REPRESENTATIVE, PC § 8502

- Wasted, mismanaged, embezzled, fraud on the estate or is about to do so
- Incapable, incompetent, or not qualifying
- Neglected the estate or neglected to perform
- Removal is necessary for the protection of the estate or interested persons (open ended grounds)
- Any other statutory grounds



REMOVAL OF PROBATE REPRESENTATIVE, PC § 8500 ET SEQ.

PETITION TO REMOVE REPRESENTATIVE

Any interested person may file

May be combined with a petition to appoint a successor

On the court's own motion

Court can suspend powers pending the hearing and make other orders regarding the property pending the hearing

Court can also appoint a temporary representative if the powers are suspended. PC 8540

Appointment of a special administrator may be made at any time without notice or on such notice as the court deems reasonable. PC 8541

Failure to answer the petition or attend the hearing is grounds for removal

FILING THE PETITION FOR REMOVAL

1 Petition allegations: standing, name of representative to be removed, and facts, not conclusions, supporting removal.

2 Representative can file a demurrer PC § 8500(c). (Weigh the legal expense and the benefit of doing so.)

3 Prepare judicial council form DE 122 citation form. Personally serve the citation and petition on the representative.

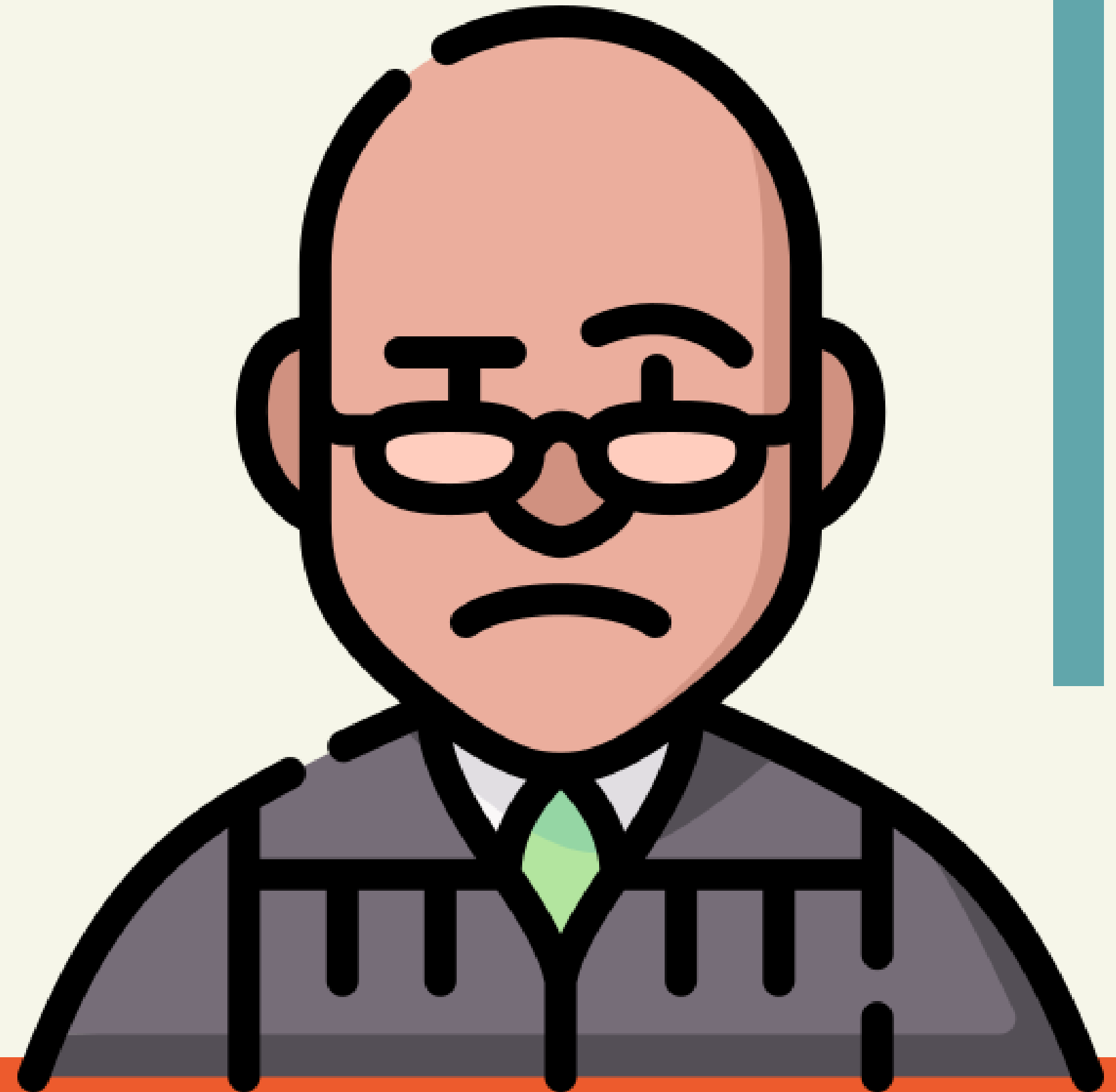
4 Mail copy to bonding company, PC § 1213. Serve other interested parties by mail. Upon obtaining the removal order or suspension, additionally serve the bonding company again within 5 days of obtaining the order.

5 The matter shall be set within 10 days unless the parties agree otherwise. PC § 9614



WEIGH THE RISK IN FILING THE REMOVAL PETITION

The court may award attorney fees against the petitioner if the removal petition was brought unreasonably and for the purpose of hindering the personal representative. The attorney fees imposed may be a charge against the petitioner's interest. PC § 9614(c).



“The bad and the ugly and the
endless law suits”

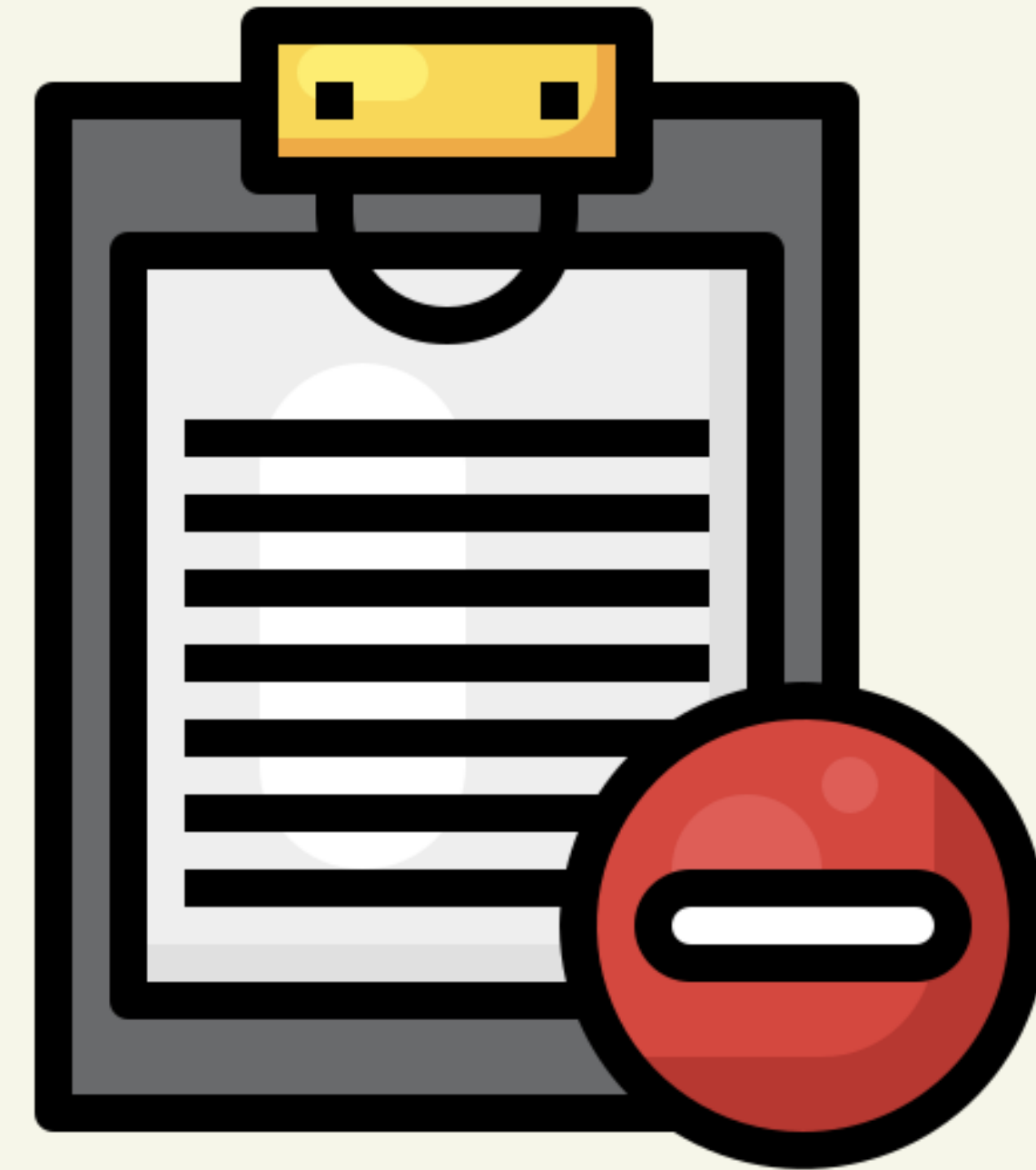
“I thought my client was a nice guy...”
PC § 8520 et. seq.

A successor personal representative may sue attorneys hired by the predecessor representative when the attorney’s negligent work caused harm to the estate. *Smith v Cimmet*, 199 Cal.App4th 1381 (1st District 2011).

REMOVAL OF TRUSTEES:

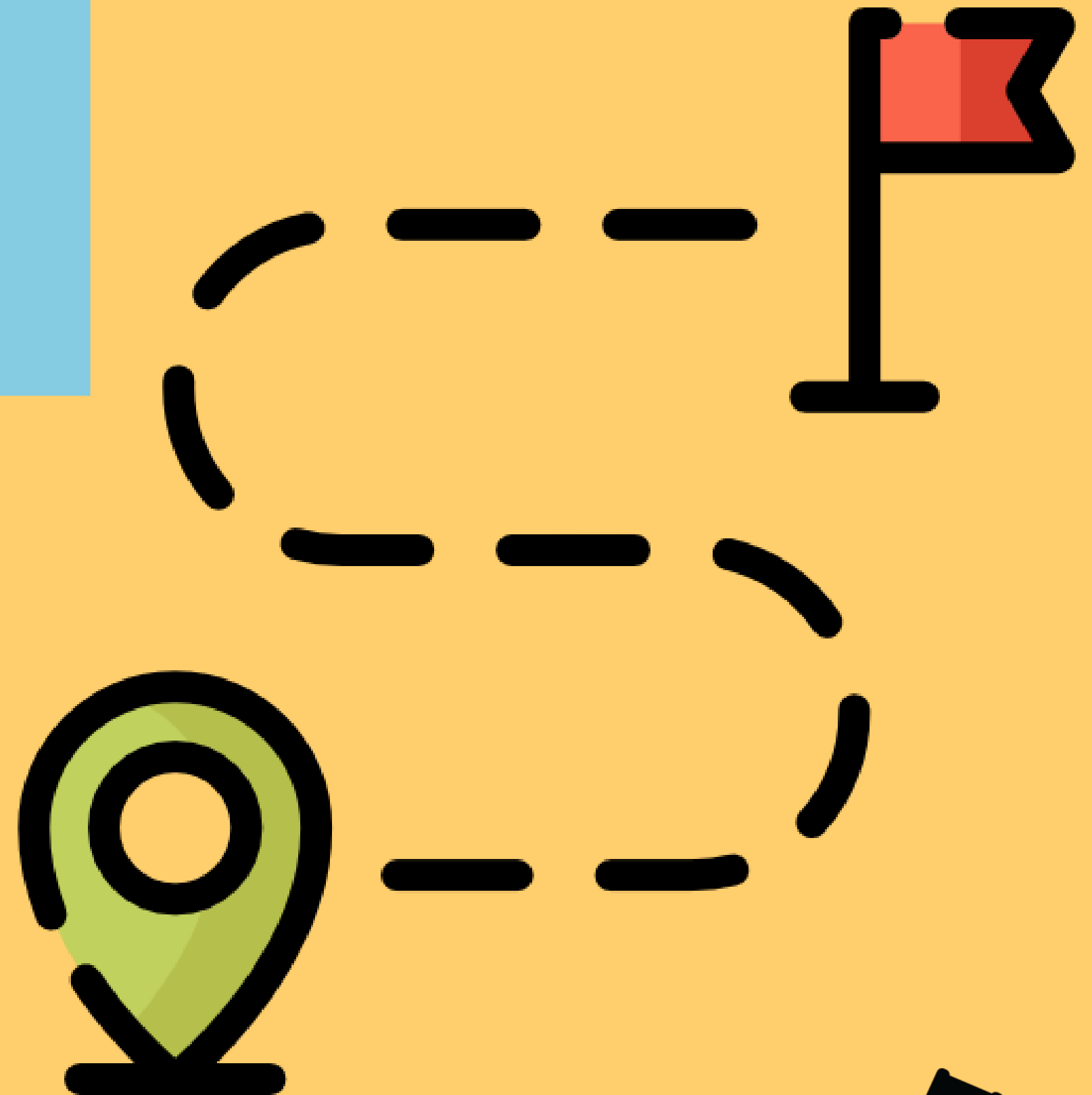
Statutory Grounds: PC § 15642(b) sets forth the following grounds for removal of a trustee by the court:

- 1 The trustee has committed a breach of the trust.
- 2 The trustee is insolvent or otherwise unfit to administer the trust.
- 3 Hostility or lack of cooperation among cotrustees impairs the administration of the trust.
- 4 The trustee fails or declines to act.
- 5 The trustee's compensation is excessive under the circumstances.
- 6 The sole trustee is a disqualified person.
- 7 The trustee is "substantially unable" to manage the trust's financial resources or properly execute the duties of the office.
- 8 The trustee is "substantially unable" to resist fraud or undue influence.
- 9 Other good cause.



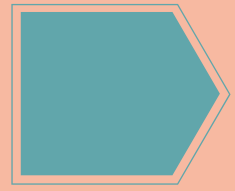
PROCEDURE

A proceeding is commenced by filing a petition stating facts showing that the petition is authorized by PC § 17000 et seq., stating the grounds and stating each person and their address entitled to notice. PC § 17201. A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under PC § 17200, PC § 15642(a).

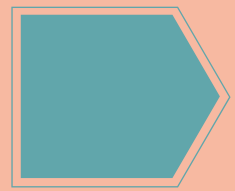


BROAD POWERS OF THE COURT

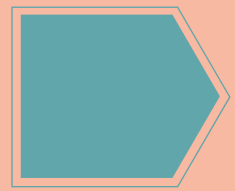
The probate court has broad powers in its discretion to make any orders and take any other action necessary or proper to dispose of the matters presented by a petition.



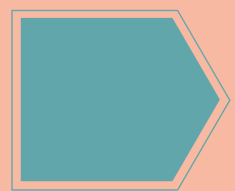
Including appointment of a temporary trustee to administer the trust in whole or part.



The court may sua sponte order an accounting. *Christie vs Kimball*, 202 Cal.App.4th 1407(2nd Dist. 2012).



Appoint a trustee ad litem to conduct litigation when the trustee had a conflict of interest because he asserted a claim against the trust which was inimical to that of the beneficiaries. *Getty vs Getty*, 205 Cal.App.3rd 134 (2nd Dist. 1988)



To settle account and fix compensation, probate court had broad statutory and equitable jurisdiction to suspend trustee's powers and appoint interim trustee without waiting for beneficiary to petition for removal or suspension. *Schwartz v. Labow* (2008) 164 C.A.4th 417, 428, 78 C.R.3d 838 on trustee's petition under PC § 17200)

ATTORNEY FEES FOR BAD FAITH REMOVAL PETITION

If a petition for removal is filed in bad faith and removal would be contrary to the settlor's intent, the court may order that the person seeking removal bear all or part of the costs, including reasonable attorneys' fees. (PC § 15642(d).)



KEEP IN MIND WHAT IS IN
THE BEST INTEREST OF THE
PARTIES...

PC § 16403 which imposes liability
on a successor trustee for failure to
remedy breaches of trust by his or
her predecessor.



NOTE

Under commentary, "In certain circumstances it may not be reasonable to enforce a claim against a former trustee, depending upon the likelihood of recovery and the cost of suit and enforcement."

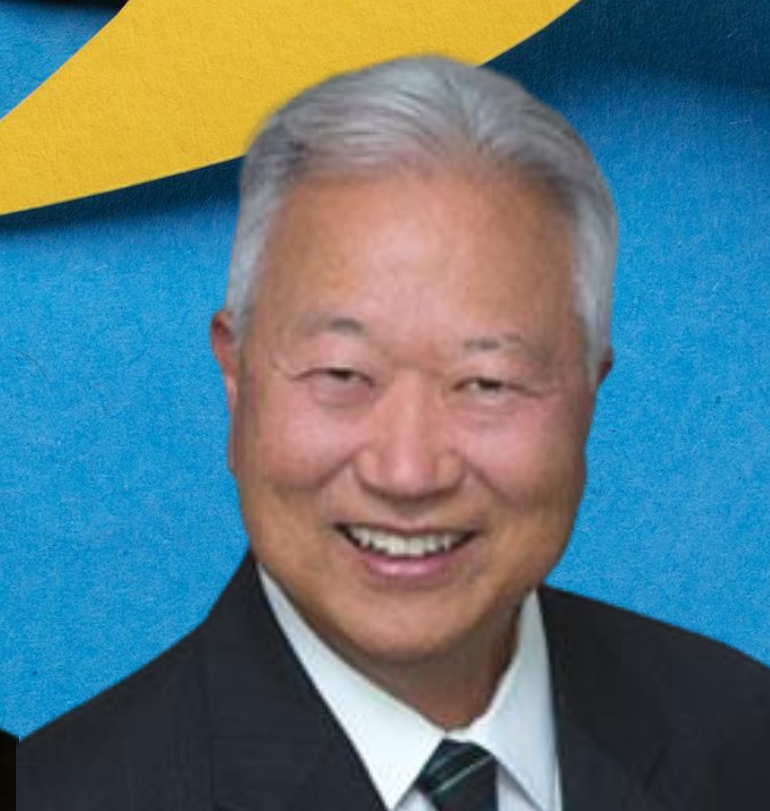
THANK YOU



Richard Collier, Esq.
rcollier@adrservices.com



Hon. Jamaa Moberly
judgemoberly@adrservices.com



Hon. Paul Suzuki
judgesuzuki@adrservices.com



Hon. Mary Fingal Schulte
judgeschulte@adrservices.com

