

**MALPRACTICE AND LITIGATION INVOLVING
TRUSTS AND ESTATES**

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MALPRACTICE AND LITIGATION INVOLVING TRUSTS AND ESTATES

Jack W. Lawter, Jr.

I. LEGAL MALPRACTICE GENERALLY

A. Suits by Clients. The attorney-client relationship begins with a contract to provide legal services. The contract may be express or implied. *Span Enters. v. Wood*, 274 S.W.3d 854, 857-58 (Tex.App.- Houston [1st Dist.] 2008, no pet.). But see *In re Bivins*, 162 S.W.3d 415, 419-20 (Tex.App.- Waco 2005, orig. proceeding) (attorney-client relationship not created when attorney hired in nonlegal capacity); *State v. Delany*, 149 S.W.3d 655, 662 (Tex.App.- Houston [14th Dist.] 2004) (same), *rev'd in part on other grounds*, 197 S.W.3d 297 (Tex.2006). Once the relationship is established, the attorney's obligations to a client are actionable under the laws of contract, tort and fiduciary relationship. Thus, attorneys are under three concurrent obligations to the client: (1) the duty to perform the contract according to its terms, (2) the duty to perform the contract as an ordinary, prudent attorney would perform it, and (3) the duty to perform the contract with the utmost good faith and fidelity. Anderson & Steele, *Fiduciary Duty, Tort & Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L.Rev. 235, 245 (1994)

B. Suits by Nonclients.

1. Privity Required. The rule of privity bars suits against attorneys by parties who are not clients. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex.1999);

Thompson v. Vinson & Elkins, 859 S.W.2d 617, 621 (Tex.App.- Houston [1st Dist.] 1993, writ denied); see, e.g., *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex.1996) (trust beneficiaries could not sue attorney who drafted trust agreement); *Swank v. Cunningham*, 258 S.W.3d 647, 666 (Tex.App.- Eastland 2008, pet. denied) (shareholders could not bring derivative suit against attorneys who represented shareholders as individuals, not as representatives of corporation); *Poth v. Small, Craig & Werkenthin*, 967 S.W.2d 511, 514 (Tex.App.- Austin 1998, pet. denied) (sole stockholder who relinquished power to voting trust could not sue attorneys hired by trustee); *Gamboa v. Shaw*, 956 SW.2d 662, 665 (Tex.App.--San Antonio 1997, no pet.) (shareholder could not sue attorney who represented corporation); *Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 288 (Tex.App.--Fort Worth 1997, writ denied) (judgment debtor could not sue attorneys who filed writ of garnishment on behalf of their clients). However, the rule requiring privity does not prevent a personal representative of a decedent's estate from bringing a suit against the decedent's attorney. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 786-87 (Tex.2006); see *Smith v. O'Donnell*, 288 S.W.3d 417, 421 (Tex. 2009). Because a personal representative of an estate stands in the shoes of the decedent, the personal representative is considered to be in privity with the decedent's attorney. *Belt*, 192 S.W.3d at 787. Thus, any suit the decedent could have brought against his

or her attorney during the decedent's life for economic damages can be brought by the personal representative of the decedent's estate. *Id.*; see *Smith*, 288 SW.3d at 422.

In *Belt*, the Texas Supreme Court reversed earlier decisions to permit the personal representative of the estate of a deceased client to sue an estate planning lawyer for damages to the estate. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006). In *Belt*, the allegation was that the estate planners had negligently caused the estate to incur additional estate taxes. The Supreme Court continues to insist upon privity and has not changed the rule that disappointed heirs of a deceased client cannot sue the estate planning attorney. *Barcello v. Elliott*, 923 S.W.2d 575 (Tex. 1996). The *Belt* decision certainly increases the risk of an estate planning practice and the limits of the *Belt* decision will certainly be tested when disappointed heirs serve as the personal representative of the deceased client's estate. As of now, the malpractice actions are limited to harm to the estate (as opposed to a beneficiary) and all damages must be paid to the estate (as opposed to the disappointed heir).

2. Privity Not Required.

a. Claims against attorneys. Although nonclients cannot sue attorneys for actions that are based on an attorney-client relationship, nonclients can sue attorneys for wrongful conduct directed at them. See *Likorer v. Sunflower Terrace II, Ltd.*, 696 SW.2d 468, 472 (Tex.App.--Houston [1st Dist.] 1985, no writ). When an attorney participates with a client in a wrongful

activity that injures a nonclient, the attorney is liable to the nonclient because the attorney's wrongful act is foreign to the attorney's duties to his or her client. *Poole v. Houston & T.C. Ry.*, 58 Tex. 134, 137-38 (1882); *Querner v. Rindfuss*, 966 S.W.2d 661, 666 (Tex.App.--San Antonio 1998, pet. denied); *McKnight v. Riddle & Brown, P.C.*, 877 S.W.2d 59, 61 (Tex.App.-Tyler 1994, writ denied). A nonclient can sue an attorney for negligently failing to advise the nonclient that the attorney is not representing her. *Burnap v. Linnartz*, 38 S.W.3d 612, 622 (Tex.App.-- San Antonio 2000, no pet.); *Parker v. Carnahan*, 772 S.W.2d 151, 157 (Tex.App.--Texarkana 1989, writ denied).

b. Sanctions against attorneys. A nonclient can seek sanctions against an attorney for wrongful conduct while representing a client in a lawsuit. See *Klein & Assocs. Political Relations v. Port Arthur ISD*, 92 S.W.3d 889, 901 (Tex.App.-Beaumont 2002, pet. denied); *Bradt v. West*, 892 S.W.2d 56, 72 (Tex.App.-Houston [1st Dist.] 1994, writ denied); see also Tex. Civ. Prac. & Rem. Code §9.012 (sanctions for signing groundless pleading), §10.004 (sanctions for frivolous pleadings and motions); Tex. Gov't Code §21.002 (sanctions for contempt of court); Tex. R. Civ. P. 13 (sanctions for filing improper pleadings, motions, and other papers), Tex. R. Civ. P. 215 (sanctions for abusing discovery).

C. Negligence.

1. Negligence Claims By A Client. The focus of a negligence claim by a client is whether the attorney adequately represented the client. *Duerr v. Brown*,

262 S.W.3d 63, 71 (Tex.App.-Houston [14th Dist.] 2008, no pet.); *Kimleco Pet., Inc. v. Morrison & Shelton, P.C.*, 91 S.W.3d 921, 923 (Tex.App.-Fort Worth 2002, pet. denied). When the client's primary complaint is that the attorney did not exercise the degree of care, skill, or diligence that an attorney of ordinary skill and knowledge commonly possesses, then the complaint should be alleged only as a negligence claim. *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 428 (Tex.App.-Austin 2009, no pet.); *Trousdale v. Henry*, 261 S.W.3d 221, 227-28 (Tex.App.-Houston [14th Dist.] 2008, pet. filed 11-13-08). When an attorney represents joint clients for purposes of estate planning, one client can sue the attorney for negligence in preparing the other client's will or trust. *Estate of Arlitt v. Paterson*, 995 S.W.2d 713, 721 (Tex.App.-San Antonio 1999, pet. denied), *disapproved on other grounds, Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex.2006). Negligence claims include giving erroneous legal advice, not giving advice when legally obligated to do so, disobeying lawful client instructions, and delaying or not handling a client matter among others.

2. Negligence Claims By A Nonclient.

a. Failure to perform duties. A nonclient generally cannot sue an attorney for negligence in the performance of a duty to the client. Under Texas law, an attorney does not owe a duty of care to nonclients who may be damaged by the attorney's negligence in representing a client. *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex.1996); *Parker v. Carnahan*, 772 S.W.2d 151, 156

(Tex.App.-Texarkana 1989, writ denied); *Dickey v. Jansen*, 731 S.W.2d 581, 582 (Tex.App.-Houston [1st Dist.] 1987, writ refd n.r.e.). By comparison, the majority of states that have addressed this issue have relaxed the privity barrier to permit an intended beneficiary to sue an attorney for negligence as a third-party beneficiary to the contract. *Barcelo*, 923 S.W.2d at 577-78. In refusing to recognize an attorney's duty to a beneficiary of a will, the *Barcelo* court adopted a rule recognized in only four states. *Id.* at 579 (Cornyn & Abbott, JJ., dissenting). Even the Restatement (3d) of the Law Governing Lawyers recognizes an attorney's duty to a beneficiary of a will. See Restatement (3d) of the Law Governing Lawyers §51 & cmt. f, illus. 2 (2000) (attorney has duty to nonclient when attorney knows that client intends for attorney's services to benefit nonclient, and this duty substantially promotes enforcement of attorney's obligations to client and would not create inconsistent duties). The only nonclients who can sue an attorney for negligence are the personal representatives of a decedent's estate, when the representatives sue on behalf of the estate for purely economic injury that the estate suffered before the decedent's death. See *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 786-87 (Tex.2006).

b. Failure to Inform.

1. No Representation. A nonclient can sue an attorney for negligently failing to advise the nonclient that the attorney did not represent the client. See *Burnap v. Linnartz*, 38 S.W.3d 612, 622 (Tex.App.-San Antonio 2000, no pet.); *Kotzur v. Kelly*, 791 S.W.2d 254, 258

(Tex.App.-Corpus Christi 1990, no writ); Parker, 772 S.W.2d at 157.

2. Scope of representation. A client can sue an attorney for negligently failing to advise the client that the attorney did not represent the client on some of the client's claims. See *Moore v. Yarbrough, Jameson & Gray*, 993 S.W.2d 760, 763 (Tex.App.-Amarillo 1999, no pet.).

D. Breach of Contract. The focus of a breach-of-contract claim against an attorney is whether the attorney performed the contract according to its terms

1. Breach of Contract Claims By a Client. A client can bring a suit for breach of contract against his or her attorney. Most breach-of-contract suits against a client's attorney involve disputes over legal fees. See, e.g., *Lopez v. Muiioz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 859 (Tex.2000) (client did not establish breach-of-contract claim against attorneys for overcharging on contingent-fee contract); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 184 (Tex.App.-Houston [14th Dist.] 2002, no pet.) (breach-of-contract claim for billing dispute); *Jampole v. Matthews*, 857 S.W.2d 57, 59 (Tex.App.-Houston [1st Dist.] 1993, writ denied) (breach-of-contract claim for excessive legal fees); see also *Judwin Props., Inc. v. Griggs & Harrison, P.C.*, 911 S.W.2d 498, 506 (Tex.App.-Houston [1st Dist.] 1995, no writ) (suit over disputed legal fees sounds in contract). Fee contract disputes involving issues other than legal fees are often characterized as negligence claims. See, e.g., *Rangel v. Lapin*, 177 S.W.3d 17, 24

(Tex.App.-Houston [1st Dist.] 2005, pet. denied.

2. Breach of Contract Claims By a Nonclient.

a. General rule. A person cannot bring a breach-of-contract claim against a party to the contract if the person is not in privity with the other party. Therefore, a nonclient cannot bring a breach-of-contract claim against an attorney if the nonclient is not in privity with the attorney. See *Republic Nat'l Bank v. National Bankers Life Ins. Co.*, 427 S.W.2d 76, 79 (Tex.App.-Dallas 1968, writ ref'd n.r.e.).

b. Nonclient paid for services. A nonclient who contracted with and paid the attorney to represent the client may be able to sue the attorney for breach of contract. See *Van Pollen v. Wish*, 23 S.W.3d 510, 516 (Tex.App.-Houston [1st Dist.] 2000, pet. denied).

E. Breach of Fiduciary Duty. An attorney owes fiduciary duties to his or her client and is liable for a breach of those duties. The focus of a claim for breach of fiduciary duty against an attorney is whether the attorney obtained an improper benefit from representing her client. See *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 429 (Tex.App.-Austin 2009, no pet.); *McGuire, Craddock, Strother & Hale, P.C. v. Transcontinental Rlty. Investors, Inc.*, 251 S.W.3d 890, 894 (Tex.App.-Dallas 2008, pet. denied). A plaintiff has a separate cause of action for breach of fiduciary duty if the client's petition includes allegations of self-dealing, deception, or misrepresentations by the attorney that go beyond mere negligence.

Trousdale v. Henry, 261 S.W.3d 221, 228 (Tex.App.-Houston [14th Dist.] 2008, pet. filed 11-13-08). An attorney who fails to disclose conflicts of interest, fails to deliver client funds, uses client confidences improperly, or engages in self-dealing may breach a fiduciary duty. *Beck*, 284 S.W.3d at 429; *Trousdale*, 261 S.W.3d at 232; *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App.-Dallas 2007, pet. denied).

1. Breach of Fiduciary Duty Claims By a Client. A client can bring a claim against an attorney for breach of fiduciary duty. *Trousdale*, 261 S.W.3d at 228. An attorney owes a fiduciary duty to his or her client. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex.1988); *Beck*, 284 S.W.3d at 428-29. An attorney's fiduciary duty to a client requires the attorney to act with abundant good faith, perfect candor, openness, and honesty, and without concealment or deception. *Beck*, 284 S.W.3d at 429; *Trousdale*, 261 S.W.3d at 229. The attorney is required to render a full and fair disclosure of facts material to the client's representation. *Willis*, 760 S.W.2d at 645; *Beck*, 284 S.W.3d at 429; *Trousdale*, 261 S.W.3d at 229; see *Joe v. Two Thirty Nine Jt. V.*, 145 S.W.3d 150, 160 (Tex.2004). A breach of fiduciary duty can result in the forfeiture of attorney fees. *Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex.1999); *Swank v. Cunningham*, 258 S.W.3d 647, 672-73 (Tex.App.-Eastland 2008, pet. denied);

2. Breach of Fiduciary Duty Claims By a Nonclient. A nonclient cannot bring a claim for breach of fiduciary duty against an attorney for breaching a fiduciary duty to a client. See *Barcelo v. Elliott*, 923 S.W.2d 575, 578-79

(Tex.1996) (attorney's professional duty does not extend to parties attorney never represented); see, e.g., *Span Enters. v. Wood*, 274 S.W.3d 854, 858 (Tex.App.-Houston [1st Dist.] 2008, no pet.) (nonclient had no cause of action against attorney for aiding and abetting breach of fiduciary duty based on legal advice to client); *Swank*, 258 S.W.3d at 666 (corporation could not sue attorneys for breach of fiduciary duty when attorneys represented shareholders as individuals). *But see Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265-66 (Tex.App.-Corpus Christi 1991, writ denied) (because attorneys implied they represented a party, even though they did not, the party could sue attorneys for breach of fiduciary duty).

F. Fraud. A fraud claim often involves deception about an existing fact. *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 481 (Tex.App.-Dallas 1995, writ denied).

1. Fraud Claims By a Client. The issue in a client's fraud claim against its attorney is whether the attorney made a fraudulent misrepresentation of fact to the client. See, e.g., *Sherwood v. South*, 29 S.W.2d 805, 809 (Tex.App.-San Antonio 1930, writ ref'd) (client alleged that attorney committed fraud by obtaining confidential information from client for attorney's own interest); *Sullivan*, 943 S.W.2d at 483 (client alleged that attorneys fraudulently lengthened litigation to increase billings). Sometimes the issue of fraud by an attorney arises when, after the formation of the attorney-client relationship, the client executes a contract with the attorney. See, e.g., *Archer v. Griffith*, 390 S.W.2d

735, 738-39 (Tex.1964) (during attorney-client relationship, client executed a deed to attorney); *Holland v. Brown*, 66 S.W.2d 1095, 1102 (Tex.App.-Beaumont 1933, writ refd) (during attorney-client relationship, client and attorney executed contract); *Cantu v. Butron*, 921 S.W.2d 344, 350-51 (Tex.App.-Corpus Christi 1996, writ denied) (attorney defrauded client by obtaining second contingent-fee agreement giving attorney greater percentage of client's recovery); *Jampole v. Matthews*, 857 S.W.2d 57, 63-64 (Tex.App.-Houston [1st Dist.]1993, writ denied) (during attorney-client relationship, attorney renegotiated fee agreement). When an attorney and client execute a contract during the attorney-client relationship, there is a presumption of unfairness and invalidity because the relationship is a fiduciary relationship and the attorney has an advantage over the client. *Archer*, 390 S.W.2d at 739.

2. Fraud Claims By a Nonclient. A nonclient can bring a fraud claim against an attorney for knowingly participating in fraudulent activities while acting for the client. *Querner v. Rindtuss*, 966 S.W.2d 661, 666 (Tex.App.-San Antonio 1998, pet. denied); see, e.g., *Chandler v. Chandler*, 991 S.W.2d 367, 394 (Tex.App.-El Paso 1999, pet. denied) (nonclient alleged that ex-wife and her attorney conspired to fraudulently claim his retirement benefits); *McKnight v. Riddle & Brown, P.C.*, 877 S.W.2d 59, 61-62 (Tex.App.-Tyler 1994, writ denied) (insured alleged that carrier's attorney conspired with carrier to defraud insured); *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex.App.-Houston [1st

Dist.] 1985, no writ) (nonclient alleged that attorney conspired with client to exact money from nonclient).

G. Violation of DTPA. The focus of a Deceptive Trade Practice Act suit is whether the defendant engaged in a false, misleading, or deceptive act or practice. Tex. Bus. & Com. Code § 17.46.

1. DTPA Claims By a Client. A client can bring a DTPA suit against an attorney for a deceptive act or practice. The suit cannot include claims based on the rendition of professional services characterized as advice, judgment, opinion, or similar professional skill. Tex. Bus. & Com. Code §17.49(c); *Burnap v. Linnartz*, 38 S.W.3d 612, 619 n.l (Tex.App.-San Antonio 2000, no pet.); see *Underkofler v. Vanasek*, 53 S.W.3d 343, 346 n.l (Tex. 2001); Beck, *Legal Malpractice in Texas*, 50 Baylor L.Rev. 547, 763 (1998). The exemption in §17.49(c) reserves for a negligence suit all claims based on the attorney's failure to exercise the degree of care, skill, and diligence an attorney owes a client. *James V. Mazuca & Assocs. v. Schumann*, 82 S.W.3d 90, 94 (Tex.App.-San Antonio 2002, pet. denied). The §17.49© exemption does not preclude the following DTPA claims against an attorney:

a. Misrepresentation. A client can file a DTPA suit against an attorney for express misrepresentation of material facts that cannot be characterized as advice, judgment, or opinion. Tex. Bus. & Com. Code §17.49(c)(I); *Latham v. Castillo*, 972 S.W.2d 66, 68 n.2 (Tex.1998); see, e.g., *James V. Mazuca & Assocs.*, 82 S.W.3d at 94-95 (no violation

of DTPA because attorney's conduct in filing motion for nonsuit without client's consent, while negligent, was not misrepresentation).

b. Failure to disclose. A client can file a DTPA suit against an attorney for failure to disclose known information in violation of Texas Business & Commerce Code §17.46(b)(24). Tex. Bus. & Com. Code §17.49(c)(2); *Latham*, 972 S.W.2d at 68 n.2; see also Tex. Bus. & Com. Code §17.46(b)(24).

c. Unconscionable action. A client can file a DTPA suit against an attorney for an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion. Tex. Bus. & Com. Code §17.49(c)(3); *Latham*, 972 S.W.2d at 68 n.2; see *Ballesteros v. Jones*, 985 S.W.2d 485, 498 n.5 (Tex.App.-San Antonio 1998, pet. denied).

d. Breach of warranty. A client can file a DTPA suit against an attorney for breach of an express warranty if the conduct giving rise to the breach cannot be characterized as advice, judgment, or opinion. Tex. Bus. & Com. Code §17.49(c)(4); *Latham*, 972 S.W.2d at 68 n.2.

e. Annuity Contracts. A client can file a DTPA suit against an attorney for a violation of Texas Business & Commerce Code §17.46(b)(26), regarding selling or illegally promoting annuity contracts. Tex. Bus. & Com. Code §17.49(c)(5).

2. DTPA Claims By a Nonclient. Because the DTPA does not require privity, a nonclient can sue the client's attorney if the transaction was undertaken

for the nonclient's benefit. Beck, *Legal Malpractice in Texas*, 50 Baylor L.Rev. at 769; see *Burnap*, 38 S.W.3d at 620. A nonclient can bring a DTPA suit against an attorney if the attorney engaged in a false, misleading, or deceptive act or practice in the representation of a client. See Tex. Bus. & Com. Code §17.46.

H. Negligent Misrepresentation.

The focus of a negligent-misrepresentation suit is whether a defendant, in the course of its business, profession, or employment, supplied false information for the guidance of the plaintiff. Restatement (2d) of Torts §552 (1997). The Restatement (2d) of Torts §552 does not require privity even when applied to attorneys. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999).

1. Negligent Misrepresentation Claims By a Client. A client can bring a suit for negligent misrepresentation against an attorney. See *McCamish*, 991 S.W.2d at 791; cf. *Federal Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991) (adopting §552 of the Restatement (Second) of Torts; bank liable to loan applicant for negligent misrepresentation); *Zipp Indus. v. Ranger Ins. Co.*, 39 S.W.3d 658, 668 (Tex.App.-Amarillo 2001, no pet.)

2. Negligent Misrepresentation Claims By a Nonclient. A nonclient can bring a suit for negligent misrepresentation against an attorney. *McCamish*, 991 S.W.2d at 791; *Kastner v. Jenkins & Gilchrist, P.C.*, 231 S.W.3d 571, 577 (Tex.App.-Dallas 2007, no pet.); see, e.g., *Safeway Managing Gen. Agency, Inc. v. Clark & Gamble*, 985

S.W.2d 166, 169 (Tex.App.-San Antonio 1998, no pet.) (liability insurer had standing to bring negligent-misrepresentation claim against attorneys representing the insured). An attorney's duty to a nonclient arises when (1) the attorney is aware of the nonclient and intends that the nonclient rely on the attorney's representation of a material fact, and (2) the nonclient justifiably relies on the attorney's representation. *McCamish*, 991 S.W.2d at 794; *Kastner*, 231 S.W.3d at 577. For purposes of determining whether there is justifiable reliance, a reviewing court must consider the nature of the relationship between the attorney, the client, and the nonclient. *McCamish*, 991 S.W.2d at 794; *Kastner*, 231 S.W.3d at 577-78; *Lesikar v. Rappeport*, 33 S.W.3d 282, 319 (Tex.App.-Texarkana 2000, pet. denied). A nonclient's reliance on an attorney's representation is not justified when the representation takes place in an adversarial context. *McCamish*, 991 S.W.2d at 794; *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 443 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). The typical negligent-misrepresentation suit brought by a nonclient involves the nonclient's reliance on an evaluation (i.e., an opinion letter) prepared by the client's attorney. *McCamish*, 991 S.W.2d at 793.

I. Collusion Claims.

1. Conspiracy.

a. Conspiracy claims by a client. A client can sue his or her attorneys for conspiracy to commit a tort. See, e.g., *Ross v. Arkwright Mut. Ins. Co.*, 933

S.W.2d 302, 303 (Tex.App.-Houston [14th Dist.] 1996, writ denied).

b. Conspiracy claims by a nonclient.

A nonclient can sue an attorney for conspiring with a client to commit a tort against the nonclient. *Mendoza v. Fleming*, 41 S.W.3d 781, 787 (Tex.App.-Corpus Christi 2001, no pet.) (conspiracy for wrongful garnishment); *Lesikar v. Rappeport*, 33 S.W.3d 282, 318 (Tex.App.-Texarkana 2000, pet. denied) (conspiracy to defraud); *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex.App.-Houston [1st Dist.] 1985, no writ) (same). Mere knowledge and silence are not enough to prove an attorney's involvement in a conspiracy because an attorney has a duty to preserve client confidences. *Bernstein v. Portland S&L Ass'n*, 850 S.W.2d 694, 706 (Tex.App.-Corpus Christi 1993, writ denied), disapproved on other grounds, *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex.2000). The attorney's conduct must be independent of his or her representation of the client. See *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 408 (Tex.App.-Houston [1st Dist.] 2005, pet. denied). There must also be indications that the attorney agreed to the fraud. *Bernstein*, 850 S.W.2d at 706.

2. Aiding & Abetting. A nonclient can sue an attorney for knowingly aiding and abetting a client to breach the client's fiduciary duty to the nonclient, to commit fraud, or to violate any other duty to the nonclient. See, e.g., *Kastner v. Jenkins & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex.App.-Dallas 2007, no pet.) (suit against attorney for aiding and abetting securities fraud and breach of fiduciary duty); cf. *Kinzbach Tool Co. v.*

Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex.1942) (suit against corporation for aiding and abetting breach of fiduciary duty committed by employee of competitor); *Hendricks v. Thornton*, 973 S.W.2d 348, 357, 372 (Tex.App.--Beaumont 1998, pet. denied) (suit against accounting firm for aiding and abetting fraud and breach of fiduciary duty). The attorney's conduct must be independent of the attorney's representation of the client. *Alpert*, 178 S.W.3d at 407; see *Kastner*, 231 S.W.3d at 580.

J. Other Claims.

1. By clients. Other claims clients can bring against attorneys include the following: (1) Conversion. See *Berger v. Lang*, 976 S.W.2d 833, 833 (Tex.App.-Houston [1st Dist.] 1998, pet. denied); *Avila v. Havana Painting Co.*, 761 S.W.2d 398, 399 (Tex.App.-Houston [14th Dist.] 1988, writ denied). (2) Retention of client's money. See Tex. Gov't Code §82.063; *Avila*, 761 S.W.2d at 400-01. (3) Violation of the Debt Collection Act. Tex. Fin. Code ch. 392.

2. By nonclients. Other claims nonclients can bring against attorneys include the following: (1) Wrongful garnishment and conversion. See *Mendoza v. Fleming*, 41 S.W.3d 781, 783 (Tex.App.-Corpus Christi 2001, no pet.). (2) Abuse of process when the process, such as a writ of garnishment or sequestration, was abused to attain an end other than what it was designed to accomplish. See *Martin v. Trevino*, 578 S.W.2d 763, 769 (Tex.App.-Corpus Christi 1978, writ ref'd n.r.e.). (3) Violation of the Debt Collection Act. Tex. Fin. Code chapter 392. (4) Duress. See *Likover v.*

Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472-73 (Tex. App.-Houston [1st Dist.] 1985, no writ).

K. Violation of Disciplinary Rules Does Not Create a Cause of Action.

1. No cause of action. Some courts have held that the Texas Disciplinary Rules of Professional Conduct do not create a private cause of action. See *McGuire, Craddock, Strother & Hale, P.C. v. Transcontinental Rlty. Investors, Inc.*, 251 S.W.3d 890, 896 (Tex.App.-Dallas 2008, pet. denied); *Cuyler v. Minns*, 60 S.W.3d 209, 214 (Tex.App.-Houston [14th Dist.] 2001, pet. denied); *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.*, 779 S.W.2d 474, 479 (Tex.App.-El Paso 1989, writ denied); *Martin v. Trevino*, 578 S.W.2d 763, 770 (Tex. App.-Corpus Christi 1978, writ ref'd n.r.e.). The preamble to the disciplinary rules states that the "[v]iolation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached." Tex. Disc. R. Prof'l Conduct preamble ¶ 15. The only remedy for violation of the disciplinary rules is a public remedy. *Renfroe v. Jones & Assocs.*, 947 S.W.2d 285, 287 (Tex.App.-Fort Worth 1997, writ denied).

2. Standard of conduct. Even though the violation of a disciplinary rule does not create a cause of action, the courts rely on the disciplinary rules as guidelines for standards of conduct in negligence suits against attorneys. See, e.g., *Keck, Mahin & Cate v. National Un. Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex.2000) (Rule 1.08(g) prohibits attorneys from making agreement that prospectively limits

malpractice liability to client unless certain conditions are met); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 793 (Tex.1999) (Rule 2.02 safeguards against attorney's exposure to conflicting duties between clients and nonclients); *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818-19 (Tex.1997) (relying on Rule 1.04 to decide reasonableness of attorney-fee claim under DTPA); *National Med. Enters. v. Godbey*, 924 S.W.2d 123, 132 (Tex.1996) (disciplinary rules do not determine whether counsel is disqualified in litigation but do provide guidelines and suggest relevant considerations); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 959 (Tex.1996) (using Rules 1.02 and 1.03 to define attorney's fiduciary duty).

II. ACTIONS TO CONSIDER TO REDUCE THE RISK OF MALPRACTICE

The following is a list of actions or considerations that an estate planning attorney may want to consider to reduce the risk of malpractice. This is not intended to be a list of actions that are required of an attorney and is not intended to define the standard of care for an attorney. Many of the items go beyond the professional rules and are simply actions to be considered that reduce risk.

A. Select Cases, Clients and Assignments Carefully. Representing a person of bad character is always dangerous. In addition, taking on an assignment or case that does not feel like the right thing to do will often lead to trouble.

B. Use an Engagement Letter. A carefully drafted engagement letter can reduce the risk of some areas of malpractice exposure. It is important to identify the client and identify the scope of the attorney's responsibilities in the engagement letter. An engagement letter is also a good time to set forth in writing the way in which fees will be charged. An engagement letter can also set forth alternative ways to resolve disputes such as mandatory mediation or binding arbitration. If arbitration is included, the client must be fully informed in writing concerning the rights he or she is waiving (such as a jury trial) and the process must be carefully explained to the client.

C. Consider Conflicts of Interest and Even the Appearance of a Conflict of Interest. Obviously, all attorneys should avoid a conflict of interest under the Professional Rules. In addition, it is smart business for an estate planning attorney to avoid even the appearance of a conflict of interest. Some representations may be perfectly permissible under the Professional Rules but will be likely to result in ugly litigation and the attorney spending a good bit of his time defending himself or his estate planning.

D. Carefully Consider Joint Representations. While there is nothing wrong with a joint representation by an attorney, joint representations give rise to more potential conflicts and more opportunities for misunderstandings by the clients. Declining a representation or withdrawing from a representation is often wise when the joint clients are in any type of dispute (even if unrelated to the representation).

E. Get Help If You Need It. If a client asks for representation on a matter that is beyond the competence of the attorney, the attorney should either decline the representation or get the specialized help he or she needs.

F. Document a Client's Wishes When the Client Wants Something Out of the Ordinary. For instance, if the client does not care about saving estate or gift taxes, the estate planning lawyer should carefully document the client's desires and the advice given by the estate planning attorney that was rejected by the client.

G. Avoid Estate Planning for People with Questionable Capacity. Avoid new clients if mental capacity is a question. The fees are not worth the risk. If the person with questionable capacity is an existing client and the attorney feels he or she should assist the client, the attorney should carefully document steps taken to establish that the client has testamentary capacity before permitting the person to sign documents. See the discussions below.

H. Avoid Circumstances That Could Suggest Undue Influence. See the discussion below.

I. Remember Who You Represent and Frequently Remind Others Who You Represent. In discussions with a client's family members or the beneficiaries of estates, the estate planning attorney should be very careful to identify his or her client in writing and frequently remind the beneficiaries that the attorney does not represent the

beneficiaries or family members. See the discussion below.

J. Try to Avoid Representations to Nonclients. Rather than representing facts to third-parties, it is better to describe the information you have received and the source of your information.

K. Do Not Assist a Client in a Breach of Fiduciary Duty. If a client who is serving as a fiduciary will not listen to your advice about a material matter, quit. If a fiduciary client has breached a duty or is in a position to breach a duty, give advice to the fiduciary designed to protect the beneficiaries.

L. Act Professionally. An attorney can avoid many problems if he or she always acts professionally and does not take on the client's emotions concerning the matter. Attorneys who step beyond the bounds of zealous representation often find themselves as targets.

M. Be Careful What You Say or Write.

N. Be Careful What You Email. An email is more permanent than a letter. Many people do not put much thought into their emails before they press send. That is something less than smart.

O. In Fiduciary Litigation, Privileged Communications May Be Revealed. When an attorney is representing a fiduciary, there is always the possibility that the successor to the fiduciary client may waive the privilege. Consequently, it is wise to always be

careful about what is written to a fiduciary client.

P. In Estate Planning, Any Contest Will Waive All the Privileges Relating to the Estate Planning. In a matter that is expected to be contested, the estate planner is one of the few lawyers whose communications with the client will be made public. If a contest is filed, the entire estate planning file will be revealed to the contestants and other parties.

Q. In Cases Involving Allegations of Financial Misconduct by a Fiduciary Client, the Attorney Should Exercise Great Care. The attorney should be very careful to avoid becoming an accomplice or co-conspirator with a client who is accused of financial misconduct with fiduciary property. The attorney can zealously represent the fiduciary, but at the same time give the fiduciary advice that complies with the fiduciary's duties to the beneficiaries.

III. WARNING SIGNS TO THE ESTATE PLANNER

A. Checklist of Situations Which Increase the Risk of Litigation. If any of the following situations exist, the estate planning lawyer should be alert for potential future litigation:

1. Multiple marriages.
2. Children from prior marriages.
3. Marital problems.
4. Husband and wife substantially disagree on the disposition of their estates.

5. One spouse has substantial separate property.

6. Substantial gifts or bequests to a girlfriend or boyfriend.

7. Any gift or bequest to a homosexual partner.

8. Any gift in a litigious family or involving a litigious beneficiary.

9. A child or other beneficiary is actively involved in the estate planning process.

10. Extremely elderly or extremely ill client.

11. A deathbed will or deathbed transfers.

12. Almost any unusual gift or bequest involving a great deal of money.

13. During an estate or trust administration, any beneficiary who hires a lawyer.

14. During an estate or trust administration, any beneficiary who hires a trial lawyer (All of your alarms should go off).

B. Potential Litigation Warrants Additional Care. If one or more of the warning signs are present, additional care should be exercised by the lawyer to protect the client and the lawyer. The estate planning lawyer should be careful to identify his or her client in an engagement letter and should carefully avoid giving advice to any other party. The additional risks should be completely discussed with the client.

IV. **DISCLOSURE OF INFORMATION**

A. Communication Problems. In the process of handling contested matters, the author has found that estate planning attorneys often have problems with communications when potential disputes arise. The following are some observations taken from actual experiences:

1. Some estate planning lawyers tend to talk too much prior to the client's death. The information given to the estate planner by the client is privileged and should not be revealed to a third party without express authorization from the client. The privilege is applicable even if the third party is a C.P.A., insurance agent or financial planner in the absence of a waiver by the client.
2. Some estate planning lawyers tend to decide for themselves whether a beneficiary or other family member has a legitimate complaint and to talk down to the person. This leads to an angry, frustrated beneficiary.
3. Some estate planning lawyers fail to identify exactly who their client is in advance and do not know to whom they should be disclosing information. It is permissible to represent an entire family, but in that case duties are owed to the entire family and the lawyer should not participate in actions which give rise to a conflict of interest.
4. Some estate planning lawyers will talk openly to any friendly sounding person who calls about client files.
5. Some estate planning lawyers fail to insist that fiduciary clients keep

beneficiaries informed which can lead to simple problems becoming big problems. If a beneficiary is contentious or difficult, there is a very natural tendency to want to avoid the beneficiary. However, the more difficult a beneficiary is, the more disclosure the beneficiary should receive.

6. Some estate planning lawyers fail to recognize conflicts when they represent more than one family member and fail to recognize their duties to keep all of their clients informed.

B. Lawyer-Client Privilege: Rule 503 of the Texas Rules of Civil Evidence

1. Definitions. As used in Rule 503:
 - a. A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.
 - b. A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.
 - c. A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.
 - d. A "representative of the lawyer" is:
 - (i) one employed by the lawyer to assist the lawyer in the rendition of professional legal services; or
 - (ii) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

e. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

2. General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client and made: (1) between him or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

3. Who May Claim the Privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

4. Exceptions. There is no privilege under Rule 503:

a. Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(i) *Volcanic Gardens Management Co., Inc. v. Paxson*, 847 S.W.2d 343 (Tex. App.--El Paso 1993, no writ). "Fraud" within the meaning of an exception to the attorney-client privilege is much broader than common law or criminal fraud and includes commission or attempted commission of fraud on the court or on a third person. The crime/fraud exception to the attorney-client privilege comes into play when a prospective client seeks the assistance of an attorney in order to make a false statement or statements of a material fact or law to a third person or court for personal advantage. See TEX. R. CIV. EVID. 503(d)(1).

b. Claimants through same deceased client. As to communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *intervivos* transaction. TEX. R. CIV. EVID. 503(d)(2).

c. Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(i) *Scrivner v. Hobson*, 854 S.W.2d 148 (Tex. App.--Houston [1st Dist.] 1993, no writ). In *Scrivner*, the exception to the

attorney-client or attorney-work product privilege regarding the breach of duty by a lawyer permitted clients to discover documents in the attorney's file regarding the actual basis for calculating the amount due each plaintiff in an environmental lawsuit. The clients sued the attorney for legal malpractice for the attorney's alleged settlement of a group environmental lawsuit without their authority. The contents of the documents were relevant to the clients' claims that the proceeds of the aggregate settlement agreement were improperly and fraudulently distributed among the various plaintiffs in the lawsuit. See TEX. R. CIV. EVID. 503(d)(3).

d. Document attested to by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(i) *Brown v. Edwards*, 640 N.E.2d 401 (Ind. App.--1 Dist. 1994). In *Brown*, the court held that the attorney-client privilege between testator and attorney in the creation of a will was waived. Here, a husband and wife entered into an enforceable contract not to revoke their mutual, reciprocal wills. The husband and wife chose their attorney and his assistant to witness the wills. By choosing their attorney and his assistant, the husband and wife implicitly requested that the attorney and his assistant defend the testamentary scheme against attack, regardless of any confidentiality which previously may have attached to the conversations among the four. That is, at the time the husband and wife intended that the attorney and his assistant should be competent to divulge the scope of their testamentary intent with regard to the wills if the mutual and reciprocal nature of

the wills were ever questioned. Thus, the husband and wife waived the attorney-client privilege. See TEX. R. CIV. EVID. 503(d)(4).

e. Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

(i) *Scrivner v. Hobson*, 854 S.W.2d 148 (Tex. App.--Houston [1st Dist.] 1993, no writ). Where parties display mutual trust in a single attorney by placing their affairs in his hands, the attorney must disclose all opinions, theories, or conclusions regarding his clients' rights or position to the other parties represented by the attorney in such matter. See TEX. R. CIV. EVID. 503(d)(5).

C. Work Product Privilege: Rule 192 of the Texas Rules of Civil Procedure. Rule 192 sets forth the forms and scope of discovery; protective orders; and definitions. TEX. R. CIV. P. 192. Rule 192.5 concerns work product. The work product of an attorney, subject to the exceptions of Texas Rule of Civil Evidence 503(d), which shall govern as to work product as well as to attorney-client privilege, is protected from disclosure by privilege.

D. Confidentiality of Information: Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. Rule 1.05 provides as follows:

1. Definitions. "Confidential information" includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

2. General Rule of Confidentiality. Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

a. Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

b. Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

c. Use confidential information of a former client to the disadvantage of the former client after the representation is

concluded unless the former client consents after consultation or the confidential information has become generally known.

d. Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

3. Revealing Confidential Information. A lawyer may reveal confidential information:

a. When the lawyer has been expressly authorized to do so in order to carry out the representation.

b. When the client consents after consultation.

c. To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.

d. When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.

e. To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.

f. To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.

g. When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

h. To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

4. Revealing Unprivileged Client Information. A lawyer may reveal unprivileged client information:

a. When impliedly authorized to do so in order to carry out the representation.

b. When the lawyer has reason to believe it is necessary to do so in order to:

(i) carry out the representation effectively;

(ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;

(iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

c. When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in

death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

5. A Lawyer Shall Reveal Confidential Information When Required To Do So by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (Rules of Professional Conduct) Rule 1.06 (1995) [hereinafter TEXAS RULES OF PROFESSIONAL CONDUCT].

E. Disclosure of Information During Estate Planning. Any confidential communications made for the purposes of facilitating the rendition of professional legal services to the client are privileged. The estate planning lawyer should refuse to disclose any confidential information without the consent of the client. The most common exceptions are claimants through the same deceased client, Rule 503(d)(2), and joint clients, Rule 503(d)(5).

F. Waiver of Attorney-Client Privilege. Texas Rule of Civil Evidence 503(b) precludes the discovery of communications between attorney and client. Under the rule, a client has the privilege to refuse to disclose and prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of legal services to the client. However, this privilege is not absolute and may be waived. A client may waive the privilege either expressly or implicitly by conduct

that extinguishes an element of the privilege. *U.S. v. Lipshy*, 492 F. Supp. 35 (N.D. Tex. 1979).

1. Disclosure of Communication. Even though a communication is made in confidence to an attorney, the attorney-client privilege may be lost if it is impliedly waived by a disclosure of the communication. *Freeman v. Bianchi*, 820 S.W.2d 853 (Tex. App.--Houston [1st Dist.] 1991, no writ). If a party discloses a communication, the attorney-client privilege is waived unless the party can disprove the waiver or establish a limited scope of waiver. *Jordan v. Ct. of App. for Fourth Sup. Jud. Dist.*, 701 S.W.2d 644 (Tex. 1985); *State ex rel. Simmons v. Peca*, 799 S.W.2d 426 (Tex. App.--El Paso 1990, no writ).

2. Communication with Third Parties. A privilege is waived when the party asserting the privilege divulges the information to third parties. *Atchison, Topeka and Santa Fe Ry. Co. v. Kirk*, 705 S.W.2d 829 (Tex. App.--Eastland 1986, no writ). The attorney-client privilege is not waived if the privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication. *Hodges, Grant & Kaufmann v. U.S. Government, Dept. of the Treasury, I.R.S.*, 768 F.2d 719 (5th Cir. 1985). Thus, the privilege is not waived if the confidential communication has been made to attorneys for coparties in order to further a joint or common interest. *Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621 (E.D. Tex. 1993). However, the attorney-client privilege does not protect communications that an attorney had with

third parties and then forwarded to a client. TEX. R. CIV. EVID. 503(a). In *Methodist Home v. Marshall*, 830 S.W.2d 220 (Tex. App.--Dallas 1992, no writ), the plaintiffs requested "all writings and correspondence between ... [the home and the law firm which represented the home] which related to [the plaintiffs] in this cause." The request covered communications between the law firm and third parties, such as hospitals or social workers, that the law firm forwarded to the home. The court held that the attorney-client privilege of the home would not protect these third-party communications with the law firm. See *Colton v. United States*, 306 F.2d 633, 639-40 (2nd Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S. Ct. 505, 9 L. Ed. 2d 499 (1963); *Jordan v. Ct. of App. for Fourth Sup. Jud. Dist.*, 701 S.W.2d 644, 648 (Tex. 1985).

3. Offensive Use Waiver. Courts balance the conflict between the desire for openness and the need for confidentiality in attorney-client relations by restricting the scope of attorney-client privilege. See *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634 (Tex. App.--Amarillo 1983, writ ref'd n.r.e.); *In re LTV Securities Litigation*, 89 F.R.B. 595, 600 (N.D. Tex. 1981). This balancing has led the court to determine that a party's need for information can outweigh the benefits associated with the attorney-client privilege. Such a situation provides for a waiver by offensive use of the attorney-client privilege.

a. In *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985), the Supreme Court held that the offensive waiver applied to the attorney-client privilege. *Ginsberg* involved a trespass to

try title action. The plaintiff testified at deposition that she was unaware that her ownership of a building had changed until 1981. However, records revealed that the plaintiff told her psychiatrist in 1972 that "the building was sold while [she and her husband] were in Padre Island." Thus, the records contained information which virtually established the defendant's statute of limitation defense. The plaintiff resisted disclosure of the records on the basis of the psychotherapist-patient privilege. The court rejected the plaintiff's claim of privilege. In so doing, the court relied on the notion that "[a] plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action." *Id.* at 108, quoting *Pavlinko v. Yale - New Haven Hosp.*, 470 A.2d 246, 251 (Conn. 1984). The court found that the facts in *Ginsberg* mandated that the plaintiff either waive her claim for affirmative relief or maintain her privilege and abandon her cause of action.

b. Six courts of appeals have considered the issue of waiver by offensive use in the attorney-client privilege. Of those six, five held that the offensive waiver applied to the attorney-client privilege. The sixth held that offensive waiver was limited to the facts of *Ginsberg* and was not applicable to the attorney-client privilege. The only court to consider the issue and reject the offensive use of waiver was the *Cantrell* court. *Cantrell v. Johnson*, 785 S.W.2d 185, 190 (Tex. App.--Waco 1990, no writ). The court noted that the case was not one in which proof of a defense might be precluded if the discovery was not permitted. While the court acknowledged

that the documents might reveal the plaintiff's knowledge and state of mind, relevant factors in the litigation, it determined these factors could be litigated without undermining the attorney-client privilege. The court went on to find that the *Ginsberg* holding must be limited to the psychotherapist-patient privilege.

c. In *Republic Ins. Co. v. Davis*, 856 S.W.2d 158 (Tex.1993), the Supreme Court concluded that a better position would not be to limit the offensive use of waiver as *Cantrell* did but to apply the *Ginsberg* offensive use waiver to the attorney-client privilege. The Court reasoned that the following factors should guide the trial court in determining whether a waiver had occurred. First, before a waiver may be found, the party asserting the privilege must seek affirmative relief. *Cf. Maryland Am. Gen. Ins. Co. v. Blackmon*, 639 S.W.2d 455, 457-58 (Tex. 1982). Second, the privileged information sought must be such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted. Mere relevance is insufficient. The confidential communication must go to the very heart of the affirmative relief sought. Third, disclosure of the confidential communication must be the only means by which an aggrieved party may obtain the evidence. If any one of these requirements is lacking, the trial court must uphold the privilege. In *Republic*, the Supreme Court held that the appellant's declaratory judgment was not seeking the type of affirmative relief that would result in an offensive waiver of the attorney-client privilege.

G. Production and/or Disclosure of Terms of a Will or Trust Document

1. Delivery to the Court. When a person is named as executor in a will and after the testator's death he has that will in his possession, it is his duty to produce the will and if it appears to be a valid will to seek probate of the will. TEX. PROB. CODE ANN. §§75, 76 (Vernon 1980); See *Plummer v. Roberson*, 666 S.W.2d 656 (Tex. App.--Austin 1984, writ ref'd n.r.e.). It is doubtful that the executor's obligation to deliver the will could be enforced by a mere intruder having no possible interest in the estate or in the property which might be affected by the probate. On the other hand, anyone alleging a good faith belief that the will might affect his interests should be permitted to compel its discovery. See *Ryan v. Texas & P. R. R. Co.*, 64 Tex. 239 (1885). Under Texas law, a personal representative may force the surrender of any kind of papers belonging to the decedent's estate. This would include any estate planning documents sent to the decedent. If a person having possession of any such papers refuses to deliver them after having been ordered by the court to do so, he may be imprisoned until such time as he complies. TEX. PROB. CODE ANN. § 232 (Vernon 1980).

2. Delivery to a Ward's Guardian. When a person is named guardian of a ward's estate, he has no duty to recover possession of the ward's will. The Texas Probate Code provides, "The guardian of an estate, immediately after receiving letters of guardianship, shall collect and take into possession the personal property, record books, title papers, and other business papers of the ward" TEX. PROB. CODE ANN. § 771 (Vernon

Supp. 1995). In the case of *Baumann v. Willis*, 721 S.W.2d 535 (Tex. App.--Corpus Christi 1986, no writ), the court found that a "will" was not included in any of the definitions of "property" within the Property Code. Furthermore, the court found no cases which defined the word "will" as being "property" as defined by the Probate Code. While the court recognized that such definitions are not all-inclusive, it did think such exclusions significant. The court found that the will does not in and of itself have value to the ward such as a note or security, nor is it a business paper necessary to conduct the business or affairs of the ward. The court concluded that there was no reason for the guardian of the estate to have possession of the will. Significantly, the court noted there was no allegation, or any evidence before the court, that the appellee had threatened to destroy the document in question; nor did the court perceive or find any pleading or evidence of how the guardian's possession of the will could in any way effect the administration of the guardianship, or was necessary to the guardian, or how its unavailability prevented the guardian from performing duties for the ward.

3. Delivery for In Camera Inspection. Section 865A of the Texas Probate Code provides that the "guardian of the ward's estate may apply to the court for an order to seek an in camera inspection of a true copy of a will, codicil, trust, or other estate planning instrument of the ward as a means of obtaining access to the instrument for purposes of establishing an estate plan under Section 865 of this Code." At the conclusion of a hearing on the application and on a finding that there is good cause for an in camera inspection, the court shall direct the

person who has custody of the document to deliver a copy to the court for in camera inspection only. If good cause exists, the court shall release all or part of the instrument to the applicant only for the purposes described in Subsection (a) of §865A. Subsection (g) of the statute states that an attorney does not violate the attorney-client privilege solely by complying with a court order to release an instrument pursuant to §865A.

H. Disclosure of Information During Estate Administration

1. Checklist of Considerations. If a request for information is made to the attorney representing an executor or testamentary trustee the following should be considered by the attorney:

a. Does the fiduciary owe a duty to the person making the request for information?

b. Is the information privileged?

c. Has any privilege already been waived by disclosing the information to someone other than the client?

d. If the information may be privileged, who holds the right to waive such privilege?

e. Does the attorney owe duties to people other than the fiduciary thereby creating a conflict of interest?

f. Has the appropriate person waived any existing privilege?

g. Will a failure to make full disclosure be a breach of fiduciary duty?

h. Are personal feelings or tactical considerations by the client overriding sound judgment and fiduciary duties?

2. Attorney-Client Privilege Held by Personal Representative of Deceased Client. Rule 503(c) of the Texas Rules of Civil Evidence provides as follows:

The [attorney-client] privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

3. Trustee's Duty to Disclose Information to Beneficiaries. One occupying a fiduciary relationship to another must measure his conduct by high equitable standards and is under a duty to make a full disclosure of all facts and circumstances concerning his dealings with the trust assets. *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942). A trustee owes a duty to give to the beneficiary upon request complete and accurate information as to the administration of the trust.

a. *Huie v. Deshazo*, 922 S.W.2d 920 (Tex.1996). In *Huie* the trust beneficiary was seeking to compel discovery, from an attorney, of communications by a trustee to the attorney relating to trust administration in a suit by a beneficiary alleging that the trustee breached his fiduciary duty. The Texas Supreme Court

held that the attorney-client privilege applied to communications between a trustee and his attorney, notwithstanding the trustee's fiduciary duties to fully disclose all material facts to the beneficiaries of the trust. The Court held that only the trustee, not the trust beneficiary, is the client of the trustee's attorney and the beneficiaries therefore may not discover communications between the trustee and attorney otherwise protected under Texas Rule of Civil Evidence 503. The Court noted that Rule 503 contains no exception applicable to fiduciaries and their attorneys.

b. *InterFirst v. Risser*, 739 S.W.2d 882 (Tex. App.--Texarkana 1987, no writ). In *Interfirst*, the court held that evidence was sufficient to sustain a jury verdict that a trustee bank had acted in bad faith and committed self-dealing in selling a beneficial owners' stock back to a closely held corporation. The court found that the trustee bank made little or no effort to get the best price possible for the stock, failed to publicize its sale, did not notify beneficiaries of the sale, did not obtain outside appraisals of stock and sold the stock back to the issuing company, which was one of the bank's borrowers.

c. *First City Nat'l Bank of Paris v. Haynes*, 614 S.W.2d 605 (Tex. Civ. App.-Texarkana 1981, no writ). In *First City*, the court held that evidence was sufficient in an action against a bank for damages resulting from the bank's mismanagement of properties which it held in a trust for the plaintiffs to support findings that the bank breached its duty by, among other things, failing to keep the beneficiaries informed of the true condition of the trust.

4. Executor's Duty to Disclose Information to Beneficiaries. The fiduciary standards of an executor of an estate are the same as the fiduciary standards of a trustee. *Humane Society of Austin and Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975), *cert. denied*, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d 800. Thus, one occupying a fiduciary relationship to another is under a duty to make a full disclosure of all facts and circumstances concerning his dealings with the estate assets.

a. *Ertel v. O'Brien*, 852 S.W.2d 17 (Tex. App.--Waco 1993, writ denied). In *Ertel*, a bank was appointed independent executor of the decedent's estate, along with decedent's wife. The bank kept all the estate records and actually functioned as the executor. The bank failed to pay a debt of the estate, assuming that a company in which the decedent was part owner would, and the creditor brought suit. The trial court held that the bank did not breach a fiduciary duty it had to the creditor. However, the trial court did find the bank negligent in not obtaining in writing an agreement which stated that the company in which the decedent was part owner would assume the debt or in failing to set aside a reserve to pay the debtor's claims in case the company did not.

The court of appeals, however, found that the trial court erred in finding that the bank's negligent handling of the debtor's claim did not constitute a breach of fiduciary duty. The court found a trustee commits a breach of trust not only when he violates a duty in bad faith, or intentionally although in good faith, or negligently but also where he violates a

duty because of mistake. The court held that the bank, while not a trustee, was liable for a breach of fiduciary duty because an executor of an estate is held to the same high fiduciary duties and standards in the administration of a decedent's estate as are trustees. *Humane Society v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975), *cert. denied*, 425 U.S. 976, 96 S. Ct. 2177, 48 L. Ed. 2d. 800. The court of appeals reversed the trial court's take nothing judgment granted in favor of the bank and remanded the plaintiff's case against the bank to the trial court.

b. *Coble Wall Trust Co., Inc. v. Palmer*, 859 S.W.2d 475 (Tex. App.--San Antonio 1993, writ denied). In *Coble*, the independent administrator of an estate brought suit in probate court against the estate's former temporary administrator alleging, among other claims, breach of fiduciary duty based upon the temporary administrator's failure to make full disclosure to the plaintiffs. The court held the temporary administrator made full disclosure to the plaintiffs for they were informed about the plan for the estate, the plan was revised and corrected according to their desires and their full approval was given before the plan was implemented by the probate court. Thus, the court found no breach of fiduciary duty.

5. Privilege Effective until Waived or Found within an Exception. Attorney-client privilege remains in effect until the person who then holds the privilege waives it or one of the exceptions applies.

V. DOCUMENT REQUEST OR SUBPOENA FOR DOCUMENTS

A. Subpoena to Produce Files. It is almost a certainty that an active estate planning lawyer will some day be served with a subpoena to produce his or her files. This is not cause for panic, but it is a reason to take actions to preserve the attorney-client and work product privileges.

B. Duty to Preserve Privilege. The attorney has the duty of preserving the attorney-client and work product privileges. TEX. R. CIV. EVID. 503; TEX. R. CIV. P. 192; TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.05.

1. Attorney May be Liable for Disclosing Privileged Information. In *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App.--Corpus Christi 1991, writ denied), the court held that attorneys breached their fiduciary duty to a client either by wrongfully disclosing a privileged statement or by wrongfully representing that an unprivileged statement would be kept confidential. A company truck driver was involved in a fatal bus accident. Attorneys for the company visited the driver in the hospital after the accident and obtained the driver's sworn statement concerning the accident. The driver claimed that the attorney's told him that they were his lawyers and that anything he told them would be kept confidential. After taking the driver's statement, the attorneys made arrangements for a criminal defense attorney to defend the driver. Without telling either the driver or his criminal defense attorney, the attorneys turned over the driver's statement to the district attorney's office.

Partly on the basis of the statement, the district attorney was able to obtain a grand jury indictment of the driver for involuntary manslaughter.

The driver brought action against the attorneys for, among other things, a breach of fiduciary duty. The trial court granted summary judgment for the attorneys, and the driver appealed. The attorneys claimed that they did not breach their fiduciary duty as the attorney-client privilege did not apply since third parties were present at the time the statement was given. The court held that regardless of whether from an evidentiary standpoint the privilege attached, the attorneys obtained the driver's statement based upon an understanding that it would be kept confidential. Thus, the court found that the attorneys breached their duty to the driver by either wrongfully disclosing a privileged statement or by wrongfully representing that an unprivileged statement would be kept confidential. Either characterization showed a clear lack of honesty toward, and deception of, the driver by his own attorneys regarding the degree of confidentiality with which they intended to treat the statement. The court also found that the driver made a valid claim for emotional distress and mental anguish suffered as a result of the publicity caused by his indictment, resulting partly by the revelation of his statement to the district attorney in breach of confidentiality. The court reversed the trial court's summary judgment for the attorneys and remanded.

C. Preservation of Privilege. Rule 193 of the Texas Rules of Civil Procedure provides that privilege is an exception to the general rule that evidence is admissible and discoverable under our

rules of procedure. Any party who seeks to deny the production of evidence must claim a specific privilege against such production. The burden is on the party asserting a privilege from discovery to produce evidence concerning the applicability of a particular privilege. *C. G. Giffin v. The Honorable R. L. Smith*, 688 S.W.2d 112 (Tex. 1985). See TEX. R. CIV. EVID. 501 and TEX. R. CIV. EVID. 503. Any party who seeks to exclude documents, records or other matters from the discovery process has the affirmative duty to specifically plead the particular privilege or immunity claimed and to request a hearing on this motion. The trial court should then determine whether an in-camera inspection is necessary. If such inspection is ordered by the trial court, those materials for which the inspection is sought must be segregated and produced to the court. Failure to follow the above procedure constitutes a waiver of any complaint of the trial court's action. *Peeples v. Hon. Fourth Supreme Judicial Dist.*, 701 S.W.2d 635 (Tex. 1985).

1. Documents Requested of Accountants. There is no accountant-client privilege recognized under federal law. *U.S. v. White*, 326 F. Supp. 459, *aff'd* 477 F.2d 757, *aff'd* 487 F.2d 1335, *cert. denied* 95 S. Ct. 132, 419 U.S. 872, 42 L. Ed. 2d 111. At least arguably under Texas law, communications between a client and an accountant are not discoverable in many instances. Occ. Code § 901.457 (a). An attorney may employ an accountant for the client's benefit in order for the communications from the client to the accountant to qualify for the attorney-client privilege. The attorney's employment of an accountant does not make the accountant an agent

of the attorney but, rather, agency is determined on the basis of the attorney's control of the work done by the accountant. *Parker v. Carnahan*, 772 S.W.2d 151 (Tex. App.--Texarkana 1989, writ denied).

2. Documents Requested of Representatives. The attorney-client privilege does not protect documents which are addressed to persons who are not proven to be representatives of the corporate client or even employees of the corporation. TEX. R. CIV. EVID. 501(4), 503, 503(a)(1, 2), (c); *Cigna Corp. v. Spears*, 838 S.W.2d 561 (Tex. App.--San Antonio 1992, no writ). However, the attorney-client privilege does protect documents which appear to have been written by one attorney to another within the corporation. *Id.* TEX. R. CIV. EVID. 503(b)(5). For example, a letter from the tax counsel for a subsidiary to the tax counsel for a parent was protected from disclosure by the attorney-client privilege and work-product privilege. The letter related to the tax consequences of certain actions involving activities between the parent and subsidiaries, and the letter was composed wholly of information constituting mental impressions, conclusions, opinion, and legal theories of the attorneys representing the subsidiary in administrative proceedings before a foreign taxing authority. *U.S. v. Mobile Corp.*, 149 F.R.D. 533 (N.D. Tex. 1993).

3. Other Document Requests. A litigant must offer to make tax returns available to the court but is not required to present them at the time of the hearing. *Dyna Span Corp. v. Hoffman*, 754 S.W.2d 341 (Tex. App.--Dallas 1988, *petition for writ of mandamus* 756 S.W.2d 723). In *Dyna*, the defendants did not waive any

claim of privilege for federal and state income tax returns by failing to present them for in-camera inspection at the time of the hearing on the motion for protective order.

4. Engagement Letter. It is wise to use engagement letters to define the client and the client representatives. A client representative will fall within the umbrella of the attorney-client privilege. However, in family businesses and estate administrations the roles may be less than clear. It is best to anticipate in advance who will be involved in the legal representation and include all such persons as "client representatives" in the engagement letter so that evidence will exist to support the assertion of a privilege.

D. Burdensome or Expensive Requests

1. *Independent Insulating Glass v. Street*, 722 S.W.2d 798 (Tex. App.--Fort Worth 1987, writ *dism'd*). Any party who seeks to exclude matters from discovery on grounds that requested information is unduly burdensome, costly or harassing to produce, has the affirmative duty to plead and prove the work necessary to comply with discovery. Otherwise, the trial court cannot make an informed judgment on whether to limit discovery on this basis or place the cost for complying with the discovery. Failure to follow this procedure constitutes a waiver of any complaint of the trial court's action.

2. *Morris v. Texas Employers Ins. Ass'n*, 759 S.W.2d 14 (Tex. App.--Corpus Christi 1988, writ denied). In *Morris*, the court of appeals held that the trial court

did not abuse its discretion in sustaining the appellee's objection to several of the appellant's interrogatories on the ground that they were unduly burdensome and not calculated to lead to any discoverable evidence at the time of trial. The appellee put on ample evidence to support its claim of burdensomeness. Appellee's claims supervisor testified he would have to review each of appellee's files, tens of thousands, to comply with the request. While appellant's attorney proposed an alternative method to accomplish the task, it was one equally burdensome. Furthermore, the court offered to subpoena the individuals as an easier means to acquire the information, which the appellant's attorney declined.

3. *State Farm Mut. Auto Ins. Co. v. Engelke*, 824 S.W.2d 747 (Tex. App.--Houston [1st Dist.] 1992, no writ). Plaintiffs objected to a discovery request on the grounds that it was burdensome and did not seek relevant information. Plaintiffs' representative claimed that plaintiffs had already produced requested reports for three years but were unable to obtain reports prior to the three years because the information was not retrievable. The plaintiffs' representative also testified that she did not know anything about the system that was available to the plaintiffs for tracing the information from the time period requested but not previously produced, nor had the representative been asked to find out this information prior to her testimony. The representative agreed that someone more knowledgeable on the issue would have to be asked such questions. Plaintiffs did not produce a more knowledgeable witness to testify. Based upon the failure of the plaintiffs to present specific evidence that the request

was burdensome, the court of appeals could not say that the trial court abused its discretion in ordering the production.

E. Objections. Texas Rule of Civil Procedure 193.2, states, in pertinent part, "A party must make any objection to written discovery in writing...within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request." TEX. R. CIV. P. 193.2(a). "A party must comply with as much of the request to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection. If the responding party objects to the requested time or place of production, the responding party must state a reasonable time and place for complying with the request and must comply at that time and place without further request or order". TEX. R. CIV. P. 193.2(b). "The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege...at the hearing or affidavits served at least seven days before the hearing...". TEX. R. CIV. P. 193.4(a). Thus, the attorney-client privilege may be relinquished or lost if privileged communications are admitted without objection. *U.S. v. Moody*, 923 F.2d 341, cert. denied 112 S. Ct. 80.

F. Waiver of Objections

1. *Conrad v. Wilson*, 873 S.W.2d 467 (Tex. App.--Beaumont 1994, no writ). In *Conrad*, the defendants failed to meet their evidentiary burden on their motion for protection, and they waived any objections or privileges they had

asserted. Plaintiffs brought a medical malpractice action against a medical center and three doctors. The trial court entered a protective order in the suit, and the plaintiffs petitioned for mandamus. At the trial court hearing on the motion for protective order, the sole witness mentioned only the medical privilege and the peer review privilege. However, the motion for protective order asserted many privileges such as overly broad, irrelevant, attorney work product, immaterial, party communication exemption, etc. Aside from the medical privilege and the peer review privilege, there was no evidence to support assertion of any other privilege, exemption or immunity. Furthermore, the sole witness testified that, "Some of the things asked for are protected." The court of appeals found this testimony was not directed to any specified document or set of documents, and was the equivalent of no evidence. As no evidence was presented, the court held the trial court could only deny the motion. *Eli Lilly and Co. v. Marshall*, 850 S.W.2d 155, 157 (Tex. 1993); *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992). Thus, the court determined that the trial court abused its discretion by granting the motion for protection and that mandamus was an appropriate remedy.

G. Joint Defense Privileges. When parties believe that there is a mutuality of interest in a common defense with regard to current or future litigation, the parties may enter into a joint defense and confidentiality agreement. This agreement provides that any sharing by or exchange between the parties to the agreement of confidential information will be under a standing invocation of a joint defense privilege of the sort acknowledged in a number of cases,

including *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 258 (5th Cir. 1977), *United States v. Melvin*, 650 F.2d 641, 645-46 (5th Cir. 1981), and *Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769 (Tex. App.--El Paso 1985, no writ). Such an agreement allows the parties' attorneys and representatives to be able to communicate freely without concern about a waiver of privileges and/or exemption protecting confidential and/or privileged information.

H. Involuntary Disclosure - Attorney-Client Privilege. "A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if - within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made - the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege." TEX R. CIV. P. 193.3(d).

VI. MAINTAINING CLIENT FILES

A. Estate Planning Files After the Client's Death. Estate planning files are unique among lawyers' files because they are all subject to review by third parties after the death of the client. Estate planning files will no longer be privileged after the death of the testator if a claim is made. TEX. R. CIV. EVID. 503(d)(2). Many times some of a will contestant's most

useful evidence comes from the files of the estate planning lawyer.

B. File Maintenance Policy. Institute a policy concerning the maintenance of estate planning files. All of the estate planning files should be treated in the same way.

C. Recommendations for File Maintenance

1. Institute Either an "All or Nothing" System.

2. "All" System. This means keeping every last piece of paper and handwritten note relating to the engagement. This is probably the best system if it is followed very carefully. The attorney needs to constantly be careful to make sure that client instructions and decisions are recorded in the file and that notes and memos are accurate. The attorney should make sure that the file accurately reflects what occurred in discussions with the client and consideration of any important issues. Some firms even keep internal drafts so that each step of the process can be recreated at a later time. This is the best system if everyone is careful. If the estate planning attorney (or the staff) is sloppy or careless, this is the worst system. For example, if the attorney made careful notes of an initial conference with the client, but fails to keep notes of a subsequent conference in which the client changes his or her mind, the file appears to reflect a mistake by the attorney.

3. "Nothing" System. This means only retaining the final instruments and any correspondence. This system increases the chances that the file will not

contain any contradictions or "evidence" to assist in a will contest (or similar suit). This system also allows for human error. The author would recommend this system to all but the most disciplined and careful practitioners. Another advantage is that testimony is simpler and more straightforward if the only documents in the file are the final documents. For example, "I do not remember what Mr. Jones said to me twenty years ago, but I always draft my wills in accordance with my client's instructions."

4. Maintain a System. Take the time to decide upon a file maintenance system and stick to it.

5. Never Mix Estate Planning Files with Other Client Matters. If a lawsuit is filed claiming through a deceased client, attorney-client privilege may be waived for estate planning documents. The privilege would normally not be waived for other legal work such as advice concerning a closely-held business. If the files are mixed together or all matters are in one file, it will make it much more difficult to maintain the privilege.

6. Never Mix the Estate Planning Files of More than One Client. Open separate files for husband and wife and maintain them separately. Otherwise, the estate planner is faced with a dilemma when an appropriate request is made for information relating to one client but such request would require the attorney to reveal information about another client.

VII. BILLING AND TIMEKEEPING RECORDS

A. Attorney-Client Privilege May Not Apply to Bills. Much like an estate planning file, the bills for estate planning may not be privileged after the death of the client if a claim is made through a deceased client.

B. Production of Bills. In cases where attorneys' fees are claimed, the bills may have to be produced. A claim for attorney fees is common in both trust and probate cases.

C. Waived Privilege. If the bills are privileged, the privilege can be waived.

D. Time Entries. Think before writing down time entries. With an estate planning file, you have no way of knowing who will be reading the bill and what they will be looking to find.

E. Recommendations

1. If Litigation is Likely, Care Should be Taken With Itemized Bills. An itemized bill sometimes gives the lawyer who is challenging the estate plan a road map to follow. In some cases, an itemized bill will reveal the estate planning lawyer's thought processes and may harm the client's interests. An itemized bill will also reveal potential witnesses. If an itemized bill has to be prepared, the estate planning lawyer should be careful not to reveal confidential information.

2. Use Care to Describe Sensitive Matters. In all situations, an estate planning lawyer should remember that people other than the client may be reviewing the entries some day. Care should be used to describe sensitive matters.

3. If Litigation is Likely, Use the Bill to Confirm the Client's Testamentary Intent. For example, "meeting with client in which client confirmed strongly that she wishes to leave nothing to her son and wants to take all steps necessary to avoid a will contest." Obviously, this type of entry should only be made if the event actually occurred.

VIII. HOW TO IMPROVE THE CHANCES THAT A WILL OR TRUST WILL BE VALID

All estate planning lawyers know the basic rules for the creation of a will or trust. The following are recommendations to improve the chances of the estate plan being confirmed in litigation. The recommendations are simply ideas to consider and are not to be considered requirements for a valid will or trust or matters that are required for a careful attorney. Some of the recommendations may not be appropriate in some situations.

A. Avoiding Claims of Undue Influence.

1. Consider Potential Conflicts of Interest. If litigation is likely, try to review the situation objectively to determine if a conflict of interest exists. If the attorney has a personal interest in the matter (such as a fiduciary appointment), make sure a written waiver is executed. See TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.06. If a bequest is made to the attorney, obtain separate counsel for the client.

2. Consider Relationships with Beneficiaries. If the estate planning

lawyer has a long, close relationship with one of the beneficiaries named in the will, the objectivity of the attorney may be questioned. This is a fairly common problem because families tend to all use the same lawyer or law firm. Although it is not unethical to represent more than one family member on legal matters (with proper disclosure), a close relationship with one of the beneficiaries can be used to show bias on the part of the attorney in favor of such beneficiary.

3. Be Cautious About Who Gives You Instructions. An estate planning lawyer should take great care to confirm that instructions about a will or trust come from the client and not another family member. Sometimes this is difficult if the client is ill or elderly. If instructions come from a family member, the estate planner should insist on a private meeting with the client to insure that the document reflects his or her wishes. This can occur at the time the instrument is executed or before. At times, the estate planning attorney may have complete confidence in the instructions given to him by someone other than the client, but to avoid the perception that the attorney is taking instructions from someone other than the client, the attorney should confirm the instructions by meeting with the client to execute the instrument or by letter (or both).

4. Remember Who Your Client Is. In family situations, it is sometimes confusing about who the attorney represents. This is a mistake, but it happens. When drafting a will or trust, keep in mind who you are representing and that you are supposed to be looking out only for their interests. If a conflict

exists, have someone else draft the document.

5. Exclude Beneficiaries at Will Execution. Make sure beneficiaries are not physically present when the will is executed.

6. Incorporate the Client's Input. Make sure the comments or changes to any drafts are the client's and not a beneficiary's comments.

7. Think Like a Trial Lawyer. Try to look at the situation objectively and think about how even "innocent" facts could be made to look like wrongful or improper conduct.

B. Avoiding Claims of Lack of Capacity

1. Make Sure You Are Comfortable that the Client Has Capacity.

a. Consider consulting with the client's doctor concerning capacity.

b. Consider reviewing hospital or medical records of client.

2. Create a Record. Have the testator answer the basic questions needed to show capacity in the presence of witnesses.

a. Who are the natural objects of his/her bounty?

b. What property does he or she own?

c. What instrument is being executed?

- d. What does the instrument do?
3. Choose Your Witnesses Carefully. Will this person be an effective witness at a trial? Will you be able to find them?
4. Consider Memos or Affidavits from the Witnesses and the Notary. If litigation is a concern, an affidavit or statement from the witnesses and the notary will help bolster their testimony. Do not put words in the witnesses' mouths. Let them describe what happened in their own words.
5. Consider Videotape. Video will executions are not always a good idea. Often the videotape is better evidence for the contestant than the proponent. If you decide to use a video, do not ask leading questions and try to make the client look as good as possible. If in doubt, do not use videotape.
6. Deposition to Perpetuate Testimony. If a contest is a virtual certainty and the client is willing, a deposition of the client can be taken regarding the will and the testator's intent.
7. Declaratory Judgment Action. Some lawyers believe that a declaratory judgment action can be brought during the testator's lifetime to declare the will valid. This theory raises some potential issues which have not been addressed by the courts.

C. Formalities. If you suspect that a will contest is a possibility, make sure you supervise the execution of the instrument and follow the formalities strictly in the presence of the witnesses. Always say the same things and follow the same procedures when wills are executed so

that you can later testify that you did these things even if you cannot remember the execution ceremony.

IX. TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS

A. Definition of Tortious Interference with Inheritance Rights.

Tortious interference with inheritance rights was recognized by the Texas appellate courts in 1987. As discussed in more detail below, Texas has not yet defined the scope of the tort, and the elements are unclear. However, the cases from other states support the following elements of the tort:

1. existence of an expectancy of inheritance or gift;

See *Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144 (Tex.App.—Houston [14th Dist.] 1998, writ denied). In *Brandes* testator's sister and her children brought action against Rice University, alleging tortious interference with inheritance rights and intentional infliction of emotional distress arising out of testator's deathbed gift to the university of \$4 million in bonds. The trial court granted summary judgment for Rice Trust, Inc. because plaintiffs had no right of expectancy from the testator's will because by the terms of the will, he did not leave them the property that was in dispute. (The plaintiffs had already lost a will contest).

2. intentional interference with the expectancy;
3. the interference was tortious, such as fraud, duress or undue influence;

4. the defendant's actions proximately caused damage to the plaintiff (*i.e.* plaintiff would have inherited but for defendant's actions); and

5. damages.

B. Restatement (Second) of Torts.

The Restatement of Torts defines intentional interference with inheritance or gift as the following:

One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift. Restatement of Torts (Second) § 774B.

C. Restatement of Torts (Second) § 774B - Definition of Terms

1. Inheritance or Gift. "Inheritance" is used to include any devise or bequest that would otherwise have been made under a testamentary instrument or any property that would have passed to the plaintiff by intestate succession. Thus, the tort applies when the testator has been induced by tortious means to make his will or not make it; and it applies also when he has been induced to change or revoke his will or not to change or revoke it. It applies also when a will is forged, altered, or suppressed.

2. Gift. "Gift" is used to include in the broad sense any donation, gratuity, or benefaction that other would have received from the third person. It includes, for example, a beneficiary designation under an insurance policy

that the actor interferes with by tortious means.

D. Tortious Interference v. Will Contest

1. A will contest is an action to contest the probate of the will, to contest the validity of a will, or to assert an interest in the estate because a will is ineffective, because another will exists, or because the decedent breached a contract to make or revoke a will.

2. A tortious interference action does not challenge the probate or validity of a will. Rather, the action seeks damages from a third party because of the plaintiff's loss of an expectancy. The tort action accrues when the wrongful act is complete. This may be before the testator's death, after the testator's death, or even after the probate proceedings have ended. In cases involving wills, Texas may require that inheritance rights be established by winning a will contest before the action will be available.

E. Jury Charge for Tortious Interference Cause of Action.

The following is a jury charge that was submitted for a tortious interference cause of action in one of the author's Harris County cases:

Do you find from a preponderance of the evidence that the defendant tortiously interfered with the plaintiff's right to inherit property from the testator?

_____ YES _____ NO

INSTRUCTION

You are instructed that a party tortiously interferes with another's inheritance rights when he: (1) participates in or receives benefits from a wrongful or tortious act; (2) proximately causes an event which prevents or interferes with an inheritance of another person; (3) and this results in damages or loss to that person.

INSTRUCTION

You are instructed that fraud, misconduct, an illegal action and intentional invasion of or interference with property or property rights, causing injury without just cause or excuse, constitute tortious or wrongful acts.

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for his losses or injury, if any, proximately caused by the defendant's tortious interference?

\$ _____

F. Texas Cases.

1. *King v. Acker*, 725 S.W.2d 750 (Tex. App.--Houston [1st Dist.] 1987, no writ). In *King*, the decedent's wife transferred stock to herself using a forged power of attorney and filed an application to probate a forged 1982 will. The plaintiffs, who were beneficiaries under a previous will, brought a will contest and prevailed. After prevailing in the will contest, the plaintiffs brought suit against the wife, her attorney, and the "witnesses" to the forged will. The case against the attorney and witnesses was severed before trial. At trial, a jury found that the

decedent's wife had maliciously conspired to tortiously interfere with the inheritance rights of the beneficiaries under the actual will of the decedent and awarded the beneficiaries punitive damages.

On appeal, it was initially noted that Texas courts had never addressed the issue of whether such a cause of action existed. The court held that "a cause of action for tortious interference with inheritance rights exists in Texas" and affirmed the trial court's award of actual and punitive damages. The court based its decision on:

- a. decisions from other jurisdictions;
- b. Restatement (Second) of Torts § 774B (1977);
- c. the recognition of a cause of action for tortious interference in other contexts by Texas courts; and
- d. previous cases implying that interference with inheritance rights is an actionable tort.

2. *Damages in King v. Acker.*

- a. The court approved recovery of the temporary administrator's commission on stock that had to be redeemed because of the acts of the defendant.
- b. The court did not allow recovery of the handwriting expert's fees because such fees were litigation expenses.
- c. The jury awarded punitive damages equal to the plaintiff's attorney's fees.

3. Implications of *King v. Acker* for Probate and Trust Litigation. The court's rationale in *King* provides no reason to believe that its holding is limited solely to actions for interference with inheritance rights. In reaching its holding, the court recognized:

a. that "equity will not suffer a right to be without a remedy" [*citing Chandler v. Wellborn*, 156 Tex. 312, 294 S.W.2d 801, 807 (1956)];

b. that an intentional and injurious invasion or interference with property or personal rights is an actionable tort [*citing Cooper v. Steen*, 318 S.W.2d 750, 757 (Tex. Civ. App.--Dallas 1958, no writ)]; and

c. that "Texas seems to recognize a cause of action for tortious interference" [*citing Tippet v. Hart*, 497 S.W.2d 606 (Tex. Civ. App.--Amarillo 1973, writ ref'd n.r.e.)].

The court's reliance on these general principles was seemingly applied to the particular allegation made in this case, interference with inheritance rights. However, it seems very possible that such principles could be applied to support the existence of a cause of action for almost any act, whether by an executor, trustee, beneficiary, or third party, which constitutes an intentional interference with or disruption of the proper administration or distribution of a trust or estate.

4. Possible Cause of Action for Interference with Inheritance Expectancy. In *Neill v. Yett*, 746 S.W.2d 32 (Tex. App.--Austin 1988, writ denied), the decedent left a will in which his granddaughter was not remembered. The granddaughter

attempted to extend the principles of *King* by pleading that, based on fraud and undue influence committed by the decedent's wife, a cause of action existed for tortious interference by the decedent's wife with the granddaughter's inheritance expectancy. The trial court granted summary judgment against the granddaughter. The court of appeals held that the judgment of the probate court admitting the will to probate barred the granddaughter's claim for tortious interference with her inheritance expectancy; as long as such judgment remained valid, the granddaughter had no inheritance expectancy. The court then noted that the granddaughter failed to either set out the elements of her claimed cause of action for tortious interference with her inheritance expectancy or to describe the basis for such cause of action. Apparently, the granddaughter cited *King* for the first time in her appellate brief in support of her claim. The court recognized the general conclusion in *King* that the cause of action for tortious interference with inheritance rights exists in Texas, but observed that the elements of such cause of action were not delineated in the *King* opinion. However, while never stating that a cause of action for tortious interference with an inheritance expectancy exists, the court stated that "if, indeed, a cause of action for tortious interference with inheritance expectancy exists," the granddaughter's assertion of such cause of action was barred by limitations.

5. *King* and *Neill* Distinguished. It should be observed that the facts of *Neill* are clearly distinguishable from *King*. In *King*, the parties who brought the action for tortious interference were named as

beneficiaries in a will that was ultimately admitted to probate. The granddaughter in *Neill* could make no such claim. Additionally, the defendant in *King* was found to have engaged in fraudulent activity in connection with the decedent's disposition of the property in question. In *Neill*, no evidence was discussed which could be viewed as demonstrating that there was anything unusual about the disposition of the estate in question. These clearly distinguishable facts make the decision in *Neill* noteworthy primarily because the court refused to preclude the possible existence of a cause of action for tortious interference with an expectancy of inheritance even though the facts supporting the granddaughter's case were relatively weak. To the contrary, the court in *Neill* gave every indication that with its elements properly pled and its basis properly described, such a cause of action would indeed exist.

6. Possible Elements of Tortious Interference in Texas.

a. Texas cases discussing interference with inheritance.

(i) *Pope v. Garrett*, 204 S.W.2d 867 (Tex. Civ. App.--Galveston 1947), *rev'd on other grounds*, 211 S.W.2d 559 (Tex. 1948). The appellee in *Pope v. Garret*, sought to recover damages caused by the acts of two of the appellants in physically preventing the decedent from executing a will under which property would have passed to appellee. As a result of such action, the decedent died intestate, and his property passed to eight appellants who would take decedent's property under the laws of descent and distribution. The trial court imposed a trust on the property received by the eight

appellants which would have passed to appellee under the will. On rehearing of the appeal, the court observed that the appellee might have obtained a judgment against the two appellants who by their wrongful act prevented the execution of the will and stated that "[t]he measure of damages would have been the value of the property which would have passed by the will except for the wrongful act." However, the court of appeals held that the interests of the six appellants who did not participate in preventing the execution of the will were not subject to the trust imposed by the trial court. Such ruling as to the six non-participating appellants was reversed by the Texas Supreme Court, and the trial court's judgment was affirmed.

(ii) *Teague v. Stephens*, 564 S.W.2d 437 (Tex. Civ. App.--Tyler 1978, no writ). In *Teague v. Stephens*, the plaintiff sued the defendant for negligently or intentionally causing the disappearance or destruction of a will under which the plaintiff was a beneficiary. The defendant's motion for summary judgment was granted based on his affidavit stating that he had never seen nor had knowledge of a will executed by the decedent under which the plaintiff would receive property and that he had never destroyed or lost a will of the decedent. The plaintiff presented summary judgment evidence which suggested that the decedent may have executed a will under which the plaintiff was a beneficiary. Stating that the focused issue of the case was whether the defendant had destroyed or lost the decedent's will, the court of appeals upheld the summary judgment on the ground that the plaintiff's summary

judgment evidence failed to create a genuine issue of material fact.

(iii) Summary. The language in *Pope* can be interpreted to break the cause of action for tortious interference with inheritance rights into the following elements:

- (a) participation in or receipt of benefits from,
- (b) a wrongful act,
- (c) proximately causing an event,
- (d) which prevents or interferes with an inheritance,
- (e) and results in damages or loss to the plaintiff.

Such interpretation is supported by the language in *Teague* which stated that the key issue in that case was whether the defendant had negligently lost or intentionally destroyed the alleged will, preventing the plaintiff from receiving his bequests thereunder.

(iv) *Clark v. Wells Fargo Bank, N.A.*, WL 2306418 (Tex.App.- Houston [1st Dist.] 2010 not reported). The court relied upon the definition of tortious interference from the Restatement (second) of Torts §774B and *King v. Acker*.

(v) *Brandas v. Rice Trust, Inc.*, 966 S.W.S2d 144 (Tex.App.- Houston [1st Dist.] pet. denied). The court used the definition from *King v. Acker* and the Restatement (second) of Torts §774B.

(vi) Tortious interference not addressed. Several Texas cases have been brought asserting tortious interference, but for a variety of reasons, the appellate courts have not addressed the merits of the tort action:

(a) A remainderman brought suit against the life tenant's executor for conversion and tortious interference with inheritance rights. The jury found both conversion and tortious interference with inheritance rights. The plaintiff elected to recover damages on the finding of conversion. *Rice v. Gregory*, 780 S.W.2d 384 (Tex. App.--Texarkana 1989, writ denied).

(b) Plaintiff, who was the beneficiary of a specific bequest under a will, sued the executor for tortious interference, breach of fiduciary duty, fraud, bad faith, and conversion. The trial court directed a verdict for the plaintiff on the conversion action. On appeal, the court determined that the plaintiff had elected the conversion remedy. The opinion can be read to indicate that other remedies may have been available if the plaintiff had preserved his rights. *Matter of Estate of Crawford*, 795 S.W.2d 835 (Tex. App.-- Amarillo 1990, no writ).

(c) Remaindermen brought suit against the life tenant's executor arising from a sale by the life tenant of certain real property. The action included a cause of action for tortious interference with inheritance rights. The defendants responded that the life tenant's right to sell the property extinguished any inheritance rights of the plaintiff. The jury failed to find that anyone tortiously interfered with plaintiff's inheritance rights.

Hext v. Price, 847 S.W.2d 408 (Tex. App.--Amarillo 1993, no writ).

b. Texas cases discussing tortious interference with contract rights. When defining the limits of tortious interference with inheritance rights, the Texas appellate courts will likely be guided by cases discussing tortious interference with contract rights. The following is a survey of Texas decisions:

(i) *American Petrofina, Inc. v. PPG Industries, Inc.*, 679 S.W.2d 740 (Tex. App.--Fort Worth 1984, writ dismissed by agr.). The court held that "[i]n maintaining a cause of action for tortious interference with contract, it must be established that (1) there was a contract subject to interference; (2) the act of interference was intentional and willful; (3) such intentional act was a proximate cause of plaintiff's damage; and (4) actual damage or loss occurred." *American Petrofina, Inc. v. PPG Industries, Inc.*, 679 S.W.2d 740 (Tex. App.--Fort Worth 1984, writ dismissed by agr.).

(ii) *Tippet v. Hart*, 497 S.W.2d 606, 610-11 (Tex. Civ. App.--Amarillo 1973, writ refused n.r.e.). To be actionable, the interference need not procure a breach of the contract. Any invasion which injures or destroys property and interferes with or makes more difficult the performance of the contract can give rise to the cause of action. *Tippet v. Hart*, 497 S.W.2d 606, 610-11 (Tex. Civ. App.--Amarillo 1973, writ refused n.r.e.).

(iii) Summary. If the Texas courts look to the elements of tortious interference with contractual relations to determine the elements of tortious interference with inheritance rights, the holding in *American*

Petrofina seems most applicable. By analogy to that holding, the elements of tortious interference with inheritance rights would be:

- (a) existence of a will or potential testator/beneficiary relationship subject to interference,
- (b) intentional and willful interference with such will or relationship,
- (c) which proximately causes,
- (d) actual damage or loss.

Under the language of *Tippet*, it seems likely that actionable interference would not require complete elimination of a potential inheritance. Instead, any interference which causes the testator's intent, as set forth in his statements or will, to be more difficult to carry out would be sufficient to give rise to the cause of action.

G. Safe Harbor for Estate Planning Lawyers

1. A Safe Harbor Has Not Been Defined in Texas. At this time, the cases in Texas have not provided sufficient guidance to know with any certainty what would be a safe harbor for an estate planning attorney relating to a claim of tortious interference with inheritance or gift. However, Probate Code Section 10C provides that the filing or contesting of any pleading relating to a decedent's estate does not constitute tortious interference with inheritance of the estate. All that is known right now is that assisting a client in offering a forged will for probate is tortious interference with inheritance

rights and pleadings related to an estate are not tortious interference. In theory, an estate planning lawyer could not accidentally tortiously interfere with inheritance rights because the cause of action requires deliberate wrongful conduct. However, tort concepts such as civil conspiracy and joint and several liability make it conceivable that an attorney could stumble into a tortious interference case.

2. Clear Outside Parameters.

a. Knowingly participating in the offering of a forged will for probate is tortious interference.

b. Changing a client's estate plan in good faith is not tortious interference.

3. Defining a Likely Safe Harbor for Attorneys.

a. Simply creating or changing a client's estate plan in good faith is safe.

b. Contesting a will or an inter vivos transfer in good faith is permissible.

X. CONFLICTS OF INTEREST

A. General Rules - Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct.

Rule 1.06. Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a

lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the

extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.06.

B. Prohibited Transactions - Rule 1.08 of the Texas Disciplinary Rules of Professional Conduct.

The Rule provides:

(a) A lawyer shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not

make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless

each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

(j) As used in this Rule, "business transactions" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.08.

C. Former Client - Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct.

The Rule provides:

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.09.

D. Recommendations Regarding Conflicts of Interest.

1. The estate planning practice presents more difficult conflict of interest questions than any other area of practice. The nature of the practice makes it very difficult to avoid giving the appearance of representing more than one person. Also, the desire to be helpful to the client will often lead to meetings and consultations with other family members. This problem is made more difficult because clients will often not want to involve separate counsel for their family members for cost reasons.

2. A well-drafted engagement letter will solve many problems. A well drafted engagement letter will accomplish the following at a minimum:

- a. identify the client,
- b. define the scope of the engagement,
- c. define the fee arrangement, and
- d. define future duties of the attorney.

3. The engagement letter will not solve problems if the attorney ignores the letter and engages in a course of conduct which would lead others to believe that the attorney represents their interests.

4. The estate planning lawyer should recognize that people often have misconceptions about the duties of an estate planning lawyer. The most common misconceptions are the following:

a. That the lawyer representing a testator owes duties to the natural objects of the testator's bounty. For example, many people would assume that the attorney for the father owes duties to be fair to the children.

b. That the lawyer for the executor owes duties to the beneficiaries of the estate.

5. Because we know that these misconceptions exist, steps should be taken to inform family members that the attorney does not represent them. In some situations a letter may be appropriate outlining the attorney's duties and loyalties. Failure to clarify the relationships may result in liability to parties who have a reasonable belief that the attorney represents them.

a. *Querner v. Rindfuss*, 966 S.W.2d 661 (Tex.App.—San Antonio 1998, pet. filed). In *Querner*, beneficiaries of an estate brought an action against the attorney for executrix for fraud, breach of fiduciary duty and other assorted acts of wrongdoing. The trial court granted summary judgment for the attorney, which included a finding that the beneficiaries lacked standing to sue. The beneficiaries appealed the granting of the summary judgment to the court of appeals. Rindfuss, the attorney, argued that he was never the attorney for the beneficiaries and he did not owe the beneficiaries any fiduciary duties. The court of appeals noted that at least one court appears to have recognized the beneficiaries' right to sue for actions taken by an attorney hired to advise the executors in administering an estate, citing to *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex.App.—Houston [14th

Dist.] 1997, writ dismiss'd by agr.). One of beneficiaries stated in an affidavit that Rindfuss continually represented himself to be the attorney for the estate. The summary judgment evidence also contained a letter drafted by Rindfuss to a beneficiaries' attorney stating that although he was employed by the executrix, "I am the attorney for the Estate as opposed to the attorney for the Independent Executrix..." The letter further stated that Rindfuss will keep the beneficiaries fully apprised of both the executrix's position and the other beneficiary's position on the interpretation of the will. The court stated that whether the evidence is sufficient to sustain a finding of privity or fiduciary relationship is not the issue before us on appeal. However, the Court stated that in light of Rindfuss's own representations regarding the nature of his relationship to the estate and his execution of accountings in keeping with that representation, we believe there is some evidence that requires us to permit this issue to be submitted to a jury for factual solution.

b. *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex.App.—Houston [14th Dist.] 1997, writ dismiss'd by agreement). Beneficiaries of an estate sued the lawyers for the estate alleging professional negligence (legal malpractice) breach of fiduciary duty, conspiracy, and violations of the Texas Deceptive Trade Practices Act (DTPA). The claims arose out of Vinson & Elkins' alleged misconduct and mishandling of legal matters in connection with the administration of the Estate of W.T. Moran. The trial court entered a judgment against Vinson & Elkins in excess of \$35 million. The Fourteenth Court of Appeals reversed and rendered

in part and reversed and remanded in part. In *Moran*, the jury found an attorney-client relationship between Vinson & Elkins, the attorneys hired by the executors, and the beneficiaries. The beneficiaries testified that Vinson & Elkins took the position early in the administration of the Estate that it represented the "Moran interests." Beneficiaries received mailings directly from Vinson & Elkins and had contact with them at formal beneficiary meetings. Even though the beneficiaries testified that they never hired Vinson & Elkins, and some beneficiaries had their own personal attorneys, the jury still found an attorney-client relationship. The Fourteenth Court of Appeals found there was sufficient evidence to support the existence of an attorney client relationship between Vinson & Elkins and the beneficiaries. The court however did hold that the beneficiaries were not consumers and therefore were not entitled to bring an action under the DTPA.

c. *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex.1996). In *Barcelo*, Decedent's grandchildren, who were intended beneficiaries under a trust that was declared invalid, brought a legal malpractice suit against the attorney who drafted the trust. The grandchildren alleged that the lawyer's negligence caused the trust to be invalid, resulting in foreseeable injury to them. The attorney moved for summary judgment on the sole ground that he owed no professional duty to the grandchildren because he had never represented them. The trial court granted summary judgment and the Texas Supreme Court affirmed the holding that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to

persons named as beneficiaries under the will or trust. But see the dissent of Justices Cornyn, Abbott and Spector. The dissent states that Texas embraces a rule recognized in only four states. The dissent would allow a cause of action by a beneficiary if the beneficiary was able to show that the attorney breached a duty to the decedent. The dissent notes that lawyers wishing to protect themselves from liability may document the testator's intentions.

d. *Thompson v. Vinson & Elkins*, 859 S.W.2d 617 (Tex. App.--Houston [1st Dist.] 1993, writ denied) in which the residual beneficiaries of a testamentary trust filed suit against the attorneys who represented the executor and trustee. The same attorneys also represented the corporation whose stock made up a substantial part of the assets of the trust. The attorneys did not check on whether representation of the trustee would be a conflict of interest with other client representations by the attorneys.

The trustee and attorneys discussed several alternative ideas to redeem the corporation stock held by the trust. In correspondence, the attorneys discussed the redemption in terms of keeping stock from passing into the hands of the remainder beneficiaries. The plaintiffs found out about this plan, and sued the attorneys for a number of causes of action. The trial court entered summary judgment in favor of the attorneys who represented the executor and trustee. The trust beneficiaries appealed asserting several claims. The court of appeals found that with respect to a breach of contract claim, privity between the remainder beneficiaries and the attorneys was lacking, since the

attorneys represented only the trustee, and did not ever take on representation of the remainder beneficiaries. The court continued to follow the Texas rule that a lawyer is not liable for malpractice to one who is not a client. With respect to a claim of fraud, the court held that the plaintiffs failed to show either that the attorneys had made a fraudulent representation to the plaintiffs, or that if such a representation had been made, that the plaintiffs relied on it. The plaintiffs also claimed a breach of a fiduciary duty owed to the remainder beneficiaries. However, the court did not consider the representation of a fiduciary to cause a fiduciary relationship to exist between the attorney and a beneficiary. The plaintiffs also made a claim based on the Texas Deceptive Trade Practices Act. The court held that this claim failed primarily because no "goods or services" were provided by the attorneys to the plaintiffs. But, the court did make the point that under different facts, a DTPA action might be sustainable, since privity is not a requirement in a DTPA action.

e. *Belt v. Oppenheimer, Bland, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex.2006). The Texas Supreme Court held that a claim for legal malpractice against an estate planner for economic damage to the estate may be brought by the client's personal representative.

XI. ESTATE PLANNER AS WITNESS

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A. Practical Tips.

1. The estate planning attorney who is called as a witness should have two goals:
 - a. assisting the judicial process; and

b. avoiding becoming a defendant.

2. Although the natural inclination of estate-planning attorney-witness is to team up with the attorneys who are representing the proponent of the instrument drafted by the estate planning attorney or the attorneys who are representing the former client of the attorney-witness, the best course of action is to keep some distance. If the attorney's actions show that he or she is actively participating in the trial, the testimony will be less persuasive. Also, the parties on the other side of the case will be more likely to blame the attorney for their problems if the attorney is doing more than serving as a witness. Finally, in the absence of a privilege, the discussions with trial counsel are discoverable and fair game for cross-examination.

3. Protect privileged documents in the files.

4. Do not reveal privileged information to anyone without appropriate waivers or consent by the person who holds the privilege.

5. Most trial lawyers will cooperate on the scheduling of a deposition and production of documents. Simply call the trial lawyer and ask for additional time if you need it. Also, if there are privilege questions, a motion for protective order needs to be filed before the date of the deposition or document production. All agreements among counsel must be in writing, signed by the attorneys and filed with the court to be enforceable.

B. Rule 501. Rule 501 of the Texas Rules of Civil Evidence provides as follows:

Rule 501. Privileges Recognized Only as Provided

Except as otherwise provided by Constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority, no person has a privilege to:

- (1) refuse to be a witness;
- (2) refuse to disclose any matter;
- (3) refuse to produce any object or writing; or
- (4) prevent another from being a witness or disclosing any matter or producing any object or writing. TEX. R. CIV. EVID. 501.

C. Rule 3.08. Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct provides as follows:

(a) A lawyer shall not accept or continue employment in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 3.08.

D. Case Law. Disqualification of attorneys who are witnesses. Rule 3.08 provides that an attorney may be counsel for a client as well as a witness at trial if the attorney has promptly notified opposing counsel of his dual role and disqualification would work substantial hardship on the client. TEXAS RULES OF PROFESSIONAL CONDUCT Rule 3.08(a)(5). Comment seven to Rule 3.08 explains that this subsection of the rule is based

upon a balancing of the interest of the client in being represented by the counsel of his or her choice with the interests of the opposing party. See *McElroy v. Gaffney*, 529 A.2d 889, 893 (N.H. 1987). For example, the opposing party may be unfairly prejudiced in some situations where an attorney for a party testifies as to a contested matter. Comment ten to Rule 3.08, however, states that the rule should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice because reducing the rule to such a use would subvert its purpose. See also TEXAS RULES OF PROFESSIONAL CONDUCT Preamble paragraph 15 (1995).

Although the Rules of Professional Conduct may be relevant when determining an attorney's disqualification to serve in a case, the primary function of the rules is to define proper conduct for purposes of professional discipline. TEXAS RULES OF PROFESSIONAL CONDUCT Preamble paragraph 10 (1995); See *Ayres v. Canales*, 790 S.W.2d 554, 556 n. 2 (Tex. 1990). The advocate-witness rule is concerned with proper conduct when an attorney representing a party also serves as a witness who testifies as to a controversial or contested matter. In such a situation, there exists a potential danger that the jury will confuse the roles of counsel. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as analysis of the proof. *Id.* at 557 n. 1. In order to prevent misuse of the rule, the trial court should require the party seeking disqualification to demonstrate actual prejudice to itself

resulting from the opposing lawyer's service in dual roles. *Id.* at 558; TEXAS RULES OF PROFESSIONAL CONDUCT Comment 1a (1995).

1. *May v. Crofts*, 868 S.W.2d 397 (Tex. App.--Texarkana 1993, no writ). Actual prejudice to the party seeking disqualification was not established in *May*. Here, a will opponent made an insufficient showing that she would be prejudiced by the opposing lawyer serving in dual roles of witness and counsel so as to be entitled to disqualification of the opposing lawyer. The will opponent challenged the will prepared by the attorney shortly before the testator's death on grounds that the testator lacked testamentary capacity, that the will was not executed with required formalities, and that the will was the result of undue influence by the beneficiaries and attorney. The will opponent argued the opposing attorney drafted and supervised the execution of the will; that he knew or should have known that his testimony would be material in proving the will; and that he did not come within any exceptions set out in Rule 3.08. The will opponent planned to call the opposing attorney as a witness and argued as such opposing attorney would be automatically disqualified from acting as an attorney in the will contest. The court held that the will opponent did not establish that the opposing attorney's continued representation of the estate was prohibited by Rule 3.08. There was no evidence showing that the opposing attorney would testify or that he was a witness who was necessary to establish an essential fact on behalf of his client. At oral argument, the opposing attorney indicated that he did not intend to call himself as a witness. Rather, the will

opponent's attorney was the one claiming he wanted to call the opposing attorney as a witness. *Id.* at 399. The mere announcement by an adversary of his intention to call the opposing counsel as a witness is insufficient to orchestrate the counsel's disqualification. *United Pacific Ins. Co. v. Zardenetta*, 661 S.W.2d 244, 248 (Tex. App.--San Antonio 1983, no writ).

2. *Anderson Producing Inc. v. Koch Oil Company*, 929 S.W.2d 416 (Tex. 1996). In *Anderson* a lawyer who had represented a party during pretrial proceedings testified as an expert and fact witness for that party during the trial. The Beaumont court of appeals found that the lawyer violated attorney disciplinary rule governing lawyer as witness and should have been disqualified from representing the party. The Texas Supreme Court held that the testifying attorney appeared at trial solely as a witness, and thus did not violate Rule 3.08 of the Texas Rules of Professional Conduct. The Court held that Rule 3.08 only prohibits a testifying attorney from acting as an advocate before a tribunal, not from engaging in pretrial, out-of-court matters such as preparing and signing pleading, planning trial strategy and pursuing settlement negotiations. The Court did not decide whether Rule 3.08 was violated due to the fact that the testifying attorney sat at counsel table during the trial because it was waived because there was no objection made regarding this matter during trial. The Court further ruled that the testifying attorney's law firm was not disqualified from being the lead trial counsel. The Court cited to comment 8 of Rule 3.08 which states that "[e]ven in those situations [in which a testifying

lawyer is disqualified], however, another lawyer in the testifying lawyer's firm may act as an advocate, provided the client's informed consent is obtained." The Court noted that the testifying lawyer's law firm had a contingency fee in the case and that it could be argued that the testifying lawyer and his firm violated Texas Disciplinary Rule of Professional Conduct 3.04(b) which forbids a lawyer from "pay[ing], offer[ing] to pay, or acquiesc[ing] in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case." However, the court declined to express an opinion regarding whether Rule 3.04(b) had been violated because that issue had not been raised at the trial court or the appellate court.

XII. REPRESENTING A FIDUCIARY

If litigation is likely, representing a fiduciary can be challenging and difficult. The following are some common problem areas:

A. Duty of Disclosure. One of the most difficult tasks for a fiduciary is to give full disclosure to a person who is currently bringing or is threatening to bring a lawsuit. The fiduciary has a duty to provide full disclosure to the beneficiaries. Of course, the cost of providing information should also be taken into account. However, failure to provide full information about significant events or transactions almost always makes matters worse and can give rise to allegations of intentionally wrongful conduct. Although insisting on full disclosure may not make you popular with your client from time to time, it is the best way to protect the client.

B. Allocation of Fees. No client wants to pay attorney fees. However, when a transaction or a lawsuit clearly involves the client's individual interests rather than the client's fiduciary interests, fees and expenses should be allocated in the absence of a contractual right or some other type of authority.

C. Counsel the Fiduciary to Exercise Restraint When Expending Funds Held in Trust. When emotions are running high during a dispute, people will have a desire to take aggressive actions. This is often expensive. When representing the fiduciary, the attorney should make an effort to make sure the actions taken and the costs incurred are appropriate in the circumstances. A good test is whether the client would take this action if the client had to pay the bill for it personally.

D. Sometimes it is a Fiduciary's Job to Make a Decision. Many fiduciaries are paralyzed by fear when litigation is threatened. Consequently, they will want to do nothing unless their lawyers can guarantee that the transaction or other action is safe. Of course, nothing is absolutely safe, so these fiduciaries will incur large fees seeking legal opinions or declaratory judgments on matters that should be decided by the fiduciary after careful consideration. This does not mean that the fiduciary always has to go along with whatever a beneficiary wants or should never file for a declaratory judgment, but care should be taken to be sure that the issue involved justifies the expense and delay.

E. Resignation is an Option. Often resignation by a fiduciary is the best option. If the fiduciary has no personal or family interest in the estate or trust, resignation to avoid litigation is always an option that should be considered.

F. Be Careful What You Write. The attorney-client privilege when representing a fiduciary is fragile. A successor fiduciary may attempt to waive the privilege. If an attorney gets caught up in the fight and writes a letter or memo about how to win in a dispute with a beneficiary, such letter or memo may end up in the hands of the beneficiary some day (or the beneficiary's trial counsel). This could harm both the client and the lawyer. Always keep fiduciary duties in mind when writing any memo or letter.

G. Be Careful What You Say. Remember that you represent a fiduciary. Comments like "we will spend every last dime fighting this", "we will spend you into oblivion" or "we are big and rich and you are small and poor, so we will wipe you out" will all come back to haunt you at a trial.

H. Settlement Negotiations. Keep fiduciary duties in mind when negotiating settlements. Although offers of compromise are normally inadmissible to prove liability, such offers are admissible for other purposes. There are no Texas cases on this point, but the author is concerned that evidence could be admitted for other purposes particularly when one of the parties is a fiduciary. Care should be taken to be sure that settlement offers are stated in a way that will show that the fiduciary is still concerned about his or her duties and

that the settlement transaction will not require a breach of these duties. If part of a settlement is arguably a breach of fiduciary duty, all beneficiaries should waive or release the duty in the settlement documents.

I. Correct Mistakes. If a beneficiary is complaining about an action by a fiduciary, take a hard look at the action and try to decide if the action was proper. If not, promptly correct the problem. People are often afraid to correct problems for fear that it will be an admission of liability. However, if a problem is quickly corrected, it takes all of the punch out of the beneficiary's argument at trial and shows good faith.

J. Use Common Sense. Often when representing a fiduciary the attorney will have many decisions to make. Sometimes the technically correct decision will not make much economic sense in the circumstances. If that is the case, try to get the fiduciary and beneficiaries to agree upon the more reasonable course of action.

K. Transactions By A Fiduciary with the Beneficiary. From time to time, a fiduciary will want to enter into a transaction with the person who is owed a fiduciary duty. The best advice to the fiduciary is to avoid such transactions. In some instances, the transactions will be strictly prohibited by the trust instrument or applicable law. In all other instances, the transaction will be subject to strict scrutiny making it difficult for the fiduciary to meet the burden of proof imposed on the fiduciary to support the transaction. The following are some cases to illustrate the burden imposed on a fiduciary who

benefits from a transaction with a person who is owed fiduciary duties:

1. *Sorrell v. Elsey*, 748 S.W.2d 584 (Tex. App. - San Antonio 1988, writ denied). In *Sorrell*, a deed transferring real property to the nephews was signed by the elderly aunt. The aunt was paid \$10.00. The court found a fiduciary relationship existed between the aunt and her nephews. The aunt sued to set aside the deed. The nephews claimed that a gift was made by the aunt. The aunt contended she was taken advantage of and was unaware she had signed a deed conveying to her nephews all her interest in the real property and she sought to set aside the deed based on lack of consideration and inadequate consideration. A take nothing judgment was entered by the trial court and a finding of fact was made by the trial court that, "Plaintiff made the gift freely, voluntarily and with a full understanding of the facts, and Defendants acted in good faith." The court of appeals reversed the trial court and held that the nephews had failed to meet their burden to show that the transaction was fair and equitable to the aunt, that the nephews made reasonable use of the confidence placed in them and that the nephews made a good faith effort to fully inform the aunt of the nature and effect of the signing of the deed.

The court of appeals in describing the "much higher standard for measuring conduct" of a fiduciary quoted the famous words of Justice Cardoza cited with approval by the Texas Supreme Court as follows:

As forcefully and tersely put by Mr. Justice Cardoza in *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546, 62 A.L.R. 1, '* * * Not honesty alone, but the *punctilio of an honor* the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. *Uncompromising rigidity* has been the attitude of courts of

equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. * * *

When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. ...[M]ischief would result more often from engrafting exceptions upon the general rule than from a *strict adherence thereto*. (Emphasis added).

Johnson v. Peckham, 120 S.W.2d 786, 788 (Tex. 1938).

The court of appeals in *Sorrell* stated that the court's "review of the law pertaining to fiduciary transactions does not justify liberal interpretations in favor of the validity claiming party." Texas law requires that the burden of proof shift to the fiduciary to prove that the fiduciary made reasonable use of the confidence placed in him and that the transaction is fair and reasonable. The court of appeals in *Sorrell* stated as follows:

Even in the case of a gift, in transactions involving parties with a fiduciary relationship, [E]quity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and

reasonable. Pomeroy, *Equity Jurisprudence* § 956 (5th ed. 1941); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); *Cooper v. Lee*, 75 Tex. 114, 12 S.W. 483 (1889); see also *Tippett v. Brooks*, 28 Tex. Civ. App. 107, 67 S.W. 512, writ ref'd, 95 Tex. 335, 67 S.W. 495, 512 (1902). *Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974). Under these circumstances, the burden cast upon the party claiming validity of the transaction not only includes presenting evidence but securing findings of the "material issues--those being whether [the validity claiming party] had made reasonable use of the confidence placed in him and whether the transactions were ultimately fair and equitable to [the complaining party]." *Stephen County Museum, Inc. v. Swenson*, 517 S.W.2d at 261; *Cole v. Plummer*, 559 S.W.2d 87, 90 (Tex. Civ. App.--Eastland 1977, writ ref'd n.r.e.).

The *Sorrell* case also answers questions about what type of conduct is required of a fiduciary. As mentioned above, the nephews proved they acted in good faith and that the aunt had a full understanding of the facts. However, the

court of appeals stated that acting in good faith "does not necessarily mean that they made a good faith effort to fully inform Sorrell [the aunt] of the consequences, that is the nature and effect of the deed she signed."

The *Sorrell* case is an excellent example of the rigid requirements imposed on fiduciaries by Texas law. The case was reversed despite a factual finding that the aunt had a full understanding of the facts and the nephews acted in good faith. The court required the nephews to meet their burden of proving that the transaction was fair and equitable to the aunt, that the nephews made reasonable use of the confidence placed in them and that the nephews made a good faith effort to fully inform the aunt of the nature and effect of the transaction.

2. *Miller v. Miller*, 700 S.W.2d 941 (Tex. App. - Dallas 1985, writ ref'd n.r.e.). The *Miller* case involved a corporate buy-sell agreement signed by a wife while a divorce petition was pending. The husband was a founder, officer and director of a company. The company was about to receive a large investment by Exxon. Exxon insisted that the founders of the company remain involved and sign a buy-sell agreement. The buy-sell was to be binding on the spouses of the founders. In the event of a divorce, the buy-sell required the spouse of a founder to sell the shares to the founder or the other owners of the company. Husband presented the agreement to his wife after they were separated, but before they were divorced. The wife read the agreement, signed it and never asked any questions about it. The wife later learned that the stock was much more valuable

than she thought and sued for fraud and breach of fiduciary duty. The jury found that various representations made by the husband were false and material, but found that the husband did not make them with the intention that the wife rely on them in deciding whether to sign the agreement. In addition, the jury found that the husband's failure to disclose material facts was not made with the intention of inducing the wife to sign the agreement. The jury also found that a confidential relationship existed between the husband and wife at the time the agreement was signed, that the husband acted in good faith at the time he presented the agreement to his wife and that the agreement imposed restrictions on the wife's ownership. However, the jury found that the agreement was not fair to the wife. Trial court found in favor of the husband and ruled that the shareholder's agreement was valid and in full force and effect.

The court of appeals reversed the trial court and found that the agreement was subject to rescission because of the husband's breach of fiduciary duty. A fiduciary relationship was found based on the personal relationship between the husband and wife and also on the husband's position as a founder, officer and director of the company. The court held that the fiduciary relationship required the husband as a fiduciary to deal fairly with the wife in acquiring any rights in the stock. The court stated that proof of good faith is necessary to sustain the transaction, but good faith does not in itself establish fairness. The fiduciary must also show that the transactions was "fair, honest and equitable." The court stated that the ultimate issues were held to be whether the fiduciary had made reasonable use of the confidence placed

in him and whether the transactions were ultimately fair and equitable.

Some of the important factors considered by the court in reaching its conclusion of a breach of fiduciary duty included whether the fiduciary made a full disclosure, whether the consideration was adequate and whether the beneficiary had the benefit of independent advice. The court noted that another crucial inquiry bearing on the issue of fairness is whether the fiduciary has benefitted or profited at the expense of the beneficiary.

The court noted that the jury findings that the husband did not act in bad faith, that his failure to disclose was not done with intent to induce the wife to sign the agreement and that the restrictions imposed on the wife's ownership were reasonably related to the corporate interests of the company are not controlling. It is interesting to note that the wife admitted many facts on cross-examination that would appear to harm her case. These included statements indicating she would have signed the agreement even if all of the facts had been disclosed. She also admitted that she read the shareholder's agreement. However, the court stated that "the rule that a party is presumed to know what he signs is not applied strictly in a confidential relationship."

The court in *Miller* rescinded the shareholder agreement as it applied between the husband and wife due to the breach of fiduciary duty on the part of the husband.

3. Texas Pattern Jury Charge Questions.

The following jury charge questions have been proposed for transactions in which the fiduciary benefitted from a transaction with the beneficiary:

PJC 104.1 Question and Instruction - Existence of Relationship of Trust and Confidence

QUESTION Did a relationship of trust and confidence exist between *Don Davis* and *Paul Payne*?

A relationship of trust and confidence existed if *Paul Payne* justifiably placed trust and confidence in *Don Davis* to act in *Paul Payne's* best interest. *Paul Payne's* subjective trust and feelings alone do not justify transforming arm's-length dealings into a relationship of trust and confidence.

A N S W E R :

PJC 104.2 Question and Instruction - Breach of Fiduciary Duty

QUESTION Did *Don Davis* comply with *his* fiduciary duty to *Paul Payne*?

[Because a relationship of trust and confidence existed between them,] [As Paul Payne's attorney,] [Because they were partners,] [As Paul Payne's agent,] Don Davis owed Paul Payne a fiduciary duty. To prove he complied with his duty, Don Davis must show:

a. The transaction[s] in question [was/were] fair and equitable to Paul Payne.;

b. *Don Davis* made reasonable use of the confidence that *Paul Payne* placed in him;

c. *Don Davis* acted in the utmost good faith and exercised the most scrupulous honesty toward *Paul Payne*;

d. *Don Davis* placed the interests of *Paul Payne* before *his* own, did not use the advantage of *his* position to gain any benefit for *himself* in any position where *his* self-interest might conflict with *his* obligations as a fiduciary; and

e. *Don Davis* fully and fairly disclosed all important information to *Paul Payne* concerning the transaction[s].

A N S W E R :

PJC 110.16 Question on Profit Disgorgement - Amount of Profit

QUESTION What was the amount of *Don Davis's* profit in [describe the transaction in question, e.g., *Don Davis's* leasing of mineral rights to himself]?

Answer in dollars and cents, if any.

A N S W E R :

PJC 110.17 Question on Fee Forfeiture - Amount of Fee

QUESTION What was the amount of *Don Davis's* fees in [describe the transaction in question, e.g., *Don Davis's* brokerage of the real estate transaction]?

Answer in dollars and cent, if any.

A N S W E R :

PJC 110.8 Question on Actual Damages for Breach of Fiduciary Duty

[Insert predicate, PJC 110.1.]

QUESTION What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for his damages, if any, that were proximately caused by such conduct?

[Insert appropriate instructions. See examples in PJC's 110.3 and .9.]

Answer in dollars and cents, if any.

A N S W E R :

4. Third Parties Can Be Held Liable for a Breach of Trust. *Kinzbach Tool Co. v. Corbett - Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942). Corbett - Wallace Corp. ("Corbett") contacted Turner, an employee of Kinzbach Tool Co. ("Kinzbach") about a whipstock contract he wanted to sell Kinzbach. Turner met with Corbett and Corbett informed him that he wanted \$20,000 for the whipstock contract and that he would pay Turner a commission if the whipstock contract was sold to Kinzbach.

Corbett instructed Turner to not mention to Kinzbach what the whipstock contract could be bought for. Turner was told to see what his employer, Kinzbach, would pay. Turner met with Kinzbach about buying the whipstock contract. Kinzbach instructed Turner to find out what Corbett would sell for. Kinzbach informed Turner that it would probably be willing to pay \$25,000. Turner never told Kinzbach that he was going to get a commission from Corbett and never told Kinzbach that Corbett might take \$20,000. Kinzbach and Corbett closed a deal by which

Kinzbach agreed to pay Corbett \$25,000 for the whipstock contract. After the deal was consummated Kinzbach for the first time discovered that Turner was to receive a commission of \$5,000. Kinzbach filed suit against Corbett and Turner seeking to establish a trust against the \$5,000 to be paid Turner. Corbett sued Kinzbach to recover under the contract and for attorneys fees.

The Texas Supreme Court held that Turner breached his fiduciary duty to Kinzbach and that Corbett knowingly participated in the breach and became a joint tort-feasor and is liable as such. The Court held that good conscience and fair dealing called on Turner, as a trusted employee of Kinzbach, when he was told to get a price from Corbett, to disclose his adverse interest in the deal. Turner's position as a trusted employee of Kinzbach, called on him to make full disclosure to his employer of all the facts and circumstances concerning his dealings with Corbett.

The Court held that it is irrelevant whether or not Kinzbach suffered any damages. A fiduciary cannot say to the one whom he bears such relationship: You have sustained no loss by my misconduct and therefore you are without remedy. It would be a dangerous precedent to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationships with another may hold on to any secret gain or benefit he may have acquired. It is the law that in such instances if the fiduciary takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

The Texas Supreme Court went on to say that it is well settled as the law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tort-feasor with the fiduciary and is liable as such. Therefore, Corbett became a

party to the breach of duty committed by Turner, and therefore became a joint tort-feasor with Turner with regard to the rights of Kinzbach.

XIII. RECOVERY OF ATTORNEY'S FEES

A. Texas Probate Code Section 243: Allowance for Defending Will.

Effective September 1, 1987, Section 243 of the Texas Probate Code was amended to allow a person designated as a devisee, legatee, or beneficiary in a will who defends such will or prosecutes a proceeding in good faith and with just cause for the purpose of having such will admitted to probate to recover from the estate his necessary expenses and disbursements, including reasonable attorney's fees, incurred in such proceedings. This amendment of Section 243 was a significant expansion of the previous statute which allowed only a named executor or appointed administrator to recover such expenses and disbursements from the estate. TEX. PROB. CODE ANN. § 243 (Vernon Supp. 1995).

1. The proponent of a will was not entitled to an award of attorney fees incurred in an unsuccessful defense, in the absence of a jury finding of her good faith offering of the will for probate. *Alldrige v. Spell*, 774 S.W.2d 707 (Tex. App.--Texarkana 1989, no writ).

2. Pleadings which alleged that the will was filed for probate in good faith and with just cause and that expenses and attorney fees were incurred in the amount of at least \$12,000 were sufficient to permit the award of \$11,932.36 to the will proponent, after probate of the purported will was successfully contested.

Candelier v. Ringstaff, 786 S.W.2d 41 (Tex. App.--Beaumont 1990, writ denied).

3. An independent co-executrix defending an action involving benefits to the estate was entitled to have her costs paid by the estate. *Lesikar v. Rappeport*, 809 S.W.2d 246 (Tex. App.--Texarkana 1991, no writ).

B. Texas Probate Code Section 245: When Costs are Adjudged Against Representative.

Effective August 29, 1983, Section 245 of the Texas Probate Code was amended to allow recovery from an estate of reasonable attorney's fees incurred in removing a personal representative of an estate and in obtaining compliance with any statutory duties he had neglected as a personal representative. Previously, the statute did not allow recovery of attorney's fees for obtaining the removal of a personal representative. TEX. PROB. CODE ANN. § 245 (Vernon Supp. 1995); *Lawyers Sur. Corp. v. Larson*, 869 S.W.2d 649 (Tex. App.--Austin 1994, writ denied).

1. A successor administrator is entitled to recover attorney fees incurred in removing a prior representative and in obtaining statutory compliance of the prior representative if, rather than undertaking to compel the prior representative to perform duties he has neglected, the successor administrator takes steps to correct the problem; however, the successor administrator need not pursue both courses of action before becoming eligible to collect attorney fees. *Lawyers Sur. Corp. v. Larson*, 869 S.W.2d 649 (Tex. App.--Austin 1994, writ denied).

In *Lawyers Sur. Corp.*, the successor administrator of two estates filed suit against the surety for the prior administrator, seeking attorney fees and costs incurred in bringing the estates of the deceased husband and wife into statutory compliance following the removal of the prior administrator. The probate court awarded fees and costs of each estate. The surety appealed. In one of its points of error, the surety challenged the probate court's application of Section 245 of the Texas Probate Code. The surety interpreted Section 245 to mean that a personal representative and his or her surety could only be held liable for fees that had been incurred by a person who both removed the administrator and attempted to obtain that administrator's compliance with neglected statutory duties. The surety contended that because the successor administrator was not involved in the removal of the original administrator and did not incur any fees associated with such removal, the successor administrator could not recover under Section 245. In the alternative, the surety asserted that the Texas Probate Code limited recovery to attorney's fees incurred in compelling the former administrator to perform the neglected duties, as distinguished from attorney's fees associated with a successor administrator performing those neglected duties himself.

The court of appeals declined to adopt either reading of the statute offered by the surety. The court held that Section 245 allowed a successor administrator to recover attorney's fees incurred in removing a prior representative and allowed recovery of any attorney's fees incurred by the successor administrator if, rather than undertaking to compel the

prior administrator to perform the duties he had neglected, the successor administrator took steps to correct the problem. The court therefore rejected a construction of Section 245 that would require the successor administrator to pursue both courses of action before becoming eligible to collect attorney's fees from the prior administrator and the surety.

Furthermore, the court held that the purpose of Section 245 was not to encourage successors to force an unwilling or incompetent administrator to carry out administrative acts required by the Texas Probate Code after judicial removal. Rather, Section 245 was designed to ensure that expenses associated with, and caused by, the administrator's neglect of statutory duties were charged not against the estate, but against the culpable administrator and the surety. The court held that it would be an unwise and impractical construction of the Code to read Section 245 to allow the successor administrator to recover only those expenses incurred in compelling the administrator to perform the very duties he had already been found incapable of performing adequately.

C. Texas Probate Code Section 149C: Removal of Independent Executor. Section 149C of the Texas Probate Code was also amended effective August 31, 1987, by the addition of Subsection (d), under the terms of which a party seeking removal of an independent executor appointed without bond can recover from the estate his costs and expenses, including reasonable attorney's fees, incident to the removal. TEX. PROB. CODE ANN. § 149C(d) (Vernon Supp. 1995).

1. A former executor may not be charged personally for a challenger's attorney's fees incurred in his removal, when a former executor fights the removal action in good faith. However, the estate is required to pay the former executor's attorney fees. *Garcia v. Garcia*, 878 S.W.2d 678 (Tex. App.--Corpus Christi 1994, no writ).

In *Garcia*, the appellee served as successor executor of his father's estate after the death of his brother. The appellee served as executor for approximately ten years before an application was filed for his removal. The appellee was removed by the court for his failure to timely file accurate estate tax and fiduciary income tax returns, to timely pay ad valorem taxes or estate taxes, and to make a final settlement. The court also found the executor guilty of gross misconduct and gross mismanagement in the performance of his duties. After the executor's removal, a successor administrator was appointed. Then, the court heard applications to pay the former executor for his work as executor and to pay his attorney for fees incurred in defending and probating the will as well as in defending his post as executor. An application was also filed to pay the appellant's attorney for fees incurred during the removal action. The court found that the executor had defended the action for his removal in good faith and granted his application to pay fees from the estate as well as the appellant's application. The appellant then filed an application to surcharge certain expenses, fees, and costs of the estate against the former executor. The county court rejected the application, and the appellant appealed to the appellate court. The appellant contended, among other

things, that the court failed to surcharge the former executor for attorney's fees unnecessarily incurred by the executor's failure to properly manage and timely close the estate and for attorney's fees awarded the appellant's attorneys accrued in the application to remove the executor.

The court of appeals held that under the Texas Probate Code, the estate had to pay the former executor's attorney's fees. TEX. PROB. CODE ANN. § 149C(c) (Vernon 1980). The court did not remand any issues relating to attorney's fees incurred in the removal proceeding. However, the court did remand as to all other attorney's fees unnecessarily incurred by the executor's failure to properly manage and timely close the estate. The court also denied to remand any issues pertaining to attorney's fees awarded to the appellant's attorney which accrued in the application to remove the executor. The court of appeals held that the Code allowed the estate to pay the attorney's fees of the challenger. TEX. PROB. CODE ANN. § 149C(d) (Vernon Supp. 1995). The court's ruling that the executor fought the removal action in good faith defeated any attempt to charge the executor personally with fees incurred to unseat him. The court stated that the legislature determined that an estate could be liable for the attorney's fees of both sides of an action to remove an executor that was defended in good faith. Surcharging the removed executor with the challenger's attorney's fees would subvert the legislature's clear support of executors who defended challenges in good faith. Because the finding of good faith was not challenged, the court overruled the objection.

D. Texas Trust Code Section 114.064: Costs. The Trust Code provides that in any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just. TEX. PROP. CODE ANN. § 114.064 (Vernon 1995).

1. *Lyco Acquisition 1984 Ltd. Partnership v. First Nat. Bank of Amarillo*, 860 S.W.2d 117 (Tex. App.--Amarillo 1993, writ denied). In *Lyco*, the court held that a bank was entitled to attorney fees for defending a cause of action brought against it under the Trust Code, even though the plaintiff dropped the cause of action under the Trust Code before the trial court ordered summary judgment in favor of the bank on the remaining cause of action. In the remaining cause of action, the court found that defending the case involved substantial time and labor, and the bank derived great benefits from the attorney's services.

2. *Lyco Acquisition 1984 Ltd. Partnership v. First Nat. Bank of Amarillo*, 860 S.W.2d 117 (Tex. App.--Amarillo 1993, writ denied). The grant or denial of attorney fees is within the sound discretion of the trial court, and the reviewing court will not reverse the trial court's judgment unless there is a clear showing that the trial court abused its discretion by acting without reference to any guiding rules and principles.

E. Texas Trust Code Section 113.018: Employment of Agents. The Trust Code provides that a trustee may employ attorneys, accountants, agents, and brokers reasonably necessary in the administration of the trust estate. TEX.

PROP. CODE ANN. § 113.018 (Vernon 1995).

F. Texas Civil Practice and Remedies Code Section 37.009: Costs. The Civil Practice and Remedies Code provides that in any proceeding seeking declaratory judgment the court may award costs and reasonable and necessary attorney's fees as are equitable and just. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1986).

1. *Canales v. Zapatero*, 773 S.W.2d 659 (Tex. App.--San Antonio 1989, writ denied). In a suit filed under this chapter, the trial court may award reasonable and necessary attorney fees that are equitable and just.

2. *Fuqua v. Fuqua*, 750 S.W.2d 238 (Tex. App.--Dallas 1988, writ denied). In *Fuqua*, the court of appeals held that the trial court did not abuse its discretion in refusing to award attorneys fees to a son, who prevailed in fewer than one half of his declaratory judgment claims in litigation arising out of the distribution of the son's mother's estate.

3. *West Texas Rehabilitation Ctr. v. Allen*, 810 S.W.2d 870 (Tex. App.--Austin 1991, no writ). Here, the court of appeals held that the probate court acted within its discretion in requiring a specific beneficiary to pay the residual beneficiaries' successful challenge to the estate distribution which resulted in the determination that the independent executor improperly distributed \$120,871 in stocks, bonds, and mutual funds to the specific beneficiary under the paragraphs of the will disposing of cash.

G. Texas Civil Practice and Remedies Code Section 37.005: Declarations Relating to Trust or Estate.

The Civil Practice and Remedies Code provides that:

A Person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate:

(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;

(3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or

(4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts. TEX. CIV. PRAC. & REM. CODE ANN. § 37.005 (Vernon Supp. 1999).