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"Discovery Toolkit for Probate, Trust, and Guardianship Litigation"

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include:

- *A General Review of Fiduciary Liability*, presented at The Charter Bank Seminar Series, February 15, 1996.
- *Liability Insurance - Duty to Defend and Indemnify (Substituting Pockets When Your Client Gets Sued)*, presented at the Andrews & Kurth L.L.P. 1995 Seminar Series.
- *Issues of Corporate Fiduciary Liability and Litigation Management*, presented at the Texas Bankers Association Financial Services Division 1992 Southwest Trust Conference, Austin, Texas, on May 7-8, 1992; to the Corpus Christi Estate Planning Council, Corpus Christi, Texas, on January 21, 1993; and to the Trust Financial Services Division of the Texas Bankers Association, Dallas, Texas, on October 22, 1993.

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Discovery Toolkit for Probate, Trust, Guardianship Litigation I. Introduction

Discovery, to paraphrase General Nathan Bedford Forrest, depends on getting there "the firstest with the mostest." Will contests, suits against fiduciaries, and guardianship fights are all factually intensive; thus, getting a jump on discovery is crucial to success in such litigation. In this paper, the authors explore discovery techniques in these cases, with a focus on getting you the "firstest" and the "mostest" information about your case.

This paper is not intended as an exhaustive treatise on either the new discovery rules or the substantive bodies of law involving probate, trust, and guardianship litigation. Rather, it is a practical guide on how to apply the new discovery rules to this unique brand of litigation. II. Getting There the "Firstest": How to Avoid Discovery Disasters From the Start A. Planning is the Key

The primary key to avoiding a discovery disaster is planning. An hour or two of planning right at the start of a case - or as the plaintiff, even before the case starts - can save you a mountain of grief later. You need to decide (1) what information you need, (2) which discovery tool is most likely to get you that information, and (3) in what order you need to get that information, so you can use it for depositions, hearings, or mediation.

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Why is planning so crucial? Early planning allows you to schedule your discovery so that when the inevitable delays occur, you will have enough time to complete discovery before the discovery period closes.

Early planning helps you advocate your case. You must present to your opponents the reasons you will emerge victorious. But you cannot present those reasons without a solid grasp of your case's underlying facts. You must have information not only to use at trial but also in mediation and settlement negotiations and even simply in framing the issues for the parties' consideration. Remember the saying - devil is in the details.

Discovery planning is especially critical when you represent the plaintiff. In chess, the white side always goes first, giving that side a slight advantage. The same is true for the plaintiff in a lawsuit, but that advantage can be lost. Do not surrender the initiative in your case without gaining some concession in return. [B. Your Primary Tools: The Discovery Control Plan and the Local Rules](#)

Let's face it: Lawyers procrastinate. Too many papers come across our desks for us to absorb all of them in detail, and besides, who wants to bore themselves by checking calendars and counting dates when they could be taking depositions or arguing in court?

But you had better bore yourself. Discovery control plans contain hidden traps for the unwary. The descent from rainmaking to throwing yourself at the mercy of your opponent or the court can be as short as seven months if you miss your deadlines and fail to designate expert witnesses in time. Do not let yourself be surprised.

The bottom line: If you miss your deadlines, it makes no difference how clever your discovery is or how many tools there are in your toolkit. You will come up empty-handed at trial or staring down the barrel of a no-evidence summary judgment motion one short year after being a hero for bringing in a new case. What a difference a year makes! [III. A "Gotcha" in Disguise: The Discovery Control Plan](#)

A particularly nasty "gotcha" lurks in the new discovery rules in the form of the Rule 190 docket control plans. Under the new Rules, all cases must fall under one of three docket control plans, Levels 1, 2, or 3. Level 1 is for small cases of \$50,000 or less; this level was primarily created to prevent small litigants from being overwhelmed by more heavily financed opponents and is rare in probate cases. Level 2 is the standard case plan, while Level 3 is court-ordered docket control.

Many courts enter docket control orders as a matter of course; Rule 190.4 governs cases in those courts. But some courts do not. Unless otherwise requested by a party, a Level 2 discovery control plan will govern cases in those courts. Tex. R. Civ. P. 190.3(a). Note that if your opponent fails to plead a discovery level in the petition, you can specially except and force her to replead. Tex. R. Civ. P. 190 cmt. 1.

Failing to recognize the Level 2 discovery plan deadlines can be fatal to your case. Under Level 2, the discovery period ends on the **earlier** of 30 days before trial **or** nine months after the first oral deposition or first written discovery is due. Tex. R. Civ. P. 190.3(b)(1)(B). Thus, even if there is no trial date, and seemingly no rush to complete discovery, the discovery period may close as early as eleven months after the case is filed. If you are not careful, you may find yourself pleading with your opponent or the court for an extension of the discovery period.

More importantly, expert designation deadlines are now tied to the end of the discovery period. Most lawyers delay retaining experts, hoping to settle the case cheaply before expending money on an expert. But gone are the days when you can simply wait until shortly before trial and then give the name, address, and telephone number of an expert and generally describe the expert's testimony.

You must be sure to designate experts timely by supplementing your Rule 194 disclosure response. If you are seeking affirmative relief, you must designate your experts and provide the information required at least **90 days** before the discovery period ends. Tex. R. Civ. P. 195. Other experts must be designated at least **60 days** before the discovery period ends. *Id.* Do not wait - line your experts up right away, get their *curricula vitae*, and get a feel for substance of their testimony.

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Here, then, is the "Level 2 Trap": Plead a Level 2 discovery plan and do not ask for a docket control order. Then start the discovery period running by serving a Rule 194 disclosure request. (See Section V.A below for a discussion of Rule 194 disclosure requests.) If the court does not enter a docket control order, you can proceed with your discovery knowing that your opponent's deadlines to name experts and conduct discovery are slowly slipping away.

If a quick discovery period turns out not to be favorable to you, simply move for entry of a docket control order. The court must enter a docket control order if a party requests one. Tex. R. Civ. P. 190.4(a). To be safe, move for a docket control order and have your motion heard before your deadline to designate experts expires.

It is as yet unclear how these new Rules regarding discovery deadlines apply in cases in this area. In crafting these Rules, the drafters do not seem to have considered their effect on *in rem* proceedings such as probate or guardianship actions. For instance, serving discovery before the answer is due gives the respondent 50 days instead of 30 days to reply to the discovery. See, e.g., Tex. R. Civ. P. 194.3. But what exactly is the answer due date when someone applies to probate a will? Who is the "plaintiff" "defendant" when four different people have applied to serve as someone's guardian? Rather than being the guinea pig for the new Rules, agree with your opponent or petition the court for clear deadlines well before any discovery deadline runs.¹ Another "Gotcha": [Hidden Deadlines in the Docket Control Order](#)

Even if you have a docket control order, you are not out of danger. There may be land mines lurking in the court's order.

If you are like most lawyers, when you receive a docket control order, you glance at it and turn it over to your secretary, saying, "Make sure those dates are docketed." Your secretary sees the dates in black and puts them on your calendar. You may have just stepped on the land mine.

Most docket control orders contain, in fine print, a catchall statement such as, "If no date is given below, the item is governed by the Texas Rules of Civil Procedure." So even those empty blanks have dates attached to them. The 90-day and 60-day expert designation deadlines discussed above may be running even if your docket control order says nothing about experts.

Moreover, many judges have standing orders regarding calendaring that they may, or may not, include with the docket control order. Some provide "supplemental" docket control orders that govern everything from *Daubert/Robinson* expert exclusion hearings to status conferences to continuances to trial preparation. One Harris County district judge, for instance, provides a five-page supplement to his docket control orders.

You cannot simply rely upon your secretary to docket the dates. The chances are that only the obvious dates will make it your calendar while the subtle ones buried in the Rules will be overlooked.² The Third "Gotcha": [The Local Rules](#)

All trial lawyers know that courts have local rules. And most trial lawyers put off reading those local rules until a day in the future when they don't have much to do. That day, of course, rarely comes.

But this is one of the first steps you should take to avoid discovery disasters. Local rules spell out the form and substance of practice before that court; for instance, they will state exactly when you must include a certificate of conference with your pleadings and discovery motions. And local rules often contain dates and deadlines that you might miss if you do not read them carefully.

With the advent of the Internet, getting local rules for courts is now easier than ever. Most Texas courts now have their own Web sites that contain information about the judge and court procedures, including the local rules. For instance, the 410th Judicial District Court, Judge K. Michael Mayes presiding, has standing orders regarding discovery periods, which may be found at www.co.montgomery.tx.us/410dc/standord.shtml. Other courts can be found at the Texas Judiciary Online: www.courts.state.tx.us. To find rules for a specific court, try entering a phrase such as "local rules 12th district court Walker County Texas" into your favorite Internet search engine. If you don't know how to do this, ask your children.³ [How To Avoid the "Gotchas"](#)

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Fortunately, you can avoid these "gotchas" with some forethought and some simple steps:

As soon as you get the case, figure out which discovery level applies.

Determine from that when the discovery period ends.

Back up from the end of the discovery period to determine the following dates:

You must propound all discovery on your opponent at least **30 days** before the discovery period ends.

If you are seeking affirmative relief, you must designate your expert witnesses at least **90 days** before the discovery period ends, **and** provide all information required by Rule 194.2(f).

All other witnesses must be designated at least **60 days** before the discovery period ends, again providing the information required by Rule 194.2(f).

Keep in mind that if the 30-, 60-, or 90-day period ends on a weekend or holiday, you must move the deadline earlier, not later (e.g., if it falls on a Saturday, move it to Friday, not Monday).

Get the local rules for the court and read them.

Review the Texas Rules of Civil Procedure regarding discovery, especially Rules 190, 194.2, and 195.

If the case is under a docket control order, review that order for hidden deadlines.

Re-read the local rules.

Now docket *all* of your dates.

If you are still uncertain about the deadlines, seek clarification from the court or through a Rule 11 agreement with your opponent.

Keep in mind that most dates in a discovery control plan can be changed by Rule 11 agreement. If you have a docket control order, examine it carefully to see which dates may be altered in that fashion. Usually, discovery may be conducted by agreement even after the formal end of the discovery period. [B. Other Things to Consider at the Beginning of a Lawsuit](#)

In addition to the discovery control plan and the local rules, you should take these items into account at the start of your case:

Confer with your client immediately and determine the client's version of the facts underlying the suit.

Ask the client for the names of any person, business, or law firm that might be involved in the case or that could provide information.

Determine the scope of your representation and explain to the client in writing what services you will and will not provide, circumscribing the roles you each will play.

Determine jurisdictional facts - place of business, residency, state of incorporation, any pending estates, and what connections each party has to the transaction or occurrence of the suit and to each county, state, or country.

Determine how service of process was or is to be effected. Service in fiduciary matters is particularly tricky - check those local rules again - and if service is ineffective, limitations may be running.

Perform a conflicts check of the people, businesses, and law firms involved in the case, and update this check as new information appears.

Examine the case to see if there are any additional counterclaims, cross-claims, or third-party claims that you could bring, so that you fall within the 30-day rule of Tex. Civ. Prac. & Rem. Code § 16.069. This is key; you may be able to revive stale claims and skirt limitations.

Immediately notify any applicable insurers about the lawsuit. Remember also to analyze each amended petition or claim to see if the new pleading brings your client within coverage.

Research your opponent. This is especially valuable in a niche practice area such as probate litigation, where you see the same opponents time and time again. Few things are as satisfying as hoisting your opponents on the petard of their own speeches and papers. [IV. Getting the "Mostest": The Discovery That You Want](#) [A. Discovery in Will Contests](#)

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A will contest is at its core a simple lawsuit. The primary grounds for contesting a will are:

- The testator lacked testamentary capacity when executing the will;
- The testator was unduly influenced in making the will;
- The testator executed the will as the result of fraud, duress, or mistake;
- The will offered for probate is not the testator's will, in that it was forged or lacks the necessary formalities for it to be valid;
- or
- The testator revoked the will offered for probate.

Each of these grounds, however, may be factually intensive, requiring substantial discovery to support or contest them.¹
[Will Formalities](#)

In order to qualify as a valid will and be admitted to probate, an instrument must satisfy the formal requisites of the Texas Probate Code, namely:

- Except for a nuncupative will, the will must be in writing. Tex. Prob. Code § 59(a).
- At the time the document is executed, the testator must be of sound mind and over eighteen years of age, married, or a member of the armed forces or merchant marine. *Id.* § 57.
- The document must show testamentary intent on its face; that is, it must show it is intended to dispose of the maker's property, take effect at death, and be revocable during the maker's life. *Hinson v. Hinson*, 154 Tex. 561, 280 S.W.2d 731, 733 (1955).
- It must be signed by the testator in person or by another person in his presence at the testator's direction. Tex. Prob. Code § 59(a).
- If non-holographic, it must be attested to by two credible witnesses over the age of fourteen, each of whom signs in the testator's presence. *Id.*

If it contains a self-proving affidavit, the will itself, is *prima facie* evidence that it was executed with the proper formalities. *Gasaway v. Nesmith*, 548 S.W.2d 457, 458 (Tex. Civ. App.- Houston [1st Dist.] 1977, writ ref'd n.r.e.).

Lawyers specializing in probate litigation have trusts and wills stacked sky-high in their offices. One comes to recognize wills from particular estate planners and get lulled into thinking they know what those wills say.

But the best evidence in a will contest is the will itself. Read it word for word. Look at who the witnesses and notary are. Who are the beneficiaries? These are your best witnesses. Look for anything unusual in the will. Below are some examples of things you might find with careful examination.[a\) Mistakes in the Will](#)

In one probate case, the will proponents were prepared to argue that the testator, an elderly man, retained his mental faculties until the very end. He was organized, detail-oriented, and read the entire will word-for-word. He knew precisely what he was doing when he executed his will.

What went wrong? The will drafter made a mistake and misnamed the county where the testator resided. The testator did not catch the error, introducing the argument that he either had not read the will carefully, or did not know which county he lived in. In other words, the contestants had evidence of either mistake or a lack of capacity.[b\) Peculiarities](#)

Sometimes you will find that there are more than the usual two witnesses to the will. Find out why. In one case, the drafter anticipated a contest and added will witnesses specifically to defeat the contest.

Along the same line, check to make sure that none of the subscribing witnesses are beneficiaries of the will. If so, they are disqualified from being a will witness or must give up their bequest. Tex. Prob. Code § 61. Perhaps one of the subscribing witnesses is named as executor or trustee, or is on the board of a foundation receiving a bequest. Because of the fees available for sitting in those fiduciary capacities, you may be able to successfully argue that the witness has a pecuniary

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interest in the will.c) Execution Problems

Is the will completely signed? Is it dated? Is it notarized? Is it the original signature? (Black ink can be deceptive.) The testator or one of the witnesses may have left a space blank, or even signed in the wrong blanks. The 1991 *Boren* amendment to Section 59 of the Probate Code cured some of the problems when people accidentally sign a will incorrectly, but it is still important to know what difficulties you or your opponent will face in admitting the will to probate.d) Holographic Wills

Holographic wills present their own special problems, since they are usually not drafted by a person with legal experience or knowledge. In addition, you may find illegible words, confusing references, and meaningless scribbles. Have the document typed up, then compare the typed version to the holographic.

In one case, the testator had an unwitnessed typed will and a similar holographic document. The contestants questioned whether the holographic document exhibited testamentary intent. The typed will was dated and stated that the testator revoked all prior wills. Five separate individuals examined the holographic document and failed to notice a date within the document, but a careful examination revealed a date within the document. This date was before the date on the typed will, bolstering the argument that the testator thought the holographic document was a will that he was now revoking via the typed will. The lesson: Examine holographic wills extremely carefully.e) Unusual Will Clauses

Sometimes you will come across will clauses that seem boilerplate at a glance, but really are not. For instance, one will that the authors have seen contained a no-contest clause governing not only contests of the will, but also the testator's *inter vivos* gifts. A beneficiary triggered this clause not by contesting the will, but by claiming that the testator's *inter vivos* transfers were fraudulent.2. Lack of Testamentary Capacity

In order to make a will, the testator must be of "sound mind" at the time the will is executed, i.e., have testamentary capacity. *Chambers v. Chambers*, 542 S.W.2d 901, 906 (Tex. Civ. App.- Dallas 1976, no writ); *Duke v. Falk*, 463 S.W.2d 245, 254 (Tex. Civ. App. - Austin 1971, no writ). The burden of establishing testamentary capacity lies upon the will contestant unless the contest was filed before the court admitted the will to probate. *Lee v. Lee*, 424 S.W.2d 609, 610 n.1 (Tex. 1968); *Horton v. Horton*, 965 S.W.2d 78, 85 (Tex. App.- Fort Worth 1998, no writ).

To have testamentary capacity, the testator must have been able to:

- 1. Understand the business in which he was engaged;
- 2. Understand the effect of making a will;
- 3. Know the general nature and extent of his property;
- 4. Know his next of kin and the natural objects of his bounty and their claims or status; and
- 5. Collect in his mind the elements of the business to be transacted and hold them together long enough to form a reasonable judgment about them.

Prather v. McClelland, 76 Tex. 574, 13 S.W. 543, 546 (1890); *Horton*, 965 S.W. at 85.

In a will contest based on testamentary capacity, the proper inquiry is whether the testator had testamentary capacity on the date of the will execution. *Lee*, 424 S.W.2d at 611; *Horton*, 965 S.W.2d at 85. This may be established through circumstantial evidence, but evidence regarding testamentary capacity at other times must be of a satisfactory and convincing character and must be probative of the testator's capacity (or lack thereof) on the day the will was executed. *Horton*, 965 S.W.2d at 85. Thus, evidence of the testator's incapacity at other times is admissible if it is based on a persistent condition that was probably present when the testator executed the will. *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983); *Horton*, 965 S.W.2d at 85.a) Direct Discovery of Testamentary Capacity

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Obviously, the best evidence of testamentary capacity is direct evidence from the day the testator executed the will. Get the testator's medical records bracketing the will execution date. Interview doctors, nurses, hospice workers, nursing home employees, and other such caregivers. Get records from these people and from hospitals and pharmacists. You will also need to get documents and testimony from friends, family members, servants, and employees. Talk to people at the testator's church, workplace, and social organizations.

The advent of the camcorder has unearthed a mother lode of information. You may not find tapes of the will execution, but look for tapes of family gatherings, birthdays, anniversaries, and speeches or presentations. Imagine the impact on the jury of a tape in which the testator is seen rambling incoherently, or where the testator lovingly embraces the alleged "undue influencer." Photographs, too, can be invaluable. A jury is less likely to believe that the testator lacked testamentary capacity when you show them a picture of the testator driving a car two days before executing his will.

Do not forget that the will's self-proving affidavit is *prima facie* evidence that the testator had testamentary capacity. *Gasaway*, 548 S.W.2d at 458.b) [Discovery Regarding Estate Planning](#)

You need to get all the relevant files from the lawyer who drafted the will: correspondence with the testator, the lawyer's internal memoranda, the internal memoranda of the will witnesses, voice-mail, email, drafts, the lawyer's notes, the paralegal's notes, the secretary's notes, office procedures, will execution procedures - anything at all the drafter might have relating to the testator. Piece together who communicated with the drafter and the testator, when were they communicating, and what about.

There may be nothing in writing regarding will execution procedures, but most estate planners have standard operating procedures for reviewing and executing a will. Were these followed? Did the will witnesses write memos to the file? Get the notary book; interview the witnesses immediately.c) [The Testator's Knowledge of the Estate](#)

It may be difficult to find evidence to show that the testator knew the nature and extent of his estate beyond the will itself. The exception to this rule is a trust beneficiary. Quite often, you can find correspondence between trust officers and a testator where the testator asks questions about a trust or gives directions to the trust officers regarding investments or disbursement. Similarly, you should look for correspondence between the testator and other financial advisors - mutual fund companies, portfolio managers, lawyers, stockbrokers, and banks - regarding the testator's finances. And you might find such information in correspondence with family or friends, or in notes, newspaper clippings, and other research performed by the testator.

Check the testator's computer; maybe he had Quicken or other financial software loaded where he kept track of his finances. The same goes for stock tracking software. Look at his list of "bookmarks" in his web browser - testator might have bookmarked Internet sites regarding his stocks, mutual funds, 401(k), bonds, commodities, or other financials. Is CNNfn or Bloomberg among the links? Furthermore, the "history" for Web browser usually record the date on which a site was last visited. Scan through that history file and see when the testator last visited his financial sites. One of those visits might be right around the will execution date. Consider a subpoena to the testator's Internet service provider (ISP); the ISP may be able to tell you which sites the testator visited on a particular day or days. Do it quickly, though - most ISPs discard this information on a regular basis.d) [The Objects of the Testator's Bounty](#)

You must also think about whom the testator would have wanted to receive his property. The testator's wishes, of course, underpin any will contest.

You want to show that your client was the object of the testator's bounty, while your opponent's client was not. This requires you to have a full understanding of your client, your opponent's client, the testator, and the testator's relationship with both parties.

To that end, consider discovery on the following topics:

Spouses / Ex-Spouses / Lovers: Who are they married to, who have they been married to, and who have they been dating?

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Family: Who are their parents, children, grandparents, grandchildren, cousins, uncles, aunts, in-laws, and step-relations?

Friends and Neighbors: Who do they spend their time with? Who would be good witnesses for or against you? Who might know secrets that the family won't divulge?

Employees: Maids, chauffeurs, gardeners, cooks, secretaries, accountants, book-keepers, caregivers, baby sitters, hairdressers, manicurists, ranch hands, and company employees.

Money: Net worth, sources of income, assets, account balances, bank and brokerage statements, taxes, trusts, debts, contracts, liens, regular payments, and coin, stamp, or other collections. Who has access or joint tenancy with them on accounts?

Real Estate: Size, location, improvements, price, appraisals, vacation homes, mineral properties, investment properties.

Work History: Job titles, duties, employers, salaries, locations, co-workers, promotions and demotions; companies, boards.

Educational History: Schools, attendance dates, GPA, degrees.

Vehicles: Automobiles, trucks, motorcycles, boats, planes, RVs; make/model, price, year, VIN; accidents, damage, tickets, DUIs, sales.

Firearms: Owned or possessed, make and model, caliber, licenses (state permits, hunting, federal ID, concealed carry), value.

Alcohol: How much, how often, maximum amount, bars frequented, more or less in the past, alcoholism, in-patient or out-patient treatment, AA, Al-Anon, confrontations or interventions.

Tobacco: What types/brands, how much, how often, more or less in the past, attempts to quit, doctors' advice.

Drugs: Controlled substances (21 C.F.R. Part 1803), inhalants (glue, paint, etc.), prescription drug abuse; first time, last time, how much, how often, maximum amount, sources, confrontations or interventions, in-patient or outpatient treatment, 12-step groups, attempts to quit.

Criminal History: Arrests, tickets, convictions, pleas, case disposition, prior testimony.

Civil Suits: Suits, judgments, bankruptcies, divorce proceedings, cases participated in, prior testimony.

Medical History: Doctors, nurses, hospitals, prescriptions, diseases, injuries, and conditions.

Psych History: Psychiatrists, psychologists, clergy, other counselors, social workers, first time, last time, how often, how long, what for, prescriptions.

Activities: Hobbies, activities, recreation, travel, fraternal organizations, charitable organizations, civic organizations, churches, and boards.

Attitudes: Their views on politics, religion, economics, and childrearing; their emotions, moods, likes and dislikes.

Remember, testators may remove their blessings simply because they didn't like the clothing the contestants wore, or disagreed with their political views, or felt they drank and smoked too much (or even too little). You must understand the dynamics between the people involved.[3. Undue Influence](#)

An undue influence claim has three elements: (1) the existence and exertion of an influence; (2) the effective operation of the influence so as to subvert or overpower the testator's mind when executing the will, and (3) the execution of a will that the testator would not have made but for the influence. *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963). In that situation, the will expresses the intentions of the person exercising undue influence, not the testator's. *Long v. Long*, 133 Tex. 96, 125 S.W.2d 1034 (1939).

Undue influence over a testator can be very difficult to prove, leading some commentators to dismiss it as a cause of action. Cf. James Hartnett, Jr., *Trust and Estate Litigation*, 23rd Advanced Estate Planning & Probate Law Course R-11 (1998).

Undue influence, however, most often comes into play when there is some sort of duress against the testator, either mental or physical. The prototypical case is an unscrupulous caregiver who withholds medication or nourishment from the ailing testator until the new will leaving everything to the caregiver is signed. See, e.g., *Cobb v. Justice*, 954 S.W.2d 162 (Tex. App. - Waco 1997, writ denied) (niece took testator dying of cancer and on morphine on a long drive without oxygen to execute a will favoring her). Thus, it is much easier to make a case for undue influence when the testator was mentally or physically weakened. But not too weakened: A testator must actually have testamentary capacity for that person's testamentary intent to be unduly influenced.

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If an undue influence case is alleged, you will need to discover everything you can about the alleged influencer and that person's participation in the will execution. You may find that the influencer initially contacted the will drafter, or hired or paid the drafter. The influencer may have driven the testator to and from the drafter, or been present at conversations between the testator and drafter or even at the execution. All of these situations present the opportunity for influence over the will's contents.

The circumstances surrounding execution of the will become critical. Who was there? Was the will read aloud? Did the testator understand the will? Ask questions? Did he walk in and out of the execution ceremony by himself?

When a will is executed at a law firm, and the witnesses are lawyers, secretaries, or other such individuals, the witnesses may have difficulties distinguishing the details of that particular will execution. Usually, however, the firm has a formal procedure that is followed for each will execution. For instance, the typical procedure may be to have no one else in the room with the testator besides the witnesses, notary, draftsman, and possibly the spouse. If you are defending the will, you can elicit the testimony you want by asking the witness to describe the typical will execution ceremony and then asking, "If there was anything unusual about the execution of this will, would you have remembered that?"

The period leading up to the execution is also important. Were will drafts sent out? Where were they sent? To whom? Who called in the changes? You will want to get email, voice-mail, and phone message slips regarding such contacts, and any drafts sent. For instance, in one case, the contestants discovered numerous phone message slips from the alleged influencer relaying information from the will drafter to the testator. You might find notes on will drafts written not by the testator, but by the influencer.

It is typical for an elderly person to rely on a spouse, child, relative, nurse, secretary, or close friend for assistance in transportation and communicating with others. These are precisely the individuals who are likely to be major beneficiaries of that person's will. The case for undue influence becomes much more difficult to make in such situations. Remember that mere opportunity and influence are not enough.[4. Mistake or Fraud](#)

Absent a showing of fraud or undue influence, the testator's mistake of law or fact will not invalidate the will, even if the testator would have made a different will were the true facts known. *Kilpatrick v. Estate of Harris*, 848 S.W.2d 859, 865 (Tex. App. - Corpus Christi 1993, no writ); *Carpenter v. Tinney*, 420 S.W.2d 241, 244 (Tex. Civ. App. - Austin 1967, no writ). A court has no authority to vary or modify the terms of a will or to reform it according to the court's perception of the testator's unexpressed intent. *Kaufhold v. McIver*, 682 S.W.2d 660, 667 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Carpenter*, 420 S.W.2d at 244.

These days, cases of fraud involving wills are rare, but they do occur, especially with holographic wills. Search out inconsistencies between the will and the testator's actual situation. For instance, look to see if names are misspelled or if the testator's personal information is incorrect.

You will need to have the document examined by professionals; consider speaking with police forensic evidence technicians for recommendations of who to use. Look for fingerprints. In one forged will case, the experts came up dry when examining the ink type, the date of the ink, the paper used, and handwriting samples of the testator. But a fingerprint analysis revealed the forgery. According to the forgers story, he had befriended the testator many years before, but had not seen him since 1970. On the other hand, the forgers fingerprint was found on the alleged will, which was dated 1978. This lapse in credibility convinced the jury to reject probate of the will.[B. Discovery in Fiduciary Litigation 1. Read the Instruments](#)

In a lawsuit over the conduct of a trustee or personal representative, the case's bedrock is the will or trust instrument. So when you have such a case, you examine the instrument carefully, right?

If so, you may be the only one in the case who has. Even those who should know better - trustees and their attorneys - often skim these documents, especially the "boilerplate" provisions. Trustees often have other work; a trust or estate may pass through several hands over its lifetime, with a resulting information vacuum. The fiduciary may not have read the actual document in years, but relies instead on a summary of its provisions, a summary that is overly simplistic or just plain

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wrong. And an individual fiduciary with no particular skill or experience may have never read the document, or read it but did not understand it. You may discover fiduciary violations on the instrument's face - examine it with care.

In particular, you must examine the instruments carefully when the fiduciary is managing multiple trusts or accounts for the family. You may find that the fiduciary made distributions from the wrong trust, or used accounting, notice, or investment guidelines for one trust in handling another.

The point, of course, is to read the instrument in detail. And despite the temptation, do not skim any part. Even a boilerplate provision can trigger an idea that contributes to your argument. In one case, the authors represented the income beneficiary of a trust, who was also a co-trustee. The trust's remainder beneficiaries claimed that the income beneficiary had waived her right to certain income distributions. But in rereading the trust instrument, the trust's spendthrift clause came to light: The income beneficiary could not have waived the right to the income, as it had not yet been distributed. So read that will or trust - you may unearth rich deposits of gold.² [What the Beneficiary is Looking For a\) Get the Trust Files](#)

Beneficiaries asserting a breach of fiduciary duty will want not just the relevant will or trust instrument, but also any summary that the fiduciary has created of that instrument. The beneficiary may find that the instrument and summary disagree, and that the fiduciary has followed neither.

A closely associated point: When dealing with corporate fiduciaries, the beneficiary will also want trust committee minutes and policy manuals. Admittedly, trust committee minutes may be of little help. Trust committee minutes tend to be innocuous and contain little useful ammunition. In fact, they typically cut against a breach of fiduciary duty, since they will almost always show the issue under consideration was discussed and decided after an adequate review. But at the least, the beneficiary will discover who was present at those meetings, who had input, and who must be deposed to find out if the minutes accurately reflect the discussions and decisions made.

Trust policies and manuals can, however, be an astonishing boon to the beneficiary. Some are out of date, or have not been examined or relied upon for years.

The beneficiary will want the fiduciary's personal file, including phone messages, email, and voice-mail. The advent of email and voice-mail has been lethal in this area. Somehow fiduciaries find themselves at their computer in informal chats with their co-fiduciaries or with beneficiaries. Email seems so temporary and spontaneous that people are unguarded in what they say. Fiduciaries email each other and make derogatory comments about the beneficiaries or their fellow fiduciaries. Yet as a trial exhibit, email works like a written letter. Be careful with your email; tell your clients not to send any email they wouldn't want to see used at trial against them; and have your clients print and save all communications related to the trust or estate. Keep in mind that "delete" means no such thing.

In particular, explore any communications from lawyers. Even lawyers are more relaxed in email; they may give opinions of their case that would otherwise require approval of their firm's opinion letter committee. One can argue a negligent misrepresentation or breach of fiduciary duty claim against the family lawyer who finds himself communicating with both the fiduciary and the beneficiaries. See *McCamish, Martin, Brown & Loeffler v. F.E. Applying Interests*, 991 S.W.2d 787, 792 (Tex. 1999); *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 402 (Tex. App. - Houston [14th Dist.] 1997, writ dismissed by agr.). Furthermore, by representing all parties jointly, the lawyer waives the attorney-client communications privilege. See Tex. R. Evid. 503(d)(5). Once that happens, you can get the lawyer's file. Finally, if a fiduciary asserts advice of counsel as a defense to a breach of fiduciary duty, you may also get behind the privilege and be able to get the lawyer's file. See generally *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105 (Tex. 1985) (discussing use of the attorney-client privilege as a shield and a sword).

Communications with the beneficiaries may have ratified the fiduciary's actions. Find out how often the fiduciary met with the beneficiaries, who was there that could be witnesses to whether full disclosure was made. Find out who the lawyers were for the trust. Figure out what the fiduciary's relationship is to the income beneficiary as opposed to the remaindermen. Find out what other relationships the other beneficiaries and any co-fiduciaries have with the fiduciary. Now you can piece

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together what was really happening behind the scenes. If you know the relationship among the players, you can find a breach of fiduciary duty not otherwise visible just from the paperwork.

As a practical matter, a fiduciary's commercial interests may impact its duties to beneficiaries. Greed could trump duty when the fiduciary wants new business relationships with related players, such as the surviving spouse, other lawyers with business to refer, the decedent's corporate interests, or a charitable foundation. The commercial and fiduciary sides of a corporate fiduciary may not know what one another are doing; just such a disconnect generated the *Risser* decision that changed Texas probate law. See *InterFirst Bank-Dallas, N.A. v. Risser*, 739 S.W.2d 882 (Tex. App.- Texarkana 1987, no writ).

A beneficiary may find breaches of the duty of impartiality by looking for different treatment of the income beneficiaries and the remaindermen. Often remaindermen are just names on papers that are long forgotten. You should track down everyone to know the players for settlement and trial. The Internet is particularly useful for finding obscure beneficiaries.

A beneficiary investigating a testamentary trust should not forget to discover information on the estate administration as well as the trust administration. A common practice by fiduciaries is to keep trust records and toss probate records. But this may be a breach of fiduciary duty, if the trustee can no longer fully account for the entire trust administration.

Get the fiduciary's document destruction records. Record destruction dates may happen to coincide with the lawsuit or inquiry, giving rise to an argument for spoliation of evidence.**b) Get an Accounting**

One of the most effective discovery tools available to a beneficiary in litigation against a fiduciary is the request for an accounting. If the case falls within the statutory timing requirements (at least fifteen months after estate administration begun; at least twelve months since last accounting), a beneficiary should ask for an accounting immediately. See *Form 7* and *Form 8* below. If the fiduciary fails to account, the beneficiary can then sue for an accounting under Sections 113.151(b) and 115.001(a)(9) of the Texas Property Code (for trustees) or Section 149B of the Texas Probate Code (for independent administrators).

Keep in mind that a trustee is accountable to a beneficiary for the trust property and for any profit the trustee makes from the trust administration, even though the profit does not result from a breach of trust. Tex. Prop. Code § 114.001(a). The trustee, however, is not required to return his compensation. *Id.*

On the other hand, a trustee is not liable for a loss or depreciation in the trust's value not resulting from a breach of trust. Tex. Prop. Code §114.001(b). But a trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to:

- the loss or depreciation in value of the trust estate as a result of the breach of trust,
- any profit made by the trustee through the breach of trust,
- any profit that would have accrued to the trust estate had there been no breach of trust.

Tex. Prop. Code § 114.001(c).

A request for an accounting is especially demanding when directed to a successor trustee, or the personal representative of a trustee who has died, or when no accounting has been requested during the lifetime of the estate or trust. And it places the burden squarely upon the fiduciary: To the extent that the fiduciary cannot adequately account for the property cared for, whether through sloppy record-keeping or more nefarious reasons, the fiduciary must make good for the disparity.**c) Remove the Fiduciary**

A trustee may be removed in accordance with the terms of the trust instrument, or, on the petition of an interested person and after hearing, a court may remove a trustee and deny part or all of the trustee's compensation if:

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the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a financial loss;

the trustee becomes incompetent or insolvent; or

in the discretion of the court, for other cause.

Tex. Prop. Code § 113.082(a).

Similarly, a person is disqualified to serve as personal representative if that person is:

incapacitated;

a convicted felon (unless pardoned);

a nonresident who has not appointed a resident agent for service of process;

A corporation not authorized to act as a fiduciary in Texas; or

a person whom the court finds unsuitable.

Tex. Prob. Code § 78.

What makes a personal representative "unsuitable" is anybody's guess, but the question of suitability typically arises where the personal representative has conflicts of interest with a beneficiary. *See, e.g., Dean v. Getz*, 970 S.W.2d 629 (Tex. App. - Tyler 1998, no writ); *see also* Stanley M. Johanson, Johanson's Tex. Prob. Code Ann. § 78 cmt. at 142-45 (2000 ed.)

Suitability contests can be extremely ugly. Be aware that there may be a priority in the instrument or by statute for who will succeed the fiduciary. *See, e.g., Tex. Prob. Code § 77.*

Furthermore, the personal representative who is an independent executor or administrator can be removed for the following reasons:

if he fails to file an inventory within 90 days of qualification;

if he has misapplied or embezzled, or is about to misapply or embezzle, the property in his care;

if he fails to make an accounting when demanded;

if he fails to file motions timely;

if he is guilty of gross mismanagement in performing his duties; or

if he becomes incapacitated from properly performing his fiduciary duties.

Tex. Prob. Code § 149C.

Note that a trustee can be removed for insolvency. Check the trustee's financial records.

Furthermore, any fiduciary - trustee or personal representative - can be removed for lack of capacity. The discovery needed in this situation is similar to that in a will contest or guardianship fight. [3. The Fiduciary's Defenses a\) Disclosure is Key](#)

At the core of any defense of breach of fiduciary duty is disclosure. This is the one area of litigation where the defendants want to disclose as much information as possible. In fact, litigation can often be avoided completely through early cooperation.

The fiduciary should provide trust or estate files to the beneficiaries upon request. Even during litigation, the fiduciary has a duty to account and a duty to disclose. Many litigators without much practice in this area do not realize that playing hardball with discovery requests in the area of fiduciary mismanagement may in itself be a breach of fiduciary duty. If you represent a personal representative or trustee from whom an accounting has been requested, act swiftly to provide one. An estate accounting is due within 60 days of the request; a trust accounting is due in a "reasonable time." Tex. Prob. Code § 149A(b); Tex. Prop. Code § 113.151(a).

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As tedious as it can be, providing an accounting to a beneficiary gives the fiduciary two benefits: It starts limitations running on any matters disclosed in the accounting, and the accounting can then be used to obtain a judicial release for the fiduciary's actions. Tex. Prop. Code § 115.001(a)(8); Tex. Prob. Code § 149E(a).

In exchange, the fiduciary should gain access to the beneficiaries files. Look for notes, phone message slips, voice-mail, email, letters from the fiduciary, letters from other beneficiaries or family members, and documents provided to the beneficiary. The fiduciary may be able to establish limitations or at least a defense of laches, waiver, estoppel, or ratification.

If the fiduciary is trustee of a testamentary trust, be sure to examine the probate files as well. Beneficiaries are charged with constructive knowledge of information found on file in the probate proceedings. *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981); *In re Estate of McGarr*, 10 S.W.3d 373, 377 (Tex. App. - Corpus Christi 1999, pet. denied). Likewise, inventories may be particularly helpful with issues of property classification. The courts are tightening up on a beneficiaries duty to investigate potential claims. See *McGarr*, 10 S.W.3d at 377; *Wright v. Greenberg*, 2 S.W.3d 666, 674-75 (Tex. App.-Houston [14th Dist.] 1999, pet. denied). [b\) Bind All the Beneficiaries](#)

Along the same lines, the fiduciary may want all beneficiaries to sign off on non-routine fiduciary decisions and be bound by them. But to do so properly, the fiduciary must find out who they are, where they are, and line them up or at least give them notice of the proceeding.

The new virtual representative provisions of the Texas Trust Code are very powerful weapons in avoiding court proceedings because of the ability to bind minor, unborn, incapacitated, and unascertained beneficiaries. Keep in mind that the statutory requirements must be satisfied for a written agreement between trustee and beneficiaries to be valid. See Tex. Prop. Code §§ 114.005, 114.032. [4. Privileges In Fiduciary Litigation](#)

Questions of privilege in the fiduciary context can be much simpler to resolve than in other cases. Quite often, there is no privilege. For instance, the attorney-client communications of a decedent are usually not privileged in suits between beneficiaries. Tex. R. Evid. 503(d)(2). In addition, the fiduciary duty of disclosure can override objections regarding document production.

Fiduciaries' consultations with their lawyers are privileged. *Huie v. DeShazo*, 922 S.W.2d 920, 921 (Tex. 1996). But if the lawyers have acted at all on the beneficiaries' behalf, the attorney-client privilege has been waived despite the protections in *Huie*. See Tex. R. Evid. 503(d)(5); *Vinson & Elkins*, 946 S.W.2d at 402.

A lesser-used privilege to keep in mind in fiduciary litigation is the spousal communications privilege. Spouses have the privilege to refuse to disclose and to prevent others from disclosing communications made privately between the spouses. Tex. R. Evid. 504(a)(2). This privilege may be claimed by the personal representative of a decedent. Tex. R. Evid. 504(a)(3). This privilege does not, however, apply in proceedings between a surviving spouse and persons claiming through the deceased spouse. Tex. R. Evid. 504(a)(4)(B). [5. Other Documentary Evidence To Get](#)

Do not overlook documentary evidence that, while peripheral to the particular trust or estate at hand, may be crucial in making your case. For instance, the trusts and estates that generate the largest litigation usually involve wealthy and famous individuals who have had books or articles written about them, or who have participated in speeches, books, and interviews. Journalists' files are discoverable, and you would be amazed at the silly things people will say in order to impress interviewers or biographical authors. Perform a NEXIS search for articles concerning your subject, and search on-line catalogs for books. Try the following sources:

[Library of Congress](#)

[Amazon](#)

[Barnes & Noble](#)

Don't forget vanity presses, a.k.a., "subsidy publishers":

[Yahoo.com/Business and Economy/Shopping and Services/Writing and Editing/Self Publishing](#)

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You never know what you may find. For instance, one fiduciary trumpeted how he fooled the IRS in his autobiography. He did so by misclassifying the community property in his deceased wife's estate as his separate property. Of course, that misclassification violated his fiduciary duties to the beneficiaries of her estate.

Another source of information may be records from other estates or trusts handled by the same fiduciary. You may find that the fiduciary did not follow the same trust and estate procedures in one case as in other cases.[6. Depositions](#)

Take the depositions of all the fiduciaries, the beneficiaries, and if possible, the lawyers for the trust or estate. The beneficiaries' depositions may be a gold mine for the fiduciary's affirmative defenses: limitations, laches, waiver, estoppel, and ratification. Find out if the fiduciary has acted as agent or custodian for other pieces of the family wealth. See the relationships and what every one knew.

Find out who is the decision-maker for the trust or estate. You may find that among co-trustee., one has been making all the decisions. Or you may find that the fiduciaries have all deferred to a family lawyer that talks regularly to the beneficiaries.

Try to get information on related family trusts, estates, and other financial arrangements. For instance, you might have a situation where the favorite son is trustee of all of the family trusts, which once were created equally among the siblings. You might find that one beneficiaries trust is filled with worthless junk bonds and penny stocks, while the trustee's own trust is full of blue chip stocks. Or you might find that all the junk plots of land were placed in one trust and the valuable pieces of land were placed in the other. Perhaps financial opportunities were used to benefit the fiduciary's own personal financial position.[7. Standing](#)

Do not neglect the issue of standing. Only those with specific pecuniary interests may bring litigation against fiduciaries. For instance, beneficiaries of a testamentary trust do not have standing to bring claims against the estates personal representative; only the testamentary trustee has standing. *InterFirst Bank-Houston, N.A. v. Quintana Petroleum Corp.* 699 S.W.2d 864, 874 (Tex. App. - Houston [1st Dist.] 1985, writ ref'd n.r.e.). When you represent the executor and have a reasonable testamentary trustee and overly litigious trust beneficiaries, it may be worth your while to file a motion *in limine* to dismiss the beneficiaries' claim for want of subject matter jurisdiction. In fact, you may even have a counter-claim against them for tortious interference with inheritance rights.[C. Discovery in Guardianship Litigation](#)

This section will focus primarily on defending the guardianship application as opposed to representing the applicant. Discovery in pursuing a guardianship application has already been covered at length in several excellent articles and will not be repeated here.[1. Introduction](#)

Unlike will contests where all the sides are taking their shot at a decedent, in a guardianship fight, the shots are being taken at someone who is still breathing. Guardianship litigation is a breeding ground for applicants with hidden motives and agendas, many of which can disqualify them from ever getting their day in court.

The purpose of a guardianship is to "protect the well-being of the individual." See *Allison v. Walvoord*, 819 S.W.2d 624, 627 (Tex. App. - El Paso 1991, no writ); accord *Tex. Prob. Code* §602. But many guardianship applicants are merely frustrated will contestants in disguise, black sheep of the family that can't wait for dear ol'" dad to die before they get their hands on his money. Despite the Probate Code's protections, the perception is that becoming the guardian of the estate makes you the crown prince before the king's death.[2. Preparation by the Proposed Ward](#)

The best way to defend the guardianship application is to never get to the issue of capacity. The first thing you want to find out is what kind of estate planning has been done on behalf of the proposed ward. Typically, estates worth fighting over are large, and as a result, the lawyers for the proposed ward have anticipated potential contests. The first task, then, is to obtain the proposed ward's estate planning files.[a\) Guardianship Predesignation](#)

Under Section 679 of the Probate Code, a person can predesignate who they want to serve as her guardian (including alternates) in the event of incapacitation. If qualified, the proposed ward's chosen guardian has preference above all other applicants. *Tex. Prob. Code* § 679(d).

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More to the point,