A FIELD GUIDE TO FIDUCIARY FUMBLES, FOLLIES, AND FIXES

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Houston Business and Estate Planning Council
FIDUCIARY FOLLIES
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BIOGRAPHICAL INFORMATION

EDUCATION

Doctor of Jurisprudence, South Texas College of Law, 2001.

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Presiding Judge, Harris County Probate Court No. 1, since January 1, 2019.

Assistant State Presiding Judge of the Statutory Probate Courts, 2023–2025 term.

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LAW RELATED PUBLICATIONS AND PRESENTATIONS

Author of more than twenty articles and legal papers, published in *The Houston Lawyer* and through the Substack publication "Jerry's Prudence," which addresses probate law, procedure, and best practices.

Speaker and presenter on more than eighty occasions, on subjects ranging from guardianship law and fiduciary responsibilities to judicial ethics and courtroom technology.

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I. THE DISTINCTION THAT ORGANIZES EVERYTHING

> *The roof was the first thing.*
>
> *Her mother had been gone eleven days and the house had a leak over the back bedroom, and there was no estate account yet because letters had not issued. So she wrote a check on her own account for $2,840 and thought nothing about it. Anyone would have. The alternative was water in the walls.*
>
> *In March she reimbursed herself. She no longer had the invoice — the roofer had emailed it, and the email was on the old phone — but she remembered the number, and it had been her money to begin with. In June the taxes came due and she paid those the same way and reimbursed herself the same way. By the fall she had stopped moving money back and forth at all and was using one account for both, because keeping two had become an inconvenience in a year that already had enough of those.*
>
> *Her brother's demand for an accounting arrived fifteen months and a day after letters issued, on the first day the statute allowed it.*
>
> *She had not taken anything. I want to be clear about that, because it is true, and because it did not help her. She could not show which deposits had been hers. The burden of proving it was hers to carry, and she could not carry it.*
>
> *Nothing in that story is a breach. The roof was a roof.*

Nearly every fiduciary disaster that reaches a probate court began as something ordinary. The interesting question is never whether a fiduciary made a mistake. It is whether the mistake is one a court can still fix without taking the fiduciary's bond, their commissions, or their letters.

That line — curable against not — is the line between a fumble and a folly. It is a line about what remains available to the court. State of mind has almost nothing to do with whether a breach occurred and nearly everything to do with what a court may forgive; the Trust Code draws its own bright line at bad faith, intent, and reckless indifference for exactly that reason.[1] A fumble is a problem the record can absorb. A folly has already consumed the remedy.

Planners build on one side of that line. Litigators arrive on the other. The fixes belong to whoever gets there first.

A word about what this paper does not do. The catalog of fiduciary duties — loyalty, disclosure, the burden that shifts on a self-dealing transaction, the limits on exculpation under Texas Property Code section 114.007, the non-waivable floor at section 111.0035 — is thoroughly covered in materials this audience already owns. Assume all of it. What follows begins after the duties are understood and the administration goes sideways anyway. The stories that open these sections are composites, assembled from patterns any experienced practitioner will recognize; no one of them describes a matter that came before this court.

Four parts. Fumbles. Then guardianship, which behaves differently and deserves its own treatment. Then follies. Then the half of this subject that almost nobody writes about, which is the lawyer's own position in all of it.

II. PART ONE — FUMBLES

Curable, if caught in time. Usually expensive. Almost always avoidable at the drafting table.

A. The Instrument That Never Met the Assets

> *They signed on a Thursday and the lawyer's letter came the following week. It listed the accounts to be retitled, the deed to be prepared, and the beneficiary designations to be changed, and it said to call with questions. There were no questions. The letter went into the folder with the trust.*
>
> *He died four years later. The trust held nothing at all — not the house, not the brokerage account, not the note from his brother. Everything passed under the pour-over will, through the probate the trust had been drafted to avoid, and the successor trustee spent her first meeting learning she was the trustee of an empty trust and the beneficiary of an estate nobody had told her about.*

1 See Tex. Prop. Code Ann. § 114.007(a)(1) (exculpation term unenforceable as to a breach committed in bad faith, intentionally, or with reckless indifference to a beneficiary's interest). Compare Ertel v. O'Brien, 852 S.W.2d 17, 21 (Tex. App.—Waco 1993, writ denied) (trustee breaches a duty whether the violation is in bad faith, intentional, negligent, or the product of mistake), *abrogated on other grounds by* Austin Trust Co. v. Houren, 664 S.W.3d 35 (Tex. 2023).

Funding is a deliverable. Treating it as an afterthought produces the most expensive and least interesting litigation in this practice area, because there is nothing to argue about — the assets are simply in the wrong place, and someone has to pay a lawyer to move them.

The trustee of an unfunded trust still holds an office, and Texas makes that office easy to accept and hard to shed. A person's signature on the writing evidencing the trust, or on a separate written acceptance, "is conclusive evidence that the person accepted the trust," and one "who exercises power or performs duties under the trust is presumed to have accepted the trust . . . ."[2] The escape is narrow: a person named as trustee "who does not accept the trust incurs no liability with respect to the trust," and may preserve trust property without accepting, provided notice of the rejection is given within a reasonable time to the settlor or, if the settlor has died or lost capacity, to all beneficiaries then entitled to distributions. Inspecting or investigating the property carries no notice condition at all.[3] The drafting question is which side of that line the client is on. The practical question is whether anyone ever told them there was a line.

The power of attorney fails in the opposite direction. It terminates when the principal dies,[4] and the agent's authority terminates with it.[5] But an agent who acts in ignorance is protected: "Termination of an agent's authority or of a durable power of attorney is not effective as to the agent or another person who, without actual knowledge of the termination, acts in good faith under or in reliance on the power of attorney."[6] The agent who kept paying the utilities for six weeks is generally fine. The agent who knew, and kept signing, is not.

There is also a statutory handoff that deserves more attention than it gets. When a permanent guardian of the estate qualifies, the agent's powers "are automatically revoked" unless the court orders suspension instead; a temporary guardianship suspends them.[7] And then the agent "shall deliver to the guardian of the estate all assets of the ward's estate that are in the possession of the agent" and "account to the guardian of the estate as the agent would account to the principal if the principal had terminated the powers of the agent."[8] One fiduciary hands the file to the next, with an accounting. Clean on paper, and almost never clean in practice, because the agent is usually a family member who does not believe the guardianship was necessary and does not experience the demand for an accounting as routine.

The fix. Confirm funding in writing, item by item, and say what remains undone and whose job it is. If the representation ends before funding is complete, the closing letter has to say so in a sentence a non-lawyer will act on. A client who believes their lawyer is still working on it will not do it themselves.

B. The Vacancy Nobody Planned For

Drafting anticipates one substitution and stops. Two declinations later there is no mechanism, no one with authority, and an application on the court's docket that exists only because a paragraph was left out.

The trust side is the most forgiving, and even it produces litigation. On the death, resignation, incapacity, or removal of a sole or surviving trustee, "a successor trustee shall be selected according to the method, if any, prescribed in the trust instrument. If for any reason a successor is not selected under the terms of the trust instrument, a court *may* and on petition of any interested person *shall* appoint a successor in whom the trust shall vest."[9] On petition the court must appoint someone; the verb is mandatory. It does not follow that the petitioners will agree about who, and the statute offers no guidance whatever on that question.

Under a power of attorney, a successor agent "has the same authority as the authority granted to the predecessor agent" but "may not act until all predecessor agents, including co-agents, to the successor agent have resigned, died, or become incapacitated, are not qualified to serve, or have declined to serve."[10] That sequencing rule assumes a single instrument. It says nothing about the situation practitioners actually encounter, which is a client who signed a power of attorney in 2009, forgot it, signed another in 2019, and never revoked the first. Two agents, each holding a facially valid instrument, neither aware of the other, and no statutory tiebreak. The problem is real, it is not addressed, and a drafter can solve it in one sentence by revoking all prior powers expressly.

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2 Tex. Prop. Code Ann. § 112.009(a).

3 Id. § 112.009(a)(1)–(2), (b).

4 Tex. Est. Code Ann. § 751.131(1).

5 Id. § 751.132(a)(4).

6 Id. § 751.134.

7 Id. § 751.133(a)(1)–(2).

8 Id. § 751.133(a-1)(1)–(2).

9 Tex. Prop. Code Ann. § 113.083(a) (emphasis added).

10 Tex. Est. Code Ann. § 751.023(c)(1)–(2).

The fix. Name a mechanism, not just a person. A corporate fallback, a private appointment power exercisable by a designated individual, a majority of adult beneficiaries — anything that resolves the vacancy without a hearing. The cost of the paragraph is nothing. The cost of its absence is a contested appointment.

C. Deadlines That Forfeit Something

> *There were two of them, which had seemed fair. He was in Portugal for most of the spring and she was not, and when the ninetieth day approached she filed the inventory herself because someone had to. She was not trying to take anything from him. She mentioned it when he got back, in the same breath as the roof and the insurance.*
>
> *He learned what it meant from a lawyer, later.*

Missing a deadline is not usually a breach. Missing these costs the fiduciary something a court cannot give back.

Start with the sharpest, which is also the least known. Where more than one representative qualifies and one neglects to file the inventory or the affidavit in lieu, any other may file alone.[11] Then: the neglectful representative "may not interfere with and does not have any power over the estate" once that filing is made, and the representative who filed "is entitled to the whole administration" unless the delinquent one files a written, sworn, and reasonable excuse the court finds satisfactory within sixty days.[12] Absent that excuse, the court "shall enter an order removing one or more delinquent representatives and revoking those representatives' letters . . . ."[13] Not may. Shall.

A co-fiduciary can lose the office by inattention, to a co-fiduciary who was merely diligent, and neither of them needs to have intended anything at all.

The rest of the catalog:

The inventory itself is due "before the 91st day after the date the personal representative qualifies."[14] An affidavit in lieu is available.[15] The inventory and the accompanying list of claims were both amended in 2025; the separate-and-community classification is now required only where the decedent was married.[16]

On the trust side, a beneficiary may demand a written statement of accounts, and if the trustee "fails or refuses to deliver the statement on or before the 90th day after the date the trustee receives the demand or after a longer period ordered by a court," any beneficiary may sue to compel — and on success "the court may, in its discretion, award all or part of the costs of court and all of the suing beneficiary's reasonable and necessary attorney's fees and costs against the trustee in the trustee's individual capacity or in the trustee's capacity as trustee."[17]

In an independent administration, a demand for accounting becomes available fifteen months after letters first issue, and the executor has sixty days to comply.[18] After two years, an interested person may petition for accounting and distribution.[19] In a dependent administration the account is affirmative rather than on demand: due "not later than the 60th day after the first anniversary" of qualification, and annually after that.[20]

And under a power of attorney, note carefully which section carries the deadline. The principal's right to demand an accounting is in one section, which sets no time limit at all.[21] The sixty-day enforcement mechanism is in the next one.[22] Papers in circulation cite the first for the deadline. It is not there.

The fix. Everyone already knows to calendar. The structural fix is to allocate the filing obligation in the instrument when more than one fiduciary is named, so that section 309.055 never has to sort out which of them was paying attention.

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11 Id. § 309.055(a).

12 Id. § 309.055(b)–(c).

13 Id. § 309.055(c).

14 Id. § 309.051(a).

15 Id. § 309.056.

16 Act of May 23, 2025, 89th Leg., R.S., ch. 438, §§ 4–5 (H.B. 3421); Act of May 28, 2025, 89th Leg., R.S., ch. 831, §§ 5–6 (S.B. 1448) (both eff. Sept. 1, 2025) (amending Tex. Est. Code Ann. §§ 309.051(a), 309.052). Neither act reached § 309.056.

17 Tex. Prop. Code Ann. § 113.151(a).

18 Tex. Est. Code Ann. § 404.001(a), (b).

19 Id. § 405.001(a). Subsection (c) was amended effective September 1, 2025 to add cancellation of letters. Act of May 28, 2025, 89th Leg., R.S., ch. 818, § 5 (S.B. 1335).

20 Tex. Est. Code Ann. §§ 359.001(a), 359.002(a).

21 Id. § 751.104(a) ("The principal may demand an accounting by the agent.").

22 Id. § 751.105.

D. The Accounting That Isn't One

> *He arrived with two banker's boxes and a spreadsheet he had built himself, and he was, understandably, proud of both. Every statement was there. Every check was there. He had spent most of a weekend on the spreadsheet and it balanced to the penny against the current bank balance.*
>
> *What it did not show was where the money had started.*

A fiduciary produces documents and believes they have accounted. They have not. An accounting is not a disclosure. It is a reconciliation, and a court cannot approve what does not reconcile.

Texas Property Code section 113.152 is the clearest statement anywhere in this state's law of what the document must contain, and it is worth reading aloud to a client who thinks the bank statements are enough. A written statement of accounts must show all trust property not previously listed or inventoried; "a complete account of receipts, disbursements, and other transactions regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately"; a listing of all property being administered "with an adequate description of each asset"; "the cash balance on hand and the name and location of the depository where the balance is kept"; and "all known liabilities owed by the trust."[23]

Five elements. A stack of statements supplies, at most, two of them.

The Amarillo court has shown what non-compliance looks like. In *In re Estate of Dillard*, the trustee's accountings "do not include a 'complete list of receipts, disbursements, and other transactions regarding the trust property . . . and fail to show which property is being administered,'" and the court's conclusion is a single flat sentence: "Neither the original nor amended accounting proffered by Dillard complies with these directives."[24] The errors ran in both directions. He omitted a bank account holding more than forty-five thousand dollars, and he swept in property that was not trust property at all.[25] The accounting was not dishonest. It was not an accounting.

The Estates Code analogs vary — one is more detailed than the trust statute, another leaves contents to the court — and the gap is a drafting opportunity rather than a relief.[26]

From the bench. There is very little a court can do with a stack of statements. "The money is all there" answers a question nobody asked; the question is what came in, what went out, and on whose authority. The ending balance is the least useful number in the file. The beginning balance and the source-and-nature detail are what make an accounting reviewable, and a reconstruction from bank records almost never supplies them.

When it cannot be sorted out on the papers, Rule 172 exists: where "an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties," the court "shall appoint an auditor," whose "reasonable compensation" is "taxed as costs of suit."[27] The rule is written in mandatory terms once the court finds an audit necessary, and the fee is taxed as costs of suit — which means it can be shifted, and in a surcharge case is often shifted to the fiduciary whose records made the audit necessary.

The fix. Bookkeeping from the first week, in a form that reconciles. And drafted authority to engage an accountant at the estate's expense before anyone is angry, so that the request does not itself become evidence of something.

E. The Conflict That Didn't Look Like One

The conflict most fiduciaries walk into is not a transaction. It is a role they held before they were appointed and never thought to set down.

Four shapes recur. The fiduciary who is also a beneficiary — structurally universal, and therefore invisible until the first discretionary distribution. The fiduciary who manages a family entity in which the estate or trust holds an interest, owing duties in two directions that will eventually point apart. The surviving spouse serving as executor. And, in guardianship, the guardian who is also an heir of the ward.

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23 Tex. Prop. Code Ann. § 113.152(1)–(5).

24 In re Estate of Dillard, 98 S.W.3d 386, 397 (Tex. App.—Amarillo 2003, pet. denied).

25 Id. at 397–98.

26 See Tex. Est. Code Ann. §§ 404.001, 405.001 (independent administration); id. §§ 359.001–.002 (dependent administration). The dependent-administration account under § 359.001(b)–(c) is in fact more granular than Property Code section 113.152, and § 404.001(a) is comparable; § 405.001 leaves contents entirely to the court. The drafting point holds for the independent administration on demand, where the instrument can usefully supply the specificity the statute omits.

27 Tex. R. Civ. P. 172; see id. 131 (successful party recovers costs of the adversary), 141 (court may, for good cause stated on the record, adjudge costs otherwise).

The spousal case is worth a closer look, because the statute is framed as a division of administrative powers rather than as a duty, and the division collapses when one person occupies both positions. A qualified representative may administer the decedent's separate property and the community property that was under the decedent's sole or joint management; the surviving spouse, "as surviving partner of the marital partnership, is entitled to . . . retain possession and control of the community property that was legally under the sole management of the surviving spouse during the marriage."[28] Two sets of hands, by design. When they are the same hands, the statute has nothing further to say.

Litigators should note a removal ground that exists only on the independent side. An independent executor may be removed who "becomes incapable of properly performing the independent executor's fiduciary duties due to a material conflict of interest."[29] The framing matters: not that a conflict exists, but that it has rendered the executor incapable. The drafter's question is which conflicts do that, and the answer is not obvious.

That ground appears nowhere in the general removal provision.[30] The two schemes are not parallel, and the difference is substantive: removal of an independent executor without notice is markedly narrower, reaching only an executor who cannot be served or who "has misapplied or embezzled, or is about to misapply or embezzle" estate property.[31]

The fix. Disclose the role at appointment, in writing, to everyone with an interest, and do it before any decision turns on it. Build structural separation for entity decisions — an independent committee, a disinterested co-fiduciary for that decision alone, or an advance authorization with a stated price mechanism rather than a bare permission. A permission to self-deal without a price term resolves nothing; it simply moves the argument.

Disclosed conflicts are manageable. Discovered ones are not. The discovery is what generates the litigation, not the conflict.

F. Commingling That Began as Convenience

Nobody commingles on purpose. It starts with a reimbursement, a Friday deposit, a closed account, a two-day gap.

What makes it disproportionately expensive is that the burden moves. In *Eaton v. Husted*, the Supreme Court held that where a fiduciary had estate property "which he liquidated and commingled with his own, it was the burden of petitioners, who stand in his shoes, to distinguish what belonged to him."[32] The Court paraphrased Perry on Trusts with approval, and the sentence is the one to give a client: "if he fails to keep clear, distinct and accurate accounts, all presumptions are against him, and all obscurities and doubts are to be taken adversely to him."[33]

A fiduciary who cannot trace loses on facts they might otherwise have won. This is the clearest example in the paper of a fumble that converts a defensible administration into an indefensible one without any dishonesty at all, and it is the reason the vignette that opens this paper ends the way it does.

The fix. Separate accounts, which everyone knows. Less obviously, a drafted reimbursement procedure, so that the fiduciary is not advancing personal funds and then chasing them — because the advance is where this always begins, and it begins for good reasons.

G. Compensation Taken Without Authority

The executor's commission is five percent of amounts "actually receiv[ed] or pa[id] out in cash," capped in the aggregate at five percent of the gross fair market value of the estate subject to administration.[34] That much is widely known. The exclusions are not, and they are where the trouble lives. No commission is allowed for "receiving funds belonging to the testator or intestate that were, at the time of the testator's or intestate's death, either on hand or held for the testator or intestate in a financial institution or a brokerage firm . . . ," nor for "collecting the proceeds of a life insurance policy," nor for "paying out cash to an heir or legatee in that person's capacity as an heir or legatee."[35]

For most estates, those three exclusions remove nearly everything that moved. An executor who computes five percent of the gross has overcharged substantially, and typically has no idea.

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28 Tex. Est. Code Ann. § 453.009(a)–(b).

29 Id. § 404.0035(b)(4).

30 Compare id. § 404.0035(b)(4), with id. § 361.052(a).

31 Id. § 404.003(2).

32 Eaton v. Husted, 141 Tex. 349, 172 S.W.2d 493, 498 (1943).

33 Id. (citing 1 Perry, Trusts & Trustees § 447, at 717 (6th ed.); 2 id. § 821, at 1351 (6th ed.); 1 id. § 447, 2 id. §§ 837, 838 (7th ed.)). The sentence is the Court's own summary of Perry rather than quoted treatise text.

34 Tex. Est. Code Ann. § 352.002(a), (b)(1).

35 Id. § 352.002(b)(2)(A)–(C).

A trustee is entitled to reasonable compensation unless the terms of the trust provide otherwise — and if the trustee "commits a breach of trust, the court may in its discretion deny him all or part of his compensation."[36] The guardian's entitlement is structured differently again, and more strictly; it is discussed in Part Two.

The fix. State what the fiduciary is paid, how it is computed, and when it may be taken. State whether it is in addition to or in lieu of the statutory measure. And counsel a fiduciary who wants to serve without charge to *suspend* compensation rather than waive it, because circumstances change and a waiver made in year one cannot be undone in year four when the administration turns out to be litigation.

H. The Lawyer Who Stopped at the Letters

> *He got his letters on a Tuesday and shook the lawyer's hand in the hallway, and that was the last conversation they had. There was no closing letter and no motion to withdraw, and the file stayed open on both ends in the sense that neither of them closed it.*
>
> *He did nothing further because nothing further had been asked of him. He was not a lawyer. He assumed that if something needed doing, someone would say so.*
>
> *Eleven months later the court sent a notice. It went to him, and it went to his attorney of record.*

This is the failure that bridges the drafting table and the courtroom. It happens to lawyers this room refers to, lawyers on the other side of its matters, and lawyers whose files it inherits.

Counsel gets the client appointed. Letters issue. Then the representation simply stops — no withdrawal, no closing letter, no conversation. And the client, who has never administered an estate and reasonably believes they still have a lawyer, does nothing further.

Here is what goes undone, in order.

Notice to beneficiaries under a will is due "not later than the 60th day after the date of an order admitting a decedent's will to probate."[37] The affidavit or certificate of compliance is a *separate section* and a *separate deadline*, due "not later than the 90th day."[38] This distinction is worth making loudly, because published materials get it wrong; citing section 308.002 for the affidavit is an error.

Notice to creditors comes next. The published notice is required.[39] Notice to secured creditors is required.[40] And the permissive notice to unsecured creditors — the one nobody sends — is the one that actually closes an estate, because it must "expressly state that the creditor must present the claim before the 121st day after the date of the receipt of the notice or the claim is barred, if the claim is not barred by the general statutes of limitation."[41] Liability attaches for failing to give the required notices.[42]

Then the inventory, or the affidavit in lieu.[43] Then everything after that.

Now the consequence.

Failing to file the section 308.004 affidavit is itself a removal ground, and there are two provisions running in parallel. For an independent executor, the probate court "on the court's own motion, may remove an independent executor . . . after providing 30 days' written notice of the court's intention," where the executor "fails to timely file the affidavit or certificate required by Section 308.004."[44] The same subsection reaches failure to return the inventory before the ninety-first day.[45] For a personal representative generally, section 361.052(b) is materially identical.[46]

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36 Tex. Prop. Code Ann. § 114.061(a)–(b).

37 Tex. Est. Code Ann. § 308.002(a).

38 Id. § 308.004.

39 Id. § 308.051.

40 Id. § 308.053.

41 Id. § 308.054(b)(1).

42 Id. § 308.056. Note that section 308.056 reaches failure to give notice under sections 308.051 and 308.053 — not the beneficiary notice under section 308.002, which carries a different consequence discussed below.

43 Id. §§ 309.051, .056.

44 Id. § 404.0035(a), (a)(3).

45 Id. § 404.0035(a)(2).

46 Id. § 361.052(b). The 2025 act amended only subsection (a) and added subsection (a-1); subsection (b)'s qualified-delivery-method language was added in 2023.

Now read where the notice goes. Both provisions direct the notice to the fiduciary's last known address *and* to the last known address of the fiduciary's attorney of record.[47]

The Legislature wrote the lawyer into the removal notice.

It is difficult to read that as anything other than an acknowledgment of what is actually happening in these cases. The failure being punished is frequently not the fiduciary's, and the statute directs the court to tell the lawyer that the lawyer's client is about to be removed. But the notice goes to an attorney of record who has functionally stopped being one, who never moved to withdraw, and who therefore remains the attorney of record for every purpose the clerk can see. The client is exposed to removal, on the court's own motion, without anyone having complained, for failing to perform an obligation they did not know existed.

The court sees a delinquent fiduciary. The court cannot see that the delinquency belongs to counsel, though the Legislature evidently suspected it might.

The fix. Scope the engagement to a defined end point and put it in writing. If the representation ends when letters issue, the client has to be told that in a sentence they will understand, before they leave the courthouse — not in a paragraph of an engagement letter signed four months earlier. If it does not end there, calendar what comes next. Either way the file needs a document showing which it was.

Whether that ending was *permissible* is Part Four.

III. PART TWO — THE WARD WHO CANNOT COMPLAIN

Guardianship gets its own part for a structural reason, and the reason is worth stating before any of the statutes.

Everywhere else in this paper, the mechanism that converts a fumble into a fix is a beneficiary who notices. A trust beneficiary demands an accounting. An heir asks why the inventory is late. A principal, still competent, asks the agent where the money went. That demand is what makes a fumble curable, because it arrives while the record can still be rebuilt.

A ward cannot do any of that. The person with the largest stake in the guardian's honesty is, by the legal predicate of the appointment, the one person unable to insist on it.

So the Legislature built substitutes. Reading Title 3 as a replacement for a missing complainant explains a great many provisions that otherwise look like bureaucratic excess.

The bond cannot be waived. "The court may not waive the requirement of bond for the guardian of the estate of a ward, regardless of whether a surviving parent's will or written declaration directs the court to waive the bond."[48] Not even a parent can waive it. Compare the ease with which independent and corporate fiduciaries serve without bond everywhere else in this paper. And a guardian initially exempt can be compelled to post one: on a complaint of waste or mismanagement, the court cites the guardian to show cause and, absent a satisfactory response, orders a bond within ten days, with removal following non-compliance without further citation.[49]

The court, not a beneficiary, must examine the account. An annual account "must remain on file for 10 days after the date the account is filed before being considered by the judge," and thereafter "the judge shall consider the account."[50] Then a subsection that matters, and that has an exact counterpart on the decedents'-estate side: "The court may not approve the annual account unless possession of cash, listed securities, or other assets held in safekeeping or on deposit under court order has been proven as required by law."[51] The judge has to be satisfied the assets exist. That is a duty ordinarily belonging to the person being protected.

Someone is appointed to speak, and someone to look. In a proceeding to appoint a guardian, "the court *shall* appoint an attorney ad litem to represent the proposed ward's interests" — mandatory.[52] That attorney must interview the proposed ward and discuss "whether alternatives to guardianship would meet the needs of the proposed ward . . . ."[53] A guardian ad litem is discretionary, "an officer of the court," who "shall investigate whether a guardianship is

47 Id. § 404.0035(a); id. § 361.052(b)(1)–(2).
48 Tex. Est. Code Ann. § 1105.101(d).
49 Id. § 1105.103.
50 Id. § 1163.051(b).
51 Id. § 1163.051(c); accord id. § 359.051(c) (same rule, decedents' estates).
52 Id. § 1054.001 (emphasis added).
53 Id. § 1054.004(a)(4).

necessary."[54] And a court investigator "shall investigate the circumstances alleged in the application to determine whether a less restrictive alternative to guardianship is appropriate."[55]

And the State audits. The Office of Court Administration maintains a guardianship abuse, fraud, and exploitation deterrence program, under which "guardianship compliance specialists" "review the guardianships of wards and identify reporting deficiencies by guardians" and "audit annual accounts required to be filed by guardians under Chapter 1163," maintaining an electronic database that monitors filings.[56]

Every one of those provisions is a prosthesis for a missing complainant. And where the prosthesis fails, a guardianship fumble converts to a folly quietly and completely, because nobody with standing and capacity was watching while the record decayed.

A. Guardianship Fumbles

> *She moved her mother in because the alternative was a facility neither of them wanted, and for the first year she did everything right, including the account, which she filed late but filed.*
>
> *The second year was harder. Her mother needed more than she had expected and gave back less, and there was a stretch in the spring when she was not sleeping. She meant to do the account in June. She meant to do it in September.*
>
> *Her mother, who could not have told anyone that no account had been filed, would not have complained about it if she could.*

The initial account is due "not later than the 60th day after the first anniversary of the date the guardian of the estate of a ward qualifies," and must list claims and "provide a complete account of receipts and disbursements."[57] Annual accounts follow until the estate closes.[58]

The teeth are real. On a written complaint by any interested person, "or the court on the court's own motion," the guardian may be cited to show cause; on hearing, and "unless good cause is shown for the failure to file," the court may "revoke the guardian's letters of guardianship," "fine the guardian in an amount not to exceed $1,000," or both.[59] Again the court may act on its own motion. In guardianship the court is structurally the complainant, because there is no one else.

Three more fumbles recur, all of them variations on the same theme — a guardian doing something sensible without the order that makes it lawful.

Spending without an allowance. Where the appointment order did not already set one, the guardian must apply for "a monthly allowance to be spent from the income and corpus of the ward's estate" for the ward's education and maintenance and the maintenance of the ward's property, filed "not later than the 30th day after the date the guardian qualifies as guardian or the date specified by the court, whichever is later."[60] The court sets the amount considering "the condition of the estate and the income and corpus of the estate necessary to pay the reasonably anticipated regular education and maintenance expenses."[61] A guardian who simply pays the ward's bills is spending without authority, however sensibly.

Selling without an order. "[A]ny property of a ward may not be sold without a court order authorizing the sale."[62]

Taking compensation without approval. The guardian of the estate "is entitled to reasonable compensation on application to the court at the time the court approves an annual or final accounting," and the five-percent measure is deemed reasonable only "if the court finds that the guardian has taken care of and managed the estate in compliance with the standards of this title."[63] The executor's commission carries the same compliance condition, so that is not the

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54 Id. §§ 1054.051, .054(a), (c)(1).

55 Id. § 1054.151.

56 Tex. Gov't Code Ann. §§ 72.121–.122.

57 Tex. Est. Code Ann. § 1163.001(a), (b).

58 Id. § 1163.002.

59 Id. § 1163.151(a), (b).

60 Id. § 1156.001(a)–(b).

61 Id. § 1156.002.

62 Id. § 1158.001(a).

63 Id. § 1155.003(a), (b). The executor's commission is conditioned the same way. Compare id. § 352.002(a) (commission allowed to a representative "a court finds to have taken care of and managed an estate in compliance with the standards of this title"), and id. § 352.004(1) (court may deny a commission to a representative who "has not taken care of and managed estate

difference. The difference is procedural, and it matters: the guardian is paid only on an application made when the accounting is presented. A guardian who has not filed accounts has not merely delayed payment; they have not established the predicate for it. The court must also consider the ward's monthly income and whether the ward receives Medicaid.[64]

There is one more fumble that hides in plain sight. The Bill of Rights for Wards enumerates a long list of protections, including the right "to personal visits from the guardian or the guardian's designee at least once every three months . . . ," and, among them, the right "to have the guardian, on appointment and on annual renewal of the guardianship, explain the rights delineated in this subsection . . . ."[65] That is a recurring affirmative duty. Most guardians perform it once, at appointment, if at all.

The fix. Every one of these is an order the guardian was entitled to and did not ask for. Counsel should treat the first sixty days as a filing calendar rather than an intake — the allowance application at thirty days, the bond, the inventory, and a standing instruction that nothing is sold and nothing unusual is paid without an order first. Then diary the annual account backward from its due date rather than forward from the last one, because a guardian who is late once is, in this court's experience, likely to be late again.

B. Guardianship Follies, and the Surcharge the Estates Code Does Not Call Surcharge

The removal grounds tell you what the Legislature was worried about.

Removal without notice reaches a guardian who "has misapplied, embezzled, or removed from the state . . . any of the property entrusted to the guardian's care," or who "has engaged in conduct . . . that would be considered to be abuse, neglect, or exploitation."[66] And then a ground with no counterpart in decedents' estates: neglect "to educate or maintain the ward as liberally as the means of the ward . . . permit."[67] A guardian can breach by hoarding. The offense is under-spending on a person who cannot spend for themselves.

Where removal is sought on either of those grounds, the court must appoint *both* a guardian ad litem and an attorney ad litem.[68] The statute anticipates that a ward whose guardian is being removed for exploitation needs both roles filled — best-interest and legal representation — though in the interest of judicial economy the court may appoint the same person to both unless the interests conflict.

Removal with notice covers the rest, including the guardian who "fails to return any account or report that is required by law to be made"[69] — which is the fumble from the preceding section, arriving as a removal ground.

And then the money. Texas has no section captioned "surcharge," which is why practitioners have difficulty finding the remedy. It is distributed across five chapters, and the pieces are individually severe.

Costs incurred because a guardian neglected a required duty or was removed for cause fall on "the guardian and the sureties on the guardian's bond," including reasonable attorney's fees incurred in removing the guardian or in obtaining compliance with a neglected duty.[70] That provision is the guardianship twin of the decedents'-estate rule discussed in Part Three.

Failure to pay a court-ordered claim produces judgment against guardian and sureties for the unpaid amount, interest, costs, and damages at **five percent per month** for each month or fraction of a month payment was neglected after demand.[71]

And neglect, on legal demand at final settlement or termination, to deliver estate property the court has ordered delivered produces personal liability to the complaining party — after complaint, personal service, and a finding of the neglect charged — at **ten percent per month** of the amount or appraised value withheld.[72]

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property prudently").

64 Id. § 1155.004.

65 Id. § 1151.351(b)(19), (24).

66 Id. § 1203.051(a)(6).

67 Id. § 1203.051(a)(7).

68 Id. § 1203.051(b).

69 Id. § 1203.052(a)(2).

70 Id. § 1155.152.

71 Id. § 1157.108.

72 Id. § 1204.202(d). A guardian who fails to present a final account may separately be cited to appear and present it. Id. § 1204.201.

And the bond does not run out after one recovery. It "is not void on the first recovery," and "may be sued on and prosecuted from time to time until the entire amount of the bond is recovered."[73] The surety remains liable for breaches committed before removal even absent a discharge order, a rule that has been settled since 1886.[74] Suit on the bond is subject to a four-year limitations period running from the guardian's death, resignation, removal, or discharge.[75]

The fix, for the lawyer who inherits one of these. Get the accounts current before anything else, including before responding to whatever complaint brought the file to you. Every month of delay compounds under provisions that run monthly, and the compensation the guardian is hoping to recover is conditioned on the very compliance that is missing.

Ten percent per month is not a typographical error, and it is the number to remember from this part of the paper.

C. What Planners Should Take From This

Alternatives are not a courtesy. Before appointing a guardian the court must find, by clear and convincing evidence, that "alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible" and that available "supports and services" were likewise considered and rejected.[76] The alternatives are enumerated: a medical power of attorney, a durable power of attorney, a declaration for mental health treatment, a representative payee, a joint account, a management trust under chapter 1301, a special needs trust, a designation of guardian before the need arises, and "alternate forms of decision-making based on person-centered planning."[77] Add the Supported Decision-Making Agreement Act.[78]

Every one of those is a fumble-prevention device for a guardianship that then never happens. Which returns the reader to Part One, § A. An instrument that was drafted and never funded, or drafted and never used, prevents nothing at all.

IV. PART THREE — FOLLIES

No longer curable — usually because a fumble was left too long.

A. Self-Dealing Dressed as Administration

This ground is well covered in the materials this audience owns, so the treatment here is short and confined to the one question that belongs in a paper about the fumble-and-folly line: at what point does an unfair transaction stop being curable?

The answer is usually documentary rather than doctrinal. A self-dealing transaction is voidable, and rescission is available, and for a period of time rescission actually restores everyone. The fiduciary who documented contemporaneously — the appraisal, the disclosure, the alternative offers, the reason a family buyer made sense — can usually defend or unwind. The fiduciary who reconstructs the file two years later cannot, and the reconstruction itself becomes an exhibit.

Note also what no amount of drafting will cure. An exculpation term is unenforceable to the extent it relieves a trustee of liability for "any profit derived by the trustee from a breach of trust."[79] The clause the client was told would protect them does not reach the one transaction they are most likely to be sued over.

The transaction is not what converts a fumble to a folly. The delay is.

B. Concealment, and Why It Defeats Itself

A fiduciary conceals to avoid a claim and instead preserves it. This is the most self-defeating conduct in the field, and it is worth explaining to clients in exactly those terms.

The Supreme Court's language in *Montgomery v. Kennedy* is the place to start: trustees and executors "owed Virginia Lou a fiduciary duty of full disclosure of all material facts known to them that might affect Virginia Lou's rights."[80] And then the holding that does the work: "A fiduciary's concealment of material facts, used to induce an agreed or uncontested judgment, which prevents a party from presenting at trial his legal right, is extrinsic fraud."[81]

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73 Id. § 1105.112.

74 Brown v. Seaman, 65 Tex. 628, 630 (1886).

75 Tex. Civ. Prac. & Rem. Code Ann. § 16.004(b).

76 Tex. Est. Code Ann. § 1101.101(a)(1)(D)–(E).

77 Id. § 1002.0015(1)–(9).

78 Id. ch. 1357.

79 Tex. Prop. Code Ann. § 114.007(a)(2).

80 Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984).

81 Id. at 313.

Extrinsic fraud supports a bill of review. The settlement obtained by concealment is not final. The fiduciary who concealed has purchased nothing at all — has, in fact, traded a defensible position for an indefensible one and given the other side a reason to reopen a judgment.

And concealment is rarely the original wrong. It is the response to the original wrong, and the original wrong is almost always a fumble. Concealment is simply the mechanism by which a fumble is made permanent.

C. The Release Extracted as the Price of a Distribution

This is flatly prohibited, and it is done constantly.

An independent executor may not be required to deliver personal property "unless the independent executor receives, at or before the time of delivery of the property, a signed receipt or other proof of delivery of the property to the distributee."[82] And then, immediately: "An independent executor may not require a waiver or release from the distributee as a condition of delivery of property to a distributee."[83]

The receipt is permitted. The release is not. Fiduciaries — and, more troublingly, their lawyers — conflate the two, and the form that goes out combines both on the same page.

The trust analog operates differently but reaches a similar place. A beneficiary "who has full legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability as to the beneficiary that would otherwise be imposed on the trustee by this subtitle, including liability for past violations," and "[t]he release must be in writing and delivered to the trustee."[84] The Supreme Court has now told us what full information means, and it means less than a full accounting: a beneficiary has full information "when he is in a position to make a meaningful and informed decision about releasing a trustee from liability or, said differently, when he is informed enough to understand the nature and consequences of what he is releasing."[85] "Knowledge of the full scope, extent, and details of the acts the beneficiary is releasing, while certainly preferable, is not required so long as he is informed enough to understand the nature and consequences of what he is giving up."[86]

That is a workable standard, and a generous one to trustees. The catch is who has to prove it. Quoting the Restatement, the Court confirmed that "a trustee who would rely on a beneficiary's consent, ratification, or release normally has the burden of showing that the beneficiary (or his or her representative) was sufficiently informed to understand the character of the act or omission and was in a position to reach an informed opinion on the advisability of consenting, ratifying, or granting a release."[87]

The release is the trustee's affirmative case. It is not the beneficiary's problem.

Which is why extracting one as the price of a distribution is a folly rather than a fumble. The release obtained that way is void in the estate context by statute and worthless in the trust context for want of proof, and the fiduciary has traded a distribution they owed for protection they never got — while supplying, in the transaction itself, evidence of the overreaching that defeats it.

D. Retaliation

Withholding distributions from the beneficiary who asked. Restricting information after a demand. Removing a beneficiary from a role in a family entity.

There is almost nothing to cite here, and that is itself the point.[88] Retaliation converts a dispute about an administration into a dispute about the fiduciary's character, and it is the most reliable predictor of removal in this entire field. A court uncertain about an accounting is no longer uncertain about the fiduciary. Nothing else a fiduciary does forfeits the benefit of the doubt so completely, and the benefit of the doubt is very often what a technically deficient administration is surviving on.

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82 Tex. Est. Code Ann. § 405.002(a).

83 Id. § 405.002(b). This is section 405.002, not section 405.007, which governs the effect of filing a closing report — a citation error that appears with some regularity.

84 Tex. Prop. Code Ann. § 114.005(a), (b).

85 Austin Trust Co. v. Houren, 664 S.W.3d 35, 53 (Tex. 2023).

86 Id. at 51–52.

87 Id. at 51 (quoting Restatement (Third) of Trusts § 97 cmt. e (Am. L. Inst. 2012)); see also id. at 50 (citing Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 699 (Tex. 2000)).

88 No Texas statute names retaliation against a complaining beneficiary as a discrete breach or removal ground. It reaches a court, when it reaches one at all, through the general removal provisions and through the court's non-waivable power to remove a trustee and to adjust or deny compensation. See Tex. Prop. Code Ann. §§ 111.0035(b)(5)(B), (E), 113.082; Tex. Est. Code Ann. §§ 361.052(a), 404.0035(b).

E. The Rogue Agent

The Durable Power of Attorney Act does most of the work here, and the drafting lesson is that the statutory defaults are far narrower than laypeople assume.

Five powers must be granted expressly: to "create, amend, revoke, or terminate an inter vivos trust"; to "make a gift"; to "create or change rights of survivorship"; to "create or change a beneficiary designation"; and to "delegate authority granted under the power of attorney."[89] Four of those five are estate-plan-altering. An agent without them cannot rearrange the principal's dispositive scheme, no matter how broadly the rest of the instrument reads.

And even a grant of gift authority is bounded. Language granting general authority with respect to gifts authorizes gifts only up to the annual federal gift tax exclusion per donee, or twice that on a spousal split-gift consent.[90] An agent holding "general authority with respect to gifts" who transfers the house has exceeded the grant by an enormous margin, and typically believes they have not.

The evidentiary problem is what makes these cases follies rather than fumbles. The principal is incapacitated or dead. The only witness to the authorization is the person who benefited from it. Whatever actually happened, the record cannot be rebuilt, which is why Part Two's ad litems and Part Four's Rule 1.17 exist.

F. The Fiduciary Who Doesn't Tell Their Lawyer

> *Three envelopes went into the drawer in the front hall. One was a claim, one was a letter from a distributee who had written twice before, and one was from the taxing authority. He was not hiding them. He intended to deal with them, and he intended to mention them, and there was a version of that week in which he would have done both.*

Counsel is engaged, competent, and available. The fiduciary simply does not report — a claim that arrived and was set aside, a distributee who has been calling, a written demand for an accounting that came and went, a tax notice.

Each of those items, reported the week it arrived, is a phone call. Reported eighteen months later, several are no longer fixable. The fiduciary has not *done* anything, and that is precisely the problem. The remedy expired while nobody was doing anything.

The creditor claim is the cleanest illustration, and the statute is unforgiving. A representative has thirty days from presentment to allow or reject a claim.[91] Then: "The failure of a personal representative to timely allow or reject a claim under Section 355.051 constitutes a rejection of the claim. If the claim is established by suit after that rejection: (1) the costs shall be taxed against the representative, individually; or (2) the representative may be removed on the written complaint of any person interested in the claim after personal service of citation, hearing, and proof, as in other cases of removal."[92]

Silence is a rejection. If the claimant then establishes the claim, the costs are the fiduciary's *personally* — not the estate's — and the same failure is an independent removal ground. An envelope in a drawer has become a personal judgment for costs, and the fiduciary's own lawyer never heard about any of it.

The upstream fix, and it is mostly the lawyer's. An engagement that establishes a reporting cadence and specifies what the client must forward and how quickly. A lawyer who calls when the client goes quiet rather than treating silence as satisfaction. And early, candid recognition that a fiduciary who will not communicate with their own counsel should resign before a court decides the question for them.

G. The Dependent Administration That Went Dark

> *In the first year there was a lawyer and there were filings, and the file looks like every other file. In the second year there is one letter from the lawyer and nothing after it. In the third year there is a notice from the court and no response, and then another.*
>
> *By the fourth year the bank has been acquired twice, the rental income has gone into an account nobody can produce statements for, and the house was insured until at some point it was not. The administrator has not appeared in three years and does not appear now.*

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89 Tex. Est. Code Ann. § 751.031(b)(1)–(5).

90 Id. § 751.032(c)(1)(A)–(B); see I.R.C. § 2503(b).

91 Tex. Est. Code Ann. § 355.051.

92 Id. § 355.052.

Nobody in this file set out to steal anything. There is simply no longer any way to find out what happened.

This is the fullest illustration in the paper, and it pairs with Part Two for a reason that becomes obvious once the structure is laid out.

Every other failure in this paper depends on someone noticing. A dependent administration is one of only two Texas fiduciary regimes — guardianship is the other — in which the court itself is the supervising mechanism, because the Legislature did not trust the arrangement to self-correct. That design has a consequence nobody plans for. When the fiduciary stops participating, the court's machinery is the only thing that notices, and a docket notices slowly.

The structure that was supposed to prevent this. A dependent administrator cannot do much alone. Claims run through the court: presentment is open until the estate closes,[93] allowance or rejection is due within thirty days,[94] and the court must then "act on each claim that has been allowed and entered on the claim docket for a period of 10 days either approving the claim wholly or partly or disapproving the claim," and "concurrently classify the claim."[95] That order "has the effect of a final judgment."[96] Sales require an order: "Except as provided by this chapter, estate property may not be sold without a court order authorizing the sale."[97] The escape hatch is a will authorizing the executor to sell,[98] which is precisely what a dependent administration does not have. And on failure to pay a court-ordered claim, the court *shall* render judgment — absent a showing of good cause — against the representative and the sureties for the unpaid amount, interest, costs, and "damages on the amount neglected to be paid at the rate of five percent per month for each month, or fraction of a month, that the payment was neglected to be paid after demand was made."[99]

Three regimes, one design principle. Where the beneficiary cannot be relied on to object — a ward who cannot, creditors who have not yet appeared — the court is inserted as the objector.

The account is the hinge. The initial account is due "[n]ot later than the 60th day after the first anniversary of the date a personal representative qualifies and receives letters testamentary or of administration . . . ," and annually thereafter.[100] That filing is the entire reporting channel. It is how a court learns whether the estate still exists.

Now trace the failure, because the timeline is the argument.

Year one. The account is late. Nothing dramatic happens. Late accounts are common, extensions are routine, and the file does not look alarming.

Year two. Still nothing. The court sends notice. Perhaps a setting. The administrator, who has not spoken to a lawyer in a year, either does not appear or appears without one and does not understand what is being asked.

Year three. The court is no longer asking about a filing. It is asking where the property went, and there is nobody in the room who can say.

At that point the court's patience has stopped being the operative constraint. **The record is.** Removal, surcharge, and restitution all require someone to establish what should have been there, and the only person who ever knew has stopped participating. A court can remove. A court cannot reconstruct.

What remains available, and the order it happens in.

Removal. The grounds include failure "to return any account required by law to be made," failure "to obey a proper order of the court . . . ," and "gross misconduct, or mismanagement in the performance of the representative's duties" — and, separately, failure to make final settlement by the third anniversary.[101] The provision was amended effective September 1, 2025 to distinguish notice methods: removal on the court's own motion now requires notice "by a qualified delivery method," while removal on an interested person's complaint still requires personal service.[102]

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93 Id. § 355.001.
94 Id. § 355.051.
95 Id. § 355.055.
96 Id. § 355.057(b).
97 Id. § 356.001(a); see also id. § 356.101 (personal property); id. §§ 356.251, .256 (real property).
98 Id. § 356.002.
99 Id. § 355.113(b), (c)(2).
100 Id. §§ 359.001(a), .002(a).
101 Id. § 361.052(a)(2)–(4), (6).
102 Id. § 361.052(a-1), as added by Act of May 28, 2025, 89th Leg., R.S., ch. 818, § 2 (S.B. 1335). Removal without notice remains available for the more serious cases. Id. § 361.051.

A successor, whose first professional act is adverse to their predecessor. This is a duty rather than a choice: "A successor representative shall account for all the estate property that came into the predecessor's possession, and is entitled to any order or remedy that the court has the power to give to enforce the delivery of the estate property and the liability of the predecessor's sureties for any portion of the estate property that is not delivered."[103] There is a mercy clause — the successor "is not required to account for any portion of the estate property that the successor failed to recover after due diligence"[104] — which is itself a legislative admission that some of it will never be found.

Suit on the bond. The successor may "commence a suit on the bond or bonds of the predecessor, in the successor's own name and capacity, for all the estate property that: (A) came into the predecessor's possession; and (B) has not been accounted for by the predecessor."[105] That is the decedents'-estate surcharge action, and it does not need to be called one.

Surcharge for costs and fees. And here the statute is stronger than most practitioners realize: "If a personal representative neglects to perform a required duty or is removed for cause, the representative and the sureties on the representative's bond are liable for: (1) the costs of removal and other additional costs incurred that are not expenditures authorized by this title; and (2) reasonable attorney's fees incurred in: (A) removing the representative; or (B) obtaining compliance regarding any statutory duty the representative has neglected."[106]

Neglect of a required duty is *independently* sufficient — removal for cause is an alternative trigger, not a prerequisite. A representative who never filed an account and was never removed is still exposed, and so is the surety. And the recoverable fees include those incurred in "obtaining compliance," which means the cost of making a fiduciary do what they were always supposed to do is chargeable to the fiduciary and to the bond.

Then the surety looks to the former fiduciary personally, on an indemnity signed in year one and not thought about since.

The arithmetic nobody runs at the front end. The successor's fees, the accountant's fees, the cost of reconstructing records from third parties who have no obligation to help, and an auditor whose "reasonable compensation" is "taxed as costs of suit"[107] — all of it out of an estate that was, in most of these cases, modest to begin with. A dependent administration that went dark for three years routinely costs more to unwind than the property is worth. The beneficiaries are not made whole. They receive a reduced estate and a judgment against a surety.

The point, plainly. The original failure was a missed filing — a fumble, in Part One's terms, and one that would have been forgiven in year one for the asking. What converted it was not missing money. It was silence, sustained long enough that the record could not be rebuilt.

And the upstream fix is mostly the lawyer's. A dependent administration is not a matter a lay client can carry alone. The statutory structure assumes counsel at every step, because nearly every step requires an application and an order. Which makes Part One, § H and this section the same story told from opposite ends. A lawyer who stops at the letters in a *dependent* administration has left a client inside a regime that cannot function without a lawyer, and the machinery designed to catch that failure will take three years to notice.

The drafting-side fix is upstream and simple to state: independent administration wherever the will permits it, and a clear-eyed conversation about what dependent administration actually demands wherever it does not.

V. PART FOUR — THE REPRESENTATION

Every fumble and every folly in the preceding parts had a lawyer standing somewhere near it. In most of them that lawyer has been off-camera — mentioned when a client failed to report something, blamed when an affidavit went unfiled, and otherwise absent from a story that was ostensibly about someone else. This part puts the lawyer in the frame, and the questions it asks are different in kind from the ones that came before. Not what the fiduciary did wrong, but whose interests counsel was serving, what counsel owed to people who were not the client, what happens when counsel leaves before the work is done, and — last — what happens to counsel.

The literature on fiduciary duty is extensive and good. It is also, almost without exception, written about the fiduciary. The lawyer appears in it as an offstage resource, someone the fiduciary "should consult." Whose client they are, what they owe, what they risk, and how they get out are largely unwritten.

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103 Id. § 361.153(b).

104 Id.

105 Id. § 361.153(c)(3).

106 Id. § 351.003.

107 Tex. R. Civ. P. 172.

A note on rule numbers before anything else. The Texas Disciplinary Rules were renumbered effective October 1, 2024. The Supreme Court adopted a new Rule 1.10 on imputation of conflicts and a new Rule 1.18 on duties to prospective clients, and seven rules moved up one place to make room: former Rules 1.10 through 1.16 became 1.11 through 1.17.[108] Nothing outside that range moved. Withdrawal, long cited as Rule 1.15, is now **Rule 1.16**. Safekeeping property, formerly 1.14, is now 1.15. And clients with diminished capacity, formerly 1.16, is now **Rule 1.17**.

Materials published before October 2024 — including CLE papers still in active circulation, and at least one widely used compilation — carry the old numbers. The change is visible in the case law itself: *Steele v. McDonald*, decided in 2006, cites the client's power to discharge counsel as Rule 1.15(a)(3),[109] which was correct then and is Rule 1.16(a)(3) now.

A. Whose Lawyer Are You?

The answer has been settled for thirty years and is still misunderstood, largely because the case that settled it is cited for something else.

Huie v. DeShazo holds: "We hold that, notwithstanding the trustee's fiduciary duty to the beneficiary, only the trustee, not the trust beneficiary, is the client of the trustee's attorney."[110] And: "It would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trustee's attorney, is the real client."[111]

The client is not the trust, either. "The term 'trust' refers not to a separate legal entity but rather to the *fiduciary relationship* governing the trustee with respect to the trust property."[112]

So the client is the fiduciary, in a representative capacity. That is not the same as the fiduciary personally, and it is not the same as the estate or trust. Three different things, and the engagement letter usually names none of them.

And the sentence that keeps this section honest. *Huie* is cited constantly for the privilege half of its holding and almost never for the other half, which appears on the same pages: "The trustee's duty of full disclosure extends to all material facts affecting the beneficiaries' rights. Applying the attorney-client privilege does not limit this duty."[113] The Court said so again, directly: "Our holding, therefore, in no way affects Huie's duty to disclose all material facts and to provide a full trust accounting . . . ."[114]

Privilege protects the file. It does not shrink the duty. A fiduciary who believes that speaking to counsel has converted a disclosable fact into a protected one has been given bad advice.

Where this bites in practice. The beneficiary who calls believes you are "the estate's lawyer," and will talk at length on that assumption. The rule is affirmative, not passive: "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."[115] Silence is not compliance. The October 2024 amendments added a comment distinguishing legal advice from legal information, worth reading in full before the next such call.[116] The fiduciary who asks about personal exposure is a different client, and possibly needs a different lawyer. And the privilege, which belonged to the fiduciary in a representative capacity, has an uncertain holder once a successor is appointed — a question the parties will litigate at the worst possible moment.

A limit worth knowing. The Supreme Court held in 2023 that an independent executor owes no fiduciary duty to the estate's creditors, "reject[ing]" the contrary "contention" and confirming the Fifth Circuit's assessment "that an independent executor does not owe estate creditors a fiduciary duty under Texas law" — expressly abrogating two courts of appeals decisions that had said otherwise.[117] And on the facts before it, the claimants — who were beneficiaries of a separate marital trust rather than devisees of the estate — got nothing more than that: "any duty Houren owed to the

108 Misc. Docket No. 24-9054 (Tex. Aug. 27, 2024) (adopting amendments to Tex. Disciplinary R. Prof'l Conduct 1.08, 1.09, 3.09, 4.03, 5.01, and 5.05; adopting new Rules 1.10 and 1.18; adopting new Tex. R. Disciplinary P. 13.05; and adopting renumbering amendments, all effective Oct. 1, 2024). The renumbering was confined to former Rules 1.10 through 1.16, which became 1.11 through 1.17; no rule outside that range was renumbered. The current official compilation is effective March 7, 2025.

109 Steele v. McDonald, 202 S.W.3d 926, 927–28 (Tex. App.—Waco 2006, order) (per curiam).

110 Huie v. DeShazo, 922 S.W.2d 920, 921 (Tex. 1996).

111 Id. at 925.

112 Id. at 926 (emphasis in original).

113 Id. at 923.

114 Id.

115 Tex. Disciplinary R. Prof'l Conduct 4.03.

116 Id. cmt. 3 (added eff. Oct. 1, 2024).

Beneficiary Parties as executor of the Estate was no different from the duty he owed to any other unsecured creditor."[118]

Being a beneficiary of *something* does not make a person a beneficiary of the *estate*. Counsel for the fiduciary should know which is which before answering the phone.

B. Co-Fiduciaries as Joint Clients

Two executors. One lawyer. They agreed at the funeral, and at the funeral they agreed about everything.

The subsection that actually governs is 1.06(b)(2): a lawyer shall not represent a person if the representation "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."[119] *Become.* The rule contemplates precisely the conflict that is absent at engagement and near-certain by the first significant decision.

Joint representation is permitted only where the lawyer "reasonably believes the representation of each client will not be materially affected" and each affected client consents "after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."[120] Full disclosure here means more than a recital that conflicts may arise. It means the implications and possible adverse consequences — including, candidly, that if the two of them diverge the lawyer will likely have to withdraw from both.

That is the practical problem. Withdrawal from one is rarely clean; withdrawal from both strands the administration twice over. Which is a reason to think hard at engagement, and a reason the conversation about it should be memorialized.

The imputation rules changed in 2024 as well. New Rule 1.10 now governs when one lawyer's conflict disqualifies the firm, with a screening mechanism for conflicts arising from a lawyer's prior firm.[121] The estate bar has not fully absorbed it.

C. You Drafted It, and Now It's Contested

> *He had taken the will to the hospital himself and watched her sign it, and he remembered the conversation clearly, including the part where she explained why she was doing it. Two years later the son's petition alleged she had lacked capacity that afternoon.*
>
> *He was the executor's lawyer. He was also the only disinterested person in the room that day.*

This is among the most common conflicts in the practice and among the least discussed.

Counsel drafts the instrument, is later engaged by the executor or trustee, and the instrument comes under attack. Counsel is now the fiduciary's advocate, the principal fact witness on execution and capacity, and — if the challenge succeeds — a potential malpractice defendant.

The advocate-witness rule is the operative constraint. A lawyer "shall not accept or continue employment as an advocate before a tribunal 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," subject to enumerated exceptions including testimony relating to "an uncontested issue," testimony "solely to a matter of formality," and a substantial-hardship exception that requires prompt notice to opposing counsel.[122]

And here is the trap. Withdrawal is **mandatory** — not discretionary, not a judgment call — where "the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law."[123] A lawyer who concludes they are a necessary witness has concluded they must withdraw, subject only to a tribunal's contrary order.

Rule 1.09 was **completely rewritten** effective October 1, 2024, which matters for the successive-representation half of this problem. The old rule turned on a fact-specific inquiry. The new rule states a single standard: a lawyer "shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are

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117 Austin Trust Co. v. Houren, 664 S.W.3d 35, 46 (Tex. 2023) (abrogating Ertel v. O'Brien, 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied), and Ex parte Buller, 834 S.W.2d 622 (Tex. App.—Beaumont 1992, orig. proceeding)).

118 Id.

119 Tex. Disciplinary R. Prof'l Conduct 1.06(b)(2) (emphasis added).

120 Id. 1.06(c)(1)–(2).

121 Id. 1.10(a)(2) (eff. Oct. 1, 2024).

122 Id. 3.08(a), (a)(1)–(2), (5).

123 Id. 1.16(a)(1).

materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."[124] Written consent is now the operative requirement, and it was not before. A practitioner relying on a conflict memorandum written before 2024 is relying on a superseded standard.

One evidentiary wrinkle. The lawyer-client privilege does not apply "[i]f the communication is relevant to an issue between parties claiming through the same deceased client."[125] In a contest between beneficiaries, that is most of the drafting file.

D. The Principal Who Is Declining

> *She had been his client for nineteen years and the appointment was routine — a small amendment, half an hour. She repeated a question twice in that half hour, and then a third time, and asked about a piece of property she had sold in 2019.*
>
> *Her son had brought her. Her son held her power of attorney. Her son waited in the reception area and asked, on the way out, how the amendment had gone.*

Texas has a rule for this, it is better than practitioners assume, and it is almost never cited — partly because it moved.

Rule 1.17 provides, in full:

> *(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.*
>
> *(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.*
>
> *(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.*[126]

Three things about that rule deserve emphasis.

First, subsection (a) is a floor, not a caveat. Diminished capacity does not end the representation or convert the client into a subject. The lawyer maintains a normal relationship "as far as reasonably possible," which means the client continues to be consulted, informed, and deferred to on everything they remain capable of deciding.

Second, subsection (b) names the appointments discussed in Part Two — guardian ad litem, attorney ad litem — and then names something else: "submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client." That court is this one. The rule expressly contemplates a lawyer writing to a probate court about a client who can no longer protect themselves.

Those letters do arrive. The useful ones state what the lawyer observed rather than what the lawyer concluded — the repeated question, the transaction the client could not recall, the person who now accompanies every visit and answers for the client. They identify who holds authority under existing instruments and who benefits from the transaction the lawyer was asked to perform. They say what the lawyer has done and declined to do. And they do not ask for relief, because the letter is information, not an application; what it triggers is an inquiry, and the court has mechanisms for that inquiry that the lawyer does not. The less useful letters assert a conclusion about capacity, ask the court to act on the writer's judgment, or arrive two years after the observations they describe.

Third, subsection (c) supplies the confidentiality authority. A lawyer who believes protective action is warranted is not choosing between the client's welfare and Rule 1.05. The rule has resolved that for them, to the extent reasonably necessary.

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124 Id. 1.09(a) (eff. Oct. 1, 2024) (emphasis added).

125 Tex. R. Evid. 503(d)(2).

126 Tex. Disciplinary R. Prof'l Conduct 1.17. Adopted as Rule 1.16 by Misc. Docket No. 21-9061 (Tex. May 25, 2021), eff. July 1, 2021, and renumbered to 1.17 by Misc. Docket No. 24-9054, eff. Oct. 1, 2024, without change to its text.

The harder question, which the rule does not answer. Subsection (b) is permissive. The lawyer *may* take protective action. Nothing compels it. So a lawyer who suspects that the agent under a power of attorney — perhaps a power of attorney that lawyer drafted — is exploiting a declining principal has authority to act and no obligation to. That gap is worth sitting with, because the person on the other side of it has no one else.

E. Getting Out

Withdrawal is Rule 1.16. Mandatory in three circumstances: where "the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law"; where "the lawyer's physical, mental or psychological condition materially impairs the lawyer['s] fitness to represent the client"; or where "the lawyer is discharged, with or without good cause."[127]

Permissive withdrawal has seven grounds, and the one that actually drives these cases is the client who "fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled."[128] Note the warning requirement, which is frequently skipped.

Two provisions are routinely overlooked.

Rule 1.16(c): "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."[129] Good cause is not self-executing. In a pending proceeding, the court decides.

Rule 1.16(d): upon termination the lawyer "shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned."[130] In a mid-administration withdrawal, "allowing time for employment of other counsel" is doing a great deal of work.

Two comments deserve a probate audience's attention. Comment 3 notes that in litigation "withdrawal ordinarily requires approval of the appointing authority or presiding judge," and — usefully for the lawyer who cannot explain the reason without breaching a confidence — that "[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."[131] Comment 5 ends on a sentence that lands very differently in a fiduciary matter than in an ordinary one: the consequences of discharging appointed counsel "may include a decision by the appointing authority or presiding judge that appointment of successor counsel is unjustified, thus requiring the client to represent himself."[132]

Which, for a fiduciary, may not be possible at all.

And the procedural rule nobody reads until they need it. An attorney "may withdraw from representing a party only upon written motion for good cause shown."[133] Where no substitute is coming, the motion must state that a copy was delivered to the party, that the party was notified in writing of the right to object, whether the party consents, the party's last known address and contact information, and — this is the requirement that matters here — "all pending settings and deadlines."[134] If leave is granted, the withdrawing attorney "shall immediately notify the party in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and has not already notified the party."[135] And: "The Court may impose further conditions upon granting leave to withdraw."[136]

Read Rule 10 next to Part One, § H. A lawyer who simply stopped complied with none of it.

F. The Collision

Withdrawal in ordinary civil litigation leaves behind a party who may proceed alone. "Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court."[137]

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127 Id. 1.16(a)(1)–(3).
128 Id. 1.16(b)(5).
129 Id. 1.16(c).
130 Id. 1.16(d).
131 Id. cmt. 3.
132 Id. cmt. 5.
133 Tex. R. Civ. P. 10.
134 Id.
135 Id.
136 Id.
137 Tex. R. Civ. P. 7.

Withdrawal from a fiduciary representation may not, because the fiduciary is acting for others. And what follows is the part worth dwelling on: **every leading Texas case on this question is a case about a lawyer leaving.**

Steele v. McDonald. Gene Steele, independent executor, discharged his attorney mid-appeal and filed a pro se brief. The Waco court held he could not: "A plain reading of Rule 7 suggests that Gene may not appear pro se as Independent Executor of the Duke Estate because in this role he is litigating rights in a representative capacity rather than on his own behalf."[138] The result was that "Gene as Independent Executor is either represented by Beale or not currently represented in this matter."[139] The appeal stopped. Two cautions on the authority itself: it is a per curiam interlocutory order on appellate representation rather than a merits opinion, and Chief Justice Gray dissented, in terms this audience will recognize immediately: "All over Texas estates are being probated, inventories prepared and filed, and estates being closed without an attorney being involved. I do not see how that can continue under the holding of the majority . . . ."[140]

In re Guetersloh. The Amarillo court extended the same reasoning to trustees: "Because of the nature of trusts, the actions of the trustee affect the trust estate and therefore affect the interests of the beneficiaries. It follows that because a trustee acts in a representative capacity on behalf of the trust's beneficiaries, he is not afforded the personal right of self-representation."[141] It went further than *Steele* — a non-attorney trustee appearing for the trust "necessarily represents the interests of others, which amounts to the unauthorized practice of law."[142]

The procedural consequence is the argument in miniature. The trial court, on its own motion, "notified Relators that no action would be taken on their motion to transfer venue until such time as the trustee obtained legal representation."[143] The case froze. Guetersloh then obtained mandamus relief in his individual capacity and had his petition stricken in his capacity as trustee — one person, one filing, two outcomes.[144]

Suday v. Suday. Decided June 27, 2025, and the facts are the thesis: "While the appeal was pending in the court of appeals, Maryvel's counsel withdrew after she informed him that she no longer desired his representation. The court of appeals notified Maryvel that she could not represent her mother's estate pro se and extended her briefing deadline to allow her time to secure new counsel. Maryvel did not obtain counsel for the estate, so the court of appeals dismissed the appeal for want of prosecution."[145]

Counsel left. The fiduciary could not proceed. The case died on the docket without anyone reaching the merits.

The Supreme Court reversed on narrow grounds. It began by acknowledging the gap: "This Court has held that an estate's executor may proceed pro se in litigation involving his own interests, but we have not squarely addressed when, if ever, such an executor may proceed pro se in litigation involving the estate's interests."[146] It then declined to resolve the general question — "We assume without deciding that this general rule applies in the estate context" — and held only that it does not reach an executor who is also the sole beneficiary: "When an executor like Maryvel is the sole beneficiary, she is, for all intents and purposes, representing only her own rights under Rule 7 and is not acting in a representative capacity at all."[147] Denying the sole beneficiary that right "is not only unjustifiably paternalistic but plainly harmful. Her interests can hardly be protected by handing her an automatic loss in the form of a dismissal of her claims."[148]

What was expressly reserved matters as much as what was decided. In a footnote: "In today's case, there are no creditors, and thus we need not decide—and instead expressly reserve for a future case—whether and to what extent the executor of a single-beneficiary estate that does have creditors may represent the estate's interests pro se."[149] A sole beneficiary with one unpaid creditor remains an open question.

138 Steele, 202 S.W.3d at 928.

139 Id. at 928–29.

140 Id. at 930 (Gray, C.J., dissenting); see also id. at 931 (the holding "will come as an enormous surprise to the personal representatives of estates that have been and are currently being probated and who regularly represent the estate as independent executor in judicial proceedings without being represented by counsel").

141 In re Guetersloh, 326 S.W.3d 737, 740 (Tex. App.—Amarillo 2010, orig. proceeding).

142 Id.

143 Id. at 739.

144 Id. at 740–41.

145 Suday v. Suday, 716 S.W.3d 586, 588 (Tex. 2025) (per curiam).

146 Id. at 587.

147 Id. at 588.

148 Id. at 589. The Court added that permitting it "avoids serious potential issues arising under the federal and Texas Constitutions concerning due process and access to the courts." Id. See also Ex parte Shaffer, 649 S.W.2d 300, 301–02 (Tex. 1983) (granting habeas relief to an executor jailed for contempt after failing to retain counsel; "ordering a party to be represented by an attorney abridges that person's right to be heard by himself"), *discussed in* Suday, 716 S.W.3d at 590.

149 Id. at 589 n.2.

And the rule that was supposed to settle all of this has not been adopted.

The Supreme Court referred the question to its Advisory Committee. In November 2020 the Committee voted, eighteen to three, that independent executors *do* have the right to proceed pro se — the opposite of *Steele*. In February 2023 its subcommittee proposed adding to Rule 7 that "[a]n individual who is acting in a representative capacity may not appear in court to prosecute or defend his or her rights, but an individual who is not appearing in a representative capacity may appear pro se," with a comment providing that an independent executor "may appear pro se" while guardians "may not." The Committee voted twenty-three to nothing to strike both, and to recommend instead a rule reading: "Any party to a suit may appear and prosecute or defend his or her rights therein, either in person or by an attorney of the court. An independent executor of an estate may appear pro se." An alternative comment extending the point to trustees drew no advocate and was never moved, and the subcommittee expressly recommended against including dependent administrators.[150]

And then nothing. No order has amended Rule 7, which still prints unamended and without a comment.[151] The recommendation has been with the Court for more than three years.

So the state of the law is three authorities pointing three directions. The courts of appeals say a fiduciary cannot proceed alone. The Advisory Committee voted unanimously that an independent executor can. The Supreme Court has carved out the single case in which it does not matter — the sole beneficiary, who strands nobody — and left everything else open.

Meanwhile the deadlines do not pause. Section 309.055 runs. The section 308.004 affidavit comes due at ninety days. The creditor period runs. A withdrawal entirely proper under Rule 1.16 can leave a court with a fiduciary who may be legally unable to act, in an administration that does not stop needing things done.

Note what the recommendation leaves alone. It settles the independent executor and says nothing about guardians, trustees, or dependent administrators. So in the one setting where the beneficiary cannot complain about the abandonment described in Part One, § H, nothing would change.

From the bench. A motion to withdraw filed mid-administration should say who has been told, what has been calendared, what is imminent, and whether anyone is lined up to take over. Most of that Rule 10 already requires. Few motions supply it. A motion that states only that the client has not paid, filed three weeks before a setting in a dependent administration with an unfiled account, asks a court to approve an outcome the movant has not thought through — and Rule 1.16(c) exists precisely so that the court does not have to.

G. Who Pays

Two standards, routinely conflated.

The general provision entitles a representative, "[o]n proof satisfactory to the court," to "reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the estate."[152] No good-faith requirement appears in it.

The good-faith-and-just-cause standard lives in a different section, and only for defending or prosecuting a will's admission to probate: a person designated as executor "who, for the purpose of having the will or alleged will admitted to probate, defends the will or alleged will or prosecutes any proceeding in good faith and with just cause, whether or not successful, shall be allowed out of the estate the executor's or administrator's necessary expenses and disbursements . . . including reasonable attorney's fees."[153] Citing the general provision for a good-faith standard is an error, and it appears in published materials.

On the trust side the standard is discretion and nothing else: "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."[154] Not a prevailing-party statute.

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150 Supreme Court of Tex. Advisory Comm., Referral Letter of Aug. 1, 2022, https://www.txcourts.gov/media/1460189/202208-scac-referral-letter-with-attachments.pdf; Meeting Materials of Feb. 17, 2023, at Ex. A, https://www.txcourts.gov/media/1455811/scac-notebook-feb-17-2023.pdf; Transcript of Feb. 17, 2023, at 34741–48, https://www.txcourts.gov/media/1456059/02172023-scac-meeting-transcript.pdf; Transcript of Nov. 6, 2020, at 32174–75, https://www.txcourts.gov/media/1450087/scac-november-6-2020-transcript.pdf. The November 2020 vote is recorded as reaching "executors"; the subcommittee's later memorandum restates it as independent executors.

151 Tex. R. Civ. P. 7.

152 Tex. Est. Code Ann. § 352.051(2).

153 Id. § 352.052(a).

154 Tex. Prop. Code Ann. § 114.064.

Removal cuts both ways. "An independent executor who defends an action for the independent executor's removal in good faith, whether successful or not, shall be allowed out of the estate the independent executor's necessary expenses and disbursements, including reasonable attorney's fees, in the removal proceedings."[155] A good-faith defense is compensable even in defeat. And costs incurred by the party *seeking* removal, where the executor served without bond, "may be paid out of the estate."[156]

Against that, the surcharge provision discussed in Part Three reaches the representative *and the sureties* on neglect of a duty alone, without regard to whether removal ever happened.[157]

The uncomfortable question, asked directly. Should a fiduciary's defense costs be paid from the estate while the fiduciary's conduct is the thing at issue? The doctrinal answer is often yes. The practical answer is that a fact-finder notices, and that a fiduciary who has funded a vigorous defense from the corpus of the trust whose beneficiaries are suing has made an argument about themselves that no closing statement can undo.

H. When You Are the Defendant

Everything to this point has treated the lawyer as the manager of someone else's exposure. So does the literature, essentially without exception. What follows is the other half, and it starts with a rule most practitioners believe protects them more than it does.

What privity actually covers. Texas draws a bright line: an attorney retained to draft a will or trust "owes no professional duty of care to persons named as beneficiaries under the will or trust," because "the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent."[158] *Huie* supplies the same answer on the administration side: "the trustee who retains an attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries."[159]

Three qualifications, and the third is the one that matters.

First, a non-client may still sue for negligent misrepresentation. That claim survives because permitting it "does not undermine the general rule that persons who are not in privity with an attorney cannot sue the attorney for legal malpractice,"[160] though it reaches only "situations in which the attorney who provides the information is aware of the nonclient and intends that the nonclient rely on the information."[161]

Second, the claim does not die with the client. "[T]here is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners."[162] Which means the successor fiduciary from Part Three, § G — the one whose first professional act is adverse to their predecessor — may hold a claim against the predecessor's lawyer as well.

Third, and this is the point: **privity has nothing to do with knowing participation.** That claim does not depend on any duty running from the lawyer to the beneficiaries, so the shield does not reach it. The rule has been settled since 1942: "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."[163] Texas courts of appeals state the elements as the existence of a fiduciary relationship, the third party's knowledge of that relationship, and the third party's awareness that they were participating in the breach.[164]

A lawyer who is told what the fiduciary is doing, and who papers it, is a third party with knowledge.

The fee is not safe. A lawyer who commits a "clear and serious violation of duty to a client" may be required to forfeit some or all of the fee, and — this is the part that surprises people — "a client need not prove actual damages in order to

155 Tex. Est. Code Ann. § 404.0037(a).

156 Id. § 404.0037(b).

157 Id. § 351.003.

158 Barcelo v. Elliott, 923 S.W.2d 575, 578–79 (Tex. 1996).

159 Huie v. DeShazo, 922 S.W.2d 920, 925 (Tex. 1996).

160 McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999).

161 Id. at 794.

162 Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 782 (Tex. 2006).

163 Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 514 (1942). Applied to an attorney defendant in Kastner v. Jenkens & Gilchrist, P.C., 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.).

164 Baylor Scott & White v. Project Rose MSO, LLC, 633 S.W.3d 263, 284 (Tex. App.—Tyler 2021, pet. denied); Darocy v. Abildtrup, 345 S.W.3d 129, 137–38 (Tex. App.—Dallas 2011, no pet.). The Supreme Court of Texas has supplied the rule but has not enumerated the elements; the three-part formulation is the work of the courts of appeals. Practitioners should use "knowing participation" rather than "aiding and abetting," which Texas courts have not settled as an independent tort.

obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client."[165] The relevant considerations are "the gravity and timing of the violation, its wilfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies,"[166] to which the Court added one more that "must be given great weight": "the public interest in maintaining the integrity of attorney-client relationships."[167] Both the whether and the how much "are inherently equitable and must thus be made by the court."[168]

And the fee already paid is not safe either. In *Drake v. Trinity Universal Insurance Co.*, a lawyer was paid twelve thousand dollars on a claim approved by the probate court. The order was reversed on appeal. The Supreme Court held he had to give it back: "he was the claimant against the estate for whose benefit the order was rendered. Because it was this order approving his claim that was reversed, he is liable to the estate for reimbursement of the money paid to him."[169] His answer — that he had earned the money — drew this: "Merely because Currie may be entitled to recover for his services from Ms. Holt does not mean that he can recover, or retain the benefit of payment, from the estate. . . . Accordingly, the estate's funds must be returned, and Currie must look elsewhere for payment."[170]

A fee approved by a probate court is not final while the order approving it remains appealable. Practitioners treat the order as the end of the question. It is not.

What the rules require, as distinct from what they permit. Rule 1.05 is largely permissive where the harm is financial. A lawyer *may* reveal confidential information to prevent a client "from committing a criminal or fraudulent act,"[171] or to "rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."[172] The mandatory trigger in 1.05(e) reaches only conduct likely to result in death or substantial bodily harm, which a looted estate is not.

The obligations are in Rule 1.02. A lawyer "shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent."[173] Holding confidential information "clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another," the lawyer "shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud."[174] And where the act is already done and the lawyer's own services were used in it, the lawyer "shall make reasonable efforts under the circumstances to persuade the client to take corrective action."[175]

Shall, in all three. And a lawyer who must disclose under Rule 4.01(b) to avoid becoming a party to the client's fraud has no discretion about confidentiality either.[176]

Read those next to *Kinzbach*. The disciplinary rules tell the lawyer to dissuade and to seek correction. The tort tells the lawyer what happens if they do neither and keep working the file.

I. The Clauses That Foreclose the Fix

This paper has been arguing that the drafting fixes preserve a court's ability to repair a fiduciary problem. The honest companion to that argument is that some drafted provisions do the opposite, and the room reading this is where they come from.

The floor is real, and narrower than its reputation. Texas fixes a list of things the terms of a trust may not limit, and the most important entry is the court's own toolkit: "the power of a court, in the interest of justice, to take action or exercise jurisdiction," including to modify or terminate, to remove a trustee, to exercise section 115.001 jurisdiction, to

165 Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999). The remedy reaches only a "clear and serious violation of duty to a client." Id. at 241.

166 Id. at 241 (quoting Restatement (Third) of the Law Governing Lawyers § 49 (Proposed Final Draft No. 1, 1996)); see id. at 245 (adopting that rule). Section 49 of the proposed draft became § 37 of the Restatement as published in 2000.

167 Id. at 244.

168 Id. at 246. Disputed underlying facts remain for a jury; the trial court must first determine whether such disputes exist. Id.

169 Drake v. Trinity Universal Ins. Co., 600 S.W.2d 768, 771 (Tex. 1980).

170 Id. The rule is the general one requiring restitution after reversal, see Peticolas v. Carpenter, 53 Tex. 23, 29 (1880), and turns on the lawyer's position as the claimant for whose benefit the order was rendered rather than on anything peculiar to lawyers.

171 Tex. Disciplinary R. Prof'l Conduct 1.05(c)(7).

172 Id. 1.05(c)(8).

173 Id. 1.02(c).

174 Id. 1.02(d).

175 Id. 1.02(e).

176 Id. 1.05(f) (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)"); id. 4.01(b).

require or dispense with bond, to “adjust, deny, or order disgorgement of a trustee’s compensation if the trustee commits a breach of trust,” and to award costs and fees.[177] Note the qualifier at the front. “In the interest of justice” is doing work that the drafter of a motion will eventually notice.

Exculpation is policed. Duty is not. Section 114.007 makes an exculpation term unenforceable to the extent it relieves a trustee for a breach “in bad faith,” “intentionally,” or “with reckless indifference to the interest of a beneficiary,” or for “any profit derived by the trustee from a breach of trust.”[178] Subsection (c) is the half that never makes the slide. Except as provided in section 111.0035, the statute “does not prohibit the settlor, by the terms of the trust, from expressly” relieving the trustee “from a duty or restriction imposed by this subtitle or by common law,” or “directing or permitting the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law.”[179]

Which is the whole game. Section 114.007 polices liability for breach. It does not police the content of the duty. A drafter who narrows the duty far enough has not exculpated a breach. There is no breach to exculpate.

The directed trust goes further than most of its users realize. An advisor with power to direct or veto a trustee’s decisions “is a fiduciary regardless of trust terms to the contrary,” subject to one narrow carve-out for a pure removal-and-appointment power.[180] That is the reassuring half. Now the other: a trustee who acts on an advisor’s direction “is not liable, except in cases of wilful misconduct on the part of the trustee so directed, for any loss resulting directly or indirectly from that act.”[181]

Set that beside section 114.007. The exculpation floor stops at reckless indifference. The directed-trustee standard stops at wilful misconduct, which is a good deal further down. A directed trustee who is merely reckless is immunized by statute in a way an ordinary trustee cannot be by drafting.

And the directed trustee has no duty “to monitor the conduct of the advisor,” none to advise or consult with them, and none to “communicate with or warn or apprise any beneficiary or third party” about decisions the trustee would have made differently.[182] The trustee’s confirming, recording, and reporting is presumed to be mere administration, rebuttable only by clear and convincing evidence.[183] A beneficiary looking for someone to sue is pushed onto the advisor, who may be an individual with no assets and no bond.

Arbitration relocates the forum. An arbitration provision in an inter vivos trust is enforceable against a beneficiary. The Supreme Court reasoned that “a beneficiary who brings a claim for breach of fiduciary duty seeks to hold the trustee to her obligations under the instrument and thus has acquiesced to its other provisions, including its arbitration clause,” and that “it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms.”[184] The beneficiary’s escape is to disclaim, or to contest the trust’s validity rather than enforce it: “One who does not accept benefits under a trust and contests its validity could not be compelled to arbitrate the trust dispute under the doctrine of direct benefits estoppel.”[185]

Rachal never mentions section 111.0035. Whether an arbitration clause can coexist with a statutory command that the terms of a trust may not limit a court’s power to “exercise jurisdiction under Section 115.001” appears to be undecided in Texas.[186] It will be litigated.

Forfeiture clauses, and the one place the Legislature closed the door in the other direction. A forfeiture provision is enforceable unless the contestant proves by a preponderance that “just cause existed for bringing the action” and that it “was brought and maintained in good faith.”[187] Both statutes then preserve the common law “recognizing that forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform

177 Tex. Prop. Code Ann. § 111.0035(b)(5)(A)–(F). All six of the enumerated judicial powers are in subsection (b)(5); subsection (b)(4) addresses the trustee’s own duties.

178 Id. § 114.007(a).

179 Id. § 114.007(c).

180 Id. § 114.0031(e).

181 Id. § 114.0031(f).

182 Id. § 114.0031(h).

183 Id. § 114.0031(i).

184 Rachal v. Reitz, 403 S.W.3d 840, 847 (Tex. 2013).

185 Id. at 850.

186 See Tex. Prop. Code Ann. § 111.0035(b)(5)(C). *Rachal* rested on the Texas Arbitration Act and on direct-benefits estoppel and did not address section 111.0035.

187 Tex. Est. Code Ann. § 254.005(a); Tex. Prop. Code Ann. § 112.038(a).

the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust."[188]

The courts of appeals had gotten there first. "The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship."[189] Forfeiture provisions are strictly construed, forfeiture is avoided where possible, and it is declared "only where the acts of the parties come strictly within the clause."[190] A beneficiary seeking removal of a trustee under a silent instrument does not trigger the clause.[191] And the clause "is not a sword they can wield to establish a forfeiture."[192]

Then the provision nobody quotes. The list of things a trust's terms may not limit ends with this: "the applicability of Section 112.038."[193] The Legislature made the trust forfeiture statute itself non-waivable. A settlor cannot draft around the just-cause-and-good-faith escape.

And the accounting floor reaches less than its reputation suggests. The trustee's duty to respond to a section 113.151 demand is non-waivable — but only as to an irrevocable trust, and only for a beneficiary who at the time of the demand "is entitled or permitted to receive distributions from the trust" or "would receive a distribution from the trust if the trust terminated at the time of the demand."[194] A remote contingent remainderman satisfies neither. The related informational floor reaches only beneficiaries who are twenty-five or older.[195]

So a drafter can, entirely lawfully, leave a class of beneficiaries with no statutory entitlement to an accounting and none to information. Whether a court can order one anyway is a different question, and the answer is yes.[196] But the beneficiary has to reach the courthouse first, knowing enough to ask — which is precisely what the accounting was for.

The point, and it is not a comfortable one. Every device in this section is lawful, and most are good practice in the right matter. An arbitration clause can spare a family a public trial. A directed trust can put investment authority where the expertise is. A forfeiture clause can deter a nuisance contest. But each is drafted years before the fumble, by someone who cannot know which client will turn out to need the court, and each narrows what remains available on the far side. These clauses do not cause the fumble-to-folly conversion. They decide what a judge can do about it afterward.

VI. WHAT THE DISTINCTION IS ACTUALLY FOR

The fumble-and-folly line is not a moral taxonomy. It is a description of what a court still has to work with.

Every folly in Part Three began as something in Part One. Concealment began as a missed disclosure. The surcharged bond began as a late annual account. The removal in Part One, § H began with a lawyer who believed the work was finished when the letters issued.

What converts one into the other is almost never additional wrongdoing. It is time and silence.

Which is why Part Two sits where it does. Guardianship and dependent administration are the two regimes in which the Legislature declined to trust the arrangement to self-correct — the ward cannot object, and the creditors have not yet appeared — so it inserted the court as the objector. An unwaivable bond. Mandatory judicial review of every account. Two kinds of ad litem. A court investigator. A state auditing program. Court orders for sales and for spending.

Those are prosthetics. Everywhere else in this paper the same function is performed, free and instantly, by a person with standing and capacity who asks a question.

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188 Tex. Est. Code Ann. § 254.005(b); accord Tex. Prop. Code Ann. § 112.038(b). The two subsections are not identical as enacted: section 112.038(b) prints a comma after "any law" that section 254.005(b) does not.

189 McLendon v. McLendon, 862 S.W.2d 662, 679 (Tex. App.—Dallas 1993, writ denied).

190 Id. at 678.

191 Conte v. Conte, 56 S.W.3d 830, 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

192 Di Portanova v. Monroe, 402 S.W.3d 711, 719 (Tex. App.—Houston [1st Dist.] 2012, no pet.); see also id. at 716–17. Note that each of these decisions construes a clause as not reaching the conduct at issue; none holds that a sufficiently explicit forfeiture clause could not reach a fiduciary-conduct suit. No Texas Supreme Court decision resolves the question.

193 Tex. Prop. Code Ann. § 111.0035(b)(6).

194 Id. § 111.0035(b)(4)(A)(i)–(ii); see id. § 113.151. On the non-waivability of these duties, cf. Martin v. Martin, 363 S.W.3d 221, 231–33 (Tex. App.—Texarkana 2012, pet. granted, judgm't vacated w.r.m.) ("neither the duty described in (b)(4)(A) nor the separate and distinct duties described in (b)(4)(B) can be limited by the terms of the trust agreement"). The Supreme Court set the judgment aside without reference to the merits on the parties' settlement, so the reasoning is persuasive only; the statutory text carries the point on its own.

195 Id. § 111.0035(c).

196 Id. § 113.151(b) (court "may require the trustee to deliver a written statement of account to the interested person" on the requisite finding); id. § 111.0035(b)(5)(C).

That person is the real fix. The statutes are what gets built when they are missing, and they work about as well as one would expect a docket to work at noticing that a family has stopped answering its mail.

And Part Four, § I is the reason this matters to a drafting practice rather than only to a litigating one. The instrument decides, years in advance, how much of that machinery will still be there. A court cannot reconstruct a record nobody kept. It also cannot exercise a power the instrument lawfully narrowed, reach a trustee the statute immunized, or hear a dispute the settlor sent to an arbitrator.

For planners: the drafting fixes in this paper are not, mostly, about preventing breaches. They are about preserving a court's ability to fix things — a mechanism for the vacancy, a definition for the discretion, an allocation of the filing duty, a stated end point for the engagement. And a clear-eyed accounting of which protective clauses are worth what they cost the client on the day something goes wrong.

For litigators: the first question is not what the fiduciary did. It is what is still available.

This paper was prepared with the assistance of artificial intelligence for research, drafting, and citation verification. Authorities marked in the accompanying verification record were confirmed against primary sources; the analysis and conclusions are the author's own.