THE PORRIDGE OF DISCLOSURE TO BENEFICIARIES: TOO HOT, TOO COLD, OR JUST RIGHT

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Houston Business and Estate Planning Council

September 18, 2025

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I. INTRODUCTION TO THE DUTY OF FULL DISCLOSURE

The "fail safe" mechanism of the relationship between a fiduciary and a beneficiary is the duty of full disclosure. Justice Cardozo, in the case *Meinhard v. Salmon*, summarized the duties required of a fiduciary:

> Many forms of conduct permissible in a workday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

A trustee's duty to make a full and accurate disclosure of all relevant facts is affirmative. Such a disclosure duty requires a trustee to share with the beneficiary all relevant facts, including the trustee's activities, transactions and mistakes. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984); *see also City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969); *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation*, 160 S.W.2d 509, 513–14 (1942). The disclosure standard for a personal representative of a decedent's estate (i.e.—an administrator or executor) is essentially the same. More specifically, a personal representative is required to disclose to those entitled to receive the estate (e.g.—beneficiaries, creditors, etc.) all material facts known to the representative that might affect their interests. *See Montgomery*, 669 S.W.2d at 313. While the Texas Estates Code describes certain mandatory duties of disclosure by a personal representative, such as annual or final accountings, the duty of disclosure by the personal representative of an estate exceeds this statutory duty. *See* TEX. ESTATE CODE ANN. §§ 359.001, 362.003 & 362.004.

Unfortunately, however, a fiduciary's duty of disclosure can also be an "unforeseen trap" for a well-intentioned, but uninformed, fiduciary. For example, some fiduciaries are unaware that the duty to disclose is not dependent on a request for information from a beneficiary; rather, if the fiduciary's failure to disclose certain vital information about a beneficiary's interest misleads the person entitled to receive the information, the fiduciary may be liable for failure to make a full disclosure. *Shannon v. Frost Nat'l Bank of San Antonio*, 533 S.W.2d 389, 393 (Tex. Civ. App.—San Antonio 1975, ref. n.r.e). Similarly, per Texas law, a trustee's breach of the duty of full disclosure (whether intentional or not) may be tantamount to fraudulent concealment. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). Long story short, allegations of a breach of duty of full disclosure permeate fiduciary litigation cases these days. Allegations by a beneficiary of a fiduciary's breach of full disclosure are easy to make, and are often costly and time consuming to disprove by the fiduciary.

The purpose of this paper is three-fold. First, the authors wish to provide the reader with a summary of all sources of Texas law which define and discuss a fiduciary's duty to make a full and accurate disclosure. Secondly, the authors will attempt to provide practical suggestions for both the fiduciary and the (disgruntled) beneficiary to consider from the standpoint of prosecuting and defending allegations of this sort. Third, the authors will suggest, in their humble opinion, how much disclosure by a fiduciary is enough, too much and too little, subject to the understanding that that the authors' opinion could be affected by facts of a specific case which are unknown to the authors.

II. A SUMMARY OF TEXAS LAW CONCERNING THE DUTY OF DISCLOSURE

There are four independent sources for a duty to disclose in Texas: (1) Texas statutory law; (2) Texas common law; (3) the trust document and (4) litigation rules. Statutory law, common law, and the trust document are discussed in this section, while litigation rules are addressed in Section III.D, *infra*.

A. Statutory Law, Common Law, and the Trust Document

The traditional obligation of any person is not to make any material misrepresentations, but a fiduciary's duty holds a much higher standard. Specifically, a fiduciary has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes—**[*even when, and especially if, it hurts*]**. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984); *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513 (Tex. 1942); *City of Forth Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969). The breach of the duty of full disclosure by a fiduciary is tantamount to fraudulent concealment. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1965); *Langford v. Shamburger*, 417 S.W.2d 438, 443 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.). A beneficiary's burden of proof does not require

him to show that he "relied" on the fiduciary to disclose the information, but rests on the broader question of whether the fiduciary had a duty to disclose in the first place. *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938); *see also Miller v. Miller*, 700 S.W.2d 941, 947 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). Equity implies constructive fraud in such situations, even if the beneficiary suffered no actual damages, and even if the fiduciary acted in "good faith." *Slay v. Burnett Trust*, 187 S.W.2d 377, 389 (Tex. 1945).

Under the Texas Estates Code, trustees, personal representatives of estates, and guardians are subject to strict accounting requirements. *See* TEX. ESTATE CODE ANN. §§ 359.001, 359.002, 359.003, 359.004, 359.005, 362.003, 362.004, 1163.001, 1163.002, 1163.003, 1163.004, 1163.005, 1163.006, 1204.101, 1204.102, & 1251.152; s*ee also* TEX. PROP, CODE ANN. §§ 113.151 & 113.152; *Hollenbeck v. Hanna*, 802 S.W.2d 412, 414 (Tex. App.—San Antonio 1991, no writ) (a settlor cannot totally eliminate a trustee's duty to provide an accounting to the court). The fiduciary's common law duty of full disclosure, however, is much broader than just the duty to faithfully account, and includes the duty to keep complete and accurate trust records. *Shannon v. Frost Nat'l Bank*, 533 S.W.2d 389, 393 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); s*ee Corpus Christi Bank & Trust v. Roberts*, 587 S.W.2d 173, 181 (Tex. Civ. App.—Corpus Christi 1979), aff'd 597 S.W.2d 752 (Tex. 1980); *Beaty v. Bales*, 677 S.W.2d 750 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

After reviewing the trust document, a trustee should be aware of statutory duties of disclosure. "A trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust, a trustee shall perform all of the duties imposed on trustees by the common law." TEX. PROP. CODE ANN. § 113.051. Additionally, in 2005, the Texas legislature enacted Section 113.060 of the Texas Property (Trust) Code, which imposes upon trustees a duty to keep beneficiaries reasonably informed concerning the trust's administration and "the material facts necessary for the beneficiaries to protect [their] interests." TEX. PROP. CODE ANN. § 113.060. This new section created disputes over whether this provision displaced common law standards, and also whether it imposes higher burdens than required by the common law. Thus, in 2007, the Texas legislature ended up repealing Section 113.060, stating that Section 113.060 was not intended to replace the common law duties and that common law duties in effect before January 1, 2006 were still in effect. Accordingly, there is no specific statutorily defined duty to disclose in Texas. Rather, the statutes state that a trustee has to act in good faith and consistent with all common law duties—including the duty to disclose.

Texas precedent on the common-law duty to disclose has not been particularly clear. The Texas Supreme Court has stated that "trustees and executors may have a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights." *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *see also Valdez v. Hollenbeck*, 465 S.W.3d 217, 230 (Tex. 2015). The existence of strained relations between parties does not minimize the fiduciary's duty of full and complete disclosure. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984).

Case law shows courts intervening in situations where a fiduciary has failed to fully disclose. For example, Section 114.008(a)(5) of the Texas Property Code authorizes a court to "appoint a receiver to take possession of the trust property and administer the trust" if the court finds that "a breach of trust has occurred or might occur." TEX. PROP. CODE ANN. § 114.008(a)(5). In *Estate of Benson*, the court affirmed the appointment of a receiver over trust assets where the trustee had violated his duty to disclose. No. 04-15-00087-CV, 2015 WL 5258702, at *6 (Tex. App.—San Antonio Sept. 9, 2015, pet. dism'd by agr.). Specifically, the court stated, "[The Trustee's] abrupt severance of all communications with the Trust beneficiaries, his undisclosed transfer of funds that could have negatively impacted the market value of [trust assets] . . . and his concealment of the Trust bookkeeper from the Trust beneficiaries constitute some evidence . . . of a failure to disclose material facts that might have affected the rights of the beneficiaries." *Id.*

Even though a trustee may not have technically violated any other fiduciary duty, the failure to disclose his activities may nonetheless result in liability. The court in *InterFirst Bank Dallas, N.A. v. Risser*, implied that the corporate trustee violated its common law duty of full disclosure by failing to notify the beneficiaries of the sale of trust assets. 739 S.W.2d 882, 906 n.28 (Tex. App.—Texarkana 1987, writ dism'd by agr.). "While Texas law does not require the consent of beneficiaries before selling trust assets, the fact that the property is in a trust does not require that the beneficiaries are to be kept in ignorance of the administration of the trust." *Id.* Omissions or misstatements in accountings violate the common law duty of disclosure, and even previously filed and court-approved accountings may be re-examined upon a final accounting. *See DiPortanova v. Hutchinson*, 766 S.W.2d 856, 858 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Thomas v. Hawpe*, 80 S.W. 129, 132 (Tex. Civ. App.—Dallas 1904, writ ref'd). A trustee or personal representative will be held liable if he knowingly discloses false information or knowingly fails to disclose harmful information regarding his dealings with trust or estate assets. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313–14 (Tex. 1984) (holding that trustees and executors who withheld information

from beneficiary in order to induce her to enter into an agreed judgment committed "extrinsic" fraud justifying bill of review).

Common law fiduciaries are also required to make full and accurate disclosure to their principals. *See, e.g.*, *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988) (failure by attorney to disclose all facts material to the client's representation was "tantamount to concealment", and tolls the running of the statute of limitations until the client discovers, or reasonably should discover the alleged malpractice.); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 580– 81 (Tex. 1963) (corporate fiduciaries who failed to make full disclosure of personal self-dealing profits could not rely on statute of limitations defense.); *Holland v. Brown*, 66 S.W.2d 1095, 1102 (Tex. Civ. App.—Beaumont 1933, writ ref'd n.r.e.) (failure of attorney in business transaction with client to disclose all material facts and the legal consequences thereof constituted actionable fraud); *Johnson v. Peckham*, 120 S.W.2d 786, 787–88 (Tex. 1938) (partner who failed to make full disclosure of all material facts regarding partnership assets before purchasing other partner's interest breached fiduciary duty, even though strained relations existed between the two and regardless of whether buyer relied on him to make such disclosure); *Johnson v. Buck*, 540 S.W.2d 393, 399 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (judgment award of over six million dollars upheld against partner who made misrepresentations and concealed material facts to induce co-partner to sell him his interest in partnership property); *Kirby v. Cruce*, 688 S.W.2d 161, 166 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (joint venturers were under "no obligation to inquire as to truth of representations" made by managing partner concerning true costs of properties or amounts other individuals had paid to participate, due to fiduciary relationship between them.); *Kinzbach Tool Co. Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513–14 (Tex. 1942) (employee required to forfeit commission paid by seller of contract where employee failed to disclose to his employer a secret commission agreement and fact that employer could have purchased contract for lower price.); *Chien v. Chen*, 759 S.W.2d 484, 495, n.7 (Tex. App.—Austin 1988, no writ) (real estate broker having fiduciary duties must disclose to principal all facts affecting the principal's interest); *Williams v. Knight Realty Co.*, 217 S.W. 755, 758 (Tex. Civ. App.--Fort Worth 1919, no writ) (real estate agent can be denied commission if he secretly agrees to split commission with broker for adverse party.); *Sorrell v. Elsey*, 748 S.W.2d 584, 588–89 (Tex. App.—San Antonio 1988, writ denied) (aunt's "gift" to nephews set aside because they failed to prove that they had fully informed her of the facts and consequences of her actions.).

By contrast to the foregoing case examples, however the Texas Business and Organizations Code demonstrates that a partner owes a partnership fiduciary duties that are not quite as onerous as those owed by other fiduciaries. *See* TEX. BUS. ORG. CODE ANN. § 152.204. Specifically, a partner owes the partnership duties of loyalty and care, and must execute his duties in good faith and in a manner the partner reasonably believes to be in the best interest of the partnership. § 152.204(a), (b). However, this section further clarifies, "A partner, in the partner's capacity as a partner, is not a trustee and is not held to the standards of a trustee." § 152.204(c). However, concerning a partner's duty of disclosure, the Texas Business Organizations Code states that on request and to the extent just and reasonable, each partner and the partnership shall furnish complete and accurate information concerning the partnership to a partner, a legal representative of a deceased partner or a partner who has a legal disability, or an assignee. TEX. BUS. ORG. CODE ANN. § 152.213(a). Given that a partner does not have the fiduciary duties of a trustee, but the standard of disclosure is hauntingly similar to that of a trustee, the level of exposure for a partner's failure to disclose is somewhat unclear.

Texas case law also demonstrates a distinction between the actions and duties of a trustee and the actions of a representative of another entity owned all or in part by the trust, even where the same person wears both hats. *Adam v. Harris*, 564 S.W.2d 152, 156–57 (Tex. Civ. App.—Houston [14th] 1978, writ ref'd n.r.e) (defendant, a trustee and director of a trucking corporation, not found liable for self-dealing for acts performed in his capacity as director of the corporation). Therefore, the actions of the entity representative will not be subject to fiduciary duties.

Common law also demonstrates that a trustee is required to keep full, accurate, and orderly records concerning the status of the trust estate and all acts performed thereunder. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.). The law further suggests that a trustee has a duty, upon demand, to allow a beneficiary on a reasonable basis to inspect the non-privileged books and records of the trust. RESTATEMENT (THIRD) TRUSTS, § 82. No Texas case addresses this duty of inspection, but trust instruments typically provide for it as part of the boilerplate trust provisions. For example, in *Alpert v. Riley*, the trusts required the trustee to notify the beneficiaries annually of their right to withdraw an amount equal to 1) the aggregate amount contributed by each donor for that calendar year, or 2) $20,000, whichever was less. 274 S.W.3d 277, 294 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Based on the express terms of the trust, the court concluded that a rational trier of fact could conclude that the trustee breached his fiduciary duty by failing to communicate the amount the beneficiaries could withdraw. *Id.* at 294–95. Additionally, the duty to permit a beneficiary to

inspect the books and records of the trust is generally recited in several Texas opinions. *Shannon v. Frost National Bank*, 533 S.W.3d 389 (Tex. Civ. App.—San Antonio 1975); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

Various considerations may be taken into account with regards to the breadth of the duty to disclose. For example, the specific information that should be disclosed may vary depending on the terms of the trust, state law, and other factors, such as the nature of the beneficiary's interest, age, capacity, and sophistication, the nature of the trust assets and transactions, and the identity of the trustee. Disclosure may include the trust instrument, information about the trustee, trustee compensation, conflicts of interest, expenses, trust assets and investment policies or strategies, performance, liabilities, receipts, disbursements, discretionary actions by the trustee, tax matters, and other items.

Although the trustee would have an affirmative duty to disclose the foregoing list of items which may affect the beneficiary's interest, there may not be a duty to disclose routine trust activities. *See* RESTATEMENT (THIRD) TRUSTS § 82(1)(b), cmt. d. The Restatement does specify that a trustee has the duty to: 1) promptly inform beneficiaries of the existence of the trust, their right to obtain further information, and basic information concerning the trusteeship; 2) inform beneficiaries of significant changes in their beneficiary status; and 3) keep beneficiaries reasonably informed of changes involving the trusteeship and other significant developments concerning the trust and its administration particularly material information needed by beneficiaries for the protection of their interests. *Id.*

Finally, the Trust document may have express provisions regarding a trustee's disclosure of information to beneficiaries that are more burdensome than statutory or common law. The Texas Trust Code states that generally, the trust document governs and should be followed. TEX. PROP. CODE § 111.0035(b). The Tyler Court of Appeals has further stated, "The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code. The powers conferred upon the trustee in the trust instrument must be strictly followed." *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 WL 2393993, at *3 (Tex. App.—Tyler May 20, 2015, no pet.). Thus, if a trust instrument provides disclosure requirements over and above the statutory requirements (e.g. - the right to inspect the books and records), a trustee should follow them or else risk a breach of duty claim.

B. Explanation from Bogert, Trusts and Trustees, & Scott on Trusts

As previously mentioned, trustees have a general duty to disclose information to trust beneficiaries. Although trustees do have a statutory duty to account, a trustee's duty of full disclosure has traditionally been considered to be a common law fiduciary duty. This duty is further explained as:

> The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is a mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines of equity entitle him, he must know of what the trust property consists and how it is managed.

George G. Bogert, Alan Newman, Geroge T. Bogert, & Amy Morris Hess, THE LAW OF TRUSTS & TRUSTEES, § 961 (2d ed. 1983).

Scott's *The Law of Trusts* also states:

> The trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. They are entitled to examine the trust property and the accounts and vouchers and other documents relating to the trust and its administration. Where a trust is created for several beneficiaries, each of them is entitled to information as to the trust. Where the trust is created in favor of successive beneficiaries, a beneficiary who has a future interest under the trust, as well as a beneficiary who is presently entitled to receive income, is entitled to such information, whether his interest is vested or contingent.

Austin Wakeman Scott, William Franklin Fratcher, & Mark L. Ascher, THE LAW OF TRUSTS, §173 (4th ed. 1998).

C. Who Has Standing to Request/Demand Disclosure?

Standing also becomes an issue with regards to a fiduciary's disclosure of information, because only certain persons are entitled to receive that information. For example, beneficiaries are entitled to demand

information from a trustee. The Texas Trust Code defines "beneficiary" as a person for whose benefit property is held in trust regardless of the nature of the interest. TEX. PROP. CODE ANN. § 111.004(2). "Interest" means any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible. TEX. PROP. CODE ANN. § 111.004(6). Therefore, the definition of "beneficiaries" includes not only primary beneficiaries who are entitled to receive a distribution, but also beneficiaries who hold a remainder interest.

Occasionally, a beneficiary with a remote remainder interest will demand information from a trustee. The right of a remote beneficiary to request and receive information concerning a trust is not entirely clear. The definitions of "beneficiary" and "interest" as described above from the Texas Property Code seem to indicate that remote beneficiaries may be entitled to information, absent a provision in the trust instrument to the contrary. By contrast, however, the Restatement of Trusts provides that disclosure to remote beneficiaries is not required. RESTATEMENT (THIRD) TRUSTS, § 82 cmt. a(1). Therefore, in this situation, it is advisable for the trustee to seek instruction from the court, and if necessary, protection from the court. If court direction and/or protection are not available options for a trustee, careful consideration should be given before action is taken.

Texas law recognizes a beneficiary's right to certain information because a beneficiary needs sufficient information to enable him or her to enforce the terms of the trust. Beneficiaries are the only parties authorized to enforce the terms of the trust, regardless of the nature of their interest. *See* TEX. PROP. CODE ANN. §111.004 (2), (6). The settlor of a trust has no equitable power to enforce this duty and is not entitled to demand the disclosure of information from the trustee

Neither creditors nor persons having tort claims against the trustee retain an equitable power under common law to enforce this duty. Although the definition of "interest" is broad, the Texas Trust Code also defines a list of what the statute considers to be a "person"—and creditors and those having tort claims are not included. *See* Tex. Prop. Code Ann. §111.004 (6), (10). The purpose for this limitation is that claims against the trust are of a legal nature (rather than an equitable nature), and therefore, those parties are required to obtain information through the discovery methods as described by the Texas Rules of Civil Procedure.

D. Limitations on a Fiduciary's Duty to Disclose

As previously described, a beneficiary is defined as a person for whose benefit property is held in trust, regardless of the nature of the interest, which includes primary and remainder beneficiaries. TEX. PROP. CODE ANN. § 111.004(2), (6). The duty to disclose is described by Section 113.151 of the Texas Trust Code, which states in relevant part:

> . . . If the trustee fails or refuses to deliver the statement [of accounts] on or before the 90th dayafter the date the trustee receives the demand or after a longer period ordered by a court, any beneficiary of the trust may file suit to compel the trustee to deliver the statement to all beneficiaries of the trust. The court may require the trustee to deliver a written statement of account to all beneficiaries on finding that the nature of the beneficiary's interest in the trust or the effect of the administration of the trust on the beneficiary's interest is sufficient to require an accounting by the trustee.

TEX. PROP. CODE ANN. § 113.151 (a)

While common law is certainly less clear that the statutory accounting provisions, the common law duty of disclosure undoubtedly also applies to both income and reminder beneficiaries.

However, a trustee does not have a duty to disclose 1) non-material facts; 2) facts about a trustees' non-trust related activities; 3) negotiations concerning the purchase or sale of trust assets (particularly in a sale concerning confidential negotiations); 4) private information (financial, medical, etc.) about other beneficiaries; and 5) attorney-client communications. Additionally, the trust instrument may relieve the trustee of at least some of the trustee's duty to disclose. Section 111.035 of the Texas Trust Code provides, in relevant part, "The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit: . . .(4) a trustee's duty: (A) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand: (i) is entitled or permitted to receive distributions from the trust; or (ii) would receive a distribution from the trust were terminated at the time of the demand." TEX. PROP. CODE ANN. § 111.0035(b).

A settlor's right to limit a trustee's disclosure obligations may depend on the type of trust instrument. A settlor may limit disclosure obligations in a revocable trust because the settlor can always revoke the trust or change the beneficiaries. *See Moon v. Lesikar*, 230 S.W.3d 800, 803 – 04 (Tex. App.—Houston [14th] 2007, pet. denied); *Mayfield v. Peek*, 546 S.W.3d 253, 262 (Tex. App.—El Paso 2017, no pet.). Duties of disclosure may also arise if a settlor becomes incompetent. However, with regards to an irrevocable trust, statutes limit what a settlor can do regarding limiting the duty of disclosure. Specifically, a trust document may not limit a trustee's duty to respond to a demand for an accounting if the demand is from a

beneficiary who is entitled to or would receive a distribution if the trust terminated at the time of the demand. TEX. PROP. CODE ANN. § 111.0035(b)(4). Also, a trust document may not limit a trustee's common-law duty to keep a beneficiary who is 25 years of age or older informed at any time during which the beneficiary is entitled or permitted to receive distribution or would receive a distribution if the trust terminated at the time of the demand. § 111.0035(c). Apart from these two limitations, however, a settlor may restrict or eliminate the right of any other beneficiary to demand an accounting or otherwise have common law rights to disclosure (for example, beneficiaries under 25 and contingent remainder beneficiaries) Therefore, a trustee should carefully review a trust document to see if there are any specifications made by the settlor concerning the duty to disclose.

E. Fraudulent Concealment Concerns & Considerations

As previously described, a trustee's breach of the duty of full disclosure may be tantamount to fraudulent concealment. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984); *see also Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988) (discussing the attorney-client fiduciary duty). Texas law further notes that a beneficiary is not required to prove the elements of actual fraud or prove any facts that show the beneficiary relied on the disclosure. *See Montgomery*, 669 S.W.2d at 313. The reasoning behind these policies is that as a matter of law, a beneficiary of a trust is entitled to rely on a trustee to disclose all relevant information without being required to prove a trustee's non-disclosure. *See Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938). The duty of disclosure lies with the trustee, and does not shift to the beneficiary. Additionally, a beneficiary may raise a claim of constructive fraud, even in a situation where the trustee has acted in good faith and no actual damages were suffered by the beneficiary. *See Slay v. Burnett Trust*, 187 S.W.2d 377, 389 (1945) (discussing self-dealing). However, even though the duty of disclosure lies solely with the trustee, if the beneficiary alleges that he or she suffered actual damages, the beneficiary is responsible for proving evidence that supports the claim for damages. *Martin v. Martin*, 363 S.W.3d 221 (Tex. App.—Texarkana 2012, no pet. h.).

A trustee's common-law duty of full disclosure is far broader than a trustee's statutory duty to account to a beneficiary. Specifically, the trustee's common law duty of disclosure includes the duty to keep complete and accurate trust records. *Shannon v. Frost Nat. Bank of San Antonio*, 533 S.W.2d 389, 393 (Tex. Civ. App.—San Antonio 1975, ref. n.r.e.). Texas case law further shows that a trustee must document all trust expenses, and any payments that are illegitimate as a trust expense may be charged to the trustee in his individual capacity. *See Corpus Christi Bank & Trust v. Roberts*, 587 S.W.2d 173, 181 (Tex. Civ. App.—Corpus Christi 1979), *aff'd in part, reformed in part*, 597 S.W.2d 572 (Tex. 1980). Even when other violations of a trustee's fiduciary duties have not occurred, a trustee's failure to disclose his activities may demonstrate that the trustee has failed to act in good faith. *See Shannon*, 533 S.W.2d at 393; *see also Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 906, at n. 6 (Tex. App.—Texarkana 1987, no writ) (finding a trustee violated the duty of disclosure by failing to notify beneficiaries of sale of major trust asset). Further, if a trustee omits or misstates anything in an accounting, the trustee violates the duty of disclosure—even if an accounting was previously filed and approved by the court, the accounting may be re-examined if a beneficiary suspects that fraud occurred. *See Thomas v. Hawpe*, 80 S.W. 129, 131 (Tex. Civ. App.—Dallas 1904, writ ref'd); *DiPortanova v. Hutchinson*, 766 S.W.2d 856, 858 (Tex. App.—Houston [1st Dist.] 1989, no writ). Extrinsic fraud occurs when a trustee knowingly presents false information or fails to disclose any material facts concerning dealings with trust assets, justifying a proceeding for a bill of review. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984).

With regards to decedent's estates, the Texas Supreme Court has similarly found that extrinsic fraud occurs when an executor and/or trustee fails to voluntarily and fully disclose to a beneficiary all material information within the course of a judicial proceeding. *Id.* This failure to disclose also warrants the grant of an equitable bill of review to examine an earlier agreed judgment. *Id.*

III. PRACTICAL SUGGESTIONS FOR THE FIDUCIARY AND BENEFICIARY

A. Duty to Disclose Unrequested Information

A fiduciary relationship gives rise to a duty of full disclosure of all material facts. *Brown v. Arenson*, 571 S.W.3d 324, 335 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Valdez v. Hollenbeck*, 465 S.W.3d 217, 230 (Tex. 2015). In other words, the duty of full disclosure requires the disclosure of all material facts known to the fiduciary that may affect the rights of the person to whom the duty is owed, even if the person does not explicitly request that information. *See Home Loan Corp. v. Texas American Title Co.*, 191 S.W.3d 728, 731 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Even absent a specific request, a duty to disclose may arise (1) when the parties have a confidential or fiduciary relationship, (2) when one party voluntarily discloses information, which gives rise to the duty to disclose the whole truth, (3) when one party makes a representation, which gives rise to the duty to disclose new information that the party is aware makes the earlier representation misleading or untrue, or (4) when one party makes a partial disclosure and conveys a false impression, which gives rise to a duty to speak. *Siddiqui*

v. Fancy Bites, LLC, 504 S.W.3d 349, 369 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). Whether such a duty to speak exists is a question of law. *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 678 (Tex. 2009). The policy by this requirement to disclose unrequested information is that a person to whom a fiduciary duty is owed may be unaware of the need to inquire into the fiduciary's actions, and "[f]acts which might ordinarily require investigation likely may not excite suspicion where a fiduciary relationship is involved." *Valdez*, 465 S.W.2d at 645; *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988).

As demonstrated by this case law, a fiduciary will likely not prevail on a defense that merely states that the beneficiary did not explicitly request the information. If the information held by the fiduciary will materially affect the rights of the beneficiary, it must be disclosed. *See Home Loan Corp. v. Texas American Title Co.*, 191 S.W.3d 728, 731 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). For example, in one case litigated by the authors, a trustee failed to disclose to his beneficiaries significant transactions and in which he was engaged on behalf of the trusts and family limited partnership. He further failed to provide to the beneficiaries documentation of the funds and assets belonging to these entities. The beneficiaries sued the fiduciary, and only after the lawsuit was pending did he provide some of the requested documents. The beneficiaries discovered, by way of newly produced bank statements, credit card statements, and tax returns that the fiduciary was engaging in significant investments and transactions of which they did not approve. Thus, as a practical matter, a prudent fiduciary should err on the side of caution when significant information comes to his attention and make a disclosure to the beneficiary. Failure to make a disclosure of material information known to the fiduciary could later lead to exposure for a breach of the duty of disclosure.

B. What can a Fiduciary (Safely) Refuse to Disclose?

By contrast, a fiduciary may refuse to disclose information in certain situations. For example, the lawyer-client privilege enables a client to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client, the client's representative, the lawyer, or a representative of such a layer in a pending action and concerning a matter of common interest in that action, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client. TEX. R. EVID. 503(b)(1). The privilege may be claimed by the personal representative of a deceased client. TEX. R. EVID. 503(c). Further, the privilege does not apply to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate succession, intestate succession, or by inter vivos transactions. TEX. R. EVID. 503(d)(2).

The attorney-client privilege also applies to communications between a trustee and an attorney hired by the trustee to advise the trustee concerning trust administration. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996). However, the Texas Supreme Court further clarified that a fiduciary is not permitted to cloak a material fact with the privilege merely by communicating it to the attorney, and that the trustee still must fully disclose material facts to his beneficiaries. *Id.*; *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 199 (Tex. 1993). The Texas Supreme Court also rejected the argument that an exception to the privilege exists for fiduciaries and their attorneys or that the fiduciary's duty of disclosure overrides any attorney-client privilege claimed by the fiduciary. *Huie*, 922 S.W.2d at 923–24. Specifically, the Texas Supreme Court stated:

> Our holding, therefore, in no way affects Huie's duty to disclose all material facts and to provide a full trust accounting to Chenault, even as to information conveyed to Ringer. In other underlying litigation, Chenault may depose Huie and question him fully regarding his handling of trust property and other factual matters involving the trust. Moreover, the attorney-client privilege does not bar Ringer from testifying about factual matters involving the trust, as long as he is not called on to reveal any confidential attorney-client communications.

Id. at 923.

Thus, a trustee may refuse to disclose to a beneficiary confidential communications between him and his attorney. The Court specified that the trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance, and without this privilege, a trustee may be inclined to either forsake legal advice or alternatively, feel compelled to blindly follow counsel's advice, to the possible detriment of the beneficiaries. *Id.* at 924; *In re Prudence-Bonds Corp.*, 76 F.Supp. 643, 647 (E.D.N.Y. 1948) (concluding that, without the privilege, "the experience in management and best judgment by [the trustee] is put aside . . . which, in the end may result in harm to the [beneficiaries]").

The Texas Supreme Court in *Huie* also disagreed with the argument that the trust beneficiary or the trust

itself is the real client of an attorney hired by the trustee to advise the trustee with regard to trust administration. *Huie*, 922 S.W.2d 924. The Court discussed first how Rule 503 of the Texas Rules of Evidence does not have an exception applicable to fiduciaries and their attorneys. *Id.* at 924–25. The Court further declined to adopt such an exception, deferring to the Texas legislature if such an amendment to Rule 503 was deemed appropriate. *Id.* at 925. Therefore, the Court held that when a trustee is a client of an attorney who represents the trustee with regard to the administration of the trust, it is the trustee who is the client, not the trust beneficiaries. *Id.* This holding further established that the attorney-client privilege precludes the disclosure of confidential communications between the trustee and the attorney to the beneficiaries. *Id. at* 925–26. The Texas Supreme Court identified a significant caveat, however: while a trustee may refuse to disclose confidential communications between him and his attorney, this refusal in no way affects or changes the trustee's duty of full disclosure of material facts concerning the trust to the beneficiary. *Id.* at 924.

There are also public policy limits on a trustee's duty to disclose. Frank Ikard, in his CLE article entitled "Trustee's Duties to Disclose Information to Beneficiaries", compiled a list of public policy limitations which supercede a trustee's duty to disclose. More specifically, recognized public policy limitations on a trustee's duty to disclose, per Mr. Ikard, are listed as follows:

i. Disclosure of information regarding negotiations for the purchase of trust assets. *See* THE LAW OF TRUSTS AND TRUSTEES, *supra* at § 961. Although a beneficiary is entitled to information, the beneficiary does not have the right to prevent a trustee from engaging in transactions which benefit the trust and other beneficiaries;
ii. Disclosure of information regarding negotiations for the sale of a trust assets. *See* THE LAW OF TRUSTS AND TRUSTEES, *supra* at § 961. For example, a trustee may receive confidential bids with regards to the sale of assets;
iii. Disclosure of confidential financial information regarding other trust beneficiaries (e.g. social security numbers, bank account numbers, security account numbers, income, etc.);
iv. Disclosure of confidential medical information regarding other trust beneficiaries;
v. Disclosure of confidential information to a beneficiary who has a personal interest in the transaction that is adverse to that of other beneficiaries or the trust;
vi. Disclosure of information that would violate any state or federal law or that would cause either the trustee or beneficiaries to violate any state or federal law;
vii. Disclosure of privileged information (*see Huie v. DeShazo, supra);*
viii. Disclosure of information relating to the trustee's individual activities. The trustee's duty to disclose relates only to information concerning his or her administration of a trust. If a beneficiary desires to obtain information from the trustee regarding his personal affairs then such person will probably be required to use the traditional discovery methods contained in the Texas Rules of Civil Procedure. When a beneficiary is demanding information regarding self-dealing transactions by a trustee, the line between trust transactions and the trustee's personal transactions becomes blurred. In this situation a court of equity should probably allow the beneficiary disclosure (outside of formal discovery) of the trustee's personal transactions with trust property.
ix. Disclosure of non-material facts;
x. Disclosure of facts that do not affect the beneficiaries rights; and
xi. Disclosure in response to requests that are duplicative, burdensome or harassing. Although a beneficiary is given wide latitude in demanding information or inspection of documents from a trustee, if the beneficiary's demands become repetitive, harassing, or vexatious, the court should prevent the beneficiary from successfully engaging in his behavior. While a trustee can seek court protection from disclosing the information specified above, in many instances such action may not be practical (especially in situations where a trustee has a duty to disclose information that is not requested).

As demonstrated by these examples, the trustee's duty to disclose, while broad, is not absolute, and situations may arise where a fiduciary may be entitled to refuse disclosure of certain information.

C. The Domino Effect

Another danger of a fiduciary failing to meet his or her disclosure obligations is that such failure to disclose may lead to allegations liability for other fiduciary duty breaches. The Texas Property Code states that a trustee may be removed in accordance with the terms of the trust instrument or a court may remove a trustee if: 1) the trustee materially violated a term of the trust or attempted to do so that resulted in a material financial loss to the trust; 2) the trustee fails to make an

accounting that is required by law or by the terms of the trust; or 3) the court finds other cause for removal. TEX. PROP. CODE ANN. § 113.082.

A court may compel a trustee to perform his duties and, specifically, may order a trustee to account. § 114.008. A court may reduce or deny a trustee compensation for breaches of fiduciary duty. *Id.*; § 114.061. A plaintiff only needs to prove a breach (and not causation or damages) when she seeks to forfeit some portion of trustee compensation. *Longaker v. Evans*, 32 S.W.3d 725, 733 n.2 (Tex. App.—San Antonio 2000, pet. withdrawn). Section 114.064 of the Texas Property Code also provides, "In any proceeding under this code the court may make such award of costs and attorney's fees as may seem equitable and just." TEX. PROP. CODE ANN. § 114.064. Therefore, if a beneficiary sues for breach of the duty of disclosure, a court may order the trustee, individually, to pay the beneficiary's attorney's fees.

Another consequence of a breach of the duty of disclosure, that may lead to other liability, is that limitations may not accrue on an underlying claim. In *Ward v. Standford*, for example, the settlor defaulted on a two million dollar note owed to the trust with the principle due in 2000. 443 S.W.3d 334, 343 (Tex. App.—Dallas 2014, pet. denied). The trustees never raised a claim for the note, and in 2008, a beneficiary sued the trustees for breach of fiduciary duty. *Id.* The trial court granted summary judgment, and the trustees appealed. The Court of Appeals recited the rule that a cause of action generally accrues when 1) a wrongful act occurs that 2) causes some legal injury. *Id.* at 347. In finding that summary judgment was improperly granted, the court stated "just as the question of whether a party breached a fiduciary duty is generally treated as a fact question, we conclude the date on which the Trustees' inaction can be said to cross the line into a breach of their fiduciary obligations to appellant remains a fact question." *Id.* at 348. The Court also held that there were fact issues on the discovery rule and fraudulent concealment. *Id.* at 351–52. Therefore, a decision and communication of that decision by a trustee would have constituted a "wrongful act" that would have started the running of limitations and would have precluded any discovery rule or fraudulent concealment allegations. Despite the ruling on limitations, however, this holding suggests that there may still be liability for other causes of action when a trustee breaches his duty of disclosure. Trustees may also have potential liability for a co-trustee's actions if the trustee does not act with reasonable care. *See* TEX. PROP. CODE ANN. § 114.006. To avoid potential liability, a trustee should exercise reasonable care to prevent a co-trustee from committing a serious breach of trust, and compel a co-trustee to perform similar actions of reasonable care. A trustee may need to seek accountings and disclosures from a co-trustee to meet his duty and to prevent breaches of that duty.

There are mechanisms, however, by which a trustee may avoid potential liability. A beneficiary who has the legal capacity and is acting on full information may relieve the trustee from any duty, responsibility, restriction, or liability, including liability for past violations. TEX. PROP. CODE ANN. § 114.005. Releases are enforceable if the beneficiary has full knowledge of the circumstances surrounding the agreement. § 114.032. However, a court may not enforce a release if disclosure was not adequate. *See, e.g., Hale v. Moore*, 289 S.W.3d 567, 582–83 (Ky. Ct. App. 2008). To be enforceable, release agreements should have detailed disclosures in the recitals, as well as additional disclosures explaining the release language. In defending claims against breach of fiduciary duty or the breach of the duty of full disclosure, a trustee may have other defenses such as consent, acquiescence, laches, ratification, waiver, and estoppel. *See, e.g.*, *Burnett v. First Nat'l Bank*, 536 S.W.2d 600 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.). However, those defenses may not apply where the trustee fails to disclose information.

D. Effective Use of Disclosure Rules by a (Disgruntled) Fiduciary in Litigation

When litigation is threatened, a trustee should marshal together all documents and other information that has been provided to the beneficiaries and create a record of everything that has been disclosed. This preparation will not only enable counsel for the trustee to prepare an adequate defense, but may be effective in either preventing the litigation, or at least shortening the length of a lawsuit if the trustee is sued. For example, a client of the authors received a pre-suit demand entitled "Attorney Ad Litem's Disclosure Requests," which demanded certain disclosures of material information by the authors' client, the trustee, in advance of litigation. An example of the pre-suit demand is attached hereto as Exhibit "A." If a trustee receives a similar demand, it is advisable to comply with the pre-suit disclosure requests as much as the trustee is able to without disclosing any confidential information that the party making the request may not be entitled to receive.

By contrast, however, if a trustee has breached his duty of full disclosure, a response to a pre-suit demand may not be sufficient to avoid liability. For example, in one case litigated by the authors, a trustee provided general ledgers and data reports he created (as opposed to source documents) after the lawsuit was filed that did not tie to any ascertainable values or source documents . Such action by the fiduciary did not constitute helpful disclosure, and did not enable the trustee to avoid exposure. Similarly, if a trustee discloses information in the course of litigation but not before, a beneficiary has strong evidence which supports a finding for a breach of

the duty of disclosure. The books and records of an entity in which a trust owns an interest may also be discoverable in litigation to the extent that such records are within the trustee's possession, custody, and control. *In re Vance*, No. 10-10-00137-CV, 2010 WL 3037578, at *3 (Tex. App.—Waco July 21, 2020, orig. proceeding); *In re Rogers*, 200 S.W.3d 318, 322 (Tex. App.—Dallas 2006, orig. proceeding).

During litigation, disclosure by a trustee is generally provided by 1) requests for disclosure; 2) requests for the production of documents and tangible things; 3) interrogatories, 4) depositions; 5) physical and mental examinations; and 6) access to real property. If a trustee fails to disclose information in the course of litigation, a court may sanction the trustee for failing to disclose when there is an obligation to do so. These sanctions can be severe and may even be case-dispositive. Ultimately, the safest course is to disclose all material facts that may impact a beneficiary's interest—whether requested in discovery or via informal means.

During the course of litigation, certain evidentiary rules apply to lawsuits between a trustee and a person entitled to the disclosure of information by trustee. For example, a plaintiff in a lawsuit who has sued a trustee for a breach of the duty to disclose is not required to have expert testimony to prove such a breach, more specifically, the Corpus Christi Court of Appeals held:

> We cannot conclude that expert testimony is necessary to establish a breach of this simple and straightforward duty. The disclosure of details concerning the Crocker sisters' interest in their father's estate, including the $230,000 from the disputed account, is not outside the common experience and understanding of the average layman. An expert was not required to testify that Wells Fargo, having the fiduciary duty to disclose material facts, should have disclosed information to the beneficiaries concerning the disputed account.

Wells Fargo Bank, N.A. v. Crocker, No. 13-07-00732-CV, 2009 WL 5135176, at *5 (Tex. App. Corpus Christi 2009, pet. denied).

The Texas Supreme Court has also rejected the argument that the attorney work product privilege does not apply in the context of a fiduciary-attorney relationship prior to the time suit is actually filed. The Court pointed out that a fiduciary must be allowed some measure of confidentiality in defending against an anticipated suit for breach of fiduciary duty. Moreover, the Court held that the attorney work product privilege applies regardless of whether the attorney is paid from trust funds or by the trustee personally. *Huie v. DeShazo*, 922 S.W.2d 920, 927 (Tex. 1996).

E. How Much Disclosure is Enough & How Much Disclosure is Too Much

With regard to how much disclosure is enough, the more the better from the standpoint of avoiding fiduciary liability. A breach of disclosure allegation is easy to make, and extremely hard to disprove. Because prudence (and not perfection) is the standard, counsel for a trustee should gather together, and then produce, evidence of pre-litigation disclosure by the trustee whenever possible. The larger the production, the better. Because it is very difficult (if not impossible) to disprove a negative, plaintiff beneficiaries will continue to accuse trustees of failing to disclose. A trustee's disclosure decisions and actions are never absolute, and are always subject to judicial review and control. Judicial review of a trustee's disclosure decisions and actions is always made with the benefit of 20/20 hindsight. As alluded to previously in this article by references to Bogart, Trusts and Trustees and Scott on Trusts, the duty of disclosure is not a concept that is unique to Texas law. Reported case law from throughout the country contain examples, from other jurisdictions, of cases wherein trustees accused of concealing information from beneficiaries are removed despite extraordinarily good investment performance. Bottom line, disclosure is important and constitutes what could be a fatal trap to a well-meaning but uninformed fiduciary. Given this fact, the authors encourage readers to explain, with sufficiency, to their trustee clients the need for regular and recurring disclosure. Such an explanation should also include what types of trust administration matters (see page 26 above) should not be disclosed. From the standpoint of attorneys who are charged with the duty of defending a trustee form a breach of disclosure allegation, the authors recommend that the practitioner work to disprove the allegation by identifying and chronicling previous disclosures which the trustee has made to the beneficiary(ies). Such an action should be relatively simple for the practitioner if the defendant trustee is a corporate fiduciary, and expectantly more difficult if the defendant trustee is an individual.