DEFENDING THE FIDUCIARY: WHAT YOU REALLY NEED TO KNOW

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State Bar of Texas
ANATOMY OF FIDUCIARY LITIGATION
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CHAPTER 13

CURRICULUM VITAE - JOYCE W. MOORE

Born San Antonio, Texas, November 27, 1951; admitted to bar, 1977, Texas; 1980, U.S. District Court, Western District of Texas; 1982, U.S. Supreme Court.

Selected as one of *The Best Lawyers in America* (Commercial Litigation and Trusts and Estates) in 2012, 2011, 2010, 2009, 2008, 2007, 2006, 2005, 2004, 2003, and 2002. Selected as a *Texas Super Lawyer* in 2011, 2010, 2009, 2008, 2007, 2006, 2005, 2004, 2003, 2002, and *Texas Lawyer Go To Guide* 2002 edition - selected as one of the five top probate and trust lawyers in the State of Texas. Selected as the San Antonio *Best Lawyers* – Litigation Trusts & Estates Lawyer of the Year for 2012*;* selected as a *Best Lawyer [Scene in SA]* in 2011, 2010, 2009, 2008, 2007, 2006, 2005, and 2004.

Member of the College of the State Bar of Texas, Litigation Counsel of America, State Bar of Texas Standing Committee on Pattern Jury Charges - Family/Probate, San Antonio Bar Foundation, Bexar County Women's Bar Association, San Antonio Bar Association, Member of the State Bar of Texas District 10A Grievance Committee, July 1986 through July 1992.

Education: North Texas State University (B.A. cum laude, 1973); University of Texas (J.D. with high honors, 1977). Phi Delta Phi; Order of the Coif; Chancellors; University of Texas Law Review, 1977.

Seminar Articles and Presentations (for preceding twelve years only):

Defending Fiduciaries: What You Need To Know, TADC 2012 Annual Meeting, San Francisco, California, September 26-30, 2012

Fiduciary Litigation – Beyond the Basics, Course Director, San Antonio, Texas, December 1-2, 2011

PJC Probate, Trust, and Guardianship Charges – Where Are We Now?, 35th Annual Advanced Estate Planning & Probate Course, Fort Worth, Texas, June 8-10, 2011

Fiduciary Litigation Case Law Update, Trial of a Fiduciary Litigation Case Course, Kerrville, Texas, December 16-17, 2010

Perspective on Protecting the Public Interest in Charity: Will Contests, Common Drafting Errors, Failed Purposed and Founders Syndrome - Panelist, 34th Annual Advanced Estate Planning & Probate Course, San Antonio, Texas, June 2010

Getting the Charge You Want and Arguing it to the Jury, Moderator, and *Voir Dire and Jury Questionnaires* – Panelist, 1st Annual Trial of a Fiduciary Litigation Case, Fredericksburg, Texas, December 2009

Litigation Involving Fiduciaries: Trial Handbook 2009 Probate & Trust Edition, 33rd Annual Advanced Estate Planning & Probate Course, Houston, Texas, June 10-12, 2009

Will Contests 2008, Tarrant County Probate Litigation Seminar, Fort Worth, Texas, September 19, 2008

Releases and Receipts and Judicial Accounting, 32nd Annual Advanced Estate Planning & Probate Course, Dallas, Texas, June 11-13, 2008

Quasi-Fiduciary Duties Between Partners: Hints on Drafting From a Litigator's Perspective, Dallas Bar Association - Probate, Trusts and Estates Section, Dallas, Texas, February 26, 2008

Another Look at Will Contest, Advanced Estate Planning and Probate Course, San Antonio, Texas, June 6-8, 2007 (author)

Risky Business: Recognizing and Managing Risks Associated with Fiduciary Service, 2007 Wealth Management & Trust Conference, Austin, Texas, March 29, 2007 (author)

In's and Out's of Privilege in Probate and Trust Litigation, State Bar of Texas Advanced Estate Planning and Probate Course, Houston, Texas, June 7 - 9, 2006

Show Cause, Contempt, Surcharge, and Injunctive Actions, Speaker, Texas College of Probate Judges Annual Conference, San Antonio, Texas, September 2005

Risky Business: Recognizing and Managing Risks Associated with Fiduciary Service, Financial Women International, Texas District Conference, San Antonio, Texas, April 9, 2005

Probate and Trust Litigation Tips and Tactics, State Bar of Texas Annual Advanced Estate Planning and Probate Course, San Antonio, Texas, June 9 - 11, 2004

1st Annual Fiduciary Litigation Seminar, Course Director and Speaker, Houston, Texas, May 6 - 7, 2004

Will Contests, LAU, Division of the State Bar of Texas, San Antonio, Texas, October 2003

Litigation Involving Fiduciaries: Trial Handbook 2003, Probate and Trust Edition, Advanced Estate Planning Strategies, Las Vegas, Nevada, April 24 - 26, 2003

Another Look at Will Contests, Travis County Bar Association Probate & Estate Planning, March 7, 2003

Hot Topics in Probate and Trust Litigation, State Bar of Texas 26th Annual Advanced Estate Planning and Probate Course, Dallas, Texas, June 5 - 7, 2002

A Different Look at Will Contests, Tarrant County Probate Bar Association, Probate Litigation Seminar, Ft. Worth, Texas, April 26, 2002

A Different Look at Will Contests, Docket Call in Probate Court Seminar, San Antonio, Texas, April 4 - 5, 2002

A Little Different Look at Will Contests, Texas College of Probate Judges, San Antonio, Texas, September 6 - 8, 2001

Will Contests, Procedural Snafus, Trial Tactics, State Bar of Texas 25th Annual Estate Planning and Probate Course, Houston, Texas, June 6 - 8, 2001

The Icing on the Cake - Preparing Your (Carefully Selected) Witness for Deposition and Trial, State Bar of Texas 25th Annual Estate Planning and Probate Course, Houston, Texas, June 6 - 8, 2001

Fiduciary Litigation: How to Avoid, Attack and Defend, Southwestern Legal Foundation 40th Annual Institute on Wills and Probate, Dallas, Texas, May 3 - 4, 2001

Quasi Fiduciary Duties Between Partners: Hints on Drafting From a Litigator's Prospective, Partnerships, Limited Partnerships, and Limited Liability Companies - University of Texas School of Law, Austin, Texas, July 13 - 14, 2000

Litigation Involving Fiduciaries: Trial Handbook 2000, Probate and Trust Edition, State Bar of Texas 24th Annual Estate Planning and Probate Course, Fort Worth, Texas, June 7 - 9, 2000

The Expert Witness in Probate and Trust Litigation, State Bar of Texas 24th Annual Estate Planning and Probate Course, Fort Worth, Texas, June 7 - 9, 2000

Risky Business: Recognizing and Managing Risks Associated with Fiduciary Service, Dallas Estate Planning Council, Dallas, Texas, March 2, 2000

LORA J. LIVINGSTON

Judge Livingston is a 1982 graduate of the UCLA School of Law. She began her legal career as a Reginald Heber Smith Community Lawyer Fellow assigned to the Legal Aid Society of Central Texas in Austin, Texas. After completion of the two-year fellowship program, she continued to work in the area of poverty law until 1988 when she entered private practice with the law firm of Joel B. Bennett, P.C. In 1993, she and S. Gail Parr formed a partnership and opened the law firm of Livingston & Parr. She was engaged in a general civil litigation practice with an emphasis on family law. In January, 1995, she was sworn in as an Associate Judge for the District Courts of Travis County, Texas. After her successful election, Judge Livingston was sworn in as Judge of the 261st District Court in January, 1999. She is the first African-American woman to serve on a district court in Travis County, Texas.

In 1992, she received the "Outstanding Attorney" award from the Travis County Women Lawyers Association. In 2005, she received both the Texas Access to Justice Commission Pro Bono Champion Award and the Texas Equal Access to Justice Foundation Harold F. Kleinman Award. Judge Livingston was also the recipient of the Texas Center for the Judiciary Exemplary Judicial Faculty Award for 2005-2006 and again for 2008-2009. She was awarded the Women of Distinction Award in 2006 by the Lonestar Girl Scouts Council and the Community Service Award in 2007 by the Austin Independent School District.

Judge Livingston is a frequent speaker at continuing legal and judicial education programs and she currently serves as the Dean of the Texas Center for the Judiciary's College for New Judges.

An Active member of the Austin community, Judge Livingston has served on the boards of the Ann Richards School for Young Women Leaders, Capital Area Food Bank, Austin Symphony Orchestra, Austin Tenants Council, Central East Austin Community Organization, YMCA, Austin Area Urban League, and El Buen Samaritano. Judge Livingston is also a graduate of the 1999-2000 class of Leadership Austin.

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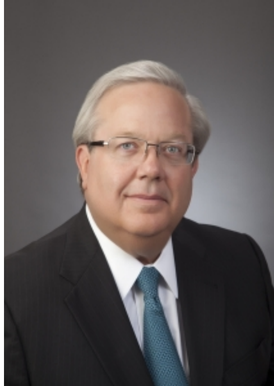


Milton C. Colia is a partner in the firm's Litigation Department. Mr. Colia has over 30 years experience as a trial lawyer, primarily in the areas of insurance defense, personal injury litigation and general commercial litigation including breach of contract, deceptive trade practice, and insurance related matters, such as bad faith claims, coverage disputes, and/or misrepresentation claims made against brokers or agents. Mr. Colia has also defended manufacturers and premises owners in asbestos claims. Mr. Colia has tried numerous jury trials, including death cases and serious injury cases, including amputations and loss of an eye, resulting from trucking and automobile accidents, defective products, and general liability situations.

In 2007 Mr. Colia was listed in The Best Lawyers in America in the area of Commercial Litigation and in the 2008 - 2013 editions listed in the areas of Commercial Litigation and Personal Injury Litigation (now known as Personal Injury Litigation-Defendants). He was also named The Best Lawyers in America 2012 El Paso Commercial Litigation Lawyer of the Year. In the 2003 - 2012 editions Mr. Colia was recognized as a "Texas Super Lawyer" by the publisher Thomson Reuters and of Texas Monthly as well as 2011 Top 50 Central and West Texas Region "Texas Super Lawyer". In 2005 he received, from the American Board of Trial Advocates, the "William Duncan-George McAlmon Civility Award" for professionalism and civility in the practice of trial law.

- Health Care

Professional Affiliations

Mr. Colia is a Fellow in the American College of Trial Lawyers. He is also a member of the American Board of Trial Advocates. He is currently serving as Treasurer for the Texas Association of Defense Counsel and has served as an Area Director and West Texas Vice President for the organization in the past. In addition, Mr. Colia is a Fellow of the Texas Bar Foundation and a member of the American Bar Association, the State Bar of Texas and the El Paso Bar Association.

Bars & Courts

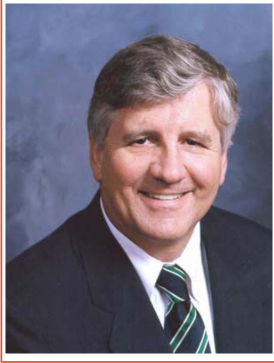
- Texas, 1978
- New Mexico, 1999
- Colorado, 2000
- U.S. District Court, Northern District of Texas
- U.S. District Court, Western District of Texas
- U.S. Court of Appeals, Fifth Circuit

Education

- Texas Christian University, B.B.A., 1975
- Texas Tech University School of Law, J.D., 1977
- **Military Service** - USAF -Judge Advocates Corp - 1978-1982

Certifications

- Board Certified, Civil Trial Law, Texas Board of Legal Specialization
- Board Certified, Personal Injury Trial Law, Texas Board of Legal Specialization



Patton G. Lochridge
Partner

Pat Lochridge has a broad-based litigation practice with significant experience in technology, oil and gas class actions, antitrust, professional malpractice, intellectual property, and business disputes. Pat is head of the firm's Intellectual Property & Technology Litigation Practice Group. Born in the Rio Grande Valley, Pat has extensive experience successfully litigating across Texas, from South Texas to Dallas, Houston, San Antonio and Austin. He was managing partner of the firm from 2000 until 2010. Pat has been listed in *The Best Lawyers in America* in commercial litigation (1993), natural resources law (1995), oil and gas law (1993), bet-the-company litigation (1993) and energy law (1993). Pat has been recognized by *Texas Law & Politics* as a "Texas Super Lawyer" in civil litigation defense (2005) and energy and natural resources (2006-2013), and as a "top-notch Lawyer" in energy law (2002) by *Texas Lawyer*. He was also recognized by *Best Lawyers* as Lawyer of the Year for Bet the Company Litigator in Austin, Texas (2009) and Austin Best Lawyers Oil & Gas Lawyer of the Year (2011).

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Practice Areas
- Litigation
- Oil & Gas
- South Texas
- Antitrust
- Securities Litigation & Arbitration
- Intellectual Property & Technology Litigation
- Legal Malpractice Litigation

Representative Experience

- Represented royalty owner and received jury verdict and judgment against oil company in East Texas.
- Represented Fortune 500 staff leasing company in breach of contract case against insurance company; received favorable verdict and judgment for client and take nothing judgment on insurance company's $30-million counterclaim.
- Defended international electronics firm in patent licensing case; Plaintiff sought damages in excess of $200 million; jury found no damages.
- Defended major oil company in various class actions in Oklahoma and Kansas.
- Defended computerized print and mail company on fraud and breach of contract case; received defense verdict for client, plus favorable verdict on client's counterclaim.
- Represented hotel company in business disparagement and tortious interference case against international accounting and consulting firm; received verdict and judgment for client in Webb County.
- Represented independent oil and gas exploration company in misappropriation of confidential information case; received multi-million dollar verdict and judgment for client in Webb County.
- Represented major pipeline company in insurance coverage case and received multi-million dollar verdict and judgment for client.
- Represented South Texas family against major oil company on royalty claim in Duval County; received confidential eight-figure settlement for client.
- Represented South Texas physician in antitrust action against member of nationwide chain of hospitals and received favorable confidential settlement during trial for client.
- Defended hospital against antitrust claims of a group of doctors; received judgment for hospital on all antitrust claims, affirmed by Fifth Circuit.
- Defended real estate developer in $44-million fraud and breach of fiduciary duty case. The Court dismissed case during trial and client was awarded

attorney's fees against plaintiff.

- Represented publicly traded software company and publicly traded photomask company in separate trade secret cases, both based on inevitable disclosure doctrine, and received favorable confidential settlements for each client.
- Represented Hong Kong-based OEM manufacturer against one of world's largest makers of personal computers; recovered multi-million dollar damages for client.
- Defended specialty chemical company in product liability case brought by major chip manufacturer, received favorable jury verdict for client.
- Successfully defended various major oil companies in royalty litigation in several South Texas counties.
- Successfully defended several different major law firms in securities, class action and malpractice cases.
- Served as counsel for numerous technology companies in patent cases in the Western District of Texas.

Activities

- United States District Court, Western District of Texas, Austin Division (Chairman, Admissions Committee, 1995-2004)
- United States District Court (Chairman, Committee on Court Administration, 1986-97)
- American College of Trial Lawyers, Fellow
- American Bar Association
- American Board of Trial Advocates
- Austin Bar Association
- St. Andrew's School, Board of Trustees (1986-89)
- Salvation Army, Board of Trustees (1998 to present)

Professional Background

- The University of Texas School of Law, J.D 1976 (with high honors; Chancellors; Order of the Coif; Phi Delta Phi; Associate Editor, *Texas Law Review*)
- Princeton University and The University of Texas at Austin, B.A 1972
- Law Clerk: Judge Joseph T. Sneed, United States Ninth Circuit (1976-77)
- Admitted to Practice: Texas; Oklahoma; United States Court of Appeals for the Fifth Circuit; United States District Courts for the Eastern, Northern, Southern, and Western Districts of Texas
- Other Language: Spanish

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Exhibit A – Pattern Jury Charges: "Business" or General Fiduciaries

Exhibit B – Pattern Jury Charges: Trustees

DEFENDING THE FIDUCIARY: WHAT YOU REALLY NEED TO KNOW

I. IS YOUR CLIENT A FIDUCIARY?

A. Yes: Some relationships are deemed to be "fiduciary" in nature as a matter of law. Some examples:

- Trustees of Express Trust. See Texas Trust Code [Property Code Title 9]

- Probate Code Fiduciaries: Executors, Administrators of Estates [Tex. Prob. Code Chapters VI and VII; *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); *Humane Society Etc. v. Austin Nat'l Bank*, 531 S.W.2d 57 (Tex. 1975)], Guardians [Tex. Prob. Code Chapter XIII]; *Portanova v. Hutchinson*, 766 S.W.2d 857 (Tex.App.-Houston [1st Dist.] 1989, no writ history.)

- Litigation Fiduciaries: Next Friends (TRCP 44) and Guardian Ad Litems (TRCP 173). *Murray v. Templeton*, 576 S.W.2d 138 (Tex.Civ.App.-Texarkana 1978 n.r.e.).

- Attorneys: Attorneys are said to owe one of the "highest" fiduciary duties recognized by law to their clients requiring proof of "perfect fairness" on the part of the attorney. *Archer v. Griffith*, 390 S.W.2d 735; *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999); *Cooper v. Lee*, 12 S.W. 438 (Tex. 1889).

- "Convenience Account" Payees: Duties are owed by the convenience signor to the owner of account. See, *Dorman v. Arnold*, 932 225, 230 (Tex.App.Texarkana 1996, no writ)(concurring opinion by Justice Grant).

- "General" Agents/Employees: Duties are owed to principal or employer. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942); *Scott v. Weaver*, 2 S.W.2d 870 (Tex.Civ.App.Austin 1927, writ denied)

- Corporate Officers and Directors: Duties are owed to the corporation. *International Bankers Life Ins. Co. V. Holloway*, 368 S.W.2d 567 (Tex. 1963); Tex. Bus. Orgs. Code §§ 21.418 and 22.226.

- Attorney in Fact: An "attorney in fact" under a power of attorney owes fiduciary duties to the principal. See Tex. Prob. Code Section 489(1); *Stephens County Museum Inc. v. Swenson*, 517 S.W.2d 257, 259–60 (Tex. 1974); *Vogt v. Warnock*, 107 S.W.3rd 778 (Tex.App.-El Paso 2003, pet. denied).

- Real Estate Agents: are the fiduciary agents of the person who hires them. *Anderson v. Griffith*, 501 S.W.2d 695 (Tex.Civ.App.-Ft. Worth 1973, writ ref. n.r.e.).

- Licensees: In *Hyde Corporation v. Huffines*, 314 S.W.2d 763,769 (Tex.1958) the Texas Supreme Court held that a ***licensee*** owed a fiduciary duty to its ***licensor***.

B. No: Absent a relationship of "trust and confidence" which pre-dates the agreements or documents creating these relationships, there is no "fiduciary" relationship "as a matter of law" in these instances. Remember, however, that proof of a "factual" fiduciary or confidential relationship is still a possibility in these cases. See D below.

- Debtor-Creditor: No fiduciary duties in banking loan or depository relationships. See, *Brazosport Bank of Texas v. Oak Park Townhomes*, 889 S.W.2d 676 (Tex.App.Houston [14th Dist.] 1994, writ denied).

- Trustee Under Deed of Trust: Must act with impartiality, but does not owe special "fiduciary" duties to mortgagor. See, *First State Bank v. Keilman*, 851 S.W.2d 914, 925 (Tex.App.Austin 1993, writ denied).

- Co-Tenants: Co-tenants of property do not owe fiduciary duties to each other but may be required to account for income and expenses. See, *McDonald v. Follett*, 180 S.W.2d 334 (Tex. 1944).

- Shareholder to other shareholder: As a general rule shareholders to not owe fiduciary duties to each other. *Scoellkopf v. Pledger*, 739 S.W.2d 914 (Tex.App.-Dallas 1987, rev'd on other grounds, 762 S.W.2d 145 (Tex. 1988)). The rule may be different; however, in cases involving majority and minority shareholders if the conduct of the majority shareholder is tantamount to "oppression". *Patton v. Nicholas*, 279 S.W.2d 848 (Tex. 1955).

- Accountants to clients: Generally not considered to owe fiduciary duties to clients. See e.g. *Sauvers v. Christian*, 253 S.W2d 470 (Tex.Civ.App.-Ft. Worth 1952, writ ref.n.r.e).

- Franchisor to Franchisee: In *Crim Truck & Tractor v. Navistar Int'l. Transp. Corp.*, 823 S.W.2d 591 (Tex. 1992) the Supreme Court refused to hold that a franchisor owed a fiduciary duty to his *franchisee* as a "matter of law".

- Manufacturer to Distributor: In *Adolph Coors Company v. Rodriguez*, 780 S.W.2d 477 (Tex. App.-Corpus Christi1989, writ denied), the Corpus Court of Appeals rejected any imposition of a duty of good faith and fair dealing between a beer manufacturer and one of its former *distributors* finding that "no special relationship" existed between the parties in the case.

- Hospital to Physician: The Dallas Court of Appeals rejected the claim of a *physician* that the *hospital* who had granted him staff privileges owed him a fiduciary duty, even though the physician may have subjectively "trusted" the hospital staff and personnel to "complete his orders" so that his patients "could recover". *Gillum v. Republic Health Corp.*, 778 S.W.2d 558 (Tex. App.-Dallas 1989, no writ).

- Promoter to Potential Investors: A "promoter" of a potential corporation does not owe a fiduciary duty as a "matter of law" to potential investors. *Flores v. Star Cab Co-op Ass'n Inc.*, 2008 WL 3980762 (Tex.App.-Amarillo 2008, pet. stricken)(mem. op.). See also, *Kapur v. Goldstein*, 2003 WL 1848559 (Tex.App.-Houston (1st Dist.) 2003, no pet.)(mem. op.) (an investor in an oil and gas production securities project failed to establish a fiduciary relationship with either his friend or the principal of the project.)

- Doctor to Patient: In *Hart v. Wright*, 16 S.W.3rd 8 72 (Tex.App.-Ft. Worth 2000, pet. denied) a patient's attempt to cast his medical malpractice claim as a breach of fiduciary duty action was rejected by the Court on the grounds that the patient had failed to cite any case law or statutory authority to support their claim of a fiduciary relationship between doctor and patient.

- Bailor to Bailee: A *bailment* generally does not create a formal, fiduciary relationship between bailee and bailor. *Bank One, Texas N.A. v. Stewart*, 967 S.W.2d 419, 442 (Tex.App.-Houston [14th Dist.] 1998, pet. denied); *Prime Products, Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3rd 631 (Tex.App.-Houston [1st Dist.] 2002, pet. denied).

- Professor to Student: In *Ho v. Univ. of Texas at Arlington*, 984 S.W.2d 672 (Tex.App.-Amarillo 1998, no writ) the Court of Appeals rejected a contention that a professor owes his or her student fiduciary duties as a matter of law and took care to point out that the "usual" job duties of a professor in "teaching, supervising, advising and evaluating" the student should not be misconstrued when determining if a "factual" fiduciary relationship exists.

- Employer to Employee: In line with the strong policy in Texas of upholding "at will" employment, there is no fiduciary duty "as a matter of law" owed by *an employer to his employee*. *Federal Express Corp v. Dutschmann*, 846 S.W.2d 282, 284 n.1 (Tex. 1993); *S.I. Choi v. McKenzie*, 975 S.W.2d 40 (Tex. App.-Corpus Christi 1998, no writ); *Hallmark v. Port/Cooper*, 907 S.W.2d 586 (Tex. App.-Corpus Christi 1995, no writ). One narrow "exception" to this rule may be in the law firm context. *Bray v. Squires*, 702 S.W.2d 266, 270 (Tex.App. - Houston [14'" Dist.] 1985, no writ)(holding that a named *partner in a law* firm may have a duty to make full disclosure to his *associates* about matters affecting firm business). *But see, Kline v. O'Ouinn*, 874 S.W.2d 776 (Tex. App. Houston [14th Dist.] 1994 writ denied)(no

fiduciary relationship between two attorneys working together under a "fee splitting" agreement).

C. Sort of: The following were formerly considered to be "fiduciary" relationships as a matter of law. Now, due to legislative enactments and/or contractual modifications of the "common law" rules, they bear little resemblance to traditional fiduciary relationships. In cases involving these relationships, never assume common law fiduciary duties are applicable.

- Partners: The traditional fiduciary duty of full disclosure is now limited to "reasonable access to books, records and other information on request," to the extent just and reasonable. Tex. Bus. Orgs. Code §§ 152.212 and 152.213. The duty of loyalty does not prohibit the pursuit of self-interest by the partners. Tex. Bus. Orgs. Code §§ 152.204(c)(d) and 152.205.

- Joint Venturers: Same rules as Partners. See Bus. Orgs. Code § 152.01 (which applies general partnership law to joint ventures).

- Escrow Agents: duties may be owed to both sides but usually exclusively defined by the terms of the escrow agreement. See, *City of Ft. Worth v. Pippin*, 439 S.W.2d 660 (Tex. 1969); *Bill v. Safeco Title Ins. Co.*, 830 S.W.2d 157, 160-11 (Tex.App.Dallas 1992 writ denied).

- Stockbrokers: Duties are defined by the "fine print" in brokerage agreements. The scope of duty owed to the client depends on whether it is a "directed" or "discretionary" account. See, *Western Reserve Life Assurance Company of Ohio v. Graber*, 233 S.W.3d 360 (Tex.App.-Ft.Worth 2007, no pet.).

- Husband and Wife:

  a. Community Property Claims: there are "fiduciary" duties owed by spouses in connection with the management of their community property but these claims can be enforced only in context of property division upon divorce. *Schlueter v. Schuelter*, 975 S.W.2d 584, 585 (Tex. 1998).

  b. Separate Property – Apparently there is no fiduciary duty owed by one spouse to the other when dealing with his/her own separate property. *Cleaver v. Cleaver*, 935 S.W.2d 491, 496 (Tex.App.-Tyler 1996 no writ hist.).

D. Maybe: Sometimes the "fiduciary" relationship may be a "Fact Question" [a/k/a "Confidential Relationships].

When establishing a "factual" relationship of trust and confidence" the focus should be on the Defendant's acts – usually requiring a voluntary assumption of a position of trust and confidence

with another. One of the most succinct definitions of a "factual" fiduciary was provided by the Dallas Court of Appeals in *Heutt v. State*, 970 S.W.2d 119 (Tex.App.-Dallas 1998, no writ), a case involving charges of criminal misapplication of fiduciary property:

> "In common parlance, "fiduciary" refers to a person or entity having a duty, *created by his undertaking*, to act primarily for another's benefit in matters connected to the undertaking." (emphasis added)

This definition appropriately focuses on the voluntary nature of the defendant's acts (or "undertaking") in the creation of the relationship. Other courts have been less successful in pinpointing just what facts will, or will not, result in the creation of a "fiduciary relationship":

> A fiduciary relation is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, nor to other recognized legal relations, but it exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed, and the origin of the confidence is immaterial, and may be moral, social, or domestic, or merely personal. (citation omitted)... a fiduciary relationship exists when the parties are "under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation. Restatement, Torts, Section 874. It exists where a special confidence is reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." (citation omitted)... The problem is one of equity and the circumstances out of which a fiduciary relationship will be said to arise are not subject to hard and fast lines.

Texas Bank and Trust Co. v. Moore, 595 S.W.2d 502, 507-508 (Tex. 1980).

Nevertheless, each of these definitions focus on what is often overlooked by litigators who think they have a "fiduciary" case simply because their client "trusted" the defendant. Subjective trust by one party isn't the test. ***To be tagged as a "fiduciary" the defendant must, by some overt or affirmative act on his part ("some undertaking"), give the plaintiff a reasonable basis to believe that the defendant would act solely in the plaintiff's best interests.*** So, even though a fiduciary relationship may arise "from moral, social, domestic or purely personal relationships", *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Swanson v. Schlumberger Technology Corp.*, 959 S.W.2d 171, 176 (Tex. 1997), antecedent dealings between persons, or the mere fact that one subjectively trusts the other, while significant factors, do not alone justify the plaintiff in reposing confidence in another person in the sense demanded by a fiduciary relationship. See, *Crim Truck & Tractor Co. v. Navistar Int'l Transport Corp.*, 823 S.W.2d 591, 594-595 (Tex. 1992)(even though every contract "includes an element of confidence and trust that each party will faithfully perform his obligation under the contract", a party to a contract is still "free to pursue its own interests, even if it results in

a breach of contract, without incurring tort liability"); *English v. Fisher*, 660 S.W.2d 521 (Tex. 1983)(Rejecting the concept that an obligation of "good faith and fair dealing" should be implied in every contract); *Meyer v. Cathay*, 167 S.W.3d 327, 331 (Tex. 2005)(Texas does not "lightly" impose fiduciary duties on contractual relationships). Moreover, to impose a fiduciary relationship in what is essentially a business transaction, there must be a finding of a fiduciary relationship existing before and apart from the agreement made the subject of the suit. See, *Meyer v. Cathay*, 167 S.W.3d 327, 331 (Tex. 2005); *Swanson v. Schlumberger Technology Corp.*, 959 S.W.2d 171, 176 (Tex. 1997); *Insurance Co. of North America v. Morris*, 981 S.W.2d 667 (Tex. 1998); *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333 (Tex. 1966); *Assoc. Indem Corp v. CAT Contracting*, 964 S.W.2d 276, 287-288 (Tex. 1998); *Carr v. Weiss*, 984 S.W.2d 753 (Tex.App.-Amarillo 1999, pet. denied).

Even though each case will be decided on the "facts", there are some general factors which may "trigger" the fiduciary claim.

- Extended Family Members
- Romantic Relationships
- Parent-Child Relationships
- Brother-Sister Relationships
- Same Sex Partners
- Professional Relationships (other than attorney client) involving an extended course of dealing.

2. WHAT "LAW" WILL APPLY TO YOUR CASE?

The nature and scope of the fiduciary's "duties", the potential affirmative defenses, the types of damages and potential for other "equitable" relief will vary depending on the type of fiduciary involved, the language of the instrument (if any) under which the fiduciary operates, the language of the statutory law applicable to the case and/or any judicial precedents applicable to the situation. ***Never assume that the "law" applicable to one fiduciary defendant will be equally applicable to the next defendant.***

A. Sources of "Fiduciary" Law

There are three primary sources of "law" applicable to breach of fiduciary duty cases in Texas:

1. The instrument creating the relationship. (*i.e.*, the Trust, the Will, the Partnership Agreement, Corporate By-Laws);

2. Statutes applicable to the specific type of fiduciary. (For example: Probate Code; Guardianship Code; Texas Trust Code; Bus. Orgs. Code); and,

3. The "common law" of fiduciary liability to the extent it has not been altered or superseded by the instrument or by statute. See e.g. Tex. Prob. Code § 32; Tex. Prop. Code 111.005 and 113.051; Bus. Orgs. Code Section 152.003.

B. Priorities in Application

In most cases, *all three* of these sources will be involved; in many cases they may seem to require different results. The general rules of ***priority*** in the event of a "conflict" are as follows:

1. "Creation Document" The terms of the instrument control, unless to do so would be against "public policy." See, e.g. Tex. Prop. Code 111.002, 111.0035, and 112.031 (setting default rules and restrictions on modification of duties, and providing that obligation to act in "good faith" and in accordance with the purpose of the trust cannot be modified or eliminated), see, Bus. Orgs. Code Section 152.002 (placing restrictions on the partners right to alter the statutory obligations of care, loyalty and good faith by agreement).

2. "Applicable Statute" If there is no "instrument," or if it is silent on a particular subject, the provisions of any applicable statute will control. Statutes are also considered to be ultimate (or current) expression of "public policy."

3. "Common Law" To the extent not expressly altered by either the instrument or by statute, the "common law" will apply.

3. WHAT ARE THE BASIC CATEGORIES OF FIDUCIARY DUTIES?

The classic definition of "fiduciary" conduct was penned by Justice Cardozo in the case of *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545-546, 62 A.L.R. 1 (1928):

> Many forms of conduct permissible in a workaday 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. ...

See also: *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.-Fort Worth 1967, writ ref'd n.r.e.). There are no hard and fast rules defining what "duties" are required of a fiduciary, and, to a great extent, the duties will vary depending on the type of fiduciary involved, the terms of the "creation document" and applicable statutes. Generally speaking, however, the duties of a

"fiduciary" may be roughly categorized under four main headings with an overriding obligation to act in "good faith." [*Caveat*– these are the "common law" concepts which may be modified and in some cases eliminated by the "creation" document.]

1. The Duty of Competence – generally a fiduciary is required to act as an ordinary prudent person would act in the conduct of his affairs. An "expert" or professional fiduciary may be held to a somewhat higher standard of care. Note: the duty of competence is often addressed and modified in documents and agreements creating the fiduciary relationship or by statute.

2. The Duty to Reasonably Exercise Discretion – any fiduciary decision must be made based on due diligence and reasonable information. Decisions should not be arbitrary. No "discretion" is absolute no matter what the document says. *Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752, 754 (Tex. 1980) A fiduciary may seek court instructions if in doubt. *American Nat'l Bank of Beaumont v. Biggs*, 274 S.W.2d 209, 211 (Tex.Civ.App.-Beaumont 1954 writ ref'd n.r.e.).

3. The Duty of Loyalty – The duty of loyalty demands that the fiduciary at all times place the interests of the beneficiary above his own. Strictly applied, the duty of loyalty prohibits the fiduciary from using the advantage of his position to gain any benefit for himself at the expense of the beneficiary and prohibits him from even placing himself in any position where his self interest will or may conflict with his obligations as a fiduciary. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). Any transaction where the fiduciary utilizes or takes the trust property for his own benefit is considered to be "self-dealing". Any self-dealing by a fiduciary, whether it be acquiring an interest in "trust" property, making a side-profit or fee in a transaction involving the trust property, accepting a "gift" from the beneficiary, or taking advantage of an opportunity that presents itself as a direct or indirect result of the fiduciary relationship, will give rise to a *"presumption of unfairness"* and likely result in the imposition of a harsh liability standard against the fiduciary. *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980); *Pace v. McEwen*, 574 S.W.2d 792 (Tex. Civ. App.-San Antonio 1978, writ ref'd n.r.e.). Indeed, the mere "aura" of self-dealing may be sufficient to sustain a finding of breach of fiduciary duty, even if the trust has suffered no damages, *City of Fort Worth v. Pippen*, 439 S.W.2d 660 (Tex. 1969), *and* even if the fiduciary has acted in good faith. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945).

Although historically it was felt to be contrary to "public policy" to authorize a fiduciary to "self-deal", the Texas Supreme Court changed this "rule" in *Texas Commerce Bank v. Grizzle*, 96 S.W.3rd 240 (Tex. 2003) when it held that the "public policy" of Texas did not prohibit self-dealing by trustees if expressly authorized by the settlor of the trust. [The legislature then responded to Grizzle with the "limits" now found in Tex. Prop. Code § 111.0035 (Mandatory Rules) and Section 114.007 (Exculpation of Trustee). As a result, today Trustees can be authorized to engage in self-dealing transactions but cannot be exculpated from liability for breach of fiduciary duty if committed in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary. Texas Property Code § 114.007(a).]

Partners can also be permitted to self-deal to a certain extent by the terms of the partnership agreement. See Texas Bus. Orgs. Code § 152.205; 152.002(b)(2). Indeed, Tex. Bus. Orgs. Code Section 152.204(c) expressly provides that "a partner does not violate a duty under [the statute] or the partnership agreement merely because the partner's conduct furthers to the partner's own interest.

4. The Duty of Full Disclosure – A fiduciary has much more than the traditional obligation not to make any material misrepresentations, he 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. *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942); *City of Fort Worth v. Pippen*, 439 S.W.2d 660 (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 (Tex. 1988). The beneficiary *is not* required to prove the elements of fraud, *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965); *Langford v. Shamburger*, 417 S.W.2d 438, (Tex. Civ. App.-Fort Worth 1967, writ ref'd n.r.e.), and need *not even prove that he "relied"* on the fiduciary to disclose the information. *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938); *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 (Tex. 1945); *City of Fort Worth v. Pippen, supra*. The fiduciary duty of full disclosure operates before and after litigation has been filed and is in addition to any obligations of disclosure imposed by the "discovery" provisions of the Texas Rules of Civil Procedure. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984).

5. The Obligation of "Good Faith" – although the legislature has given substantial freedom to partners, settlers of trusts and others creating "fiduciary" relationship by written document to modify and/or eliminate most of the common law fiduciary duties, no "agreement" can eliminate the requirement that the fiduciary act in good faith. See e.g. Tex. Prop. Code § 111.0035 (b)(4) (B) (Trustees) and Bus. Orgs. Code § 152.002 (b)(4) (Partners).

4. WHO HAS THE BURDEN OF PROOF AT TRIAL?

A. It Depends on the Issue Presented

In fiduciary litigation, the burden of proof will shift, depending on which duties are involved: therefore, it is helpful to categorize the fiduciary duties into two main groups, each with two primary duties:

1. (a) The duty of competence; and (b) the duty to reasonably exercise discretion(corresponding to the principle that *"fiduciary law does not demand absolute perfection in judgment");* and.
2. (a) The duty of loyalty; and (b) the duty of full disclosure (corresponding to the principle that *"fiduciary law does demand absolute loyalty and absolute honesty ".)*

- In cases falling within the ***first*** *category* (breach of the duty of competence or the duty to reasonably exercise discretion) the defendant fiduciary is *not* usually placed in a posture at trial which is significantly different from other non-fiduciary defendants - the burden of proof remains on the plaintiff.
- In the ***second category***, however, (breach of the duty of loyalty or breach of the duty of full disclosure) the defendant fiduciary will face a trial "turned upside down," because in this category the burden of proof to *negate* the "breach" is placed on the fiduciary.

B. Specific Questions

1. Existence of Relationship – does a fiduciary duty exist under the facts of the case? The burden is on the plaintiff to prove the relationship is a "fiduciary" one.

2. Duty of Competence – every fiduciary has a general duty to manage or invest the fiduciary property in a reasonable and prudent manner. In a claim based on negligent handling or management– the plaintiff has burden to show fiduciary *failed to comply* with his duty.

3. Duty of Loyalty – a fiduciary is generally prohibited from benefitting from his fiduciary service at the expense of the fiduciary estate in a "self-dealing" transaction, the presumption of unfairness arises and the burden shifts *to the fiduciary* to *prove he complied with his duty.*

4. Duty of Full Disclosure– in general the fiduciary has a duty to disclose to the "beneficiary" all material information which effects the beneficiary's interest. Who has the burden on this question can be complicated.

A. Was the non-disclosed information a *material fact affecting the beneficiary's interest*? Some would argue this burden is on the plaintiff, but it is not clear.

B. If the fact is clearly material, then burden is on fiduciary to prove full disclosure. [Safer Route: the defending fiduciary should always be prepared to show that whatever he did not disclose was not a material fact which needed to be disclosed to this particular beneficiary.]

5. Duty of Good Faith– since this usually arises in connection with a self-dealing transaction the burden will be on the fiduciary– but if part of a "negligence" or competence question, the burden of proof should be on the plaintiff.

6. The Good News: There are Pattern Jury Charges So Use Them:

A. "Business" or General Fiduciaries: [Attached hereto as **Exhibit A**]

PJC 104.1 Question and Instruction – Existence of Relationship of Trust and

Confidence

PJC 104.2 Question and Instruction – Breach of Fiduciary Duty with Burden on Fiduciary (Self-Dealing Transactions/Failure to Disclose)

PJC 104.3 Question and Instruction – Breach of Fiduciary Duty with Burden on Beneficiary [This is a "new" PJC – not really clear yet whether it is correct.]

B. <u>**Trustees**</u>: [Attached hereto as **Exhibit B**]

PJC 235.9 Breach of Duty by Trustee – Other than Self-Dealing

PJC 235.10 Breach of Duty by Trustee – Self-Dealing – Duties not Modified or Eliminated by Trust

PJC 235.11 Breach of Duty by Trustee – Self-Dealing – Duties Modified but not Eliminated by Trust

PJC 235.12 Breach of Duty by Trustee – Self-Dealing – Duty of Loyalty Eliminated

PJC 235.13 Remedies for Breach of Fiduciary Duty (Comment)

PJC 235.14 Actual Damages for Breach of Trust

PJC 235.15 Exculpatory Clause

5. YES, THERE IS AN ATTORNEY-CLIENT PRIVILEGE SO DON'T BLOW IT.

A. Even though the fiduciary is acting "for" others, the law is clear that the *fiduciary* is the client in the attorney-client relationship. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

B. Be careful not to confuse the issue by letting the beneficiaries think you are "their" lawyer. *Vinson Elkins v. Moran,* 946 S.W.2d 381, 402 (Tex.App.-Houston [14th Dist.] 1997, writ dismissed)(If attorney for executor undertakes to perform legal services for one of the beneficiaries, an attorney client relationship may be implied).

C. The attorney client privilege covers only "communications" so it does not mean that the fiduciary is relieved of his independent existing obligation to make full disclosure of all material facts to the beneficiary. *Huie v. DeShazo,* 922 S.W.2d 920 (Tex. 1996).

D. The attorney client privilege may be invoked by "offensive use". *Republic Ins.*

Company v. Davis, 856 S.W.2d 158 (Tex. 1993). So be careful before invoking the "advice of counsel defense" found in some creation documents.

6. THE IMPACT OF THE FIDUCIARY DUTY OF "FULL DISCLOSURE" IN LITIGATION

A. Informal Discovery from the Fiduciary under the "Full Disclosure" Duties

1. Full disclosure exists independent of litigation [*Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).]

2. May be governed by applicable statute–
Examination of books and records – Partnerships/JV's
Statutory Accountings – trustees/executor/Attorney's-in-Fact

3. May also be dictated by the agreement or creation document.

4. May impact (broaden) the scope of discovery once litigation is filed.

B. Affirmative Defenses Affected by the Duty of Full Disclosure

1. The Statute of Frauds – The Statute of Frauds is not a defense to an action based on breach of fiduciary duty. *Turner v. PV Intern. Corp.*, 764 S.W.2d 455 (Tex. App.-Dallas 1988) writ denied per curiam, 33 Tex. Sup. Ct. J. 7 (October 7, 1989) (on unrelated issue); *Sibley v. Southland Life Ins. Co.*, 36 S.W.2d 145 (Tex. 1931); *Omohundro v. Matthews*, 341 S.W.2d 401 (Tex. 1960) (statute requiring an express trust to be in writing will not bar the imposition of a constructive trust based on an oral agreement between parties in a fiduciary relationship.); *King v. Devans*, 791 S.W.2d 531 (Tex. App.-San Antonio, 1990, writ denied) (When land is acquired for partnership purposes but is held in one partner's name, partnership's claim to land is not barred by absence of written document of conveyance.); *Carr v. Weiss*, 984 S.W.2d 753 (Tex.App.-Amarillo 1999, pet. denied)(pre-existing fiduciary relationship allows proof of oral agreement otherwise barred by Statute of Frauds).

2. Res Judicata/Bill of Review – Because the fiduciary duty of "full disclosure" is broad and absolute, the affirmative defense of res judicata will *not* be available to any fiduciary who *withheld pertinent information or who furnished incorrect information in a prior suit. Thomas v. Hawpe*, 80 S.W. 129 (Tex. Civ. App.-Dallas 1904, writ ref'd) (Temporary Administrator who furnished false information in accounting filed with court could not rely on res judicata); *see also, Portanova v. Hutchinson*, 766 S.W.2d 856 (Tex.App.-Houston [1st Dist.] 1989, no writ) *and In Re Higganbotham's Estate*, 192 S.W.2d 285 (Tex.Civ.App.-San Augustine 1946, no writ) (annual accountings filed by guardians can be reopened and attacked); *Gordon v. Terrance*, 633 S.W.2d 649

(Tex.App.-Houston [14th Dist.] 1982, writ ref'd n.r.e.) (an order removing a probate code personal representative is not a res judicata bar to a subsequent suit for damages for breach of fiduciary duty.). Simarily, *a fiduciary's concealment of a material fact,* used to induce an agreed or uncontested judgment which prevents the beneficiary from presenting his legal rights at trial has been expressly held to constitute *"extrinsic" fraud* justifying an *equitable bill of review proceeding, Montgomery v. Kennedy*, 669 S.W.2d 309, 311-314 (Tex. 1984).

3. Accord and Satisfaction – The duty of full disclosure applies to any settlement made while the fiduciary relationship continues. The existence of strained relations between the parties will not lessen the fiduciary obligations of full disclosure and fair dealing. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *Montgomery v. Kennedy, supra*; *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938). In order to prevail on a defense of accord and satisfaction the fiduciary must show that **(a)** a bona fide controversy existed between himself and his principal, and, **(b)** that in making the settlement, the fiduciary acted in good faith and did not take advantage of his position. *King v. Cliett*, 31 S.W.2d 350 (Tex. Civ. App.-Waco 1930, no writ); *Lopez v. Munoz, Hockema & Reed*, 22 S.W.3rd 857 (Tex. 2000). Even then, if the settlement is unfair to the principal any jury finding of accord and satisfaction will be rendered immaterial. *Thywissen v. Cron*, 781 S.W.2d 682 (Tex. App.-Houston [1st Dist.] 1989, writ denied); *Trevino v. Brookhill Capital Resources*, 782 S.W.2d 279 (Tex. App.-Houston [1st Dist.] 1989, writ denied) (Escrow agent's breach of fiduciary duty superseded its accord and satisfaction defense); *cf. Burton Mill & Cabinet Works v. Truemper*, 422 S.W.2d 825 (Tex. Civ. App.-Waco 1967, no writ).

4. Release/Discharge – Before a fiduciary will be able to rely on the affirmative defense of "release", he will also have to establish that the release was obtained only after full disclosure of all material facts known to the fiduciary. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945); *Tricentrol Oil Trading, Inc. v. Annesley*, 809 S.W.2d 218, 221 (Tex. 1991) (*per curiam*); *Swanson v. Schlumberger Technology Corp.*, 895 S.W.2d 719 (Tex. App.-Texarkana 1994, rev'd. o.g.); *Swanson v. Schlumberger Technology Corp.*, 959 S.W.2d 171 (Tex. 1997)). For two cases in which the fiduciary was able to convince the court that the requirement of "full disclosure" had been met for estoppel or consent purposes, see *Beaty v. Bales*, 677 S.W.2d 750 (Tex.App.-San Antonio 1984, writ ref'd n.r.e.); *and, Burnett v. First Nat. Bank of Waco*, 567 S.W.2d 873 (Tex. Civ. App.-1978, writ ref'd n.r.e.).

5. Estoppel – The fiduciary duty of full disclosure requires the fiduciary defendant to prove that any acquiescence in his actions by the beneficiary for "estoppel" purposes *occurred after, and in spite of, "full and complete disclosure" by the defendant. Langford v. Shamburger*, 417 S.W.2d 438, 446-447 (Tex. Civ. App.-Fort Worth 1967, writ ref'd n.r.e.); *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). *See also, Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) (fiduciary could not establish estoppel defense in absence of showing that principal had knowledge of fraud prior to accepting benefits under settlement agreement.), *but see, Tharp v. Blackwell*, 570 S.W.2d 154 (Tex.Civ.App.-Texarkana 1978, no writ history)(guardian on final accounting was entitled to all benefits received by ward - even if not supported by vouchers or prior court order - where ward admitted receipt of such expenditures).

6. <u>Waiver and Ratification</u> – In a fiduciary case, the defendant not only must meet his regular burden of proof on the waiver defense, he must further prove that <u>he</u> furnished all necessary information to his principal so that an intelligent decision could be made. *Lang v. Lee*, 777 S.W.2d 158 (Tex. App.-Dallas 1989, no writ); *but see, Williams v. Moores*, 5 S.W.3rd 334 (Tex.App.-Texarkana 1999, pet. denied)(held beneficiary's silence or inaction for ten (10) years, coupled with proof of her knowledge of her rights was such an unreasonable period of time as to be sufficient to "prove" waiver). A similar burden of proof is required to establish that a principal ratified the actions of his fiduciary. *Burnett v. First Nat. Bank of Waco*, 536 S.W.2d 600 (Tex.Civ.App.-Eastland 1976, writ ref'd n.r.e.); *Lang v. Shell Petroleum Corp.*, 159 S.W.2d 478 (Tex. 1942); *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.); see also *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 21-22 (Tex.App.-San Antonio 2006, pet. denied)(ratification is effective only when the corporate officer has fully disclosed all material facts to the Board of Directors or shareholders) and *Karnes v. Fleming*, 2007 WL 4191894 (S.D. Tex. 2007)(defendant fiduciary has burden of proof on all these elements of ratification defense). There are, however, at least two cases which indicate that ratification is <u>not</u> available to condone a corporate officer or director's disloyalty or fraud. <u>See</u>, *General Dynamics v. Torres*, 915 S.W3d 45, 51 (Tex.App.-El Paso 1995, writ denied) and *Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473, 477-78 (Tex.Civ.-El Paso 1975, writ ref'd n.r.e.).

Significantly, the general rule that "a party is bound by what he signs" is *not* applicable in a fiduciary relationship. *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.-Dallas 1985, writ ref'd. n.r.e.); *Ginther v. Taub*, 570 S.W.2d 516 (Tex. App.-Waco 1978, writ ref'd n.r.e.); *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.).

7. <u>Laches</u> – The affirmative defense of "laches" may be available to a fiduciary if he can establish that, *after full disclosure* of all facts, the beneficiary delayed in enforcing his rights until the position of the fiduciary had, in good faith, become so changed that he could not be restored to his former status if the beneficiary's rights were then enforced. *Culver v. Pickens*, 176 S.W.2d 167 (Tex. 1944); *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). What is required is *detrimental* reliance by the fiduciary on the inaction of the beneficiary, <u>*and*</u> a change in circumstances (*e.g.* the intervention of third-party rights). *Culver v. Pickens, supra* at 170-171; *Fitz-Gerald v. Hull*, 237 S.W.2d 256 (Tex. 1951); *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.).

8. <u>Confession and Avoidance</u> – If the fiduciary wishes to interpose an affirmative defense in the nature of "confession and avoidance", TRCP 94 requires that it be affirmatively plead. See e.g. *Sorrell v. Elsey*, 748 S.W.2d 584 (Tex.App.-San Antonio 1988, writ denied) (the court held that two nephews who were in a fiduciary relationship with their elderly aunt had waived their right to claim that certain property was deeded by her to them as a "gift" because they failed to affirmatively plead the gratuitous nature of the transfer as an affirmative defense). One example of an "avoidance" defense would be that the defendant, even if negligent, was protected by an exculpatory clause limiting his liability to "grossly negligent" acts. (See No. 10 below.)

9. <u>Statute of Limitations</u> – There is a four year statute of limitations for a breach of fiduciary duty cause of action. Tex.Civ.Prac. & Rem. Code § 16.004. The "Discovery Rule" applies in breach of fiduciary duty actions, *S. V. v. R. V.*, 933 S.W.2d 1 (Tex. 1996), although, as a result of the fiduciary duty of full disclosure, the beneficiary has no affirmative duty to investigate for possible violations of trust until he has actual knowledge of facts sufficient to excite inquiry. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945); *accord*, *Johnson v. Buck*, 540 S.W.2d 393, 412-414 (Tex. Civ. App.-Corpus Christi 1976, writ ref'd n.r.e.) (Co-partner who relied on managing partner for explanation of representations made by managing partner concerning state of business had no legal duty to use means allegedly available to discover fraud.)

As the Dallas Court of Appeals explained in *Lang v. Lee*, 777 S.W.2d 158 (Tex.App.-Dallas 1989, no writ), the modern "discovery rule" in a "fiduciary" statute of limitations defense makes certain "allowances" for the beneficiary:

> In an arm's length transaction, knowledge of facts that would have excited inquiry in the mind of a reasonably prudent person, which if pursued by him with reasonable diligence would lead to the discovery of the fraud, is equivalent to knowledge of the fraud as a matter of law. . . . *In a confidential relationship, however, diligence on the part of the defrauded party does not exact as prompt and as searching an inquiry into the conduct of the other party as where the parties were strangers or dealing with strangers.* . . . Where there is a relationship of trust or confidence . . . the defendant is under a duty to make a full disclosure of the facts so that the fraud may be discovered. The trust and confidence in the relationship are *evidentiary matters* bearing on the issue of whether the defrauded party acted as would a person of ordinary prudence in discovering the fraud.

Lang v. Lee, 777 S.W.2d at 164 (emphasis added) (citations omitted).

However, even though a fiduciary's conduct may be "inherently undiscoverable", due to the beneficiary's inability to inquire into the trustee's actions or his unawareness of the need to do so, when a fact of misconduct becomes apparent it can no longer be ignored regardless of the fiduciary nature of the relationship. *S. V. v. R. V.*, 933 S.W.2d 1, 8 (Tex. 1996). At that point, limitations will begin to run. *See*, *Poth v. Small, Craig & Werkenthin*, 967 S.W.2d 511 (Tex.App.-Austin 1998, writ denied); *Estate of Fawcett*, 55 S.W.3rd 214 (Tex.App.-Eastland 2001, pet. denied).

7. EXCULPATORY CLAUSES AND MODIFYING LANGUAGE AS AN "AFFIRMATIVE DEFENSE" – To be on the safe side, defendants should always affirmatively plead any exculpatory language found in the operative documents <u>and</u> any language modifying statutory or common law duties of any kind. This is in the nature of a "confession and avoidance" defense which must be affirmatively plead under TRCP 94.

8. **"JOINT AND SEVERAL LIABILITY" FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY** – Even though your client may not be a "fiduciary" if he knowingly assists, and/or abets a person that he knows is a fiduciary in breaching his fiduciary duty, or, if he knowingly benefits from a breach of fiduciary duty (even if he does nothing to further the breach) he may be jointly and severally liable for any damages resulting from the breach. *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation*, 160 S.W.2d 509 (Tex. 1942). This claim may also be cast under a "civil conspiracy" umbrella. See, *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 581-82 (Tex. 1963). Under either third party claim, the burden will be on the plaintiff to prove the elements required for third party liability even if the burden of proof in the main action may have shifted to the primary fiduciary defendant. See e.g. *Kirby v. Cruce*, 688 S.W.2d 161 (Tex.App.Dallas 1985 writ ref'd) (conspiracy) and *Nathan v. Hudson*, 376 S.W.2d 856, 861 (Tex.Civ.App.-Dallas 1964 writ ref'd n.r.e.) (Kinzbach defendants).

9. **ATTORNEYS FEES**— Be sure your client individually is responsible for your fees even though you are representing him in his "fiduciary capacity".

- Fees paid from the fiduciary "pot" may be subject to disgorgement.
- Some courts will strictly enforce the "reimbursement" rules.
- Your client has a fiduciary duty to ensure that the fees are reasonable and necessary– so do not overcharge.

10. COMMON MISTAKES BY LAWYERS IN FIDUCIARY LITIGATION

1. WRONG PARTIES. Plaintiff sues the "trust," "estate," or guardianship as an entity rather than suing the Trustee or Executor. Trusts and Estates are not "entities" and must be sued by suing the Trustee, the personal representative of the estate or the guardian.

2. DEFENDANT SUED IN WRONG CAPACITY. Fiduciaries such as Trustees, Executors, and Guardians, have two "capacities" for suit and service and much be sued in the correct capacity. Example: Plaintiff sues Joe Blow, in his capacity as Trustee, for liability he really wants assessed against Joe Blow individually based on Joe's breach of fiduciary duty as Trustee. Defendant may need to file verified denial of "not liable in the capacity sued."

3. DEFENDANT SERVED IN WRONG CAPACITY. Plaintiff sues Joe Blow, as Trustee, to compel and accounting, but only serves him in his individual capacity. [service on "Joe Blow" without designation of any other capacity is presumed to be service in his individual capacity only.] Defense counsel should always check the citation– do not assume service was correct. Defendant should file verified denial if sued in one capacity but served in another. Also, if sued in both fiduciary and individual capacity, but only served in one capacity.

4. IMPROPER DERIVATIVE ACTIONS. Plaintiff sues on "behalf" of Trust, estate or partnership – without the required pleading. Plaintiff has no standing to sue on "behalf" of Trust, etc. unless he pleads and proves that, after request the fiduciary has wrongfully refused to bring the action, or that request on the fiduciary to do so would be futile (because action is against the fiduciary). [Similar to pleading and proof requirement for shareholder derivative suit.] If the suit is not against the Trustee (or other fiduciary), but is against a third party for 'wrongs' allegedly done to the trust (or other estate)— then it may be appropriate to have a preliminary determination of whether the fiduciary's decision not to bring the suit, was "wrongful" or not.

5. IGNORING THE FACT THAT COMMON LAW DUTIES HAVE BEEN MODIFIED/ELIMINATED. Plaintiff pleads that the fiduciary has breached certain "common law" fiduciary duties, even though the creation document or applicable statutes clearly modify (or even eliminate) the duties. Defendant should affirmatively plead any language of the agreement or statute that defines or modifies the duty of the defendant as a fiduciary. Consider it in the nature of a confession and avoidance defense — example: The defendant's duty of loyalty was expressly modified by the trust agreement which specifically provided that the "trustee is authorized to engage in transactions with himself, individually." Modified or eliminated duties may shift the burden of proof back the plaintiff – as in the example above, when the duty of loyalty was basically eliminated. Pleading this express language in the answer also clarifies what language should be included in the *instructions* for the jury. See e.g. PJC 235.11 (attached).

6. EXCULPATORY CLAUSES NOT AFFIRMATIVELY PLED. An exculpatory clause, which may relieve the fiduciary from liability for what would otherwise be a breach of fiduciary duty under certain circumstances, <u>must</u> be expressly plead as an affirmative defense. This is clearly a "confession and avoidance" defense where the defendant is basically stating that even if he breached his fiduciary, he is nonetheless, not liable for damages, unless the plaintiff can show that his action was in "bad faith," "fraudulent," etc. See, e.g. Tex. Prop. Code Section 114.007 (settlor of the trust can relieve trustee from liability for breach of trust *unless* it was committed "in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary.") If it is not plead, you will not be able to get a jury question on the exculpation. Note– this is a separate jury *question* (not an instruction as would be the case for a modified or eliminated duty) which should be conditioned on an affirmative finding to the breach of fiduciary duty question. See: PJC 235.15.

7. FAILURE TO UNDERSTAND WHO HAS THE BURDEN OF PROOF. The Texas Pattern Jury Charges should help solve the question of burden of proof placement in the jury charge, but this issue can arise at earlier stages. For example, if a self-dealing transaction has been alleged, the burden of proof will be on the fiduciary – therefore a "no evidence" motion for summary judgement would NOT be proper for the defendant. Similarly, if the fiduciary relationship is not one that is recognized as a matter of law, the plaintiff should not *assume* it's existence in filing a motion for summary judgement on a breach of fiduciary duty claim.

8. FIDUCIARY CLIENT DOES NOT UNDERSTAND HIS ROLE AND DUTIES. The attorney for the fiduciary should be sure that fiduciary understands that his "role" is to primarily act for the benefit of others and that he has certain "duties" which arise the minute he accepts the post. Do not assume that the fiduciary client has read the creation document, or that he understands it even if he has read it. Give him an outline or checklist of what the creation document, relevant statutes and even the common law may expect of him as a fiduciary.

9. INVITING LITIGATION BY HIDING THE BALL. All fiduciaries have some version of a duty to disclose. Figure out the parameters of this duty for your client and encourage him to comply with it *before* litigation is filed. The vast majority of fiduciary litigation is triggered by the fiduciary's refusal to disclose what is going on to the beneficiaries.

10. FIDUCIARY NEED NOT SERVE AND CAN RESIGN. Fiduciaries have a litigation target painted on their backs. Counsel your client that simply because he was appointed, he does NOT have to serve and that he may certainly be better off, financially and stress-wise, if he refuses to serve or if he resigns.

NOTE: The "base document" for this Memorandum of Agreement (MOA) is the conditional agreement signed by Doug and Chris on 9/24/2012

*****FOR SETTLEMENT PURPOSES ONLY*****

(1) Thunderbird will agree to purchase all but 1% of Wright Development's share of Campus, contingent on execution of the Ground Lease by Wright Development and Thunderbird. Wright Development will remain a 1% owner of Campus.

(2) Wright Development and Thunderbird agree to sign (immediately after the execution of the Settlement Agreement) the Ground Lease in its current form (attached).

(3) Thunderbird will indemnify Wright Development from any financial obligation imposed by the Ground Lease, or otherwise (including, but not limited to, the obligation to fund any further capital calls). Wright Development will draft the Settlement Agreement (which will include all points in this MOA) for Thunderbird's approval.

The value of Wright Development's 50% share of Campus (the Value), will be determined as of the earlier of (a) the date of the arbitration or (b) the date of the Settlement Agreement, and will be determined in arbitration with Clyde Pine as arbitrator. The Value will be determined with the assumption that the Ground Lease has been fully executed. The value of Wright Development's 50% share of Campus will be the sole issue for the arbitration. Both parties, Wright Development and Thunderbird, waive all claims (including rights of offset) against the other party.

(4) Payments and consideration by Thunderbird to Wright Development shall be as follows:
   a. $40,000 cash upon execution of the Settlement Agreement
   b. In addition to the cash payment referenced in (4)a above, execution of a promissory note upon signing of the Settlement Agreement, the face amount of which will be the Value less $40,000. The note will have a term of two years, will bear interest at 12% per annum, compounded, and may be prepaid at any time without penalty.
      i. Payments on the promissory note are subject to financing being secured (debt, equity or otherwise) on the UTEP project. When any financing agreement is signed which provides funding to the UTEP project, Thunderbird will pay Wright Development (within 30 days) no less than 50% of the balance due on the note plus all accrued interest.
      ii. Wright Development will receive 75% of all of Campus Developers' draws, before expenses, until the note is paid in full

(5) Wright Development will execute a non-compete agreement strictly relating to the UTEP Project, as long as Campus Developers or affiliated entity remains Lessee (in good standing) on the Ground Lease, and is pursuing development of the Project. This settlement agreement is contingent on the parties mutually agreeing on the terms of a non-compete agreement.

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(6) Arbitration will occur on October 23, 2012.

(7) All parties will execute a mutual release of any and all claims between them related to any and all claims, known or unknown, between them in any capacity, that were in existence up to and including the date of the Settlement Agreement.

(8) All references to Thunderbird apply to Thunderbird Holdings, LLC and to all successors in interest and to any entity of which Chris, Tommy and John have an interest which benefits from the development of the UTEP project. References to Campus Developers apply to Campus Developers, LLC and to all successors in interest.

(9) Doug and Tom have the right to attend all meetings of Campus Developers, whether internal or external, to review all architectural and engineering drawings and will have access to the accounting records of Campus Developers, its successors and assigns.

(10) This offer will expire at 3:00 p.m., Wednesday, October 3, 2012.

(11) Exchange of Witness Lists and Exhibits Lists will be delayed until 5:00 p.m., Wednesday, October 10, 2012.

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