A Trustee's Duty To Disclose In Texas

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Introduction

- Trustees possess, manage, and control assets for beneficiaries – usually for compensation.
- This is significant authority and power.
- There are many corresponding duties: one of the most important duties is the duty to disclose information.
- This presentation is intended to provide the current legal authority in Texas dealing with a Trustee's duty to disclose.

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Sources For Duty To Disclose

- There are four independent sources for a duty to disclose in Texas:
  - The Trust Document;
  - Texas Statutory Law;
  - Texas Common Law; and
  - Litigation Rules.

Trust Document's Duty To Disclose

- A trust document may have express provisions regarding the disclosure of information to beneficiaries that are more onerous than statutory or common law.
- Generally, the trust document governs and should be followed. Tex. Prop. Code §111.0035(b).

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Trust Document's Duty To Disclose

- "The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code." *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.).
- "The powers conferred upon the trustee in the trust instrument must be strictly followed." *Id*.
- If a trust instrument provides additional disclosure requirements, a trustee should follow them or else risk a breach of duty claim.

Trust Document's Duty to Disclose

- In *Alpert v. Riley*, the trusts required the trustee to notify the beneficiaries annually of their right to withdraw an amount equal to the aggregate amount contributed by each donor for that calendar year or $20,000, whichever is less. 274 S.W.3d 277 (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.

Trust Document's Duty To Disclose

- A settlor may want to limit the duty to disclose.
- For example, the "silent trust" where the trust document instructs the trustee to not disclose the existence of the trust to the beneficiaries.
- There are practical reasons why a fiduciary would not want to be involved in a silent trust.
- The trustee can be in an awkward position where he is required to keep the trust a secret, which may mean he has little interaction with the beneficiaries, but may still have the discretion to make distributions where he does not have any communication with the beneficiaries and does not know their circumstances.
- It probably increases risk of fiduciary claims.

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Trust Document’s Duty To Disclose

- Can a settlor limit disclosure obligations?
- A settlor may limit disclosure obligations in a revocable trust – the settlor can always revoke the trust or change beneficiaries.
- Some limited precedent in other jurisdictions that would support a duty to disclose to beneficiaries in revocable trust situations.
- Also, duty may arise if the settlor becomes incompetent.
- However, in an irrevocable trust, statutes limit what a settlor can do regarding limiting the duty of disclosure.

Trust Document’s Duty To Disclose

- 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 or permitted to receive distributions or would receive a distribution if the trust terminated at the time of the demand. Tex. Prop. Code §111.0035(b)(4).
- 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 distributions or would receive a distribution if the trust terminated at the time of the demand. *Id*. at §111.0035(c).

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Trust Document's Duty To Disclose

- Other than these two exceptions, a settlor may restrict or eliminate the right of any other beneficiary to demand an accounting or otherwise have common laws rights to disclosure.
- Example: Beneficiaries under 25 and contingent remainder beneficiaries
- Accordingly, a trustee should carefully review a trust document to see if there are any changes regarding the duty to disclose.

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Statutory Duty to Disclose

- 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 §113.051.

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Statutory Duty to Disclose

- In 2005, the Texas Legislature enacted Texas Property Code Section 113.060 that imposed on 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."
- This created certain problems regarding whether this displaced the common law and whether it imposed higher burdens than required by the common law.

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Statutory Duty to Disclose

- So, in 2007, the Texas Legislature repealed Section 113.060 stating:
- “The enactment of Section 13.060 was not intended to repeal any common-law duty to keep a beneficiary reasonably informed, and the repeal of this Act of Section 113.060 does not repeal any common-law duty to keep a beneficiary informed. The common-law before January 1, 2006, is continued and in effect.”

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Statutory Duty to Disclose

- 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 common law duty to disclose.

Demand for Accounting

- The Texas Property Code provides for a right of beneficiaries to demand an accounting. *See* Tex. Prop. Code §113.151.
- A beneficiary may give a written demand for accounting, and a trustee has 90 days to provide a written accounting covering all transactions since the last accounting or the creation of the trust, whichever is later.

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Demand for Accounting

- If the accounting is not provided in 90 days (or the court does not allow an extension), the beneficiary can bring suit to compel.
- A court may award attorney's fees and costs to the beneficiary as against the trustee (individually or against trust).
- Trustee cannot be compelled to do an accounting more than once a year, unless a court orders otherwise.

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Demand for Accounting

- In *Grinnell v. Munson*, a court of appeals affirmed a trial court's summary judgment on a beneficiary's claim that a fiduciary had failed to prepare an accounting on demand when the fiduciary had previously provided a detailed accounting less than a year before. 137 S.W.3d 706, 721-22 (Tex. App.—San Antonio 2004, no pet.).

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Demand for Accounting

- An “interested person” can seek an accounting.
- An “interested person” means a trustee, *beneficiary*, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust.” Tex. Prop. Code §111.004(7) (emph. added).
- A “beneficiary” means a person for whose benefit property is held in trust, regardless of the nature of the interest. *Id*. at §111.004(2).
- Absent a contrary provision in the trust instrument, a trustee must respond to any demand for an accounting by any beneficiary, including contingent beneficiaries.

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Demand for Accounting

- Absent a request or other term of the trust instrument, a trustee is under no duty to prepare an accounting.
- In *Malone v. Malone*, the court of appeals held that a trustee did not breach a duty by failing to provide accountings to a beneficiary where the evidence did not indicate that the beneficiary ever requested one and the trust document did not otherwise require it. No. 02-08-157-CV, 2009 Tex. App. LEXIS 6589 (Tex. App.—Fort Worth August 20, 2009, pet. denied).
- However, a trustee is under a duty to maintain adequate records to be able to prepare an accounting at any time.

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Demand for Accounting

- The accounting should include:
  - All assets that belong to the trust (whether in the trustee's possession or not);
  - All receipts, disbursements, and other transactions, including their source and nature, with receipts of principal and interest shown separately;
  - Listing of all property being administered;
  - Cash balance on hand and the name and location of the depository where the balance is maintained; and
  - All known liabilities owed by the trust.
- Tex. Prop. Code §113.152

Demand for Accounting

- In *Beaty v. Bales*, a beneficiary wanted an audited or verified accounting, which the trial court did not require. 677 S.W.2d 750 (Tex. App.—San Antonio 1984, no writ).
- Court of appeals held that the trial court did not abuse discretion in determining that an unaudited accounting was sufficient.
- The trial court was concerned with the financial burden on the trust corpus and a CPA testified that unaudited accountings were sufficient with banks and IRS.
- Court held that it could interfere with a trial court's discretionary powers only in cases of fraud, misconduct, or a clear abuse of discretion.

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Demand for Accounting

- A beneficiary may simply be impossible to please, no matter the accountings and disclosures given.
- Repeated and detailed requests for accountings can be a substantial cost to the trust – a cost that may impact other beneficiaries.
- Accordingly, a trustee should consider the cost in responding to difficult beneficiaries.
- Further, a trustee may seek protection from a court via a declaratory judgment suit from unreasonable requests for information. *See* Tex. Civ. Prac. & Rem. Code §37.005 (court may declare rights to any question arising from administration of trust).

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Demand for Accounting

- Texas Property Code 115.001(9) provides that a district court has jurisdiction to require an accounting, review trustee fees, and settle interim or final accounts.
- This provision allows trustees to file suit for a final accounting and judicial discharge, which can usually be avoided if the beneficiaries will sign an adequate receipt, release, and refunding agreement.

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Common-Law 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 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 (Tex. 1996). *See also Valdez v. Hollenbeck*, 465 S.W.3d 217 (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).

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Common-Law Duty To Disclose

- In *Estate of Benson*, court affirmed an appointment of a receiver over trust assets where the trustee had violated his duty to disclose. No. 04-15-00087-CV, 2015 Tex. App. LEXIS 9477 (Tex. App.—San Antonio September 9, 2015, pet. dism'd. by agr.).
- 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."
- "[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."

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Common-Law Duty to Disclose

- Does a plaintiff have to have expert testimony to prove a breach of a duty to disclose?
- No. In *Wells Fargo Bank, N.A. v. Crocker*, the court 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."
- No. 13-07-00732-CV, 2009 Tex. App. LEXIS 9791 (Tex. App.—Corpus Christi December 29, 2009, pet. denied).

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Common-Law Duty To Disclose

- 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 trustee, tax matters, and other items.

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Common-Law Duty To Disclose

- Is there an affirmative duty to disclose?
- Yes and no.
- There is a duty to affirmatively disclose certain matters, such as conflicts-of-interest, fiduciary breaches, or information that a trustee has that may significantly impact a beneficiary's interest.
- However, there may not be a duty to disclose routine trust activities. *See* Restatement (Third) Trusts, §82(1)(b), cmt. d.

Common-Law Duty To Disclose

- The Restatement (Third) of Trusts, Section 82(1) provides that a trustee has a duty to:
  - Promptly inform beneficiaries of the existence of the trust, their right to obtain further information, and basic information concerning the trusteeship;
  - Inform beneficiaries of significant changes in their beneficiary status; and
  - Keep beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.

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Common-Law Duty To Disclose

- Who is entitled to disclosure?
- Certainly, any active beneficiary that currently may receive a distribution is entitled to information.
- Whether remote beneficiaries are also entitled to information is not entirely clear.
- Once again, the Texas Property Code would seem to indicate that remote beneficiaries are entitled to information absent a trust provision to the contrary.
- Restatement (Third) of Trusts, Sec. 82 cmt. a(1) would indicate that disclosure to remote beneficiaries is not required.

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Common-Law Duty To Disclose

- A trustee does not have a duty to disclose:
  - Non-material facts;
  - Facts about a trustee’s non-trust related activities;
  - Negotiations concerning the purchase or sale of trust assets (if disclosed, possible cure is a confidentiality agreement);
  - Private information (financial, medical, etc.) about other beneficiaries; and
  - Attorney/client communications.

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Common-Law Duty To Disclose

- Where a trust owns stock or partnership interests in closely held businesses, may a beneficiary obtain access to the businesses' information?
- Yes, if the business is wholly owned by the trust.
- Maybe, if the business is only partly owned by the trust (may set up a conflict situation for the trustee – duty to business versus duty to beneficiaries).

Common-Law Duty To Disclose

- Texas draws a line 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 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).
- The actions of the entity representative will not be subject to fiduciary duties.
- The books and records of an entity in which a trust owns an interest may be discoverable in litigation to the extent such records are within the trustee's possession, custody, and control. *In re Vance*, No. 10-10-00137-CV, 2010 Tex. App. LEXIS 5940 (Tex. App.—Waco July 21, 2010, original proceeding); *In re Rogers*, 200 S.W.3d 318, 322 (Tex. App.—Dallas 2006, original proceeding).

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Common-Law Duty To Disclose

- 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 at 754.
- Potentially, 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 of the Law of Trusts 3rd §82.
- No Texas case addresses this duty of inspection.

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Disclosure In Litigation

- Texas Property Code Section 115.012 states that all actions are to be governed by the Texas Rules of Civil Procedure and other statutes and rules that are applicable in civil actions generally.
- So, if a trustee is in litigation with a beneficiary, it will have to follow the normal rules of disclosure of information that litigants have to follow.

Disclosure In Litigation

- Rules generally provide for disclosure via:
  - Requests for disclosure;
  - Requests for production (documents and things);
  - Interrogatories;
  - Depositions and pre-suit depositions;
  - Physical and mental examinations; and
  - Access to real property.

Disclosure In Litigation

- The harm in not disclosing information in litigation is that a court may sanction a party for failing to disclose when there is an obligation to do so.
- These sanctions can be severe and case dispositive.

Disclosure In Litigation

- There is an issue as to whether a trustee's common-law duty to disclose is in addition to discovery during litigation, such that a trustee only has to respond to discovery and not informal requests for information.
- Multiple authors have different views on this issue.
- The safest course is to disclose all material facts that may impact a beneficiary's interest – whether requested in discovery or via informal means.

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Disclosure In Litigation

- Texas Rule of Civil Procedure 172 allows a court to appoint an auditor to state the accounts between the parties and to make a report thereof to the court.
- The auditor shall verify the report via an affidavit.
- Court will award compensation to the auditor to be taxed as costs.

Ramifications For Failure To Disclose

- Texas Property Code Section 113.082 provides that a trustee may be removed in accordance with the terms of the trust instrument or a court may remove a trustee if:
  - The trustee materially violated a term of the trust or attempted to do so and that resulted in a material financial loss to the trust;
  - The trustee fails to make an accounting that is required by law or by the terms of the trust; or
  - Or the court finds other cause for removal.

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Ramifications For Failure To Disclose

- A court may compel a trustee to perform its duties and, specifically, may order a trustee to account. Tex. Prop. Code § 114.008.
- Court may reduce or deny a trustee compensation for breaches of 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).

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Ramifications For Failure To Disclose

- Texas Property Code Section 114.064 provides: “In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney’s fees as may seem equitable and just.”
- So, 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.

Ramifications For Failure To Disclose

- Another ramification is that limitations may not accrue on an underlying claim.
- In *Ward v. Standford*, the settlor defaulted on a $2 million dollar note owed to the trust with the principle due in 2000. 443 S.W.3d 334 (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.
- Trial court granted summary judgment on limitations.
- A cause of action generally accrues when: 1) a wrongful act 2) causes some legal injury.

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Ramifications For Failure To Disclose

- The court held: “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.”
- Court also held that there were fact issues on discovery rule and fraudulent concealment.
- So, a decision and communication of the decision would have constituted a “wrongful act” that would have started limitations and would have precluded any discovery rule or fraudulent concealment allegations.

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Ramifications For Failure To Disclose

- A trustee may also 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.).
- Those defenses may not apply where the trustee fails to disclose information.

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Ramifications For Failure To Disclose

- A beneficiary who has legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability, including liability for past violations. Tex. Prop. Code §114.005.
- Releases are enforceable if the beneficiary has full knowledge of the circumstances surrounding the agreement. Tex. Prop. Code §114.032.
- A court may not enforce a release if disclosure was not adequate. *See, e.g., Hale v. Moore*, 2008 WL 53871 (Ky. Ct. App. January 4, 2008).
- Release agreements should have detailed disclosures in the recitals and there should be written disclosures explaining release language.

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Ramifications For Failure To Disclose

- Trustees have potential liability for co-trustee's actions if the trustee does not act with reasonable care. *See* Tex. Prop. Code §114.006.
- Trustee should exercise reasonable care to prevent a co-trustee from committing a serious breach of trust and compel a co-trustee to redress same.
- Trustee may need to seek accountings and disclosures from a co-trustee to meet its duty to prevent breaches.

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Conclusion

- Trustees take on significant duties when they accept the position.
- One of the most important duties is the duty of disclosure.
- Due to the potentially extreme consequences for failing to meet this duty, trustees should be very cautious.
- The Author hopes that this presentation was helpful in analyzing the duty to disclose.

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