

ORAL ADVOCACY IN FIDUCIARY LITIGATION

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She remains a member of the Generation-X Estate Planning Forum. Sarah served on State Bar of Texas Pattern Jury Charge Oversight Committee, numerous planning committees and continues to Chair the Guardianship Manual Committee. She is a frequent author and speaker for various state and local professional organizations. In recognition of her contributions to the State Bar of Texas, she was awarded the 2011 Standing Ovation Award by the staff of TexBarCLE.

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Judge Stagner and his wife, Amy, have been happily married for 30 years and are proud parents of two daughters, Claire and Katie.

TABLE OF CONTENTS

- I. INTRODUCTION..... 1
- II. BASIC COMMUNICATION PRINCIPALS 1
 - A. How People Retain Information..... 1
 - 1. Attention and Selective Filtering 1
 - 2. Chunking and Grouping Information 2
 - 3. Using Prior Knowledge and Schemas 2
 - 4. Building Mental Models and Connections 3
 - 5. Making Inferences and Reading Between the Lines 3
 - 6. Visualization and Mental Imagery..... 4
 - 7. Emotional and Social Cues..... 4
 - 8. Memory Encoding and Review 4
 - 9. Conclusion..... 4
 - B. Structuring a Trial Presentation: How Attorneys Can Align Their Presentations
With Juror Listening and Retention 4
 - 1. Start with a Strong Story 4
 - 2. Simplify and Organize Information..... 5
 - 3. Repeat and Reinforce Key Points 5
 - 4. Use Visuals and Demonstrative Aids 5
 - 5. Speak Clearly, Slowly, and Simply 5
 - 6. Connect Every Piece of Evidence to the Theme 6
 - 7. Highlight Key Takeaways 6
 - 8. Anticipate Juror Questions and Confusion 6
 - 9. Use the Inoculation Theory 6
 - C. Voir Dire..... 7
 - 1. New Theory of Voir Dire 7
 - 2. Use “Looping” Questions..... 8
 - 3. Areas of Inquiry..... 8
 - D. Opening Statements..... 10
 - E. Direct Examination Techniques 11
 - 1. Ask Open-Ended Questions..... 11
 - 2. Establish a Logical Sequence 12
 - 3. Use Short, Clear Questions..... 12
 - 4. Listen and Follow Up 12
 - 5. Highlight Key Facts..... 12
 - 6. Prepare and Practice Thoroughly..... 12
 - 7. Use Exhibits Effectively 12
 - 8. Maintain Control of the Examination 12
 - 9. Humanize the Witness 13
 - 10. Avoid Objections..... 13
 - 11. Strategic Considerations 13
 - F. Cross-Examination Techniques..... 13
 - 1. Effectively Organize The Examination 13
 - 2. What You Do Not Ask Is As Important As What You Do..... 13
 - 3. Keep The Questions Short For Control 13
 - 4. Lean Into What The Witness Did *Not* Do 14
 - 5. Reptilian Theory 14
 - 6. Subjects For Examining A Fiduciary 15
 - G. Examining a Beneficiary 16
 - H. Examining Expert Witnesses..... 18
 - 1. Direct Examination..... 18
 - 2. Cross Examination..... 19

| | |
|--|----|
| III. CLOSING STATEMENTS..... | 20 |
| IV. THEMES IN FIDUCIARY LITIGATION | 21 |
| V. CONCLUSION ON PERSUASIVE TRIAL TECHNIQUES | 21 |
| VI. CONCLUSION | 22 |

ORAL ADVOCACY IN FIDUCIARY LITIGATION

I. INTRODUCTION

Fiduciary litigation is a booming business. Baby boomers and the silent generation will bequeath a total of \$84.4 trillion in assets through to 2045, with \$72.6 trillion going directly to heirs.¹ So, attorneys are naturally transitioning from non-fiduciary practices to this busy area of practice.

The problem is that fiduciary litigation involves special issues that can be very different from a commercial or personal injury case. As justice Cardozo famously stated: “A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”² These cases are not between arms-length actors; more is expected and required.

A fiduciary owes its principal one of the highest duties known to law—this is a very special relationship.³

The term “fiduciary relationship” means “legal relations between parties created by law or by the nature of the contract between them where equity implies confidence and reliance.”⁴ The expression of “fiduciary relation” is one of broad meaning, including both technical fiduciary relations and those informal relations that exist whenever one person trusts and relies upon another.⁵

Indeed, “[t]he enforcement of fiduciary duties through judicial proceedings is essential to maintaining the integrity of the trust relationship.”⁶ “The courts serve as the ultimate safeguard to ensure fiduciaries act in the best interests of those they serve.”⁷ This is important not only for the parties to the case, but fiduciary enforcement sustains confidence in financial and legal systems in general.⁸

This article will address basic communication techniques and advice and suggestions on trying a fiduciary case, from voir dire, opening statement, examining witnesses, to closing argument.

II. BASIC COMMUNICATION PRINCIPALS

A. How People Retain Information

In a courtroom, listening should not be a passive act. Jurors, judges, attorneys, and witnesses all engage in complex mental processes to interpret and organize what they hear. Understanding how people mentally intake and store information during a trial can help lawyers communicate more effectively, present evidence persuasively, and ensure that key facts and arguments are remembered when the time is right to use them: deliberations.

1. Attention and Selective Filtering

In a trial, listeners must focus their attention amid competing noises—such as the hum of the courtroom, the shuffle of papers, or emotional testimony. The brain automatically filters out irrelevant sounds and focuses on what matters most.

A juror listening to a witness’s testimony about a power of attorney transaction will tune out background noise and focus on the witness’s description of the events—what was done, when it was done, whether the principal knew of and consented—because those details are relevant to determining liability.

However, an attorney should be very aware of the surroundings in the courtroom and make every effort to wait until the atmosphere is appropriate. If someone is making noise, wait on that to clear up until continuing the examination or argument.

¹ “The Greatest Wealth Transfer in History Is Here, With Familiar (Rich) Winners.” The New York Times, May 14, 2023.

² *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, C.J.).

³ See, e.g., *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009) (“A fiduciary ‘occupies a position of peculiar confidence towards another.’”); *Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, L.L.P.*, 344 S.W.3d 56, 60 (Tex. App.—Eastland 2011, no pet.) (“A fiduciary duty is the highest duty recognized by law.”).

⁴ *Peckham v. Johnson*, 98 S.W.2d 408, 416 (Tex. Civ. App.—Fort Worth 1936), *aff’d sub nom.*, 132 Tex. 148, 120 S.W.2d 786 (1938).

⁵ *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980); *Peckham*, 98 S.W.2d at 416.

⁶ Bogert, *THE LAW OF TRUSTS AND TRUSTEES* § 861 (rev. 2d ed. 1995).

⁷ *In re Estate of Miller*, 230 S.W.3d 846, 850 (Tex. App.—Texarkana 2007, no pet.).

⁸ Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997).

2. Chunking and Grouping Information

Listeners naturally group related information into “chunks” to make it easier to process and remember.⁹ Another way to think of this is building rooms in a listener’s brain. A listener will automatically try to organize and place certain information related to a similar issue together, and “build” a new “room” in their memory for that to exist. If a listener does not know what “room” to place information, he or she may simply forget it.

When an attorney presents evidence, jurors may mentally group it into categories such as physical evidence, eyewitness testimony, and expert analysis. Further, the juror may then group each type of evidence dealing with a particular factual allegation into the “room” in his or her memory. The juror may select the eye-witness testimony about POA transactions at issue, expert testimony on amount of damage related to that allegation, and documentary evidence proving the transactions for the “room.”

By organizing information this way, jurors can later recall which type of evidence supported each argument during deliberations. Attorneys should be aware of this natural process and attempt to organize evidence in arguments or in examinations to coordinate with this approach to memory.

3. Using Prior Knowledge and Schemas

Jurors and judges interpret new information through the lens of their prior experiences and knowledge—known as “schemas.”¹⁰ A schema is a cognitive structure that organizes knowledge and guides information processing.¹¹ People prefer information that aligns with their existing beliefs and experiences.¹² Jurors construct narratives that integrate evidence with their prior knowledge and experiences.¹³ These foundational studies show that jurors interpret trial evidence through preexisting mental models, not in isolation.

When a witness describes a “breach of duty,” jurors who have been an executor or trustee or agent may draw on their own understanding of duties owed to others. This helps them interpret the testimony, though it can also introduce bias if their personal experiences differ from the legal definition.

Jurors actively interpret, organize, and evaluate evidence through their prior experiences, beliefs, and knowledge. Understanding how schemas shape juror perception is essential for effective trial advocacy. Schemas influence what jurors notice, how they interpret testimony, and what they remember during deliberations.

Schemas are resilient. Once formed, they are often unaffected by logical challenges. This is known as the “perseverance effect.” Once established, they persist, even in the face of evidence to the contrary or instructions to disregard. In fact, schemas persevere even when people are shown that the evidence in support of them is false. This perseverance effect is so strong that when faced with information that challenges existing schemas people ignore the inconsistencies or construe it as if it supported their position. Attorneys who recognize and strategically engage these cognitive processes can present cases more persuasively and minimize bias.

A juror focuses on information that fits his or her expectations. A juror that thinks that a bank is heartless and cold, may remember evidence that a corporate fiduciary did not interact with a beneficiary more than contrary evidence. Regarding a juror’s interpretation of the evidence, a juror interprets ambiguous evidence through his or her prior beliefs. A juror who has cared for an elderly parent may interpret testimony from a power of attorney agent (who cares for an elderly principal) as more credible. A juror remembers schema-consistent information more easily. A juror may recall testimony that supports their initial impressions and forgets contradictory details. A juror uses schemas to construct a coherent story of the case to assist the juror in their decision-making. Jurors integrate evidence into a narrative that aligns with their worldview—*e.g.*, all banks are bad and heartless and so is the defendant in this case.

Jurors’ adopted schema have practical implications in trial of which the fiduciary trial attorney must be aware. In voir dire identify the venire members’ schemas. Use open-ended questions to uncover jurors’ experiences and attitudes.

⁹ Kendra Cherry, MSED, How Chunking Pieces of Information Can Improve Memory, VeryWellMind (Feb. 23, 2026, 9:56 AM), <https://www.verywellmind.com/chunking-how-can-this-technique-improve-your-memory-2794969>.

¹⁰ Gordon, *Through the eyes of Jurors: The Use of Cognitive Psychology in the Application of the “Plain Language” Jury Instructions*, 64 HASTINGS L. J. 643 (2013).

¹¹ Bartlett, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY (1932).

¹² Fiske & Taylor, SOCIAL COGNITION (2d ed. 1991).

¹³ Pennington & Hastie, “*Explaining the Evidence: A Cognitive Model of Juror Decision Making*,” 13 J. VERBAL LEARNING & VERBAL BEHAVIOR 519 (1992).

Have you ever had to care for someone else? Have you had any experiences, good or bad, with a bank?

The purpose is to identify schemas related to responsibility and authority.

In opening statements, an attorney should frame the narrative and present his or her case as a story that fits familiar schemas (i.e., fairness, accountability, trust).

This case is about living up to one's responsibilities—just like you do in your daily life.

The attorney should anchor jurors' understanding in relatable experiences.

In witness examination, the attorney should reinforce or reframe schemas. The attorney should use witnesses to validate jurors' intuitive expectations or gently challenge them.

Do you think that people should look out for themselves? Do you think that a beneficiary can assume that the trustee is looking out for him or her?

The purpose is to shift jurors' schema from a duty of self-protection to an ability to rely upon another.

In closing statements, an attorney should strengthen the story model by summarizing evidence within the schema the attorney has built throughout trial.

Every piece of evidence confirms what you already know—the trustee took advantage of his position to benefit himself at the expense of the beneficiaries.

Trial attorneys should be aware of the most common schema-related biases. Individuals can have a confirmation bias that means that jurors generally favor evidence that supports their preexisting beliefs. Attorneys should realize this and understand that early impressions in the case can steer deliberations. Another bias is an anchoring effect where initial information shapes subsequent interpretation. Attorneys should realize that opening statements heavily influence schema formation. Finally, individuals use stereotyping to apply generalized beliefs to parties or witnesses. This can affect credibility assessments and verdicts.

An attorney should try to present evidence in light of and in alignment with familiar schemas. This will increase comprehension and acceptance of the evidence. The attorney should use relatable analogies, e.g., "This relationship creates duties like a parent owes his or her child." The attorney should reframe the opposing party's schemas to reduce bias and resistance, e.g., "You may think banks are cold—but this bank cared for its beneficiary and regularly checked in on her." The attorney should use appropriate repetition and clarity to strengthen new schema formation. The attorney should restate key themes throughout the trial. The attorney should employ visual aids like diagrams, timelines, and photos to help jurors organize information.

Jurors assimilate new information through schemas—mental frameworks shaped by prior experiences and beliefs. These schemas guide attention, interpretation, and memory, profoundly influencing verdicts. By understanding and strategically engaging juror schemas, trial lawyers can: present evidence more clearly, anticipate bias, and reinforce persuasive narratives that align with jurors' cognitive processes. Effective advocacy requires not only mastery of law and evidence but also insight into how jurors think.

4. Building Mental Models and Connections

Listeners construct mental models to connect new information with what they already know.

During closing arguments, jurors mentally reconstruct the sequence of events based on all the testimony and evidence presented. They connect cause and effect—such as how a defendant's actions led to an injury—and build a coherent narrative that supports or refutes the claims made.

5. Making Inferences and Reading Between the Lines

Effective listening in a trial involves inference-making—drawing conclusions from tone, context, and nonverbal cues.

If a witness hesitates or avoids eye contact while answering a question, jurors may infer uncertainty or deception, even if the words themselves seem straightforward. Similarly, an attorney's tone during cross-examination can signal confidence or doubt, influencing how the jury interprets the exchange.

6. Visualization and Mental Imagery

Listeners often create mental images to help them understand and remember testimony.

When a witness describes a self-interested transaction where an agent buys real estate from the principal, the jurors may visualize the location and layout of the real estate and the sequence of events. Alternatively, a party defending against a mental incompetence claim can use a photo of the individual showing him or her in a good state. Attorneys can enhance comprehension by using demonstrative exhibits—such as diagrams or photos—to align jurors’ mental images with the facts.

7. Emotional and Social Cues

Emotions play a powerful role in how information is organized and remembered.

A victim’s emotional testimony may evoke empathy, making the details more memorable. Conversely, an attorney’s calm, measured tone during closing arguments can convey credibility and professionalism, helping jurors focus on logic rather than emotion. Attorneys should remember that jurors often empathize with witnesses, so an aggressive approach in questioning may be off putting to jurors (at least until the jurors are themselves frustrated with the witness).

8. Memory Encoding and Review

Jurors, as active listeners, encode important information into memory. There are several things that can assist memory encoding: active focusing on the content rather than passively hearing; repetition as hearing the same information multiple times; association, such as linking new sounds or words to existing knowledge; and multisensory input because combining listening with visual cues can enforce information. On the last point, attorneys should try to reinforce oral testimony with visual content like timelines, charts, documents, summaries, etc.

When a judge provides jury instructions, repeating key legal standards—such as “beyond a reasonable doubt”—helps jurors retain and apply them during deliberations. Similarly, attorneys who restate their main points at the end of each witness examination reinforce those ideas in the jurors’ minds especially when combined with visual aids.

9. Conclusion

In a trial, listening is an active, structured process involving attention, organization, inference, and memory. Jurors, judges, and attorneys all rely on these cognitive mechanisms to make sense of complex testimony and evidence. By understanding how people mentally organize information, legal professionals can craft arguments, questions, and presentations that are clearer, more persuasive, and more memorable—ultimately shaping how justice is understood and delivered.

B. Structuring a Trial Presentation: How Attorneys Can Align Their Presentations With Juror Listening and Retention

In the courtroom, persuasion depends not only on the strength of the evidence but also on how effectively it is communicated. Jurors are active listeners who filter, organize, and interpret information through cognitive processes such as attention, chunking, and memory encoding. Attorneys who understand these processes can structure their presentations to maximize juror engagement, comprehension, and recall.

1. Start with a Strong Story

The object of communicating is to persuade the audience to your point of view, so an attorney should start with an introduction. The introduction should contain what the case is about, your theme, and what you want the court/jury to do.

Jurors connect most deeply with narratives, not isolated facts. This is especially true for complex ideas. Begin your presentation by framing the case as a story—with clear characters, a logical sequence of events, and a central theme.

In a power of attorney case, rather than starting with technical details, begin with a relatable narrative: “This case is about an agent that ignored his duties in benefiting himself, and a principal who paid the price.”

A compelling story activates jurors’ attention and provides a mental framework for organizing subsequent evidence.

Themes can be based on facts or the law or both (i.e., how they intersect). They are usually policy based – if you win, it is because the court/jury determined that the policy behind your argument outweighed counter-policies. Weave theme throughout case – voir dire, opening statement, witness examinations, and closing statement.

2. Simplify and Organize Information

Jurors process information best when it is structured and predictable. Break complex material into digestible segments and use verbal signposts to guide them.

Use transitions such as: “First, we’ll discuss what happened.” “Next, we’ll look at the evidence.” “Finally, we’ll explain why the law supports our position.”

This approach mirrors how the brain “chunks” information, helping jurors follow the logic and retain key points.

3. Repeat and Reinforce Key Points

Repetition is essential for memory retention. Jurors are more likely to remember information that is restated at critical moments, especially at the beginning and end of a presentation.

If your theme is “With great power comes great responsibility,” repeat that phrase throughout the trial—during opening, witness examination, and closing. Each repetition strengthens jurors’ recall and reinforces the case narrative.

Some oral advocates think that by phrasing matters neutrally they will have more credibility. But the audience knows that we are all lawyers and are paid to represent our clients. So, it is appropriate to take an adversarial position. For example, it is appropriate to use conclusory statements in leading questions in cross examination.

4. Use Visuals and Demonstrative Aids

Visual information enhances comprehension and memory by engaging multiple cognitive pathways. A picture, after all, is worth a thousand words. An attorney can spend thirty minutes asking questions about the family, but a simple family tree diagram can get the same meaning across in five minutes (and the information will more likely be retained).

Use timelines to clarify sequences of events. Display photographs or diagrams to illustrate testimony. Present charts summarizing financial data or expert findings.

Visuals help jurors create mental images, making abstract or technical information more concrete and memorable.

5. Speak Clearly, Slowly, and Simply

Jurors vary in background and education. To ensure understanding, use plain language, short sentences, and measured pacing. Avoid legal jargon unless it is defined clearly. This is especially important in fiduciary cases as the concept of a fiduciary duty is based in the law.

Instead of saying, “The plaintiff’s claim is barred by the doctrine of waiver,” say, “The plaintiff cannot win because he knew of the transactions, did not object, and the agent relied on that silence.”

Clarity ensures that jurors can focus on meaning rather than decoding terminology.

Avoid passive voice – unless there is a valid reason to use it, e.g., the actor is unknown or the bad actor was your client. The attorney should use the active voice for most issues. Active voice is easier for the listener to comprehend information: the listener is used to hearing the actor-action-result formula.

Listeners can drift from the subject; it is simply human nature. It is best to engage the listener by giving a variety of things from which to listen. In other words, mix up questions and statements in length. Having a longer question and then a short question can really emphasize the information in the short question.

Similarly, a speaker should alter the speed of their speech, if a quick speaker wants to emphasize something, speak very slowly. If a slow talker wants to emphasize something, speak quicker.

Finally, a speaker should alternate the volume of their voice. It is very effective for a speaker that typically is on the louder side to suddenly speak slowly and softly. On the other hand, a lawyer that is more paced and softer spoken can really highlight information by raising his or her voice and showing some emotion. Once again, the attorney wants the listener to be an active listener; help the listener out by making the presentation interesting and different.

6. Connect Every Piece of Evidence to the Theme

Jurors remember information better when it fits into a coherent framework. Tie each exhibit, witness statement, or expert opinion back to your central theme.

After presenting a bank statement showing transfers to the agent, remind jurors: “This document shows that the agent had great power and ignored his responsibility.”

This reinforces relevance and helps jurors mentally organize evidence around your narrative.

7. Highlight Key Takeaways

Mark important moments explicitly so jurors recognize them as significant.

Use phrases like: “This is the crucial point.” “Remember this when you deliberate.” “This evidence answers the key question in this case.” Even during an examination, these types of cues can be used. “Mr. Agent, these bank documents answer the key question in this case, don’t they?”

Moreover, in examinations, an attorney can ask a witness to repeat an answer. The attorney can faint that they did not hear the answer: “I am sorry, Mr. Agent, this is a really important question and answer, and I did not hear your answer, can you give it again?” These verbal cues help jurors prioritize information and recall it during deliberations.

The speaker should exploit positions of emphasis – beginning and end – to emphasize good facts. The attention of the audience will vary – that is human nature. There is a theory of primacy and recency: the listener remembers things at the beginning and ending over things in the middle.¹⁴ Try to place helpful facts and admissions at the beginning and end.

8. Anticipate Juror Questions and Confusion

Jurors often form questions as they listen. Address potential confusion proactively by clarifying complex points and filling logical gaps.

If expert testimony involves technical data, summarize it in plain terms: “In simple language, what this means is that the agent personally benefited from his relationship with the principal, correct?”

Anticipating and answering unspoken questions keeps jurors engaged and prevents cognitive overload.

9. Use the Inoculation Theory

The speaker should consider whether to utilize positions of de-emphasis to “inoculate” bad facts. Try to place hurtful facts in the middle and juxtapose those with good facts. The inoculation theory was originally developed in the field of social psychology by William J. McGuire (1961).¹⁵ In the courtroom, this theory translates into a powerful advocacy tool: by preemptively addressing and refuting potential weaknesses in one’s case, an attorney can “inoculate” jurors against the persuasive impact of the opposing side’s arguments.

Inoculation theory for trial lawyers is a persuasion strategy in which an attorney introduces a weakened version of an anticipated opposing argument and immediately refutes it, thereby strengthening jurors’ resistance to that argument when it is later presented by opposing counsel. This approach mirrors the biological process of vaccination—exposing the body to a weakened virus to build immunity. Similarly, jurors “build immunity” to opposing arguments through early, guided exposure and refutation.

An attorney may use this theory early in the case. In opening statement, an attorney can introduce potential weaknesses in his or her case before opposing counsel does. Attorneys can frame them within their narrative, so jurors interpret them through their lens.

You’ll hear the defense claim that our client knew all about the trustee’s bad acts in investing in his own business. But the evidence will show that that is not true, the statements never disclosed that XYZ company was in any way affiliated with the trustee.

¹⁴ Saul McLeod, PhD, Serial Position Effect (Glanzer & Cunitz, 1966), SimplyPsychology, (Feb. 23, 2026, 11:17 AM), <https://www.simplypsychology.org/primacy-recency.htm>

¹⁵ WJ McGuire, Journal of Abnormal Psychology, 63 (2): 326–332. (1961). <https://www.communicationtheory.org/inoculation-theory/>

This approach builds credibility and prevents jurors from being surprised or swayed later.

The attorney can also use this theory in cross-examination to expose and neutralize opposing arguments before they are emphasized. Further, the attorney can have his or her own witnesses acknowledge and explain potential weaknesses. The attorney can even do a faux cross examination of his or her own client on a particular subject to get an explanation out first.

If you knew about this conduct, why are you allowed to now complain? The trustee states that you knew about his investing trust funds in his knitting business, is that true?

This technique transforms potential vulnerability into evidence of reasonableness or diligence.

Finally, an attorney can use the inoculation theory in closing arguments. He or she can reinforce the refutations he or she introduced earlier. Remind jurors that they have already considered—and rejected—the opposing side’s claims.

Remember, the defense tried to argue that our client knew of the trustee’s investing in his knitting business. But you saw the evidence—my client’s testimony, the trust statements, correspondence and emails—all showing the opposite.

Repetition here strengthens jurors’ cognitive resistance and solidifies your narrative.

Some of the benefits of the inoculation theory are: (1) preemptive control: the attorney controls how jurors first encounter and interpret opposing arguments; (2) credibility enhancement: acknowledging weaknesses demonstrates honesty and confidence; (3) reduced persuasive impact: jurors are less likely to be swayed by opposing counsel’s later arguments; and (4) narrative reinforcement: keeps jurors anchored to your case theme throughout the trial. However, the attorney needs to avoid overexposure and present only manageable “doses” of the opposing argument—too much detail can inadvertently strengthen it. The attorney should maintain factual accuracy and the “inoculation” should never distort or misrepresent evidence.

The inoculation theory offers trial lawyers a scientifically grounded method to anticipate, neutralize, and control the impact of opposing arguments. By strategically introducing and refuting potential weaknesses early, attorneys can enhance juror resistance, reinforce their narrative, and maintain persuasive dominance throughout the trial. Effective trial advocacy is not only about persuasion—it is about preparing jurors to resist persuasion from the other side.

C. Voir Dire

Voir dire is the only time when attorneys are allowed to directly talk to potential jurors. This is an incredibly important part of the jury trial experience. Some say that a party has won or lost its case after voir dire; after the trial the party finds out the result.

Remember that when the attorney is judging the venire members, they are also judging the attorneys. First impressions are important. The attorney should be sincere; know your case; show respect to the judge, the jurors and your opponent; ask short, simple and easy to understand questions; lose the legalese; be pleasant; be confident but not arrogant; don’t argue with a juror; don’t embarrass a juror; be organized and look organized (neat desk); if a juror cannot understand your question, apologize for not making the question clearer (it is always the attorney’s fault).¹⁶

Once again, the main part of voir dire is discovering the venire members’ schemas. In a fiduciary case, voir dire should therefore focus on jurors’ attitudes toward trust, loyalty, and fairness in various relationships, and their ability to apply legal—not moral—standards.

1. New Theory of Voir Dire

The old style of voir dire was to teach the jury about facts and law and ask leading questions. Attorneys did not want to lose control of the panel and have bad opinions expressed to poison the panel. The attorneys basically just turned voir dire into a form of an opening statement. The Texas Supreme Court has since held that attorneys cannot give a long recitation of facts and then ask the jury how they feel about who should win.¹⁷

The most important aspect of voir dire is finding members who hold harmful schemas (life experiences and opinions that are harmful to the case). This process necessarily means that the venire members are talking and disclosing their experiences and thoughts. Short, open-ended questions should be used. Harmful thoughts are expected and a good thing; it educates the attorney on how to effectively use peremptory strikes. Moreover, if the opinions are

¹⁶ <https://www.advocatemagazine.com/article/2018-january/everything-you-wanted-to-know-about-voir-dire>

¹⁷ See Craig T. Enoch and David F. Johnson, *Narrowing The Ability To Strike Jurors: The Texas Supreme Court Addresses Important Voir Dire Issues*, 39 Tex. Tech L. Rev. 229 (2007).

sufficiently bad, a trial court should use a for-cause strike and remove the member from the panel without the attorney having to use a peremptory strike.

2. Use “Looping” Questions

During voir dire, one strategy is to utilize looping questions. “Looping” questions refers to a strategic technique used by attorneys to build rapport, encourage discussion, and uncover deeper insights into jurors’ beliefs or biases. Looping occurs when a lawyer references or repeats a prior juror’s answer while posing a new question—either to that same juror or to others. This technique “loops” the conversation back to earlier responses, creating continuity and engagement. It demonstrates active listening and helps the attorney explore attitudes that may affect impartiality. The purposes of looping are to: reinforce key points or themes relevant to the case; encourage jurors to elaborate on their views; promote group discussion and comparison of opinions; and help identify potential biases or predispositions.

Examples of looping are:

So, Ms. Smith, you just mentioned that you are a retired nurse, how might that experience influence how you evaluate medical evidence in this case? Ms. Smith said she believes strongly in following the rules. Does anyone else feel the same way? How might that affect your decision-making as a juror?

Looping is not merely conversational—it is a trial advocacy technique that helps attorneys: identify jurors who may be biased or sympathetic to one side; build a narrative that aligns with case themes; and foster openness and trust during voir dire. This method is widely recognized as an effective way to elicit candid responses and select an impartial jury.

3. Areas of Inquiry

The attorney should start voir dire with an introduction, introduce the theme, and frame the main issues in the case. This should establish rapport with the panel, explain the type of case, and set expectations. The attorney may say:

Good morning, ladies and gentlemen. My name is [Attorney Name], and I represent [Plaintiff/Defendant]. This case involves a claim of breach of fiduciary duty — a legal duty that arises when one person places special trust and confidence in another, such as in a business partnership or financial relationship. In Texas, a fiduciary must act with the utmost good faith, loyalty, and full disclosure. With great power comes great responsibility. The question for you as jurors will be whether the defendant breached his duties under the law.

Attorneys should discuss who the attorneys and witnesses are and whether anyone on the panel knows any of them. If so, there should be deep questioning (maybe outside the presence of the panel) on how the member knows the individual and what impact that will have on his or her decision-making process.

Attorneys should attempt to assess the venire members’ baseline understanding of fiduciary obligations under Texas law.

In Texas, a fiduciary must act with utmost good faith and loyalty. What does that mean to you in a business relationship? In Texas, a fiduciary must act with loyalty and good faith. What does that mean to you? Do you think a fiduciary should always put the other person’s interests ahead of their own? “Can you think of situations where a fiduciary might make a decision that benefits both parties? Would you be able to apply the judge’s legal definition of fiduciary duty, even if it differs from your personal view?

The attorney should evaluate the venire members familiarity with the relationship at issue.

Have you ever been involved in a partnership or managed someone else’s money? How did you handle issues of trust and disclosure? Have you ever been an agent for someone? Have you ever been an executor or trustee? Have you ever trusted someone to handle your finances, investments, or property? How did that experience go? Would that experience make it difficult for you to be fair in a case involving alleged breach of trust?

Then follow up questions on the members’ experiences with that position.

The attorney should weave in their theme in questioning.

In the Spiderman movie, there was a quote that with great power comes great responsibility. What does that mean to you? Do you agree with that statement? Should that apply to a situation where a defendant is a trustee and has power over millions in property?

Identify jurors who have strong emotional reactions to breaches of trust.

Has anyone here ever felt betrayed by a business partner, financial advisor, executor or trustee? How did that experience impact you? How does it affect your views?

The attorney should ensure that venire members jurors can distinguish between moral disappointment and legal breach. Texas jurors often equate fairness with morality. Clarify that the law imposes specific duties, not general fairness standards.

Do you believe someone can make a poor business decision without breaching a fiduciary duty? If a business partner uses company funds for a personal investment but later repays the money with interest, do you think that's a breach of fiduciary duty under Texas law? Suppose a trustee invests trust funds in a business he partially owns, but the investment performs well. Should that be considered a breach of fiduciary duty? What factors would you consider in deciding whether that conduct was fair or a breach?

Do you believe that every mistake in judgment is a breach of trust? If someone makes a business decision that turns out poorly, should that automatically mean they violated a fiduciary duty? Can you separate moral disappointment from legal liability? Would you be able to follow the law even if you personally disagree with the outcome?

The attorney for the plaintiff should clarify that intent is not always required for liability under Texas law.

If a fiduciary benefits from a transaction but doesn't intend harm, should that still be considered a breach?

The attorney for the defendant should detect bias against corporate or high-net-worth parties.

Do you believe large companies or wealthy individuals are more likely to take advantage of others?

The attorneys should test jurors' expectations about disclosure duties.

"Should a fiduciary disclose every potential conflict, even if it doesn't affect the outcome?"

The attorneys should attempt to identify potential dominant jurors.

"When you're in a group discussion, do you tend to lead or listen first?" "Do you often find yourself persuading others to your point of view?" "Would you be comfortable letting others express their opinions before sharing yours?"

Texas recognizes fiduciary duties in informal relationships based on trust and confidence. If applicable, attorneys should ask jurors whether they believe close friendships or long-term business relationships should create legal duties.

Attorneys often spend some time clarifying the burden of proof. The plaintiff's attorney should emphasize that the plaintiff must prove breach by a preponderance of the evidence, not beyond a reasonable doubt. The defendant's attorney should emphasize that the plaintiff has the burden to prove his or her claim (if that is the case) and that the defendant wins if there is a tie.

Attorneys should spend time discussing actual damages and punitive damages, if applicable. There may be a case where there are breaches of fiduciary duty that do not directly harm the trust but benefit the fiduciary. The attorney should focus on the concept of no harm/no foul. Do the members agree with that or do not agree with it? Could they find someone in breach of a duty even if there is no damage to the trust. Are theoretical breaches still important to them? If there are damages, are the members comfortable with awarding that amount. Some breaches cause a large amount of damages, much more than a typical venire member earns in his or her life. Could they consider awarding that amount if the evidence supports that amount. Could they do so even if the beneficiaries are already wealthy. Going

into the amounts helps anchor that amount in the members' mind.¹⁸

Punitive damages are an even harder topic to address. The attorney should discuss the legal basis for it and whether the venire members agree that in the right case they can award punitive damages. The attorney should discuss the amount that may be sought and whether the members could consider such an amount under a case with the right facts. This is a good area to consider lodging for-cause arguments, i.e., that a member that cannot follow the law, no matter the facts, should be struck.

The attorney may want to address attorney's fees, if sought. Fees can be very expensive in today's legal environment. Once again, the amount of fees sought may be insulting to some individuals. The attorney should discuss the amount that may be sought and whether the members could consider such an amount under a case with the right facts. This is a good area to consider lodging for-cause arguments

The attorney should seek a commitment that the members who make the jury act with impartiality and adherence to law.

This case involves complex issues of trust and responsibility. Can each of you commit to deciding the case based solely on the evidence and the judge's instructions — not on personal experiences or emotions? Is there anything about your background or beliefs that might make it difficult to be fair in a case involving alleged breach of fiduciary duty?

In Texas fiduciary duty cases, voir dire should: educate jurors on the legal meaning of fiduciary duty, expose biases about trust and fairness, and select jurors who can apply Texas law objectively, even when emotional issues of betrayal or loyalty arise.

D. Opening Statements

Opening statements are important for framing the issue, setting the theme, and telling a story.

The attorney should choose a unifying theme that helps jurors remember the case. This should be a concise, emotionally resonant phrase and repeat it throughout trial.

With great power comes great responsibility. A betrayal of trust. Loyalty means transparency. Trust given, trust broken.

Jurors often do not understand what a fiduciary duty entails. Begin by explaining, in plain language, that a fiduciary duty is a special legal obligation of loyalty, honesty, and full disclosure that arises when one person places trust and confidence in another. For example:

In Texas, when someone agrees to act as a trustee, business partner, or financial agent, the law requires them to put the other person's interests ahead of their own. That's what we mean by fiduciary duty.

The attorney should identify the relationship creating the duty and describe the breach in order to anchor the jury in the specific relationship that gives rise to the duty.

This case is about a trustee who was trusted to manage funds that a family would rely on for their living expenses — and who used that trust for personal gain.

Importantly, an attorney should tell a compelling story because jurors connect with stories, not legal theories. Consider giving a chronological, human-centered narrative that highlights trust, reliance, and betrayal. The attorney should preview key evidence and give the jury a roadmap of what they will see and hear. The attorney should mention documents, testimony, or expert evidence that will support your case — without arguing.

For years, Ms. Lopez trusted her trustee to handle the trust's finances. She believed they had a good relationship. But over time, that trust was quietly broken. You'll see bank records showing transfers from the trust account to the defendant's personal account, and you'll hear from the accountant who discovered them.

¹⁸Nicholas C. Rowley, How to Think About, Discuss, and Present Money Damages in Voir Dire and Opening Statement: The Importance of Asking for Specific Dollars, and How to Convince the Judge that it's Not Preconditioning, Advocate: Journal of Consumer Attorneys Associations for Southern California, (June 2019), <https://www.advocatemagazine.com/article/2019-june/how-to-think-about-discuss-and-present-money-damages-in-voir-dire-and-opening-statement>

Fiduciary cases often hinge on whether the breach was intentional or in good faith. An attorney should frame the motive early — either to show bad faith or to demonstrate honest mistake.

The evidence will show that this wasn't an accident. It was a deliberate choice to put personal profit ahead of duty.

The evidence will show that every decision was made in good faith, with full disclosure and no intent to deceive.

The attorney should explain the damages and remedy sought. Jurors need to understand what harm occurred and what the attorney is asking them to do.

Because of this breach, the trust lost over \$1,500,000 in value. My client will ask you to restore what was taken by awarding her damages and hold the fiduciary accountable.

Once again, the attorney should avoid legal jargon and use simple words. Jurors respond to clarity and fairness. The attorney should replace terms like “constructive fraud” or “self-dealing” with simple explanations.

He used his position of trust to benefit himself — and that's what the law forbids.

The attorneys may use the inoculation theory, discussed above, to build credibility by addressing unfavorable facts before opposing counsel does. The attorney should briefly acknowledge the issue and explain why it doesn't defeat your case.

You'll hear that my client didn't catch the problem right away. That's true — because she trusted her trustee, as anyone would in that situation.

The attorney should ground the opening in the legal framework jurors will apply. The attorney should reference the elements of fiduciary duty and breach as defined in Texas Pattern Jury Charge.

The judge will instruct you that a fiduciary must act with loyalty, good faith, and full disclosure. The evidence will show that the defendant failed each of those duties.

However, the attorney should not argue his or her case like he or she is giving a closing statement. The attorney should maintain credibility and restraint. Avoid overstating evidence or making promises the attorney cannot fulfill. Jurors will remember inconsistencies; especially if opposing counsel points those out.

The attorney should end with a clear, emotional anchor. The attorney should leave jurors with a sense of purpose and fairness.

At the end of this trial, we'll ask you to hold the defendant accountable — not just because the law requires it, but because trust, once broken, must be made right.

E. Direct Examination Techniques

Having the jury like and/or trust a client's witnesses is a very important aspect of winning a case. The following are some suggestions for making the most of a direct examination in a fiduciary case.

1. Ask Open-Ended Questions

The jury wants to hear the witness testify, not the attorney. When the attorney does not trust the witness to give the right answer, it shows weakness to the jury and loses some credibility, which is everything in trying a case. An attorney should use open-ended questions that begin with “who,” “what,” “where,” “when,” “why,” and “how.” These allow the witness to tell their story in their own words and provide detailed, credible testimony. The attorney should avoid leading questions that suggest an answer and may draw objections.

What steps did you take to evaluate the investment options? When did you do this? Did you disclose this to the beneficiaries? When did you disclose it?

2. Establish a Logical Sequence

Organize the examination in a clear, logical order—chronological or thematic—so the testimony flows naturally and is easy for the judge or jury to follow. For example, in a trust case, you might begin with the witness’s background, then move to the creation of the trust, the fiduciary’s actions, and finally the resulting harm or compliance. Use sign posting and signals to assist the witness and the jury for where the testimony is headed.

I would like to talk to you today about three things: (1) your background in investments, (2) your review of the evidence in this case, and (3) your opinions on how the trustee invested the assets of the trust. Is this ok? Moving to the first topic, what is your background in investments?... Moving to the second topic, what evidence did you review in this case?... Moving to the last topic, what are your opinions on how the trustee invested the assets?...

3. Use Short, Clear Questions

Keep questions concise and focused. Long or compound questions can confuse the witness and the factfinder. Simple phrasing ensures clarity and maintains control of the narrative.

Instead of asking, “When the trustee made the investment, did you think it was prudent and consistent with the trust’s objectives?” ask, “What was your opinion of the trustee’s investment decision?”

4. Listen and Follow Up

Active listening is critical in a deposition and at trial. So many attorneys follow their outlines and do not really pay attention to what the witness is saying. So, pay close attention to the witness’s answers and follow up to clarify or expand on key points. If a witness gives an incomplete or ambiguous answer, ask a short follow-up question to ensure the record is clear. If the witness uses technical language that is difficult to understand, follow up and ask for a simpler explanation.

5. Highlight Key Facts

Use your questioning to emphasize the facts that support your case theory. Structure the examination so that the most important points are repeated or reinforced naturally through the witness’s testimony. This helps jurors remember the evidence that matters most. Use follow-up questions that highlight the answer.

So, let me get this straight, and this is very important, the trustee purchased property from the trust, and he did not even tell you about that fact?

6. Prepare and Practice Thoroughly

Preparation is essential. Review all potential questions with the witness, discuss possible cross-examination topics, and practice responses to ensure confidence and clarity. A well-prepared witness appears credible and composed, which strengthens your case.

7. Use Exhibits Effectively

Incorporate documents, charts, or other exhibits to support the witness’s testimony. Introduce them at the right moment to illustrate key points or corroborate statements. For example, in a fiduciary case, use trust accountings, correspondence, or investment reports to reinforce the expert’s analysis. Use digital projectors to show the jury in live time on the screen what the document states. There are programs that allow a party to highlight and pull excerpts out of the document and emphasize that portion. Timelines can be very effective and helpful. Let the witness prove the facts in a pre-prepared outline and then introduce it as an exhibit or simply use it as a demonstrative.

8. Maintain Control of the Examination

While allowing the witness to tell their story, maintain control by steering the examination toward relevant topics and avoiding tangents. If the witness strays, use transitional questions to bring them back to the main theme.

Thank you for that answer, I would like to go back to the topic of disclosure. What communications did the trustee give to you on the issue of purchasing the trust’s real estate?

9. Humanize the Witness

Briefly establish the witness's background—education, experience, or motivations—to help the jury relate to them. A credible, relatable witness is more persuasive. This is especially important for fiduciary experts, whose testimony can otherwise seem technical or abstract. Be honest about negative motivations or biases. One can “inoculate” the jury on these types of issues in the middle of the direct examination to weaken the opposing party's cross examination.

10. Avoid Objections

Frame questions carefully to minimize objections. Avoid leading, argumentative, or compound questions. Anticipate potential evidentiary issues and structure your examination to comply with the rules of evidence. The more that a judge sustains the opposing party's objections, the less credibility that the offering party has with the jury. The jury certainly accepts the judge as the primary expert in the courtroom, and a party wants to “win” the judge's rulings to the extent possible. Planning ahead can assist in winning that battle.

11. Strategic Considerations

Effective direct examination is about storytelling through credible testimony. The goal is to present a coherent narrative that supports your case theory while maintaining the witness's credibility. In fiduciary litigation, this often means translating complex financial or legal concepts into clear, relatable terms that emphasize fairness, prudence, and trustworthiness.

F. **Cross-Examination Techniques**

Attorneys are usually most nervous about cross examining a key witness. Indeed, this interplay often greatly impacts the result of the trial. Can you make the opposing party or their key witness, like an expert, look bad, careless, or dishonest? Here are a few techniques that can assist with an effective cross examination.

1. Effectively Organize The Examination

Some state that an attorney should limit an effective cross-examination to three key points. There can be more, depending on the case and the witness, but the concept is sound: narrowly tailor a cross examination. Once again, there is the primacy and recency bias concept, i.e., a listener has a better chance to remember what he or she heard first and last. So, when an attorney has the chance to question a witness, do not waste these opportunities. Address the most important issue first when the jury is paying their attention most. Address the second most important issue last: leave the jury with a good impression of your case at the end of the examination. Address the least important issues in the middle and consider using the inoculation theory for bad facts.

Once again, use signals and highlight issues when you address them, e.g., “I would first like to talk about your communications and disclosures to my client... I would now like to move to your decision to buy real estate from the trust... I would like to end my time with you discussing your decision to not make distributions to my client...”

2. What You Do Not Ask Is As Important As What You Do

Trial attorneys on occasion ask a witness questions that elicit bad facts that came out on direct examination. They retrace the direct examination, thinking that it will lead to some cross examination point. Do not do that. It reinforces and repeats bad facts and may anchor those facts into the jurors' heads.

3. Keep The Questions Short For Control

Having control over an adverse witness can be very difficult at times. Typically, when an attorney loses control, it is because they are asking questions that are too long, filled with too many facts, and ask the witness to agree to a conclusion. The witness will simply disagree with the question and may give a long speaking answer that is contrary to where the attorney wants to go.

Isn't it true that you sold trust property, the residence, to yourself for under market value with a loan from the trust with no collateral and with no interest rate and breached your fiduciary duties? No, I had the right under the trust document to sell property to myself and did not breach any duties.

Rather, to get control, the attorney should ask very short questions that build on each other. Cross-examination in fiduciary cases should be tightly controlled. Use short, leading questions that limit the witness's ability to explain or evade. Each question should elicit a “yes” or “no” answer, keeping the narrative in your control.

The attorney should use “baby steps” in cross examination and not “leaps.” If an attorney does this correctly, then after the set up (baby steps), the attorney can ask a conclusory question to drive home the point. It does not matter what

the answer is: if they agree, you win, if they disagree, they look like liars.

You sold trust property to yourself? Yes.

This was done via a loan from the trust? Yes.

You did not actually pay any money to the trust when you sold the residence? Correct.

You did not have a written loan agreement, like a promissory note? Correct, I did not.

You did not pay any interest on the loan? No, I did not.

You did not have any security agreement? No, I did not.

So, you did not offer any collateral to secure the loan? No, I did not.

You did not appraise the property when you sold it to yourself? No, I did not.

If my expert's appraisal is correct, you did not pay fair market value for the property? I guess that is correct.

Do you think that a trustee should act fairly and in good faith? Yes.

Would one aspect of that be to not take advantage of the position to benefit oneself? Yes.

You must admit that you did not comply with your duty to act fairly when you purchased the trust's property on an interest-free loan with no collateral and for less than fair market value? [Doesn't matter what the answer is].

4. Lean Into What The Witness Did *Not* Do

Attorneys usually emphasize what a witness did wrong. Of course, that is the correct thing to do. But the attorney should also lean into what the witness did not do, that was also wrong. This requires the skill of empathy. Empathy is the ability to understand and share another person's emotional state, involving cognitive recognition of what someone else is feeling.¹⁹ It requires perceiving another's perspective and emotionally connecting with their experience. *Id.*

In preparing for cross-examination the attorney should place themselves in the witness's shoes—what was the witness doing, feeling, experiencing, etc. If the witness was actually doing something in a correct way and in good faith, what would they have done? Compare the two: what was done versus what a good and careful person would do. Prepare questions that highlight the differences and show what the witness did not do that a good and careful person would do.

When you sold the trust's property to yourself, you did not appraise it? You did not seek a real estate agent's informal opinion on value? You did not review the taxing authority's value of the property? You did not talk to anyone about the value of the property? You did not even tell the beneficiary that you were buying trust property? You did not ask the beneficiary about his opinion on value? You did not seek out an agreement with beneficiary on the sale or value? You did not ask the beneficiary for a release or other legal agreement that would protect you? Because to do that, you would have had to disclose the sale to the beneficiary? Instead, in the dark of night and in secret, you sold the property to yourself for an amount that we know was substantially below market value? [Doesn't matter what the witness says] You, as a fiduciary who owed duties of loyalty and good faith, greatly benefited from the transaction at the trust's and beneficiary's expense? [Doesn't matter what the witness says]

5. Reptilian Theory

The theory is grounded in neuroscience and psychology, positing that jurors' decision-making can be influenced by appealing to the "reptilian brain" — the part of the brain associated with survival instincts, fear, and self-

¹⁹ American Psychological Association, APA Dictionary of Psychology (2023). Empathy. <https://dictionary.apa.org/empathy>.

preservation.²⁰ Rather than focusing solely on sympathy for the plaintiff, the Reptilian approach encourages jurors to view the defendant's conduct as a threat to community safety, thereby motivating them to render a verdict that protects themselves and others.

To use the Reptilian Theory, the attorney first establishes universal rules (e.g., "A trustee must disclose all material facts that effect a beneficiary's interest in a trust"). The attorney then demonstrates that the defendant violated one or more of these rules. The attorney then shows that the violation is a danger not just to the plaintiff, but to the entire community — including the jurors themselves. The jurors are encouraged to act as "guardians" of community safety by holding the defendant accountable through their verdict.

During cross-examination, an attorney using the Reptilian Theory will: (1) ask broad policy-based questions that the witness must agree with (e.g., "It is important for a fiduciary to disclose facts to his or her beneficiary, correct?"). Then the attorney will gradually narrow the focus to show how the defendant's conduct violated those rules. The attorney will emphasize that such violations endanger the public, appealing to jurors' instinct to protect themselves and their community.

Some attorneys argue that the Reptilian approach improperly appeals to emotion and fear, rather than evidence and reason, and some courts have limited or excluded Reptilian-style arguments, finding them prejudicial or inconsistent with evidentiary rules.²¹ Thus, judges may sustain objections if questioning crosses into improper argumentation or jury nullification territory.

6. Subjects For Examining A Fiduciary

There are certain topics that normally come up in cross examining a fiduciary. The following are not in a particular order, and an attorney may be able to use some, but often not all, of these areas, in any one particular examination.

The attorney should try to establish a breach of duty. Begin by focusing on specific actions or omissions that may constitute a breach of fiduciary duties such as loyalty, care, prudence, or good faith. Use leading questions to highlight decisions that benefited the fiduciary at the expense of the beneficiary or trust or that otherwise harmed the trust.

You approved that investment without consulting the beneficiaries, correct?

This approach helps the jury see the fiduciary's conduct as self-serving or careless.

The attorney should probe for conflicts of interest. The attorney should ask leading questions to uncover any undisclosed relationships, financial interests, or transactions that could indicate a conflict of interest. The goal is to show that the fiduciary's judgment was compromised.

You had a personal financial interest in the company the trust invested in, didn't you?

The attorney should challenge the credibility and diligence of the fiduciary. The attorney should use documents, prior statements, and inconsistencies to question the fiduciary's credibility and diligence. Highlight any failure to follow established procedures, maintain records, or act with due care.

You testified that you reviewed the investment reports monthly, but the records show no review for six months, correct?

The attorney should test the knowledge of fiduciary obligations. The attorney should question the witness about their understanding of fiduciary duties and applicable legal standards. This can expose ignorance or misunderstanding of core obligations such as loyalty, impartiality, and full disclosure.

Have you ever heard of the principal and income act? What is it? Where is it located? It requires the trustee to act impartially, correct? What does that mean to you? Have you ever heard of the power to adjust? What does that mean? Etc.

The attorney should explore communications and documentation to see if there are any material misstatements or omissions. The attorney should examine emails, correspondence, and trust records to identify omissions, misleading statements, or evidence of self-dealing. Use these materials to demonstrate that the fiduciary concealed information,

²⁰ See Keenan, D., & Ball, D., REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION, (2009) (Balloon Press).

²¹ *Greer v. Key*, No. 2024-CA-01393-SCT, 2026 WL 470883, at *3 (Miss. Feb. 19, 2026); *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985) ("all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty, and expectation" are inadmissible); *Allen v. Patel*, 341 Cal. Rptr. 3d 1, 17 (Cal. Ct. App. 2025).

failed to communicate material facts, or misstated facts.

You never informed the beneficiaries about the sale of that asset, did you? You did not inform the beneficiaries about the fair market value of that property? In fact, on trust statements it was listed at the value that reported on the settlor's 706 and inventory, and that value was six years old?

The attorney should analyze procedural compliance. The attorney should ask about adherence to internal procedures or policies, reporting requirements, and record-keeping obligations. Any noncompliance can suggest negligence or intentional misconduct.

You were required to provide annual accountings under the trust, but you failed to do so for two consecutive years, correct? The policies of the bank require that any sale of real estate has to be approved by the trust committee, and you did not have the committee approve this transaction, did you?

The attorney should establish damages by connecting the fiduciary's conduct to measurable harm suffered by the beneficiaries or trust. The attorneys should use financial records and expert testimony to quantify losses and show causation.

As a result of that investment decision, the trust lost over \$250,000, correct?

The attorney should impeach the witness with prior statements or testimony. If the fiduciary's current testimony contradicts prior depositions, written reports, or communications, use those inconsistencies to impeach credibility.

You just testified in direct that you disclosed to the beneficiaries certain things. Have you ever given a prior inconsistent statement? In your deposition, you stated that you never discussed the investment with the beneficiaries, but today you testified that you did? Your deposition was taken a year ago, correct? That was certainly closer in time to the events in question than your testimony today? People typically lose memory over time? Your memory was probably better then than today?

The attorney should use evidence strategically to anchor your questions in documentary evidence—trust instruments, accountings, emails, or financial statements—to reinforce credibility and prevent the witness from speculating. This approach grounds your cross-examination in verifiable facts rather than opinion.

In conclusion, the attorney should use a cross examination that is detail-oriented and evidence-driven. The goal is not only to discredit the fiduciary but also to demonstrate how their conduct violated core duties and caused harm. Preparation is critical and an attorney should know the documents and governing law inside and out. The attorney should use tone and pacing strategically: remain calm, professional, and precise to maintain credibility with the court or jury.

G. Examining a Beneficiary

When cross-examining a beneficiary in a fiduciary case, the goal is often to challenge their credibility, uncover biases, establish inconsistencies, or clarify their understanding of the terms and the defendant's actions. The defendant's attorney wants the jury to dislike the beneficiary and not feel sorry for him or her. Good questions will depend on the specific circumstances of the case.

When an attorney examines a witness, the attorney should not start out in an overly aggressive fashion. The jury will typically identify with the witness and may hold it against the attorney and his or her client for bullying the witness. Rather, the attorney should be polite and professional with the witness, at least until the witness deserves a more aggressive approach. If the witness answers in evasive ways or is caught not giving accurate answers, then the examining attorney may have more runway to be more aggressive.

The attorney should set up defenses, like the statute of limitations, waiver, estoppel, etc. The attorney should be fully aware of the pleadings and what evidence needs to be admitted to support questions in the jury instructions/charge.

You were a beneficiary named in the will? You were mailed a copy of the will by the executor? You knew that the probate was pending? If you had reviewed the probate file, you would have seen the inventory? That indicates that the executor was claiming half of the real property as his own property? Yet, you waited six years to file suit after the inventory was filed?

The attorney may want to question the beneficiary on his or her knowledge of the relevant document that creates the fiduciary relationship (trust, will, POA document, etc.). This will show that the plaintiff is complaining about something that he or she does not understand.

You are not aware of the specific terms outlined in the trust agreement? You have not read the trust instrument in full? You do not understand the trustee's responsibilities as outlined in the trust? You cannot even explain your rights as a beneficiary?

The attorney should ask about the beneficiary's relationship with the defendant. Show that the plaintiff has a grudge or unfair bias against the defendant.

Your relationship with the trustee has been poor? You have not communicated directly with the trustee regarding your concerns? The trustee never denied you access to information about the trust when you asked for it?

The attorney should ask if the beneficiary understands his or her claims against the defendant to, once again, chip away at his or her credibility.

You claim the trustee mismanaged funds; what evidence do you have to support this? Are you aware of any decisions that the trustee made that you believe were improper? Can you provide details of any specific transactions that you believe violated the trust's terms? Do you have financial expertise to evaluate the trustee's actions?

The attorney should question the beneficiary over his or her motives. For example, showing that the beneficiary is simply in the case for financial reasons may make the fact finder less inclined to feel sorry for him or her.

You believe you are entitled to a larger share than other beneficiaries? Well, that is what you are asking the jury to award you? You are asking the jury to not only award you money lost on the investment, but you are asking the jury to award you money to punish the defendant. That will be money that you will get to keep that does not relate to any damage to you or the trust?

The attorney may want to ask questions that attack the beneficiary's qualifications.

You do not understand the financial complexities involved in managing the trust? You have never managed a trust or similar financial structure yourself? You do not have any education or training in the medical field or dealing with dementia?

The attorney should ask questions that show inconsistencies or contradictions in the beneficiary's current testimony.

You stated in direct examination that the trustee never told you that he purchased trust owned real estate? Have you ever made a prior inconsistent statement? In your deposition, you stated on page 96 that the trustee sent you a copy of the agreement outlining the transaction? That was at a time that was closer to the transaction than today, correct? People normally lose memory with time, not gain memory, correct?

The attorney should ask questions that show that the beneficiary is being unfair with the defendant. Often the beneficiary does not communicate with the defendant, review documents, and simply use reasonable care over his or her finances. It is usually a good idea to explore these areas with the beneficiary to make the jury empathize with the defendant.

Have you documented your concerns with the trustee in writing? The trustee is not supposed to know that you are upset without you telling him, correct? How many times have you contacted the trustee regarding your issues? Were you informed of the trustee's decisions and rationale for certain distributions and did not object or complain? You knew of previous similar investments that were very profitable and never complained about those? You are now only complaining about the one that did not go as well?

H. Examining Expert Witnesses

1. Direct Examination

The attorney should establish the expert's qualifications. The attorney should begin by laying a strong foundation for the expert's credibility. Ask about their education, certifications, and professional experience related to fiduciary matters—particularly trusts, estates, or investment management. Highlight their history of evaluating fiduciary conduct, serving as a trustee, or advising fiduciaries. This establishes authority and helps the jury understand why the expert's opinions are reliable.

What are the general areas that you will be testifying to today? What makes you qualified to testify to those opinions? [follow up if the expert omits an important qualification]

The attorney should ask the expert to define the role and duties of a fiduciary. The attorney should clarify for the jury what a fiduciary is and what legal standards apply. The attorney should have the expert explain duties such as loyalty, prudence, good faith, and full disclosure. This helps frame the fiduciary's obligations in understandable terms.

Example questions: Can you explain what it means to act as a fiduciary? What are the core duties that govern fiduciary conduct under trust law? What does it mean to have a duty of impartiality?

The attorney should have the expert address the standard of care. The attorney should ask the expert to describe how fiduciaries are expected to act under professional norms and legal standards. The attorney should use hypotheticals or case-specific examples to illustrate what constitutes prudent management versus a breach of duty.

What is considered reasonable and prudent behavior for a trustee managing trust assets? How do fiduciaries typically avoid conflicts of interest?

The attorney should relate fiduciary principles to case facts. The attorney should present the facts of the case and have the expert apply fiduciary principles directly to those facts. This connects abstract standards to concrete actions and helps the jury see how the fiduciary's conduct either met or fell short of expectations. Further, experts are allowed to apply the facts to the law and reach conclusions; as opposed to testifying on pure legal concepts.

Based on the facts presented, did the trustee's actions align with fiduciary standards? How? In your opinion, did the fiduciary exercise appropriate judgment and care?

The attorney should discuss common fiduciary issues that are relevant to the case. The attorney should explore relevant areas where breaches occur—such as conflicts of interest, mismanagement, commingling of assets, or failure to disclose material information. Have the expert explain how these issues typically arise and what best practices should have been followed.

What are common warning signs of fiduciary mismanagement? How should a fiduciary handle potential conflicts between beneficiaries?

The attorney should use clear, layman's language and encourage the expert to explain complex fiduciary concepts in simple, accessible terms. This ensures jurors understand the testimony and can connect it to the case facts.

Please explain in plain language what 'duty of loyalty' means in the context of a trust.

The attorney should preempt cross-examination by anticipating and inoculating the jury with potential bad facts. The attorney should invite the expert to address potential opposing arguments or misconceptions proactively. This strengthens credibility and reduces the impact of cross-examination.

Some might argue that the fiduciary acted reasonably under the circumstances—how would you respond? The trust in this case states that the trustee can purchase trust assets, does that give a trustee carte blanche to do so in any manner he or she prefers?

The attorney should ask the expert to support his or her opinions with authority. The attorney should ask the expert to reference authoritative sources—such as the Texas Trust Code, Restatement (Third) of Trusts, or leading case law—to reinforce their opinions. This adds weight and legal grounding to their testimony.

What legal authorities or professional standards support your conclusions? Can you cite any cases or regulations that define the fiduciary duties you've described?

A well-structured direct examination should educate the jury, establish the expert's credibility, and clearly link fiduciary principles to the facts of the case. Focus on clarity, professionalism, and moral framing—showing that fiduciary duties are not just technical obligations but fundamental standards of trust and fairness.

2. Cross Examination

One of the most stressful things to do in a fiduciary duty case is to cross-examine an expert witness. It is very intimidating to ask questions of someone who may be a professional witness and who has a depth of knowledge on the substantive issues in the case.

Depending on the witness, an attorney may begin by probing the expert's background to reveal any limitations or potential biases. Question whether their experience truly aligns with the fiduciary context at issue—such as trust administration, investment management, or estate oversight. Explore whether they have a pattern of testifying for one side (plaintiffs or defendants) or any financial or professional relationships with the parties involved. The attorney should explore the expert's compensation structure and prior engagements to suggest potential bias or financial motivation.

How many times have you testified for plaintiffs versus defendants in fiduciary cases? Have you ever personally served as a trustee or fiduciary in a matter similar to this one? Are you being compensated on an hourly basis or contingent upon the outcome?

The attorney should examine the foundation of the expert's conclusions. Ask what materials they reviewed, whether they considered all relevant documents, and whether their analysis aligns with authoritative fiduciary standards. Highlight any omissions, outdated references, or selective use of information.

The attorney may test the expert's knowledge of the fiduciary duties and standards. The attorney could use hypotheticals or direct questions to test the expert's understanding of fiduciary obligations—loyalty, prudence, impartiality, and full disclosure. If their answers deviate from accepted legal standards, emphasize those inconsistencies.

You would agree that a trustee must always act solely in the best interest of the beneficiaries? It is not consistent with fiduciary duties to delegate investment decisions without proper oversight?

The attorney should evaluate the expert's application to case facts to legal standards. The attorney should challenge how the expert applied fiduciary principles to the specific facts of your case. The attorneys should identify assumptions, leaps in logic, or ignored evidence. If the expert's analysis relies on incomplete or speculative information, expose that weakness.

You assumed the trustee had full discretion over distributions—what evidence supports that assumption? You did not consider the trust's stated investment objectives before concluding the trustee acted imprudently?

The attorney should explore possible mistakes or omissions by the expert. The attorney should probe whether the expert overlooked key facts, documents, or industry practices. Ask what additional steps they would have taken if they were the fiduciary, forcing them to acknowledge uncertainty or hindsight bias.

Did you review the trustee's contemporaneous notes or only the final accounting? If you were the fiduciary, what additional information would you have sought before making that decision?

The attorney should impeach the expert with prior statements or publications. If possible, the attorney should locate and review any deposition testimony that the expert has given in the past. Further, the attorney should review prior relevant publications (internet posts, papers, law review articles, etc.) that the expert has prepared in the past. The attorney should mine those for any inconsistent positions from what the witness is taking in case. Contradictions between their current testimony and prior opinions can significantly undermine credibility.

The attorney should attempt to limit the scope of the expert's expertise. The attorney should clarify the boundaries of the expert's knowledge. Many fiduciary experts have general financial or legal backgrounds but lack hands-on experience in trust administration or specific fiduciary contexts.

The attorney should attempt to expose where the expert has stated generalizations and overstatements. The attorney should push the expert to clarify vague or overly broad statements and force them to acknowledge exceptions or uncertainties that weaken their conclusions.

You testified that the executor breached her duty by failing to timely make distributions, but you would admit that many attorneys recommend that distributions not be made until the IRS issues a closing letter? Would you agree that fiduciary decisions often involve judgment calls where reasonable experts may differ?

The attorney should attempt to obtain concessions on legal principles that helps his or her case. The attorneys should try to turn the expert against the proffering party on certain limited issues.

You have testified as to the investment policy that the trustees used. But you admit that a trustee has a duty to disclose the existence of the trust to all trust beneficiaries who are adults? You admit that a person who does not know that they are a beneficiary cannot properly protect his or her rights on any subject, including investment policies?

The objective of cross-examining a fiduciary expert is not necessarily to discredit them entirely but to undermine the certainty and reliability of their opinions. Focus on exposing bias, incomplete analysis, and overreach. Use concise, leading questions to maintain control and avoid giving the expert room to elaborate. When possible, tie inconsistencies back to authoritative fiduciary standards or the trust instrument itself to reinforce your client's position. Where possible use the expert against the proffering party.

III. CLOSING STATEMENTS

The purpose of closing statement is to reinforce the most persuasive evidence jurors heard. Normally, a juror who has sat through the trial has a very definite direction that he or she is leaning regarding a verdict. The closing statement will normally not sway that juror's view. However, a closing statement may enforce favorable juror's views, and it may give favorable jurors ammunition to use in deliberations to convince other jurors to find for the attorney's client.

The attorney should recap documents, testimony, and expert opinions that establish the fiduciary relationship, breach, and resulting harm.

Example: You saw the partnership agreement that required mutual consent for any distributions. You heard the accountant testify that funds were transferred without consent. That's the breach.

The attorney should tie facts to the legal elements of the of a breach of fiduciary duty under Texas law. Typically, the attorney should focus on the jury charge that has just been read by the judge to the jury. Summarize evidence that establishes the existence of a fiduciary duty, the breach of that duty, causation, and damages or benefits to the defendant.

The judge instructed you that a fiduciary must act with loyalty and full disclosure. The defendant did neither. The law is clear — that's a breach. The evidence proves each element: there was a fiduciary duty between partners, that duty was breached when funds were diverted, and that breach caused \$2.4 million in financial harm.

The attorney should be clear and persuasive. Jurors respond to clarity and confidence, not legal jargon, so the attorney should use plain, direct language and a logical structure.

This case isn't about complicated business terms. It's about trust — and what happens when that trust is broken. These two partners started a business, a successful business, and trusted that they would split everything 50/50. But the defendant did not want to share equally, and he took what he wanted. He abused the plaintiff's trust in him.

The attorney should address weaknesses in his or her case. This builds credibility by acknowledging and rebutting opposing arguments. The attorney should briefly address the defense's strongest points and explain why they fail under the law or facts or both.

The defense says this was just an honest mistake. But under Texas law, intent isn't required — only a failure to act with loyalty and full disclosure.

The attorney should highlight credibility because jurors often decide fiduciary cases (really, any case) based on who they trust is giving them the honest facts. The attorney should emphasize his or her client's honesty and consistency and contrast it with any inconsistencies in the opposing party's testimony.

Example: Our client answered every question directly. The defendant changed his story three times. Credibility matters — and you saw the difference.

The attorney should explain damages and connect the breach to tangible harm. The attorney should show how damages were calculated and why they are fair under Texas law.

The accountant showed that \$2,500,000 was diverted. That's not speculation — that's documented loss caused by the breach.

The attorney should appeal to justice and fairness because fiduciary cases resonate with jurors' sense of fairness and trust. The attorney should frame his or her conclusion around restoring fairness and accountability.

This case is about accountability. With great power comes great responsibility. When someone accepts trust, they promise to accept responsibility. Justice means holding them to that promise.

The attorney should be aware of time limits. Texas courts often impose time caps on closing arguments. So, the attorneys should practice the closing statement to ensure the statement is sufficiently concise, focused, and impactful. To stay in the time limits, the attorney should prioritize his or her strongest evidence and themes and avoid repetition.

The attorney should end the statement with a clear ask and leave jurors with a specific, confident request. The attorney should state exactly what verdict or judgment he or she seeks.

We ask you to find that the defendant breached his fiduciary duty and to award damages of \$2,500,000 — the amount taken from the partnership. That is the right thing to do and makes sure that justice is done.

Though attorneys get really wrapped up in closing arguments, in truth, they are often the least important part of the trial. But attorneys should still strive to do their best to represent their clients.

IV. THEMES IN FIDUCIARY LITIGATION

In fiduciary litigation, effective case themes often center on trust, responsibility, fairness, and accountability.

For plaintiffs, strong themes include betrayal of trust, abuse of power, duty and honor, protecting the vulnerable, and accountability. A plaintiff may argue that the fiduciary violated the confidence placed in them, misused their authority for personal gain, or failed to uphold the high standards of loyalty and honesty required of fiduciaries. Emphasizing the fiduciary's duty to protect vulnerable parties and holding them accountable for harm caused can resonate deeply with jurors, appealing to their sense of justice and moral responsibility.

On the defense side, successful themes often focus on good faith, reasonableness, and the absence of harm. Defense counsel may argue that the fiduciary acted in good faith and exercised sound judgment under complex circumstances, that any mistakes made were honest and not malicious, or that the plaintiff suffered no measurable harm as a result of the fiduciary's actions. Another effective defense theme is that the plaintiffs are overreaching—exaggerating claims or seeking to second-guess reasonable decisions made in the course of fulfilling fiduciary duties.

Strategically, plaintiffs should emphasize the moral and emotional dimensions of the fiduciary relationship—trust, betrayal, and fairness—to humanize the breach and appeal to jurors' sense of right and wrong. Defense counsel, by contrast, should focus on reasonableness, prudence, and good faith to counter emotional arguments and demonstrate that the fiduciary acted responsibly within the bounds of their duties. Both sides benefit from framing the fiduciary relationship as one grounded in responsibility and fairness, allowing jurors to connect with the underlying principles of justice that define fiduciary law.

V. CONCLUSION ON PERSUASIVE TRIAL TECHNIQUES

Winston Churchill: "I have made this letter longer than usual because I lack the time to make it shorter." Many have said that the best prepared lawyer usually wins at trial. The attorney should prepare, prepare, and prepare. The attorney should create outlines – but do not read from them. Visual aids are so important, and preparation should include creating powerful and impactful visual aids. The attorney should think ahead of time of arguments and examinations: make them as short as possible to emphasize the important facts, keep the jury's attention, and not insult the jury with overly repetitive evidence. The attorney should also think about appellate points and evidence that will need to be in the record.

An effective trial presentation is not just about what is said—it's about how it is structured to align with how jurors listen, process, and remember. By telling a clear story, organizing information logically, reinforcing key points, and using visuals and plain language, attorneys can ensure that jurors not only understand the evidence but also retain the arguments that matter most. In essence, successful advocacy is both a legal and cognitive exercise—one that respects how the human mind listens, learns, and decides.

VI. CONCLUSION

Attorneys are professional communicators; people pay them to write and speak. So, attorneys owe it to their clients to communicate effectively and persuasively. This article was intended to provide general advice on how to communicate and advocate fiduciary issues to a jury. Moreover, it was intended to address some of the common legal issues that arise in fiduciary litigation.