PREPARING YOUR FIDUCIARY LITIGATION CASE FOR TRIAL

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State Bar of Texas
BECOMING A FIDUCIARY LITIGATOR
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CHAPTER 10

BART C. FREDERICK
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Legal Experience

Moorman Tate, LLP, Brenham, TX
Associate Attorney, April 2021—Present
Represents parties and litigants in probate matters, fiduciary disputes, estate administrations, guardianships, trusts, real estate matters, business disputes, and personal injury lawsuits.

Serpe Jones Andrews Callender & Bell PLLC, Houston, TX
Associate Attorney, June 2017—March 2021
Represented hospitals, physicians, other health care providers, and business entities in medical malpractice, civil rights, commercial, and personal injury litigation.

Germer PLLC, Houston, TX
Associate Attorney, August 2015—May 2017
Defended businesses and governmental entities in employment, civil rights, and personal injury lawsuits in both state and federal court.

Education

Baylor University School of Law, Waco, TX
Juris Doctor, *cum laude*, May 2015

- *Baylor Law Review* – Administrative Editor
- 3L Vice President

University of Texas, Austin, TX
Bachelor of the Arts in Government, August 2012

Representative Experience

Obtained $1.2 million jury verdict as first chair in fiduciary litigation case.

$500,000.00 settlement on behalf of clients injured in motor vehicle accident.

$250,000.00 settlement on behalf of client asserting wrongful death claim arising from motor vehicle accident.

Obtained favorable judgment after bench trial in will construction case.

Obtained summary judgment dismissing executor's claims that client exerted undue influence, coercion, and duress on decedent to obtain designation as beneficiary on checking account agreement.

Obtained $109,176.50 judgment awarding damages for breach of contract and attorney fees after successfully obtaining summary judgment.

Dismissal for lack of jurisdiction of claims against client serving as executor of a decedent's estate.

Settlement of claims against client serving as executor of a decedent's estate.

Successfully argued and obtained summary judgment of breach of contract claims brought by client's former employee.

Obtained dismissal of claims against estate executor and successfully defended the dismissal on appeal. *Folsom v. Folsom*, No. 01-22-00531-CV, 2024 WL 187443 (Tex. App.—Houston [1st Dist.] Jan. 18, 2024, no pet.).

Obtained dismissal of defamation and constitutional claims against client. *Booth v. USA Archery*, No. H-24-4827; United States District Court for the Southern District of Texas.

Obtained dismissal of inverse condemnation lawsuit filed against a municipality.

Publications & Speaking Engagements

Speaker: "Types of Acknowledgments and What They Are Used For," 27th Annual Texas Bar College Summer School, July 10, 2025.

Speaker: "Probate Law 101," Texas Bar CLE, Handling Your First (or Next) Transactional Matter, March, 20, 2025.

Speaker: "Acknowledgments Update," Texas Bar CLE, 47th Annual Advanced Estate Planning & Probate, June 8, 2023.

Speaker: "General Business Succession and Operational Planning," Texas Bar CLE, 46th Annual Advanced Estate Planning & Probate, June 17, 2022.

Certifications & Distinctions

2025 Texas Rising Star, Super Lawyers.

Leadership Academy Class of 2024-2025, Real Estate, Probate & Trust Law Section of the State Bar of Texas.

HON. JERRY D. BULLARD

Jerry Bullard serves on the Texas Business Court's Eighth Division, which is based in Fort Worth, Texas but covers 18 counties in North Texas.

Prior to his appointment, Judge Bullard was a shareholder and attorney with Adams, Lynch & Loftin, P.C. He has over 30 years of experience in state and federal court trial and appellate litigation. During that time, in addition to handling complex commercial litigation matters, Judge Bullard routinely represented and consulted with individuals and business organizations with respect to organizational governance, policy drafting, commercial transactions, and other operational matters.

Judge Bullard is board certified in civil appellate law by the Texas Board of Legal Specialization, is a member and secretary of the Board of Directors of the American College of Business Court Judges and serves on the Texas Supreme Court Advisory Committee.

Judge Bullard is an active member of the State Bar of Texas and its Appellate, Litigation, and Legislative/Campaign Law Sections, the Texas Bar College, and the Tarrant County Bar Association. He has also served as a gubernatorial appointee on the Texas Juvenile Justice Board, a Section Representative on the State Bar of Texas Board of Directors, a member of the Texas Supreme Court's Conduct Commission Procedural Rules Task Force, and a member of the State Bar of Texas Court Administration Task Force.

Judge Bullard received a Bachelor of Arts in Telecommunications from Baylor University and his law degree from The University of Texas at Austin School of Law.

Chamberlain Hrdlicka
Attorneys at Law

Ryan O. Cantrell

Shareholder

Houston

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Practice Areas

- Probate & Fiduciary Litigation
- Labor & Employment
- Commercial Litigation
- Construction Law
- Trade Secret Litigation

Education

- Southern Methodist University, BBA (honors), BA (honors), 2003, magna cum laude, BBA in Finance
- Washington University in St. Louis, J.D., 2006

Honors

- *The Best Lawyers in America*, 2026, Litigation - Labor & Employment, Litigation - Trusts & Estates
- Band 1, Chambers USA: High Net Worth Guide, Private Wealth Disputes (Texas), 2025
- Texas Super Lawyers, Estate & Trust Litigation, 2021-2025
- Best Lawyers in America - Litigation - Labor & Employment, 2025
- Best Lawyers in America - Litigation - Trusts & Estates, 2025

Ryan Cantrell is a Shareholder and maintains a diverse litigation practice, representing clients in probate and fiduciary litigation, labor and employment litigation, governmental defense, complex commercial litigation, and construction litigation and arbitration.
In the area of probate and fiduciary litigation, Mr. Cantrell represents trustees, executors, beneficiaries, individuals, and business entities in all types of complex litigation matters including will contests, trust disputes, beneficiary claims, fraud, and breach of fiduciary duty claims. Mr. Cantrell combines his extensive litigation experience with his background in finance to bring adaptability and creativity to hotly contested disputes where there's more at stake than money.

With significant experience arbitrating and litigating in state and federal court on behalf of individuals and businesses, Mr. Cantrell also represents clients in various industries including employers against FLSA, Title VII, Section 1981, ADA/ADEA, hostile work environment claims, as well as a variety of state law claims. He has achieved positive outcomes for clients on dispositive motions on labor and employment issues in state and federal court in Texas, California, Missouri and Pennsylvania. In his commercial litigation practice, Mr. Cantrell represents clients in a wide array of cases including real estate, civil fraud, contract, and construction litigation.

Significant Cases

- *In re Travis Allen Morgan Trust* : Obtained a unanimous defense jury verdict against claims of breach of fiduciary duty and award of attorneys' fees for former trustee.
- *Estate of Aline V. Gausepohl* : Obtained a complete defense jury verdict in estate litigation against claims of fraud, undue influence, capacity, and forgery.
- *Estate of Ravindra Kumar, MD* : Obtained a complete defense judgment in will contest challenging lack of capacity, fraud, and undue influence.
- *Cellular Sales v. McGonagle*: Obtained unanimous jury verdict in a commercial lease dispute in favor of client enforcing contract and awarding attorneys' fees.

- Listed Chambers USA: High Net Worth Guide Private Wealth Disputes (TX), 2024
- Listed, Best Lawyers in America, 2024
- Texas Super Lawyers Rising Star, Estate & Trust Litigation, 2014 2017
- H-Texas Magazine Top Lawyers in Houston 2015 2016
- Selected Fellow of the Texas Bar Foundation, 2015
- Washington University in St. Louis School of Law: Editor-in-Chief Washington University Global Studies Law Review, 2005-2006

Bar Admissions

- Texas

Court Admissions

- U.S. Supreme Court
- Fifth Circuit Court of Appeals
- Southern District Court of Texas
- Western District Texas
- Eastern District Texas

Ryan O. Cantrell, Continued

- *In re Estate of Gibbons*:Obtained unanimous defense jury verdict in a will contest in favor of client enforcing no contest clause and awarding attorneys' fees.
- *Unlimited Restoration Specialists, Inc., v. 1002 Gemini Interests, LLC, et. al*.: Obtained unanimous jury verdict of $1.2M in favor of client on breach of contract, quantum meruit, promissory estoppel, fraud, civil theft, fraudulent transfer, punitive damages, and attorneys' fees.
- *Billy S. Addison, Billy J. Green, Alfred Jones Jr. and Robert Nisbet, III v. SMG, et. al*: Obtained unanimous jury defense verdict for employer/client on all Title VII discrimination claims and award of costs.
- Second-chaired a 35-day construction industry arbitration in 2009-2010 in which the arbitrator awarded over 3.2M out of 3.5M sought, denied an 11M counterclaim, and awarded attorneys fees.
- Participated in a successful commercial pipeline arbitration under the American Arbitration Association in which the arbitrator awarded virtually 100% recovery to our client (awarding approx. 3.2M out of 3.3M sought) and denied respondents counterclaims.

News & Publications

- *Individual Governmental Immunities in Federal Court: The Supreme Court Strengthens an Already Potent Defense*, The Advocate, vol. 47 (Summer 2009) (co-author with William S. Helfand)
- *Recent Cases: Texas Tort Claims Act, Houston Bar Association, Labor and Employment Law Section Luncheon* (May 2007) (co-author with William S. Helfand)
- *Finding Nemo . . . and Eating Him: The Failure of the United Nations to Force Internalization of Negative Social Costs Resulting from Over-fishing*, 5 Wash. U. Global Stud. L. Rev. 381 (2006)
- *Individual Immunity Claims in Federal and State Court*, *in* State Bar of Texas, Suing and Defending Governmental Entities, ch. 3 (2005) (co-author with William S. Helfand)

Seminars & Presentations

- *Ex-friends with Death Benefits: Litigating Life Insurance Policies in Texas,* Attorneys in Tax and Probate Association (2018)
- *Preventing Discrimination, Harassment and Retaliation in the Workplace*, Client Training Seminar (2015-2017)

Ryan O. Cantrell, Continued

- *Insurance on Your Life, but Not Your Life Insurance: A Case Study of Competing Claims to Life Insurance Proceeds 2016 Advanced Education Seminar.*
- *Disclosure of Employee Information: An Overview of the Law and Practical Aspects: Client Training Seminar.*
- *Dont Step In It: Practical Tips to Help you AVOID (or at lease LIMIT) the Problems of a Will Contest*
- *Recent Cases: Texas Tort Claims Act, Houston Bar Association, Labor and Employment Law Section Luncheon* (May 2007)

Sawyer Neely
Bradley Arant Boult Cummings LLP
Dallas, Texas

Sawyer Neely is a Dallas trial lawyer who has been trying cases in state and federal courts and arbitrations for more than 20 years. His practice is primarily focused on partnership and majority-minority shareholder disputes, business divorce, business and commercial litigation, and employment law. He represents publicly traded and privately held companies, as well as individuals and families facing internal and external threats to their business interests.

Sawyer has extensive experience in matters involving complex business disputes, direct and derivative breach of fiduciary duty and shareholder claims, breach of contract, fraud, misappropriation of trade secrets, employee and physician noncompete and non-solicitation agreements, wrongful termination, and fraud. He routinely handles all phases of litigation through trial, including preliminary issues such as the enforcement of arbitration and forum selection clauses, venue disputes, and personal jurisdiction challenges. He also acts as an expert witness on the recovery of attorney fees under Texas law, and he has significant experience managing and preparing expert witnesses in class actions and mass torts.

Sawyer has also been retained by businesses to conduct independent internal investigations regarding workplace safety, sexual, gender or racial discrimination and/or harassment and environmental compliance.

Sawyer also acts as local counsel for out-of-state companies and lawyers with Texas litigation. His knowledge of local judges and local rules has proven invaluable to out-of-state lawyers.

Sawyer began his career in Washington, D.C. at one of the largest law firms in the world. He returned to Texas in 2005 and became a partner at Sayles Werbner, P.C., a Dallas litigation boutique. Sawyer joined Bradley in 2019 and has since expanded his practice. His skill set is comprehensive, and he works tirelessly on behalf of his clients to solve their problems in the most efficient and strategic manner possible. Whatever the dispute, he works closely with clients to understand their objectives and develop the right strategy to achieve them, whether that means a business solution or litigation.

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A. INTRODUCTION

Each fiduciary litigation case is unique. There is therefore no cookie-cutter approach to trial preparation. Nonetheless, there is one constant in each—the importance of that preparation. As once stated by Louis Nizer, "Preparation is the be-all of good trial work. Everything else—felicity of expression, improvisational brilliance—is a satellite around the sun. Thorough preparation is that sun." This article provides a high-level view of preparing for trial in a fiduciary duty case, focusing on matters specific to fiduciary duty cases.

B. MANAGING CLIENT GOALS AND EXPECTATIONS.

Managing a client's expectations is of course important in any case, but it is especially true in fiduciary litigation. Why? As already stated, each fiduciary litigation case is unique. Rarely will you be able to advise you clients with broad generalizations (e.g., "this is how these cases typically play out …"). Rather, each case will have its own facts, unique characters, relationship dynamics, financial hurdles, legal issues and other considerations. In fact, it's not uncommon to find yourself unable to advise your clients much at your initial meeting at which they explain the background of their case to you. You'll often need time to ponder, research, and consult with others regarding the specific issues posed by the case.

Second, unlike some practice areas, fiduciary litigation is almost always about more than just "the money." A claim for breach of fiduciary litigation is at its heart a claim of betrayal of trust by someone that was close to the claimant, or that the claimant had a reasonable basis for trusting. Accordingly, these cases often have a deeply personal, emotional element. It is of utmost importance that we do our best to apprise our clients of the emotional toll that these cases will take on them.

The case's unique circumstances should color how we advise our clients on everything, including budget, risk/liability analysis, and emotional toll. But what about advising our clients about trial specifically? What considerations are specific to fiduciary litigation in that regard? Again, the emotional toll of the trial must be addressed. This is almost never fully appreciated by the client. The best way to convey to the client what they will go through is to actually walk them through the trial process, from voir dire to closing. Make sure they are aware of any expected character assassination and mudslinging, and do your best to explain what cross examination will be like. For certain clients, an appreciation for what trial will be like could be the determining factor as to whether they want to go to trial, or avoid it. You don't want to hear "If I knew it was going to be like that, I would've settled a long time ago" from your client after trial.

If you are representing the defendant, it is particularly important to explain the burden of proof to them. As discussed below, the fiduciary/defendant often has the burden to prove he complied with his duty. It is critical that clients understand this, as they are often operating under the mistaken assumption that they are "innocent until proven guilty." The burden of proof also affects budget considerations. While in other cases it is the plaintiff's attorney who is tasked with pounding the pavement and drumming up all evidence necessary to prove his or her case, it is the attorney defending the fiduciary that must take diligent, affirmative action in discovery and in trial to prove compliance with their duties. That of course can make the case more expensive.

It's also vital to impress upon your fiduciary/defendant client from the outset how difficult it can be to defend against a breach of fiduciary duty claim. Tell them that courts repeatedly hold that a fiduciary duty is the highest duty imposed by law. Explain to them what a fiduciary duty requires. For good measure, you may consider showing your client the intimidating pattern jury charge question for breach of fiduciary duty (discussed further below).

Finally, if you represent the defendant fiduciary, make sure they appreciate the damage that can result to their reputation (personal or professional) from an adverse verdict or judgment. Such an outcome could include a publicly-available judicial determination that your client was effectively dishonest or took advantage of someone. For those engaged in professions that, like ours, place a premium on a reputation for honesty and integrity, such a finding could be disastrous. That consideration alone could determine whether your client even wants to go to trial, or do everything they can to avoid it.

C. THE GUIDING STARS: THEME, OPENING STATEMENT, & JURY CHARGE.

Theme. From the very outset of the case, you will want to decide on and keep in mind the theme that you intend to present at trial. In fiduciary litigation, plaintiffs often focus on greed, or betrayal of trust. Defendants will often focus on scope of duty and good faith. Fiduciary litigation cases can be factually complex, with multiple claims and defenses. A theme serves not only as a helpful anchor that you can return the jury to amidst the complexities of the case, but also as a guiding star that informs your opening statement and the evidence you intend to offer at trial.

For each witness or document you offer, does it advance your theory? Will this testimony support your theory that the defendant was a greedy, dishonest opportunist? Will these documents support your story that your fiduciary was acting in good faith on the plaintiff's behalf?

Opening Statement. Your opening statement should also serve as a helpful anchor for you in preparing for trial. The importance of opening statement cannot be understated. "Research shows that at least 80 percent of jurors reach a decision about a case based on the persuasion of opening statements." D. Shane Read, Winning at Trial (2007), p. 65. The goal of opening statement is not simply to inform the jury of the evidence they will be presented with, but to *persuade* them that said evidence requires a finding for your client. Thus, your opening will include a discussion of the key pieces of evidence that are most important to your case.

However, your opening should also include mention of the key pieces of evidence that are most *harmful* to your case as well. If you are the plaintiff, you will want the first time the jurors hear of the most damaging evidence to be from you. This builds credibility and allows you to present the evidence in the light most favorable to your client.[1] This can be done by downplaying the significance of the evidence or, even better, recasting it in a light that supports your case if possible.

Thus, preparing a good opening statement will force you to focus on and identify the key pieces of evidence, both good and bad, and prepare a plan for presenting them. If, as often happens in trial preparation, you find yourself getting lost in the weeds, you can return to the question "how does this advance, support, and prove the story I'm telling in my opening statement?"

Jury Charge. Preparing a draft jury charge at the outset of a case is important in all cases, but especially so in fiduciary litigation. Preparing a charge will narrow your focus on the issues to be proven. The following is a pattern jury charge question on breach of fiduciary duty (note the heavy burden placed on the fiduciary):

> Did *Don Davis* comply with *his* fiduciary duty to *Paul Payne*? [*Because a relationship of trust and confidence existed between them*,] [*As Paul Payne's attorney*,] [*As Paul Payne's agent*,] *Don Davis* owed *Paul Payne* a fiduciary duty. To prove *he* complied with *his* duty, *Don Davis* must show—
>
> 1. the transaction[*s*] in question [*was/were*] fair and equitable to *Paul Payne*; and
> 2. *Don Davis* made reasonable use of the confidence that *Paul Payne* placed in *him*; and
> 3. *Don Davis* acted in the utmost good faith and exercised the most scrupulous honesty toward *Paul Payne*; and
> 4. *Don Davis* placed the interests of *Paul Payne* before *his* own and did not use the advantage of *his* position to gain any benefit for *himself* at the expense of *Paul Payne*; and
> 5. *Don Davis* fully and fairly disclosed all important information to *Paul Payne* concerning the transaction[*s*].
>
> Answer "Yes" or "No."
>
> Answer: _______________

TEX. PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT (2020), PJC 104.2.

As noted above, each fiduciary litigation case is factually unique. But they also often contain unique legal issues that manifest in the jury charge itself. A jury charge in a fiduciary litigation case can look vastly different from a charge in any other fiduciary litigation case.

For example, while the plaintiff normally bears the burden of proof on their claims, in cases involving transactions between the fiduciary and a beneficiary, in which the fiduciary benefits, the fiduciary has the burden of proving he did *not* breach his fiduciary duty, *i.e.*, that the transaction was fair and equitable to the beneficiary. *Webre v. Black*, 458 S.W.3d 113, 118-19 (Tex. App.—Houston [1st Dist.] 2015, no pet.). This distinction is seen in the Pattern Jury Charges, which provide different questions depending on who bears the burden of proof. *See* TEX. PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT (2020), PJC 104.2 ("To prove he complied with his duty, Don Davis must show […]"); PJC 104.3 ("To prove Don Davis failed to comply with his fiduciary duty, Paul Payne must show […]"). It is worth noting, as well, that if your client is the defendant who owes those fiduciary duties, getting them to understand the burden shifting nature of this exercise can itself be a challenge.

Another example can be found in the difference in questions depending on the source of the fiduciary's duty. A fiduciary's duty is can either be an "informal" fiduciary duty, which arises from a relationship of trust and confidence, or a "formal" fiduciary duty, arising as a matter of law upon proof of a certain type of legally-recognized relationship (e.g., a trustee relationship). *Meyer v. Cathey*, 167 S.W.3d 327, 330-31 (Tex. 2005). The charge question on the

[1] As the plaintiff, neglecting to mention harmful evidence only gives your opposing counsel the opportunity to open with something to the effect of "I would first like to talk to you about what my opposing counsel did not mention and did not want to talk about in his opening statement." D. Shane Read, Winning at Trial (2007), p. 85.

existence of a fiduciary duty will vary depending on which relationship is alleged. TEX. PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT (2020), PJC 104.1. And if the duty is a formal duty, the language of the agreement creating the duty may alter the duties owed, requiring deviation from the standard breach question shown above. *Id*. PJC 104.5. By the time of trial the issue of whether a duty is owed and its source should be determined, but bear in mind that the Texas Supreme Court has clarified informal and formal fiduciary duties in the context of business organizations. *See, e.g., In re Estate of Poe*, 648 S.W.3d 277 (Tex. 20022).

Further, fiduciary litigation cases often provide the opportunity to include in the charge helpful instructions not included in the Pattern Jury Charges. Attorneys can forego these valuable opportunities by slavish adherence to the pattern charges.

For example, assume you represent a plaintiff challenging a deed from a deceased individual to a fiduciary. For a transaction between a fiduciary and a beneficiary to be "fair and equitable," the fiduciary must prove that he provided "fair and reasonable compensation." *Lee v. Hasson*, 286 S.W.3d 1, 22 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Therefore, it would be advantageous for you to include the following instruction on the above breach question:

> Regarding item No. 1 listed above, the transaction in question cannot be fair or equitable to *Paul Payne* unless *Don Davis* provided fair and reasonable compensation for the deed.

By tying "fair and equitable" to "reasonable compensation," you can more persuasively argue that any payment for the deed below fair market value is not "fair and equitable."

In that same scenario, assume you represent the defendant, and are arguing that the deed to your client was a gift. Despite not involving any consideration from the fiduciary, a gift from a principal to a fiduciary *can* be fair and equitable. *See Vogt v. Warnock*, 107 S.W.3d 778, 784-85 (Tex. App.—El Paso 2003, pet. denied); *Estate of Townes v. Townes*, 867 S.W.2d 414, 417 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Thus, "fiduciary status does not prohibit the beneficiary from giving the fiduciary gifts or bequests[.]" *Vogt*, 107 S.W.3d at 784. In one case involving a gift from a principal, the court noted the following factors in assessing whether it was "fair": (1) whether there was full disclosure regarding the transaction, (2) whether the consideration (if any) was adequate, (3) whether the beneficiary had the benefit of independent advice; and (4) whether the fiduciary has benefited at the expense of the beneficiary. *Townes*, 867 S.W.2d at 417.

Accordingly, you would resist the inclusion of an instruction regarding "reasonable compensation," and might instead seek inclusion of the following instruction: "Regarding item No. 1 listed above, the law does not prohibit a fiduciary from receiving gifts from their principal, so long as the gift is fair and equitable to the principal."

A comprehensive discussion of the jury charge is beyond the scope of this paper. The point is, the jury charge should guide your decision regarding what evidence you intend to present, and how you present it. Given that preparation of the jury charge in fiduciary litigation cases can require significant thought, strategy, and research, it should be done as early as reasonably possible.

D. DOCKET CONTROL ORDER.

Because fiduciary litigation cases vary widely in their issues and evidence, careful consideration should be taken to obtain a docket control order that fits your case.

An initial and important consideration is whether you will have a jury or bench trial. The first question in this analysis is whether you have a right to a jury trial in the first place. As illustrated by a recent Texas Supreme Court case, whether you are entitled to a jury trial can sometimes be a complex inquiry. *See generally In re Troy S. Poe Trust*, 646 S.W.3d 771 (Tex. 2022). While an in-depth discussion of that matter is beyond the scope of this paper, it is worth noting that in civil cases, a party generally has a right to a jury trial to determine disputed questions of fact. *In re Commitment of Harris*, 541 S.W.3d 322, 330 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *In re Poe Trust*, 711 S.W.3d 648, 649 (Tex. 2024) (Busby, J., concurring).[2]

However, the right to a jury trial can be waived if done knowingly and voluntarily. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132 (Tex. 2004). If the fiduciary duty at issue arises from a written agreement, you will want to scan the agreement for a contractual jury waiver. Other ways in which the right to jury trial can be waived include failing to timely request a jury trial, TEX. R. CIV. P. 216; *In re Hulcher Servs.*, 568 S.W.3d 188, 190 (Tex. App.—Fort Worth 2018, orig. proceeding), agreeing to a bench trial, or failing to object to a bench trial despite a properly perfected

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[2] Some courts have taken a view that "[c]ourts have generally treated issues involving the administration of trusts—and deviation proceedings in particular—as matters for the court, rather than a jury, to resolve." *In re Poe Trust*, 673 S.W.3d 395, 412 (Tex. App.—El Paso 2023, pet. denied). However, a recent concurring opinion from Justice Busby indicates the issue is more nuanced, and a litigant may have a right to a jury trial in trust administration proceedings if there are contested issues of fact. *In re Poe Trust*, 711 S.W.3d 648, 649 (Tex. 2024) (Busby, J., concurring).

request. *In re Montelongo*, 586 S.W.3d 513, 518 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Thus, the decision to seek a jury trial should be made as soon as reasonably possible to avoid any claim that the right was waived.

Assuming you have a right to a jury trial, and that it has not been waived, the next question is whether you want to assert it. This must be considered on a case-by-case basis. Considerations include cost, how quickly the relief is needed, optics, and whether there is an increase in chance of a favorable result under a judge or jury.

For example, assume that you represent an estate beneficiary and seek to remove the independent executor on the basis of some sort of misconduct. You have clear and compelling evidence of this misconduct, and want him removed as quickly as possible to prevent further damage to the estate. In that situation, the law could permit removal of that executor on 30 days' notice or less. TEX. EST. CODE §§ 404.003 (grounds for removal of executor without notice); 404.0035(a) (grounds for removal of executor on 30 days' notice); 404.0035)(b) (grounds for removal after executor "has been cited by personal service to answer at a time and place set in the notice"). Obtaining a jury trial in that time frame will not be feasible. Thus, you will likely want to obtain the earliest available bench trial setting.[3]

If your case is taking place in a probate proceeding, obtaining a docket control order takes on added significance. "The Texas Rules of Civil Procedure apply in probate matters unless the rules conflict with specific provision in the Probate Code [now Estates Code]." *In the Estate of Hoelzer*, 310 S.W.3d 899, 902 (Tex. App.—Beaumont 2010, pet. denied) (citing *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 812 (Tex. 1983)). While this principle is simple to state, its application can be difficult, and may at times lead to results that seem counterintuitive. *E.g., Estate of Hoelzer*, 310 S.W.3d at 902-03 (holding that Rule 245 of the Texas Rules of Civil Procedure, which requires at least 45 days' notice of a first trial setting, does not apply in proceedings to remove independent executors under predecessor statute to Section 404.0035(b) of the Texas Estates Code, which only requires that the executor be "cited to answer at a time and place set in the notice").

For example, assume you file a motion to remove an independent executor, to which the executor files a response. You then subsequently file an amended pleading styled as a petition and motion to remove, asserting claims for damages. Are the initial disclosures required by Rule 194 of the Texas Rules of Civil Procedure due 30 days from the date the executor filed a response to your removal motion, or from his answer to your amended pleading? *See* TEX. R. CIV. P. 194.2(a) (requiring initial disclosures "within 30 days after the filing of the first answer or general appearance unless a different time is set by the parties' agreement or court order"). The answer is important, as the end of the discovery period and deadlines for expert disclosures are calculated from that date. TEX. R. CIV. P. 190.3(b)(1); 195.2. These types of ambiguities—which can result in costly arguments depending on who your opposing counsel is—can and should be avoided with the early entry of a docket control order.

E. DISCOVERY.

There are some specific features of it that any fiduciary litigator must be aware of, and that are worth mentioning. First, a fiduciary's duty of full disclosure "exists independently of the rules of discovery." *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996). It is *not* diminished by the fact that "strained relations" may have arisen between the parties, or that litigation between them is ongoing. *Id*. In fact, the failure of a fiduciary to voluntarily and fully disclose all material facts to his principal in the course of a judicial proceeding can constitute "extrinsic fraud" justifying the grant of an equitable bill of review. *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984).

Second, this duty does not deprive the fiduciary of the attorney-client privilege. In *Huie v. DeShazo*, the Court was faced with the question of how the attorney-client privilege interacts with a fiduciary's duty of full disclosure. Is a fiduciary required to divulge communications between him and his attorney that are relevant the principal's rights? The principal in that case argued exactly that. The Supreme Court disagreed, finding that the attorney-client privilege still applied to communications between a fiduciary and his attorney. 922 S.W.2d at 923-24. However, "a person cannot cloak a material fact with the privilege merely by communicating it to an attorney." *Id*. at 923.

The Supreme Court provided the following guidance to help explain the interplay of these concepts:

> This distinction may be illustrated by the following hypothetical example: Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However,

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[3] Removal proceedings are most often tried to the bench. Other considerations in this hypothetical would include whether you are also asserting claims for damages (e.g., via a breach of fiduciary duty claim), whether you want such claims to be heard at that same time, and whether those claims being heard at a later date could result in any argument that those claims were waived by not being raised at the removal hearing.

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

Id.

F. NARROWING ISSUES FOR TRIAL.

A good trial attorney will do everything they can to simplify their case for the jury. One way in which this can be done is to reduce the issues the jury is actually presented with. An attorney has multiple tools at his disposal to do this, including a plea to the jurisdiction, Rule 91a motion to dismiss, anti-SLAPP motion, and motions for partial summary judgment. Consideration should be given to whether these tools can be used to narrow the issues, and whether doing so is worth the expense.

For example, assume your client has brought a claim for breach of fiduciary duty. The defendant is named as agent for your client in a power of attorney, and used that power of attorney to consummate the self-dealing transaction that is at issue in the case. As your client's agent, the defendant owed your client a formal fiduciary duty as a matter of law. *Bombardier Aero Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 231 (Tex. 2019). Accordingly, you might consider filing a motion for partial summary judgment on the element of the existence of that fiduciary duty. By obtaining a ruling that the defendant owed the fiduciary duty, you will have removed that from contention at trial, and will be empowered to tell the jury "the judge has already determined that the defendant owed this duty—you need only decide whether he complied with it."

G. PREPARING EXHIBITS & EVIDENCE.

As in other cases, your pretrial disclosures, containing your exhibit and witness lists, are due 30 days prior to trial unless a court order states otherwise. TEX. R. CIV. P. 194.4(b). After you've exchanged exhibit lists with opposing counsel, work with them to determine which exhibits are agreed admitted. While this is often required by scheduling orders and standing orders, it is best to do it anyways, as it will streamline your trial preparation and offering of evidence at trial. Once agreements are reached, obtain a Rule 11 agreement or agreed court order regarding the admission of those exhibits.

For each exhibit that is not agreed as admitted, you should have a gameplan for obtaining its admission. Ask yourself what objections are available, or that you would make to the exhibit, and plan to counter them. For critical exhibits that you *must* have admitted, conduct any necessary research and memorialize it in a bench brief (discussed more below).

Prepare witness examination outlines. Mark in your outline each point at which you will be presenting an exhibit, with the exhibit number bolded and highlighted for ease of reference. For any question in your cross-examination outline that you have impeaching evidence or deposition testimony, make a note next to that question of the exhibit number, so that you can more quickly access if it needed for maximum effect.

H. MOTIONS IN LIMINE.[4]

As you compile and prepare your exhibits, also compile a list of exhibits and deposition testimony that you want to exclude. A motion in limine is a motion that, if granted, prohibits the offering of evidence at trial without first approaching the bench, making the court aware that you intend to offer the challenged evidence, and then obtaining the court's ruling on the other party's objection to its admission.

If a motion in limine does not result in the exclusion of evidence when granted, why file it? Because doing so will ensure that the jury will not hear the evidence at all if the court ultimately grants your objection to it. Without a motion in limine, objectionable evidence could be introduced before you have a chance to object (e.g., when the witness gives

[4] A motion in limine is a familiar tool to any trial attorney. However, to those trial attorneys new to fiduciary litigation, it must be noted that the term "motion in limine" is also sometimes used to describe the motion used to challenge a party's standing in a probate proceeding. *See Estate of Johnson*, 631 S.W.3d 56, 60 (Tex. 2021); *see also In re Estate of Corbett*, No. 14-24-00922-CV, 2025 Tex. App. LEXIS 9380, at *5-6 (Tex. App.—Houston [14th Dist.] Dec. 9, 2025, no pet. h.) ("The absence of standing to contest a will may be properly raised in a motion in limine.").

a nonresponsive and therefore unforeseeable answer containing the challenged evidence). At that point, you may still object and ask the court to instruct the jury to disregard the inadmissible testimony. But the jury has already heard it, and the damage has already been done.

A motion in limine can also mitigate or remove the potentially adverse optics of objecting to evidence. Assume your executor client has been sued for allegedly misappropriating estate assets. On cross-examination, opposing counsel asks "Isn't it true that you were fired at your last job because you were using the company credit card on personal expenses?" Assume the answer is yes. You timely object on multiple grounds, and the court sustains your objections. In this hypothetical, you've won the battle, but lost the war. You prevented the admission of harmful evidence, but it doesn't matter. By simply asking the question to which you've objected and prevented a response, the jury knows very well what the answer is. Not only did the objection not benefit you, it could even have an adverse effect. The jurors will know that you attempted to hide evidence from them that they find relevant and want to hear. Now assume the court had granted a motion in limine on any testimony regarding your client's termination at his job. Prior to asking the question, opposing counsel would have been required to approach the bench and ask outside the hearing of the jury to introduce that testimony. If the court prohibits it, the jury won't hear the question at all, or even be aware of your efforts to withhold evidence from them.

The items your motion in limine will address will generally fall into two buckets: (1) matters that are prejudicial in any case and that should be excluded in general (e.g., settlement negotiations, character evidence to prove conformity therewith, criminal convictions, insurance, or the failure to call a specific witness); and (2) matters specific to your case that are known between the parties or evidence exchanged during discovery.

I. WITNESS PREPARATION.

Perhaps the best way to prepare your witness for trial is to make them as comfortable as possible. For most witnesses, testifying at trial is a highly intimidating, formal process. They are well aware that they are going to be offering testimony that someone is not going to be happy with. Make your client aware that you want to make them comfortable with the process, and will try to answer any questions they may have about testifying. Witnesses often feel pressure to speak a certain way or not "mess things up." Reassure your witness that their primary objective should be simple—just tell the truth. This simple reminder can do much to assuage a witness' anxiety.

Tell each witness why you are calling them to testify, *i.e.*, what you intend to prove through them. Knowing their purpose and what questions to expect will not only make them more comfortable, but will make them aware that the entire case does not hinge on them.

You must prepare your witness for any expected cross examination. You will want to cover in your direct examination topics you anticipate opposing counsel to cover on cross. This will allow the jury to see you as forthcoming, while also mitigating the effect of cross examination. Tell your witness that you yourself will go over these suspected cross-examination topics with them during direct examination. Explain to your witness that "I don't know" is a perfectly fine answer on cross-examination if it is truthful. It is certainly preferable to a guess. Do what you can to steer your witness away from becoming argumentative or hostile towards the attorney, even if the attorney is acting in this manner.

If you are defending a fiduciary regarding their administration of a trust or estate, consider whether they have any experience in that role. Being an executor or trustee can be complicated, and requires a certain level of sophistication. Nonetheless, as a matter of reality and necessity, many fiduciaries are lay individuals with no prior experience in that role or in any similar role. Instead, they are often chosen simply because the decedent or settlor trusted them and thought they met some base level of competency. Accusatory cross-examination, backed up by the fiduciary standard, can easily have your client thinking "why did I ever think I was fit to do this job?" or "how does the law even allow someone like me to do this incredibly demanding job?" If your client reaches this point, they've already been defeated mentally, and will likely cave to leading questions they should not. To prepare your client for this, explain to them that opposing counsel will want to portray their fiduciary duties in the most demanding way possible. Explain that they will ask your client about all the things that they did and did not do, all the while maintaining a tone that implies that each of these acts and omissions is a breach of fiduciary duty that seals their fate. Explain to your client that you have a good, sound argument that they did not breach their computer duty at any point, and that therefore they need not be defensive about anything that they did or did not do. Where appropriate, remind them that the vast majority of executors and trustees are not corporate, professional fiduciaries, but are instead family members just like them—the law is not so exacting as to make every caring family member that undertakes this role liable. Make sure they understand that their testimony on cross examination is generally not the time to explain themselves. That is much better done on redirect and in closing arguments.

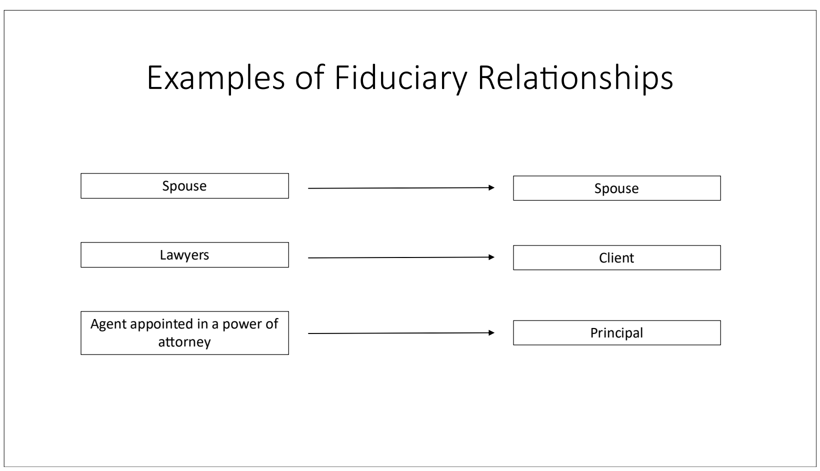
J. PREPARING YOUR OPENING STATEMENT.

The role of the jury is to determine disputed questions of fact (and sometimes mixed questions of fact and law). Accordingly, many cases will not require much explanation of the law to the jury beyond what will be in the jury charge. Not so with fiduciary duty cases.

For a jury to answer the question of whether a fiduciary duty was breached, they have to have a basic understanding of the fiduciary relationship. Maybe your jurors know what a fiduciary is, maybe they don't. Maybe they've never even heard that term before. Accordingly, you must teach the jury what a fiduciary is in your opening statement. This can be done in a number of ways. But again, simplicity is key. Consider the following example of how to explain this issue to the jury:

> The first question you'll be asked to answer is whether the defendant complied with his fiduciary duty to the decedent. You may be wondering what a fiduciary is, or how one complies with a fiduciary duty. So I'm going to briefly explain that. A fiduciary relationship sometimes exists when someone places a significant amount trust or reliance in another. Where a fiduciary duty exists, the person being relied on is the "fiduciary," and the person relying on the fiduciary is the "principal."
>
> What are some examples of a "fiduciary relationship?" Spouses are each other's fiduciary. The law presumes that each spouse puts an enormous amount of trust and reliance in their spouse.
>
> Attorneys are their clients' fiduciary. That is the relationship I have with my clients. They have put their trust in me, and are relying on me, and it my duty to put their interests above my own and act in their best interest.
>
> When someone appoints another to act as an agent on their behalf through a power of attorney, the person appointed as agent in that power of attorney, owes a fiduciary duty to the person that appoints them.

During this discussion, it might be helpful to include very simple visual aids in a PowerPoint.[5] The following is an example of a slide that you could use when discussing examples of fiduciary relationships:



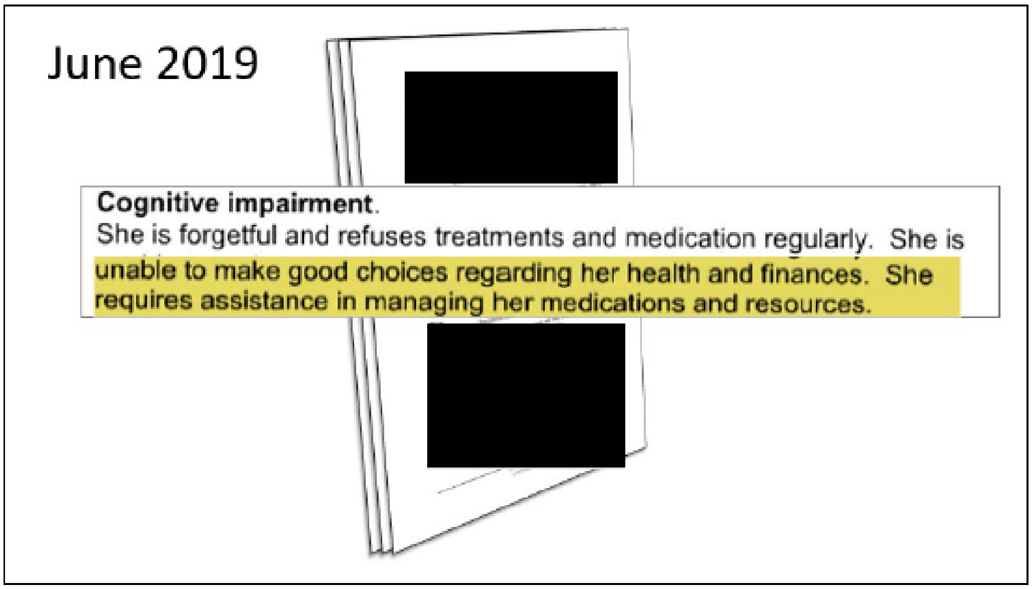
You might follow up these examples with a one-sentence summary of what the duty is. Then provide the policy basis for this legal relationship—make the jury understands why it is important:

> In these situations, the law says that the fiduciary owes their principal a "high duty of good faith, fair dealing, honest performance, and strict accountability." Courts describe the fiduciary duty as "the highest duty recognized by law."

[5] Most courts will allow you to use utilize a PowerPoint presentation during your opening. However, the amount of information contained on any given PowerPoint slide should be kept to a minimum. The fewer words, the better. You do not want the jurors to miss what you are saying because they are trying to read a paragraph of text on a PowerPoint slide. Some of your most effective slides will show pictures, not words. A fantastic resource that I have found very helpful in learning how to effectively use PowerPoint is Beyond Bullet Points by Cliff Atkinson.

> The reason for this is that the principal is relying completely on the fiduciary to act in their best interest. For example, if I sign a broad power of attorney appointing someone as my agent, I am giving that person the ability to access and transfer funds out of my bank account, or to even convey any land I might own. In that situation, the law says, if you're going to have that much power over someone, we're going to hold you to a high standard of good faith, fair dealing, honesty, and strict accountability.

If your court permits the use of PowerPoints, do not pass on the opportunity to show photos of your most significant pieces of evidence.[6] If your key pieces of evidence are documents (as is often the case in fiduciary litigation), do not overwhelm the jury by drowning them in paragraphs of text from those documents. Instead, use "call outs" and highlights to spoon feed the jury the relevant information. Consider this example slide showing an excerpt from medical records:



The photo of the medical records in the foreground anchors the information in an actual document that they will see at trial, while the call-out limits their focus and mental exertion to only the information you want them to focus on.

Do *not* let the human element of your case go unaddressed in your opening statement. Fiduciary litigation cases are about family, trust, relationships, fairness, and betrayal. A photo is worth a thousand words. So don't just tell the jury your client trusted the defendant—*show* them. Candid photos, private texts, and even videos can be excellent ways to convey to the jury the nature of a given relationship. In this age of smart phones, there is often a treasure trove of such evidence.

K. ANTICIPATING AND PREPARING BENCH BRIEFS.

You will likely have most of your evidentiary issues resolved through pretrial agreements or motions to exclude. However, if the admissibility of a certain exhibit or testimony is still unresolved, and the significance of that evidence justifies it, you should prepare a bench brief addressing those topics. Fiduciary cases often involve uncommon or unique evidentiary issues.

For example, assume you are representing a plaintiff suing to undo a deed executed by a now-deceased grantor. You want to offer testimony from your client that, while still alive, the decedent made multiple statements that he intended to leave the property to your client. The most obvious objection you'll get is hearsay. You may also catch an objection based on the "Dead Man's Rule," which generally provides that a party may not testify against another party

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[6] It should be noted that some courts hold attorneys have no right to display evidence, documents, and photos during opening statement. *Guerrero v. Smith*, 864 S.W.2d 797, 799 (Tex. App.—Houston [14th Dist.] 1993, no writ). The reasoning for this is that the jury may be confused if the evidence actually admitted during trial differs from that presented during opening statement. *In re Dodson*, 434 S.W.3d 742, 749 (Tex. App.—Beaumont 2014, pet denied). However, many (if not most) trial courts will still allow such presentations. Moreover, to the extent that it is error to permit presentation of evidence during opening statement, it is not harmful if that same evidence is subsequently admitted during the trial. *In re Dodson*, 434 S.W.3d at 749. For this reason, and for the purpose of protecting your credibility with the jury, you will want to be sure to only show evidence in your opening statement that you have either already stipulated to its admission with opposing counsel, or that you are highly confident will be admitted.

about an oral statement by a decedent. TEX. R. EVID. 601(b)(2). A judge's intuition will likely tell him that such testimony would be inadmissible under one or both of these rules. However, there are ways to overcome these objections. For example, you could argue that the testimony falls under the hearsay exception regarding statements of "then-existing state of mind (such as motive, intent, or plan)." TEX. R. EVID. 803(3). You could also argue that the testimony is not prohibited by the Dead Man's Rule, because the testimony is "corroborated"—an explicit exception to inadmissibility that is relatively easy to meet. TEX. R. EVID. 601(b)(3)(A). But overcoming the judge's initial gut feel may require more than just oral argument in response to the objection. This is where a bench brief can be helpful. Consider providing the Court with a copy of the brief (with important supporting authority attached, tabbed, and highlighted) that morning before the jury is seated.

L. MOCK TRIALS, FOCUS GROUPS, AND "OUTSIDE OPINIONS."

In many cases, the question posed to the fact-finder is "black and white." For example, in a case over an alleged forgery, the question before the jury is simply whether the purported signatory or someone else actually signed the document. For a breach of fiduciary duty claim, the question is more enigmatic. For example, consider a deed executed by a grandmother conveying property to her fiduciary grandson before her passing. The jury will be asked whether this transaction was "fair" to the grandmother. Like "reasonableness," fairness can be an elusive concept. And reasonable individuals can disagree over what constitutes "fair." For any given individual, that concept is shaped by a number of factors, including upbringing, culture, and life experience. Thus, even if you could somehow be sure that the jury would believe all the facts you seek to prove, that does not necessarily mean that the jury will agree with you regarding whether the transaction was "fair."

For this reason, it's absolutely critical that we do not let our own biases, prejudices, and values control this analysis. Your three years of law school and years of legal experience does not make you more qualified to answer the question at hand (a sound argument can be made that it makes you less qualified). Your proximity to the case can also cloud your judgment. You know all the evidence, all the testimony, inside and out. Having that depth of knowledge can lead to you missing the forest through the trees.

What matters is what the *fact-finder* believes. What do other people think? What will your *jury* think? Mock trials and focus groups serve as a formal method of assessing this. They can be very valuable, and expose not only your blind spots, but also your client's. Assured self-righteousness is the downfall of many a litigant. Assume your defendant client suffers this defect, as well as unmerited confidence in his case. Assume he so far has disregarded your warnings regarding the weaknesses of his case, choosing to interpret your advice and cautionary remarks as mere "CYA." There is no better bucket of ice water to throw on your client's confidence than having him watch a group of people say they think the transaction was unfair and would award millions in damages against him. Make the most of the opportunity to test your theories against objective third parties. Be sure to weight the evidence fairly, and even in your opponent's favor, so that you do not bias the exercise toward your own side, as doing so will not serve you or your client. Learning how to improve your trial presentation – and/or determining a settlement strategy – should be the primary focus of this exercise.

But for most fiduciary duty cases, mock trial and focus groups will be cost prohibitive. So what can you do then? Do what you can to informally obtain input from others. Your law firm's staff can be invaluable in this regard. Choose a staff member not acquainted with your case, or who you represent. Sit them down in your office, and give them the most basic facts, as objectively as possible, without indicating who you represent or what your own personal opinion on the matter is. Then ask for their thoughts. The answer might surprise you.

You might also consider obtaining the opinions of people outside the firm (family members, friends, etc.). You could pitch the scenario to them just the same as you do with your staff while being careful to withhold any confidential information.

M. CONCLUSION

No two fiduciary duty cases are alike, but they have one commonality – the focus will be on fairness – did the defendant who owes fiduciary duties to the plaintiff treat the plaintiff consistently with the defendant's fiduciary duties? Any number of factors weigh upon this question, including among other things the evidence, the credibility of the witnesses, power dynamics, venue, and the relationship between the parties, and legal arguments. Preparation can be the difference between winning and losing, and this includes managing client expectations and obtaining full participation and buy-in from those clients, which is just as important as the time the lawyers spend readying themselves for the main event.