

UTILIZING DISCLOSURE RULES TO OBTAIN DISCOVERY IN TRUST LITIGATION

I. INTRODUCTION

Trustees have a general duty to disclose information to trust beneficiaries. With the exception of the statutory duty to account, this has traditionally been a common law fiduciary duty.

Bogert, *Trusts & Trustees, Second Edition Revised*, §961 explains the reason for this duty as follows:

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

William E. Fratcher, *Scott On Trusts*, §173 (Fourth Edition) states that:

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

II. RELIEVING A TRUSTEE OF HIS DUTY TO DISCLOSE

Section 111.004 of the Texas Trust Code defines “Beneficiary” to mean a person for whose benefit property is held in trust, regardless of the nature of the interest.” This definition includes both income and remainder beneficiaries. Texas Trust Code §113.151 (dealing with demands for statutory accountings) allows a “beneficiary” as defined by Texas Trust Code §111.004 to demand a statutory accounting.

While the law is not as clear as with statutory accounting demands, the common law duty of disclosure undoubtedly applies to both income and remainder beneficiaries.

May the instrument creating the trust relieve the trustee from the duty to disclose? The answer is a qualified “yes”.

Texas Trust Code §111.035 (b) provides that the “terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit: ... (4) a trustee’s duty: (A) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand: (i) is entitled or permitted to receive distributions from the trust; or (ii) would receive a distribution from the trust if the trust terminated at the time of the demand...”

Texas Trust Code §111.035 (c) provides that “the terms of a trust may not limit any common law duty to keep a beneficiary of an irrevocable trust who is 25 years of age or older informed at any time during which the beneficiary: (1) is entitled or permitted to receive distributions from the trust; or (2) would receive a distribution from the trust if the trust were terminated.”

Consequently, the settlor of a revocable trust can relieve the trustee from all or any part of both the statutory duty to comply with a §113.151 accounting demand and the common law duty of disclosure. The settlor of an irrevocable trust can relieve the trustee from such duties only with respect to: (1) beneficiaries who are under the age of twenty-five years and (2) contingent remainder beneficiaries.

III. ACCOUNTING

A. A Trustee Has No Duty To Periodically Account:

In Texas there is no common law or statutory duty for a trustee to periodically account to the trust beneficiaries. A trustee is only required to periodically account to beneficiaries if the duty is imposed on the trustee by the terms of the trust instrument.

B. Beneficiaries’ Statutory Accounting Demand:

Statutory accounting demands are governed by Texas Trust Code §113.151 and §113.152.

§113.151 (a) provides in part that:

A beneficiary by written demand may request the trustee to deliver to each beneficiary of the trust a written statement of accounts, covering all transactions since the last accounting or since creation of the trust, whichever is later... However, the trustee is not obligated or required to account to the beneficiaries of a trust more frequently than once every 12 months unless a more frequent accounting is required by the court.

Note that the request must be to deliver the accounting to “each beneficiary of the trust” rather than just to the beneficiary demanding the accounting. If a court compels the accounting, apparently the court may decide which beneficiaries are entitled to receive the accounting. §113.151(a) provides that: The court may require the trustee to deliver a written statement of account to all beneficiaries on finding that the nature of the beneficiary’s interest is sufficient to require an accounting by the trustee.”

The statute also requires that, if there has been no prior accounting, the accounting relate back to the beginning of the trust. This can result in real hardship if the trust has been in existence for a long period of time.

If there has been a prior accounting, the accounting relates back to the date of the end of the last accounting period. Finally, a trustee, unless ordered to account more frequently by the court, is not required to account to beneficiaries more frequently than once every twelve months. It is the author’s experience that courts will rarely require a more frequent accounting.

§113.151 (a) further provides in part that:

If the trustee fails or refuses to deliver the statement on or before the 90th day after the date the trustee receives the demand or after a longer period ordered by the court, any beneficiary of the trust may file suit to compel the trustee to deliver the statement to all beneficiaries of the trust....If a beneficiary is successful in the suit to compel a statement under this section, the court may, in its discretion, award all or part of the costs of court and all of the suing beneficiary’s reasonable and necessary attorney’s fees and costs against the trustee in the trustee’s individual capacity or in the trustee’s capacity as trustee.

It is obvious that a trustee should not let the 90 day period for response expire without either delivering the account or seeking preliminary relief from the court. The preliminary relief can take the form of: (1) seeking an extension of time; (2) seeking to limit the contents of the accounting (while the contents of the accounting are statutory [Texas Trust Code §113.152], Texas Trust Code §115.001(8) allows the court to relieve a trustee from any or all of the duties, limitations, and restrictions of the Texas Trust Code); or (3) seeking to limit the beneficiaries who are entitled to receive the accounting.

There is sometimes confusion regarding when the 90 period begins to run. A demand for a statutory accounting should usually be sent by certified mail or some other means whereby the date of receipt can be proven by the beneficiary.

A suit to compel an accounting should be filed in either a district court or a statutory probate court. Texas Trust Code §115.001. All persons designated in Texas Trust Code §115.011 should be made parties. Venue is governed by Texas Trust Code §115.002.

A suit to compel will usually include a prayer for costs and attorney's fees. Note that the statute does not require an accounting or even give preference to the payment of attorney's fees or costs against the trustee in his individual capacity. The statute simply states that the award of costs and attorney's fees may be made in either the trustee's individual capacity or in the trustee's capacity as trustee.

A suit to compel may also seek the removal of the trustee. Texas Trust Code §113.082 (3) allows a court to remove a trustee for failing to make an accounting that is required by law or by the terms of the trust.

§ 113.152 lists the contents of a statutory trust accounting. It provides that:

A written statement of accounts shall show:

- (1) all trust property that has come to the trustee's knowledge or into the trustee's possession and that has not been previously listed or inventoried as property of the trust;
- (2) a complete account of receipts, disbursements, and other transactions regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately;
- (3) a listing of all property being administered, with an adequate description of each asset;
- (4) the cash balance on hand and the name and location of the depository where the balance is kept; and
- (5) all known liabilities owed by the trust.

Most of the information to be included in a statutory accounting is self evident. The only exception to this is item (2). Trust accounting involves the allocation of receipts and disbursements between income and principal accounts.

Trust accounting is more than an academic exercise. If the distribution standard in the trust deals with the distribution of income then it is not possible to ascertain what constitutes income available for distribution without applying trust accounting. Conversely, trust accounting ascertains what is in the principal account that is available to the remainder (and sometimes income) beneficiaries of the trust. Stated simply, trust accounting is usually the process of calculating what the beneficiaries are entitled to receive from the trust.

The rules governing the allocation of receipts and disbursements are contained in the Texas *Uniform Principal and Income Act* ("UPIA" Chapter 116 of the Texas Trust Code). Section 116.004 of UPIA provides that "In allocating receipts and disbursements to or between principal and income ..., a fiduciary: (1) shall

administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter; (2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter; (3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and (4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.”

The principal problem with statutory accounting demands is going back and reconstructing the allocation of receipts and disbursements if they have not been properly allocated in the past. This usually does not happen with a corporate trustee but frequently presents real problems to individual trustees.

C. Non Beneficiary’s Statutory Accounting Demand:
§113.151 (b) provides in part that:

An interested person may file suit to compel the trustee to account to the interested person. The court may require the trustee to deliver a written statement of account to the interested person on finding that the nature of the interest in the trust of, the claim against the trust by, or the effect of the administration of the trust on the interested person is sufficient to require an accounting by the trustee.

Texas Trust Code §111.004 (7) defines an “Interested Person” as:

a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.

Unlike a trust beneficiary, an interested person has no statutory right to receive a trust accounting. An interested person must obtain prior court approval in order to obtain a statutory trust accounting.

IV. EXAMINATION OF BOOKS AND RECORDS

A trustee has the fiduciary duty, upon demand, to allow a beneficiary on a reasonable basis to inspect the non privileged books and records of the trust. *Restatement of the Law of Trusts 3rd* §82; *Scott on Trusts* §173; and Bogert, *The Law of Trusts and Trustees* §961. While there are no Texas cases specifically dealing with this duty, authority for the existence of this duty exists in the writings of the commentators set forth above as well as

the general recitation contained in *Shannon v. Frost National Bank*, 533 S.W.2d 389 (Tex. Civ. App. – San Antonio 1975); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); and *Huie v. Deshazo*, 922 S.W.2d 920 (Tex. 1996)

A trustee is required to keep full, accurate and orderly records concerning the status of the trust estate and of all acts performed thereunder. *Beaty v. Bales*, 677 S.W.2d 750 (Tex. Civ. App. – San Antonio 1984).

V. DUTY TO DISCLOSE REQUESTED INFORMATION

- A. A trustee has the fiduciary duty, upon demand by the beneficiary, (or, if the trust instrument requires periodic accountings, without demand) to furnish the beneficiaries with a formal trust accounting:

See discussion of accounting above.

- B. A trustee has the fiduciary duty, upon demand by the beneficiary, to promptly respond to a request for information concerning the trust and its administration:

Restatement of the Law of Trusts 3rd §82; *Scott on Trusts* §173; and *Bogert, The Law of Trusts and Trustees* §961. Authority for the existence of this duty exists in the writings of the commentators set forth above as well as the general recitation contained in *Shannon v. Frost National Bank*, 533 S.W.2d 389 (Tex. Civ. App. – San Antonio 1975); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); and *Huie v. Deshazo*, 922 S.W.2d 920 (Tex. 1996).

VI. DUTY TO DISCLOSE UNREQUESTED INFORMATION

- A. A trustee has the fiduciary duty, without any demand, to disclose to the beneficiaries all material facts known to the trustee that might affect the beneficiaries' rights. *Kinzbach v. The Corbett-Wallace Corporation*, 160 S.W.2d 509 (Tex. 1942); *Shannon v. Frost National Bank of San Antonio*, 533 S.W.2d 389 (Tex. Civ. App. – San Antonio 1975); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); *Huie v. Deshazo*, 922 S.W.2d 920 (Tex. 1996); *Restatement of the Law, Trusts 2d*, §170; *Scott on Trusts*, §170; *Bogert, Trusts and Trustees*, §961.

The breach of the duty of full disclosure by a fiduciary is tantamount to **fraudulent concealment**. *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). The beneficiary is not required to prove the elements of fraud, *Archer v. Griffith*, 309 S.W.2d 735 (Tex. 1965); *Langford v. Shamburger*, 417 S.W.2d 438, (Tex.App.— Ft. Worth 1967, writ ref'd n.r.e.), and need not even prove that he relied on the fiduciary to disclose the information. *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938); *Miller v. Miller*, 700 S.W.2d 941 (Tex.App.—Dallas 1985, writ ref'd n.r.e.).

The trustee's duty of full disclosure extends to all *material facts* affecting the beneficiaries' rights. This duty exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and the beneficiaries. *Huie, supra*, 923.

- B. It is the author's opinion that a trustee has a fiduciary duty to disclose the following information to a beneficiary regardless of a request for information:
1. the existence of the trust;
 2. the beneficiaries' right to receive distributions from the trust;
 3. material facts in connection with any non-routine transaction which significantly affects the trust estate and the interest of the beneficiaries;
 4. material facts relating to any transaction in which the trustee has a personal interest;
 5. material facts concerning any transaction whereby the trustee uses his fiduciary office to obtain any personal benefit or profit; and
 6. any breach of trust by the trustee.
- C. Who is authorized to receive information?

Again, the beneficiaries of the trust are authorized to receive information. (See the definition of "beneficiaries" above). Neither the settler nor creditors are entitled to information.

VII. OBTAINING INFORMATION FROM A TRUSTEE

- A. Who is authorized to demand information or examine books and records?

"Beneficiaries" are authorized to demand information. Texas Trust Code §112.004(2) defines "beneficiary" to be a person for whose benefit property is held in trust regardless of the nature of the interest. This definition would include both income beneficiaries and remaindermen. If a very remote remainderman were to demand information of the trustee the trustee might want to seek instruction and possibly protection from the court. The settlor is not entitled to demand information from the trustee.

The policy underlying a trustee's duty to disclose is to give the beneficiaries of trusts access to sufficient information to allow them to enforce the trust. The beneficiaries are the only persons authorized to enforce the trust. The only persons who may enforce this duty are beneficiaries of the trust regardless of the

nature of their interest. See Texas Trust Code §111.004 (2). The settlor of a trust has no equitable power to enforce this duty.

It is the author's opinion that neither creditors nor persons having tort claims against the trustee have a common law equitable power to enforce this duty. Their claims against the trust are of a legal nature (rather than an equitable nature), consequently, they are required to obtain information through the legal discovery methods contained in the Texas Rules of Civil Procedure.

B. Who pays the costs of producing the information?

The trustee is usually allowed to utilize the trust estate of the trust to pay costs necessary for him to comply with any demand for information. If a trustee resists disclosure (and thereby breaches his fiduciary duty to disclose) the beneficiaries should be able to convince a court of equity to make such trustee reimburse the trust for any costs incident to such resistance.

A harder question is whether these costs should be allocated to the income account or the principal account of the trust estate. Texas Trust Code §116.201 and §116.202 are not very helpful. Equity would seem to dictate that the expenses should be allocated against the interest of the beneficiary seeking the information (e.g. if an income beneficiary demands information then the costs should be allocated against the income account; if a remainder beneficiary demands information then the costs should be allocated to the principal account). If the expenses are substantial, a trustee might consider seeking instruction from the court pursuant to Texas Trust Code §115.001. The trustee should be careful not to allocate costs in a manner that would constitute retaliation against the beneficiary seeking the information.

Finally, if a beneficiary's requests for information become burdensome or harassing then the trustee should probably seek court relief. The trustee should either seek to charge the expenses directly to the beneficiary seeking the information or should seek to be relieved from the duty of supplying all or part of the information pursuant to Texas Trust Code §115.001 (8).

C. How should information be requested?

Any demand for information should be in writing and delivered to the trustee. If a beneficiary can prove an oral demand for information was received by the trustee then the beneficiary may still have a common law right to obtain the information. An oral demand is a risky and uncertain method of requesting information.

The author recommends that demands for information be sent by certified mail, fax or email so that the beneficiary will have a receipt to show when the demand was received by the trustee. It is much easier to prove a demand was received if the demand was sent in the manner specified above.

I usually demand compliance with a demand for information within a specified time period ranging from thirty to sixty days. After years of waiting for the demand deadline to expire and then having to compel disclosure of information, I have modified my form demand to include the following language:

Please confirm to me in writing, within ten days of your receipt of this demand, that you intend to furnish all of the information requested in this demand on or before the date specified in this demand. If I do not receive such written confirmation within such time then my client reserves the right to immediately file a petition in any court of competent jurisdiction to compel compliance with this demand. Any motion to compel compliance may also contain a request that, because of your breach of your fiduciary duty of disclosure, you, acting in your individual capacity, pay all legal fees and costs incident to the enforcement of this demand.

While it does not completely resolve the problem, this language has noticeably increased timely compliance with my accounting demands. I have not had the opportunity to see if a court would enforce this request.

If there is no litigation pending at the time that a common law information demand or a common law demand for production of documents is made, then courts are likely to apply equitable remedies to the enforcement of the demands.

If litigation is pending at the time that a common law information demand or a common law demand for examination and/or production of documents is made, then the trustee's attorney's will invariably seek to have the demands treated as legal discovery under the Texas Rules of Civil Procedure.

In this situation, some courts will force the beneficiary to treat the information demands as quasi-discovery. They will allow the beneficiary unlimited requests (e.g. they will not treat common law demands for information as interrogatories for the purposes of limiting the number of requests) but will frequently force the beneficiary to enforce the demands using the legal remedies contained in the Texas Rules of Civil Procedure. They may also try to limit the information requested to information that falls within the "scope of discovery" under such rules.

These approaches stem from the difficulty courts have in applying equitable remedies rather than the more familiar legal remedies to attempts by a beneficiary to demand information from his trustee.

VIII. PUBLIC POLICY LIMITS ON THE DUTY TO DISCLOSE:

There should be public policy limits on a trustee's duty to disclose. Unfortunately, these limits are not well defined in Texas law. Some obvious limits include:

- A. Disclosure of information regarding negotiations for the purchase of trust assets (See Bogert, *supra* § 961). A beneficiary, while entitled to information, should not

be able to prevent a trustee from engaging in transactions which benefit the trust and other beneficiaries;

- B Disclosure of information regarding negotiations for the sale of a trust assets (See Bogert, *supra* §961). This exception is especially applicable when the trustee is receiving confidential bids on the sale of property;
- C. Disclosure of confidential financial information regarding other trust beneficiaries (e.g. social security numbers, bank account numbers, security account numbers, income, etc);
- D. Disclosure of confidential medical information regarding other trust beneficiaries;
- E. Disclosure of confidential information to a beneficiary who has a personal interest in the transaction that is adverse to that of other beneficiaries or the trust;
- F. Disclosure of information that would violate any state or federal law or that would cause either the trustee or beneficiaries to violate any state or federal law;
- G. Disclosure of privileged information (see *Huie v. DeShazo, supra*);
- H. Disclosure of information relating to the trustee's individual activities. The trustee's duty to disclose relates only to information concerning his or her administration of a trust. If a beneficiary desires to obtain information from the trustee regarding his personal affairs then such person will probably be required to use the traditional discovery methods contained in the TRCP. When a beneficiary is demanding information regarding self-dealing transactions by a trustee, the line between trust transactions and the trustee's personal transactions becomes blurred. In this situation a court of equity should probably allow the beneficiary disclosure (outside of formal discovery) of the trustee's personal transactions with trust property.
- I. Disclosure of non material facts;
- J. Disclosure of facts that do not affect the beneficiaries rights; and
- K. Response to disclosure requests that are duplicative, burdensome or harassing. A court of equity should allow a beneficiary wide latitude in demanding information or inspection of documents from a trustee. If, however, the beneficiary's demands become repetitive, harassing, or vexatious, the court should prevent the beneficiary from successfully engaging in this behavior.

While a trustee can seek court protection from disclosing the information specified above, in many instances such action may not be practical (especially in situations where a trustee has a duty to disclose information that is not requested).

IX. TEXAS TRUST CODE SECTION 113.060

If you are involved with a trust disclosure issue for years 2006 and 2007 you need to be aware of Texas Trust Code §113.060. It was in effect from January 1, 2006 through June 16, 2007. The statute provided that:

The trustee shall keep beneficiaries of the trust reasonably informed concerning:

- (1) the administration of the trust; and
- (2) the material facts necessary for the beneficiaries to protect the beneficiaries' interests.

Section (2) of this statute incorporated the common law standard set forth in *Huie, supra*. Section (1), however, was new to Texas law and was very broad. The problem with Section (1) is that no one knew what the statute meant.

Immediately after the passage of §113.060, lawyers and trustees identified significant problems with the wording of that section. Glenn M. Karish, *Analysis of 2007 Legislation, O'Connor's Probate Code Plus, XXV (2007-2008)*. The lawyers and trustees complained that the language of the statute was ambiguous because it failed to define what types of disclosures would meet the standard. *Id.* Although the Uniform Trust Code had attempted to define such standards, the Texas statute was silent. *Id.* Many prominent trust officers and attorneys put their heads together to try to fix the statute, however, no consensus was reached as to how to fix the statute. *Id.* The only consensus was that Texas Law was better off before the enactment of that statute. *Id.*

Section 113.060 of the Texas Trust Code was passed in the 2005 legislative session, and by its explicit terms became effective January 1, 2006. The legislature demonstrated its intent that §113.060 was not retroactive when it stated in section 31 of HB 1190 that the changes in law made by that Act applied only to acts or omissions relating to trusts that occurred *on or after* January 1, 2006. Section 31 of Acts 2005, 79th Leg., ch. 148. Thus, §113.060 did not apply retroactively and there was no statutory duty requiring a trustee to inform beneficiaries about "the administration of a trust" prior to January 1, 2006. Because the statute does not apply retroactively, a trustee cannot be liable under §113.060 for the failure to keep a beneficiary informed when such purported failure occurred prior to January 1, 2006.

In 2007, the Texas Legislature repealed § 113.060 through H.B. 564. *Id.* The Real estate, Probate and Trust Law section of the Bar tried to make the repeal retroactive to January 1, 2006, the effective date of the enactment of §113.060, however, the Legislative Council prevented the statute from being retroactive. *Id.* REPTL was successful, however, in ensuring that the repeal of § 113.060 was effective immediately upon the Governor's signing of the law. Thus, the repeal became effective on June 16, 2007. *Id.*; Tex. Prop. Code § 113.060 (2007).

X. DISCLOSURE OF INFORMATION RELATED TO TRUST AFFILIATES

Assume that a trustee holds 100% of the partnership interests of a partnership or 100% of the stock of a corporation as part of the trust estate. May the beneficiary of the trust demand information about the financial condition of the partnership or the corporation? May the beneficiary demand to examine the books and records of the partnership or corporation? While there is little Texas law on this issue, it is the author's opinion that the beneficiary is entitled to demand information regarding and examine the books and records of such partnership or corporation.

Next, assume that a trustee, acting in his capacity as trustee, is the general partner of a partnership or the President or Director of a corporation that is partially owned as a part of the trust estate. In this scenario third parties would have ownership interests in the partnership or corporation. May the beneficiary of the trust demand information about the financial condition of the partnership or the corporation? May the beneficiary demand to examine the books and records of the partnership or corporation? This is a more difficult problem, some may argue that the trustee has a conflict between his duty of disclosure to the trust beneficiaries and his duty of confidentiality to the non trust partners or shareholders.

Finally, assume that a trustee, acting in his capacity as trustee, is a partner (or limited partner) of a partnership or a shareholder of a corporation and that by virtue of this status may have rights to examine the books of the partnership or corporation and/or be entitled to disclosures of information from the partnership or corporation. May the beneficiary of the trust force the trustee to exercise these rights and then share the information with the beneficiary? There is no law on this point. The author can see arguments dictating both disclosure and non disclosure in this instance.

XI. PRIVILEGED INFORMATION

Is a trust beneficiary obligated to disclose privileged communications with his or her attorney to the beneficiaries of the trust? In *Huie, supra* the Texas Supreme Court recognized that:

The attorney-client privilege protects from disclosure confidential communications between a client and his or her attorney made for the purpose of facilitating the rendition of professional legal services to the client. Tex. R. Civ. Evid. 503(b) This privilege allows "unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978) The privilege thus "promotes effective legal services," which "in turn promotes the broader societal interest of the effective administration of justice". *Republic Ins. Co. V. Davis*, 865 S.W.2d 158, 160 (Tex. 1993)

In *Huie* the court, after recognizing a trustee's duty of full disclosure to trust beneficiaries, held that the attorney-client privilege extends to communications between a

trustee and his or her attorney. Stated differently, a trustee is not required to disclose confidential communications with his or her attorney to trust beneficiaries.

The court recognized that, while the privilege extends to the entire communication between the trustee and his or her attorney (including facts contained therein) a trustee may not cloak a material fact with the privilege merely by communicating it to an attorney. The court illustrated this distinction by the following 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, because the attorney's only knowledge of the misappropriation is through the confidential communication, the attorney cannot be called on to reveal this information.

XII. USE OF THE DISCLOSURE RULES IN TRUST LITIGATION

Utilization of disclosure rules set forth above can be valuable in trust litigation if you are representing a trust beneficiary.

In my experience formal discovery under the Texas Rules of Civil Procedure is a cumbersome and expensive way to obtain information. Almost every discovery request is objected to. Protective orders are frequently sought. Compelling formal discovery is very expensive. Sanctions for discovery abuse under TRCP 215 are almost impossible to obtain.

The public policy considerations involved in a common law information demand are different than those involved in a discovery request under the Texas Rules of Civil Procedure for the following reasons:

1. The trustee is administering property (the trust estate) that belongs to the beneficiaries of the trust (i.e. the beneficiaries hold equitable title to the trust estate). The trustee, acting in his individual capacity, usually has no personal interest whatsoever in the trust estate of the trust that he is administering.
2. Consequently, the information requested does not "belong" to the trustee (i.e. the trustee has no equitable interest in the trust estate of the trust). In legal discovery requests (under the TRCP) a party to a lawsuit is requesting proprietary information and documents that belong to another party. This is not the case with respect to equitable demands for information. The trustee of a trust holds the trust estate for the benefit of the trust beneficiaries who have an equitable interest in all information and documents.

3. There is usually a financial disparity between the beneficiary (who is using his personal financial resources to obtain information) and the trustee (who is using the trust estate of the trust to pay for the cost of his compliance with the information demand). In essence, the beneficiary is paying everyone's fees. This situation does not occur in legal discovery requests where independent parties are involved in litigation.
4. The beneficiary of a trust is the only person authorized to enforce the trust. It is not possible for him or her to perform this function without disclosure from the trustee regarding how the trust is being administered.

Legal discovery is a time consuming and expensive process. The TRCP impose stringent limits on the amount of discovery available to the party to a law suit. Having said this, some forms of formal discovery such as requests for disclosure and depositions are essential tools to obtain information.

Public Policy should dictate that courts of equity afford a beneficiary an expedited and relatively inexpensive method of obtaining information regarding his or her trust.

When representing beneficiaries I have had significant success invoking the trustee's common law duty to disclose information. I am aware of no legal precedent that provides that a trustee's duty to disclose ceases when he becomes involved in litigation. Most courts that I have practiced before have recognized and enforced these duties during litigation.

The benefits of utilizing common law disclosure rules over formal discovery in litigation are as follows:

1. The scope of discovery is more broad. In discovery under the Rules the scope of discovery is whether the information sought appears reasonably calculated to lead to the discovery of admissible evidence. TRCP 192.3 In common law disclosure, the scope of discovery is material facts known to the trustee that might affect the beneficiaries' rights.
2. There is less opportunity to object. There is really no law in place allowing formal objections to common law disclosure demands for information. As a practical matter, while I have had the opposing party seek protection from compliance from the court, I rarely encounter objections.
3. There is no limitation on the number of requests that can be made. Unlike interrogatories, there is no limitation on the number of demands for information that can be made on a trustee. At some point the demands can become so burdensome that a court may intervene but my experience is that courts give you a great amount of leeway in requesting information.
4. You can ask a trustee to compile information. I believe that it is permissible to ask a trustee to actually put together information to comply with an information request. For example you could ask a trustee to calculate the net return on

investment of the trust portfolio for several years. You might not be able to do this through formal discovery.

5. The breach of fiduciary duty specter. If a demand for information is made on a trustee and he refuses to comply with the demand (or if he seeks court protection and loses) then he has breached his fiduciary duty of disclosure and subjects himself to all applicable equitable remedies for that breach.
6. Sanctions. As stated previously, if the trustee breaches his duty to disclose he is subject to all equitable remedies. Moreover, his breach is a factor in the award of legal fees in the overall case pursuant to Texas Trust Code §114.064.

When representing a trust beneficiary against a trustee, I usually rely on demands to examine books and records and demands for information rather than requests for production and interrogatories (other than purely trial oriented interrogatories such as contention interrogatories).

XIII. COMPELLING DISCLOSURE

If you are not already in litigation and a trustee refuses a demand for information then your remedy is to file a lawsuit to compel the trustee to answer the information demand. The lawsuit should be filed in either a district court or a statutory probate court pursuant to Texas Trust Code 115.001.

The lawsuit should allege breach of the fiduciary duty to disclose and should seek your legal fees from the trustee individually, rather than from the trust estate of the trust. You should also pray that the court order the trustee to pay his legal fees individually, rather than from the trust estate of the trust.

If you are already in litigation you should simply file a motion to compel and have it heard by the court. If you are successful you should amend your pleadings and seek damages for breach of the fiduciary duty of disclosure.