

FIDUCIARY DUTY TO DISCLOSE:

**Informal demand for information or formal discovery: the debate on
obtaining information from fiduciaries under their duty to disclose**

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CHAPTER 6.1

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FIDUCIARY DUTY TO DISCLOSE

INTRODUCTION

Trustees have a common-law fiduciary duty to disclose material information to trust beneficiaries. There is little real dispute over the existence of the duty. The dispute arises with extent and enforcement of the duty to disclose. Does it end with the filing of a lawsuit? Can a trustee decline to disclose information after a beneficiary files a lawsuit? Is the duty suspended during litigation? Is the beneficiary forced to send discovery to obtain material trust administration information?

This paper focuses first on the source and rationale for the duty to disclose. Next it turns to the tension between a trustee's fiduciary duty to disclose material trust information to a beneficiary before and after a lawsuit for breach of fiduciary duty has been filed. Finally, the paper discusses some of the practical problems and strategies for addressing the enforcement of the duty to disclose from the perspective of the beneficiary and the trustee in commonly occurring scenarios.

I. TRUSTEE'S COMMON-LAW DUTY TO DISCLOSE MATERIAL TRUST INFORMATION

A. The basis for the trustee's duty to disclose.

Trustees have a duty to disclose trust information to the trust's beneficiaries. The duty to disclose is an affirmative duty; it is not triggered by a demand from the beneficiary.

"Trustees and executors owe beneficiaries 'a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights.' *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984)." *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (orig. proceeding). Trustees have an affirmative duty to make a full and accurate confession of *all* their fiduciary activities, transactions, profits, and mistakes. *Montgomery v. Kennedy*, 669 S.W.2d at 312-14; *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 513-14 (1942) (emphasis added).

The beneficiary's right to material information and the trustee's corresponding duty to disclose are based on two principles: 1) beneficiaries are the true owners of trust property, and 2) the nature of the fiduciary relationship itself.

First, beneficiaries are the true owners of trust property. A trust allows a settlor to give property to a beneficiary at a certain point in the future and places the property with a trustee to hold in the meantime. *Faulkner v. Bost*, 137 S.W.3d 254, 258 (Tex. App.—Tyler 2004, no pet.); *Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*, 907 S.W.2d 586, 589 (Tex. App.—

Corpus Christi 1995, no writ). When a valid trust is created, "the beneficiaries become the owners of the equitable or beneficial title to the trust property and are considered the real owners." *Hallmark v. Porter/Cooper-T. Smith Stevedoring*, 907 S.W.2d at 589 (quoting *City of Mesquite v. Malouf*, 553 S.W.2d 639, 644 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.)). The trustee holds the property for the beneficiary and is "merely the depository of the bare legal title." *Id.* The trustee is "vested with legal title and right of possession of the trust property but holds it for the benefit of the beneficiaries, who are vested with equitable title to the trust property." *Id.* The beneficiaries are the "real owners." *Id.*

Second, the trustee and beneficiary are in a fiduciary relationship. The fiduciary relationship is not adversarial. The fiduciary relationship demands one of the highest duties of loyalty:

When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. If the existence of strained relations should be suffered to work an exception, then a designing fiduciary could easily bring about such relations to set the stage for a sharp bargain.

Texas Bank & Trust Co. v. Moore, 595 S.W.2d 502, 508 (Tex. 1980) (quoting *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938)).

Further, a beneficiary in seeking trust information is not creating work for a trustee. The duty to disclose reflects the information a trustee is duty-bound to maintain. Trustees are required to keep records of trust property and their actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

Because of the fiduciary relationship and because beneficiaries own legal title to the trust's property, a trustee must disclose information and a beneficiary is entitled to all material information known to a trustee that might affect the beneficiary's interest in the trust. *See Montgomery v. Kennedy*, 669 S.W.2d at 313. This standard provides a beneficiary with broad rights to information about a trust.

There is no Texas statute governing the duty to disclose. The duty to disclose is a common law matter. The legislature attempted to codify the duty to disclose in Property Code §113.060, but later repealed it. Act of May 12, 2005, 79th Leg., R.S., ch. 148, §15, 2005 Tex. Gen. Laws 287, 292, *repealed by* Act of May 11, 2007, 80th Leg., R.S., ch. 451, §22, 2007 Tex. Gen.

Laws 801, 808. Although repealed, the legislature made clear that its attempt to codify left intact the common law duty to disclose. “The repeal by this Act of Section 113.060, Property Code, does not repeal any common-law duty to keep a beneficiary informed. The common-law duty to keep a beneficiary informed that existed immediately before January 1, 2006, is continued in effect.” *Id.*

In addition to case law descriptions of the duty to disclose, several leading commentators have discussed the rationale for the duty to disclose. For example, one leading authority on trust law has explained,

A beneficiary of a trust is the equitable owner of the trust property, in whole or in part. The trustee, although holding legal title, is a fiduciary whose function is to manage the trust property for the beneficiary’s benefit in accordance with the terms of the trust and applicable law. The fact that the settlor has created a trust, and thus required that the beneficiary enjoy the property interest indirectly, does not imply that the beneficiary is to be kept in ignorance of the trust, the beneficiary’s interest in the trust, the nature of the trust property, and the details of the trustee’s administration of that property. For the beneficiary to be able to hold the trustee accountable for its administration of the trust, the beneficiary must know of the trust, the beneficiary’s interest in it, its property, and how that property is being managed.

ALAN NEWMAN, GEORGE G. BOGERT & GEORGE T. BOGERT, *The Law of Trusts & Trustees* § 962 (3d ed. 2010).

The trustee is accountable to the beneficiary for the management and administration of the trust. *See id.* Further, “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.” AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *The Law of Trusts* § 173 (4th ed. 1987).

Finally, the Restatement also addresses the duty to disclose. A trustee has a duty

(a) promptly to inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship;

(b) to inform beneficiaries of significant changes in their beneficiary status; and

(c) to keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.

RESTATEMENT (THIRD) OF TRUSTS § 82(1) (2007).

B. Texas Supreme Court interpretations of the duty to disclose.

The Texas Supreme Court has interpreted the duty to disclose in two primary cases. Both cases, *Huie v. DeShazo* and *Montgomery v. Kennedy*, offer guidance on the extent of the duty to disclose and on its enforcement.

A detailed look at the two cases is critical, yet trustees often overlook the controlling principles in these cases. The two supreme court cases establish that the duty to disclose: 1) exists despite acrimony between a trustee and a beneficiary, 2) exists notwithstanding litigation between a trustee and a beneficiary, 3) is not the equivalent of a statutory accounting; and 4) exists whether a beneficiary asks for trust information or not.

In *Montgomery v. Kennedy*, the Texas Supreme Court addressed allegations of a trustee’s failure to disclose material information to a beneficiary during acrimonious pre-litigation settlement negotiations. 669 S.W.2d 309 (Tex. 1984). In *Montgomery*, a family dispute arose after the father’s death. Montgomery was a beneficiary and sister of the trustee. Upset that she was not receiving her portion of the family’s income, Montgomery threatened to sue her brother, who served as trustee of a trust established in their father’s will. *Id.* at 311. Before filing suit, the parties negotiated a settlement that gave Montgomery her portion of the family trust.

During settlement negotiations, the trustee did not turn over the estate’s files for a complete and unsupervised inspection. *Id.* Instead, the trustee “declined to volunteer information other than on request.” *Id.* The trustee turned over documents he “deemed relevant” to the negotiations. *Id.*

After entering an agreed judgment, Montgomery discovered that her brother, while acting as trustee of the trust, failed to disclose the existence of an oil and gas lease on a ranch that was the main asset of the estate. *Id.* at 311-12. The lease had been signed shortly before the parties’ negotiated settlement. *Id.*

Montgomery filed a bill of review to set aside the agreed judgment based on the trustee’s fraudulent concealment of material information about trust property. *Id.* at 312. The trial court granted the

trustee's motion for summary judgment and the court of appeals affirmed.

The Texas Supreme Court reversed and remanded. According to the supreme court, a trustee owes a beneficiary a "fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiary's] rights." *Id.* at 313. "The existence of strained relations between the parties did not lessen the fiduciary's duty of full and complete disclosure." *Id.* The failure to disclose the oil and gas lease "concealed a material asset of the estate." *Id.* The Texas Supreme Court did not limit this language to significant transactions or to self-dealing transactions.

In *Huie v. DeShazo*, the Texas Supreme Court addressed a trustee's duty to disclose trust information during litigation between a trustee and a beneficiary. 922 S.W.2d 920, 922 (Tex. 1996). A trust beneficiary sued a trustee for breach of fiduciary duties for mismanagement of the trust, self-dealing, and conversion. *Id.* In discovery, the beneficiary sought disclosure of communications between the trustee and the trustee's attorney. The trial court ordered the attorney to be deposed. The court of appeals denied relief.

In granting mandamus relief, the Texas Supreme Court followed its earlier ruling in *Montgomery v. Kennedy* and reiterated the trustee's duty to disclose material information to a beneficiary. The Texas Supreme Court explained that

[t]rustees and executors owe beneficiaries 'a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights.' *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). *See also* TEX. PROP. CODE §113.151(a) (requiring trustee to account to beneficiaries for all trust transactions). This duty exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and beneficiaries.

DeShazo, 922 S.W.2d at 923.

According to the supreme court, the beneficiary could depose the trustee's attorney regarding factual matters involving the trust. *Id.* at 923. The Court held, however, that the attorney-client privilege protected communications between the trustee and the trustee's attorney made confidentially and for the purpose of facilitating legal services. *Id.* at 923-24.

The Texas Supreme Court concluded that, while the attorney-client privilege protected a trustee's attorney from revealing communications between the attorney and the trustee during litigation, a lawsuit or the assertion of privilege did not change the trustee's

duty to disclose. *Id.* The Court expressly noted that its holding "in no way affects [the trustee's] duty to disclose all material facts *and* to provide a full trust accounting to [the beneficiary], even as to information conveyed to [the trustee's attorney]." *Id.* at 923 (emphasis added).

As these authorities establish, the duty to disclose is an affirmative duty to disclose all material information that might affect the beneficiaries' rights that exists without the need for a beneficiary to make a request for the information. The duty to disclose without a request from a beneficiary also requires a trustee to disclose the existence of the trust, the beneficiaries' right to receive distributions from the trust, self-dealing transactions involving the trustee, and any breach of trust committed by the trustee. Frank N. Ikard, Jr., *Trustee's Duties to Disclose Information to Beneficiaries*, 32ND ANNUAL ADVANCED ESTATE PLANNING AND PROBATE COURSE 2008, ch. 12, pp. 5 (State Bar of Texas, June 11-13, 2008).

C. Common-law duty to disclose is not satisfied by a statutory accounting.

As the discussion above establishes, the duty to disclose is an independent, common-law affirmative duty to disclose information. Trustees, however, often contend that a beneficiary's only ability to obtain trust information is through an annual statutory accounting. A statutory accounting, however, does not absolve a trustee of her separate and distinct fiduciary duty to disclose. Both the statute detailing a trustee's duty to account and Texas Supreme Court authority refute the argument that the duty to disclose is satisfied by an accounting.

The statutory basis for a trustee's duty to account is found in Trust Code §113.151(a). Section 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.

TEX. PROP. CODE 113.151(a).

A statutory accounting must provide specific, uniform information. A statutory accounting must be a written statement that shows:

- (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.

TEX. PROP. CODE 113.152.

As the statutory requirements indicate, a statutory accounting is an annual financial statement, setting out income, expenses, and a remaining balance; it provides no detail of any particular transaction. TEX. PROP. CODE §§ 113.151(a); 113.152. In contrast, the trustees' duty to disclose is an on-going, affirmative duty to report all fiduciary activities, transactions, profits, and mistakes. *Montgomery*, 669 S.W.2d at 312-14.

By its terms, a trustee's duty to account includes different information than a trustee's duty to disclose. While certain information contained in an accounting may satisfy in part a trustee's duty to disclose, the duty to disclose is not limited to information contained solely in a statutory accounting.

Not only is the statutory accounting on its face different than the duty to disclose, the supreme court expressly recognized the distinction in the two duties. The Court noted in *DeShazo* that its holding "in no way affects [the trustee's] duty to disclose all material facts *and* to provide a full trust accounting to [the beneficiary], even as to information conveyed to [the trustee's attorney]." *DeShazo*, 922 S.W.2d at 923 (emphasis added). Accordingly, the duty to disclose allows a beneficiary to at least obtain the back-up information and supporting documentation behind the information listed on a statutory accounting.

A couple of examples demonstrate the difference between the duty to disclose and the statutory duty to account. First, consider a trustee selling trust land. A statutory accounting would only reveal the money realized from the sale and its allocation to principal or income. *See* TEX. PROP. CODE § 113.152. Under the duty to disclose, on the other hand, a trustee must inform beneficiaries of the terms of the sale, the reason for the sale, the basis for the sales price, the comparable properties used to arrive at a sales price, the listing agreement, the trustee's relationship to the

buyer, the motivation for the sale, etc. *See Montgomery*, 669 S.W.2d at 313; *DeShazo*, 922 S.W.2d at 923.

Another example shows the distinction between the two duties. Consider a trustee who receives an offer to purchase trust land at or above its appraised value. An offer of purchase (that is not consummated) is not a matter required by statute to be included on an accounting. *See* TEX. PROP. CODE 113.152. The duty to disclose, however, would require a trustee to disclose the offer, the source of the offer, the trustee's relationship to the proposed buyer, any due diligence in which the trustee engaged, and the reasons for rejecting the offer. *See Montgomery*, 669 S.W.2d at 313; *DeShazo*, 922 S.W.2d at 923.

As these examples demonstrate, the facts required to be provided under the duty to disclose reveal whether a trustee has engaged in a self-dealing transaction, breached her duty of loyalty, or mismanaged trust property. These examples also show why an accounting does not satisfy the duty to disclose.

D. Problems with limiting the affirmative duty to disclose.

The examples listed above also show the problems with a trustee's argument that the duty to disclose is limited to "significant transactions" involving trust property or only to a trustee's self-dealing transactions. The most obvious problem with limiting the duty to disclose to significant transactions or self-dealing transactions is who decides the nature of the transaction. Without an affirmative duty to disclose, a beneficiary would not know about what to inquire or when to make the inquiry. Limiting the duty to self-dealing or to significant transactions assumes a trustee will be upfront about all trust dealings and transactions. It also assumes a trustee will label a transaction as "self-dealing," a determination that most trustees will make in their favor. The affirmative duty to disclose, on the other hand, serves as a check on the trustee. Without the duty to disclose, a beneficiary is relying on a trustee to reveal a self-dealing transaction and to reveal something that "significantly" impacts a beneficiary.

A trustee's affirmative duty to disclose may not apply to routine, mundane trust administration matters. If a beneficiary, however, makes a demand for such information, the trustee is duty-bound to provide it. *See* RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. d (section 82 does "impose an affirmative requirement that, if and as circumstances warrant over the course of administration, the trustee inform fairly representative beneficiaries of important developments and information that appear reasonably necessary for the beneficiaries to be aware of in order to protect their interests.")

II. ENFORCING THE TRUSTEE'S DUTY TO DISCLOSE

By far the more difficult question is the enforcement of a trustee's duty to disclose. Trustees argue that the duty to disclose is limited with the filing of litigation between a trustee and a beneficiary. According to some trustees, once a lawsuit is filed, a beneficiary's only means of obtaining trust information is through formal discovery. Precedent from the Texas Supreme Court again refutes the trustee's argument. Without enforcement of the duty to disclose through informal demand for information, there is effectively no duty to disclose.

A. The trustees' duty to disclose exists independently of discovery.

A trustee's duty to disclose material information to beneficiaries is not altered because the beneficiaries have sued the trustee for breach of fiduciary duty. As *Huie v. DeShazo* and *Montgomery v. Kennedy* demonstrate, a trustee's fiduciary duty to disclose and a beneficiary's corresponding right to material information does not end with strained relations between a beneficiary and a trustee or when there is litigation between them.

As the supreme court stated, the duty to disclose "exists independently of the rules of discovery." *DeShazo*, 922 S.W.2d at 923. It does not require a lawsuit or discovery to invoke the duty to disclose. The duty to disclose is an affirmative duty to provide information, not an obligation to answer when asked. *Montgomery*, 669 S.W.2d at 311 (trustee fraudulently concealed trust information by "declin[ing] to volunteer information other than on request.").

The trustee's argument that the duty to disclose cannot be enforced is contrary to long-standing precedent from the Texas Supreme Court. "Equity will not suffer a right to be without a remedy." *Chandler v. Welborn*, 294 S.W.2d 801, 807, 156 Tex. 312, 319 (1956). "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it. . . . It is a vain thing to imagine a right without a remedy." *Miers v. Brouse*, 271 S.W.2d 419, 421, 153 Tex. 511, 515 (1954) (citation omitted). If a trustee's duty to disclose could not be enforced, the duty to disclose would be meaningless.

A trustee's fiduciary duty to disclose is different from discovery. The duty to disclose is not a substitute for formal discovery under the Rules of Civil Procedure. Beneficiaries sending an informal demand for information are not absolved of their obligation to send discovery to obtain lawsuit-related information. Like any litigant, beneficiaries must send discovery to obtain identity of witnesses, expert information, legal theories, and the factual bases to support them. Formal discovery must be sent as in any lawsuit.

The informal demand does not circumvent formal discovery. As discussed below, an informal demand for information relates to material information about the trust and trust administration that a beneficiary is entitled to have notwithstanding a lawsuit between the trustee and the beneficiary.

B. Formal discovery is contrary to the trustee's duty to disclose.

That a trustee has a duty to disclose independently of discovery is based on the two principles mentioned at the outset of the paper. Beneficiaries are the beneficial owners of trust property. Further, the fiduciary relationship itself demands the highest degree of loyalty. Accordingly, the duty to disclose allows beneficiaries to obtain a class of information independently from discovery - material factual information that may affect the beneficiary's rights related to the administration of the trust. *DeShazo*, 922 S.W.2d at 923.

Unlike the trustee's duty to disclose that is based on the fiduciary relationship, discovery under the rules of civil procedure is based on an adversarial relationship where one party seeks information belonging to its opponent. Discovery is designed to safeguard a litigant's information from an adversary unless the requested information is "discoverable." See TEX. R. CIV. P. 192.3. Discovery is limited by an opposing party's interests in avoiding overly broad requests, harassing requests, or disclosure of privileged information. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding); *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990) (orig. proceeding). The discovery process is further limited and prohibitive by delays in responding and expense in pursuing it.

If beneficiaries are forced to go through formal discovery, then a trustee no longer has a duty to disclose and only has a deadline to answer discovery. Discovery forces a beneficiary who does not have access to her own trust information to guess at the questions to ask a trustee to obtain information. The trustee maintains a trust's books and records. A beneficiary lacks information or access. As in *Montgomery v. Kennedy*, a beneficiary may not know the information to request and a trustee can take the position she has no duty to disclose unless asked the correct question. Yet, providing information voluntarily is exactly what the duty to disclose requires. *Montgomery*, 669 S.W.2d at 311.

An example demonstrates the potential for abuse if beneficiaries are restricted to obtaining trust information solely from formal discovery. Consider a trustee who hides from the beneficiaries the existence of a trust for 20 years before the beneficiaries discover their interests in the trust. The beneficiaries learn that the trustee stole money from the trust, but do not know

the assets that exist or existed in the trust. By limiting the beneficiaries to discovery requests, the beneficiaries are restricted to asking the trustee about all instances of wrongdoing that the beneficiaries can only surmise. In this situation, however, a beneficiary who is not intimately familiar with the trust may not be aware of what questions to ask, and if restricted by the rules of discovery, such beneficiary will miss the opportunity to discover potential breaches of fiduciary duty or other transactions that materially affect the beneficiary. With the trustee's tool of objecting to discovery requests, the beneficiaries' requests may be whittled down further.

Through enforcing the trustee's duty to disclose, however, the trustee has an affirmative duty to disclose *all* of her actions, whether the beneficiaries ask the "right" question or not. *See Montgomery v. Kennedy*, 669 S.W.2d at 313-14. By enforcing the duty to disclose, beneficiaries will discover what happened to the trust assets that *they*, not the trustee, equitably own.

Similarly, other litigation remedies do not substitute for the duty to disclose. For example, in a recent case in which beneficiaries filed a motion to compel trustees to answer an informal demand for information after a lawsuit had been filed, a district court denied the motion to compel, but invited the beneficiaries to seek sanctions under Rule 215. *In re Nankervis*, No. 13-11-00400-CV, 2011 WL 2601441 (Tex. App.—Corpus Christi-Edinburg June 30, 2011, orig. proceeding) (mem. op.). While the case remains pending on petition for writ of mandamus at the Texas Supreme Court, *DeShazo* refutes the argument that pursuing Rule 215 sanctions provide a remedy. *See In re Nankervis*, No. 11-0558, in the Supreme Court of Texas. The trustee's duty to disclose exists independently of litigation or discovery. *Huie*, 922 S.W.2d at 923. That the trial court invited beneficiaries to seek sanctions (a discovery rules issue) is contrary to *Huie*. Beneficiaries are not required to send discovery and seek sanctions under Rule 215 to obtain their own trust information. *See id.*

C. Benefits of an informal demand for information.

The duty to disclose enforced independently of discovery accomplishes several things. First, it gives transparency to the trust's administration and allows beneficiaries access to factual information relating to administration of their assets. Simply having the information may alleviate a beneficiary's questions and concerns.

Second, an informal demand for information avoids the delay and expense of formal discovery and accelerates the speed with which information is provided. Formal discovery takes time and money – to craft non-objectionable questions; digest answers, if any substantive ones are provided; and respond to

objections through motions to compel and hearings. Discovery requests tend to be written broadly to put the burden on the responding party to produce as much information as possible. Thus, when documents are provided in discovery, additional time and expense is required to cull through and determine whether the information is useful. An informal demand for information, on the other hand, can be written narrowly to target the true transactions in dispute.

Material information related to the trust exists for the benefit of the beneficiary and is owned by the beneficiary. Thus, a beneficiary should not be required to spend the money to discover what is her own information.

Finally, enforcing the duty to disclose informally may avoid litigation in the first place. For example, a beneficiary may question a trustee's decision to sell a trust asset. Sending discovery requires filing a lawsuit and in effect forces a beneficiary and trustee into an adversarial relationship unnecessarily. If a trustee responds to the beneficiary's informal request for information about the decision to sell the asset, the beneficiary may learn that the sale was appropriate and avoid a lawsuit for breach of fiduciary duty.

Another example further demonstrates why the trustees' duty to disclose exists independently of discovery. If a trust had three beneficiaries but only one sues the trustee, what happens to the trustee's duty to disclose? Can the two non-suing beneficiaries obtain trust information informally and the suing beneficiary obtain the same information only by sending discovery? Does a lawsuit by one beneficiary cut off the right of the other two beneficiaries to information?

III. PROCEDURES AND STRATEGIES IN SEEKING TRUST INFORMATION INFORMALLY

Having set out the basics on the duty to disclose and its enforcement, the following discussion applies those concepts to realistic scenarios where an informal demand for information may be made.

A. Questions and information to seek informally.

What does an informal demand for information look like? As stated above, an informal demand is not a substitute for discovery. In general, the request for information should be simple and direct in a written letter. Trustees cannot file objections so there is no need for the formalities used with discovery. The written demand should contain a deadline for responding, for example 30 days, and a shorter deadline, 10 days for example, to inform the beneficiary if the trustee does not intend to respond. The shorter deadline allows a beneficiary to go ahead with a motion to compel rather than waiting 30 days to be told there will be no response. Obviously, a 30-day

deadline correspondences to the rules of civil procedure's discovery deadlines. Whether these deadlines should be longer is a matter for a trustee to raise in response.

Informal demands for information are not without limits. Beneficiaries should keep these limitations in mind when drafting informal demands for information. The language of *DeShazo* and *Montgomery* instruct that the duty to disclose is limited to material information that might affect the beneficiaries' interests in the trust. Thus, a beneficiary's demand for information must satisfy the materiality and impact elements as set out by the supreme court.

Further, a demand for information, as an equitable remedy, must not be burdensome or harassing to a trustee. That is, a beneficiary cannot force a trustee to abandon their role as trustee and duty to other beneficiaries to chase down documents and information that are only tangentially related to material trust matters. A demand for information also cannot seek privileged information. *DeShazo*, 922 S.W.2d at 923. Finally, a demand for information should not seek information duplicative of a statutory accounting.

From a trustee's standpoint, the response to a demand for information may be as simple as referring with particularity to a part of a previously provided accounting. Trustees always should respond to the demand for information even if the response simply points out the problems with the information requested. Trustees could also respond by asking for additional time to gather the information and documents requested.

The form of an informal demand for information and the information available depends on the kind of assets in the trust. For example, the information available about oil and gas interests likely differs from the information available if the trust's assets are commercial real estate. Attached in Appendix A are some suggested questions to consider asking in an informal demand for information.

B. Informal demand for information when no litigation is pending.

There is little debate that a beneficiary can request a trustee to disclose material trust information before a lawsuit is filed. Requesting trust information at this point can be made by the beneficiary without going through an attorney.

Trustees would be well-advised to answer reasonable requests for information when no lawsuit is pending. That a trustee refuses to answer pre-lawsuit fuels the fire for a beneficiary to file suit.

If the trustee refuses to respond to the information demand, a beneficiary should file a lawsuit alleging breach of the fiduciary duty to disclose and request attorney's fees. After filing the lawsuit, a beneficiary

can then file a motion to compel the trustee to respond to the demand for information.

C. Informal demand for information after filing a lawsuit, but before sending discovery.

The more interesting scenario is the enforcement of the duty to disclose after a beneficiary has filed a lawsuit alleging breach of fiduciary duty, but before formal discovery is served.

As discussed above, a lawsuit does not alter the duty to disclose. *Montgomery*, 669 S.W.2d at 313; *DeShazo*, 922 S.W.3d at 923. From a trustee's standpoint, however, the existence of a lawsuit routinely changes how a trustee views an informal demand for information.

Beneficiaries' counsel can employ the same letter format as mentioned above and with the same limitations in mind. With a pending lawsuit, a beneficiary's demand for information should be carefully crafted to avoid requests that look like discovery requests and that seek lawsuit-type information.

Beneficiaries should expect that a trustee may refuse to answer anything informally and insist on formal discovery to obtain information about the trust. The strategy a beneficiary may employ if a trustee refuses to answer an informal demand for information may depend on resources. A beneficiary could file a motion to compel responses to the informal demand for information seeking the court's assistance and seek attorney's fees for the trustee's failure to respond either from the trustee individually or alternatively from the trust estate. *See* TEX. PROP. CODE § 114.064. If the court denies the motion to compel, a beneficiary could file a mandamus petition to enforce the duty to disclose.

On the other hand, a client's resources may dictate that sending formal discovery and abandoning any attempt at obtaining information informally is the best course of action. Under either scenario, any conduct by a trustee other than answering the informal information demand constitutes additional evidence of breach of fiduciary duties.

A beneficiary's success in the trial court on a motion to compel an informal demand for information may depend on whether the matter is in district court or a statutory probate court. Probate court judges will be familiar with the duty to disclose. District court judges may not be as fluent in trustee's duties.

As a practical matter, a trustee's argument that the duty to disclose is suspended during litigation makes little sense. What if there are multiple beneficiaries and only one has sued the trustee? Is the duty to disclose still in place for the other beneficiaries? If the duty were suspended because of litigation, when is the duty "reinstated?" After the discovery period ends? After judgment? After an appeal?

From the trustee's standpoint, with receipt of an informal demand for information after a lawsuit is filed, several options exist. First and foremost, with a pending breach of fiduciary duty lawsuit, the trustee's actions are under the microscope. Any misstep with an informal demand for information will certainly add allegations to the existing lawsuit. The prudent course of action includes responding to the information demand in good faith or to at least some parts of it. If the demand is beyond the requirements set out in cases, then the trustee could point those problems out to the beneficiary. The trustee should also document the information provided previously in accountings and whether the informal demand for information is answered. Building a record of what has been provided to a beneficiary will be important if the trustee has to file a motion for protective order in response to numerous information demands.

D. Informal demand for information when a lawsuit is pending and discovery has been propounded.

If discovery has been served, an attempt to file an informal information demand may be met with more resistance, even from a trial court. Again, the duty to disclose does not end with the filing of a lawsuit, but the trial court may monitor the process more closely. A beneficiary may be better off simply using formal discovery and not trying to resurrect using an informal demand for information.

APPENDIX A

Samples of Information and Documents to Demand from Trustees and Personal Representatives:

The type of information and documents demanded depends for the most part on what your beneficiary already knows, the type of property the trust or estate owns and whether the fiduciary is corporate or an individual or individuals. The requests for information and documents below range from the very basic to the more case-specific.

Trust Documents:

- The trust instrument (if a testamentary trust, provide the will creating the trust)
- If a testamentary trust, provide the decedent settlor's Federal Income Tax Form 706 (to assist in determining what assets comprised the trust estate at formation)
- If a testamentary trust, provide the inventory filed in decedent settlor's estate (to assist in determining what comprised the trust estate at formation)
- Trust Accounting Demand: Provide a statutory trust accounting, pursuant to Tex. Trust Code § 113.151 and § 113.152, which shall consist of a written statement of accounts that shows:
 - o 1) All trust property that has come to trustee's knowledge or into trustee's possession since the inception of the trust;
 - o 2) A complete account of receipts, disbursements, and other transactions regarding the trust's property from the inception of the trust, including their source and nature, with receipts of principal and income shown separately;
 - o 3) A listing of all property being administered, with an adequate description of each asset;
 - o 4) The cash balance on hand and the name and location of the depository where the balance is kept. Also include the account number for each account, as well as a contact number at each depository where the balance is kept; and
 - o 5) All known liabilities owed by the trust.
- All tax information; accountants' work papers, Form K-1s, 1099s, depreciation schedules, depletion schedules, etc.
- Instruments of title/ownership
- Instruments of conveyance of trust property, including all appraisals and valuations
- Partnership agreements
- Demand to see the books and records of the trust.

Estate Documents:

- Decedent's federal estate tax return (Form 706)
- Decedent's final income tax return
- All appraisals performed of estate property
- Accountants' work papers relating to preparation of tax returns for the executor
- The inventory of Decedent's estate
- Last Will and Testament
- Powers of attorney executed by the Decedent in the past ten years prior to death
- Did Decedent have a safe deposit box at the time of his/her death? If so, what were the contents of the box and was the box ever inventoried by an independent third party?
- Estate Accounting Demand: Provide a statutory accounting of the ____ Estate, pursuant to Texas Probate Code § 149A.
- Instruments of title/ownership
- Instruments of conveyance of estate property, including all appraisals and valuations of property

Questions To Fiduciary (Trustee, Estate Representative):

- Who are the officers and/or directors overseeing the trust or estate (include their names and period served). [this question arises with corporate trustees]
- Trust department policy manual. [corporate trustees]
- Have you ever loaned money to the trust estate?
 - o If so, provide a list of all funds loaned, specifying for each loan: the purpose for the loan, the date of the loan, the amount of the loan, any security for the loan, the term of the loan, the interest rate, all payments made, whether and how such loan was documented and the amount remaining due.
- Has the trustee on behalf of the trust ever loaned money to you or your family?
 - o If so, provide a list of all funds loaned, specifying for each loan: the purpose for the loan, the borrower, the date of the loan, the amount of the loan, any security for the loan, the term of the loan, the interest rate, all payments made, whether and how such loan was documented and the amount remaining due.

- Have you ever distributed, conveyed or transferred anything of value belonging to the trust estate to or for the benefit of yourself or any member of your family?
 - o If so, provide a list of everything that you or a member of your family have received, and with respect to each receipt of property:
 - Identify the person receiving the distribution
 - Identify the property distributed
 - Explain the purpose for each distribution
 - Identify the date of each distribution

Questions Regarding Trust or Estate Assets

Real Property:

- Identify all real property currently owned by the Trust/Estate.
- Has any property been sold or transferred from the Trust/Estate?
 - o If any real property has been sold by the Trust/Estate:
 - Provide documentation evidencing the date of sale, the purchaser(s), the sales price and terms of sale.
 - Did you know the purchaser prior to the sale, and if so, how?
 - How was the sale price determined? For example, was an appraisal performed and if so, provide a copy of such appraisal.
- Are any properties of the Trust/Estate currently being leased?
 - o If so, provide the following:
 - Lease agreement showing the name of the lessee, lease period, amount of rent, and lease terms.
 - How did you determine the amount of rent/lease terms?
 - Did you (trustee/personal representative) know the lessee prior to leasing, and if so, how?
- Provide copies of insurance policies insuring the real property of the (trust) estate.
- Have you delegated any part of managing the assets to anyone? To whom?
- Produce all financial investment account statements for the last 5 years.

Questions Regarding Administration of Trust

Often these questions arise in the context of a discretionary trust when a beneficiary cannot determine how a trustee is making discretionary distribution decisions. In an extreme example, if one beneficiary is receiving annual distributions of a million dollars, and the second beneficiary receives no distributions, the second beneficiary will likely have some questions. Although a trustee is often granted wide latitude in exercising discretion, a beneficiary should be permitted to inquire into *how* the trustee exercises such discretion without having to file suit. The fact that there is a discrepancy does not *necessarily* mean that the trustee has breached any duties.

Questions Regarding How a Trustee Exercises Discretion in a Trust with a Health, Education, Maintenance and Support Discretionary Distribution Standard:

- Disclose all factors that you considered in exercising your discretion to make or withhold distributions to Joe Smith Beneficiary during each of the last 5 years.
- Do you consider Mary Jane Beneficiary to have a preferential beneficial interest to that of Joe Smith Beneficiary?
- Disclose each beneficiary's health [education, maintenance, support] needs during the last five years, of which you are aware.
- In making distributions from the Trust, have you considered the resources and/or income available to each of the Trust beneficiaries (other than from the Trust)? [*Where particular Trust provides that the trustee could/should consider outside resources*]
 - o If not, why not?
 - o If you have, what resources and/or income have been available to each of the trust beneficiaries for each of the last five years?
- If you have refused to pay for any of Joe Smith Beneficiary's requests for trust distributions in the last five years, explain why you have denied such requests.
- Produce copies of meeting minutes and/or memorandums regarding the trustee's decisions regarding making discretionary distributions in the last 5 years.
- Disclose all loans made to each beneficiary by the trustee during the last five years, specifically disclosing the amount of the loan, the interest rate, the security for the loan, the purpose of the loan, whether and how such loan was documented, the date of the loan, and all factors you considered in determining whether to make such loan.

