NORTH TEXAS PROBATE BENCH BAR

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April 3 – 5, 2024
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NORTH TEXAS PROBATE BENCH BAR
AGENDA

THURSDAY, APRIL 4

8:00 - 9:00 - Breakfast - Sponsored by Frost Bank

8:45 - 9:00 - Welcoming Remarks by American National Bank & Trust

9:00 - 10:00 - Fiduciary Duties & Related Litigation: What Every Estate and Trust Lawyer Should Know

Sarah Patel Pacheco, *Houston*
Jackson Walker, LLP

10:00 - 11:00 - "Click Bait" for the Courts & Other Mandamus Practice Tips

Patricia Askew, *Fort Worth*
Staff Attorney, Second Court of Appeals
Steven K. Hayes, *Fort Worth*
Law Office of Steven K. Hayes

11:00 - 11:15 – BREAK

11:15 - 12:00 - How to Navigate Problem Probates - Tips from the Bench - (***No Article***)

Moderator
Jill Jester, *Denton*
Minor & Jester, P.C.

Panelists
Hon. Lincoln Monroe
Associate Judge, Dallas County Probate Court No. 2
Hon. Edward Nolter
Associate Judge, Denton County Probate Courts

12:00 - 12:10p - Lunch - Sponsored by Bank of Texas

12:10 - 1:00p - Ethics Jeopardy – (Powerpoint will be provided after presentation)

Jeanne Huey, *Garland*
Hunt Huey, PLLC
Jason B. Friedman, *Frisco*
Friedman Law, PLLC

1:00 - 1:15 - BREAK - TRANSITION TO BREAKOUT SESSIONS

LITIGATION BREAKOUT SESSION

LOCATION: MAIN BALLROOM – NO NEED TO CHANGE ROOMS

1:15 - 2:15 - Hearsay & Other Evidentiary Issues

Joshua Sandler, *Dallas*
Winstead, P.C.

2:15 - 3:00 - Jury Selection

Keith Morris, *Fort Worth*
The Blum Firm
Lynn Waller Kelly, *Fort Worth*
The Blum Firm

3:00 - 3:15 - BREAK - STRETCH YOUR LEGS & GRAB A SNACK

3:15 - 4:00 - Remedies in Trust & Estate Litigation - (***No Article***)

Hon. Brooke Allen
Judge, Tarrant County Probate Court No. 2

TAX AND PLANNING BREAKOUT SESSION

LOCATION: MEETING ROOM ADJACENT TO MAIN BALLROOM

1:15 - 2:15 - Pros & Cons of 678 Trusts

Philip M. Lindquist, *Plano*
Lindquist & Eisenberg, LLP

2:15 - 3:00 - Corporate Transparency Act

Kimberly N. Loveland, *Frisco*
Loveland & Hurley, PLLC

3:00 - 3:15 - BREAK - STRETCH YOUR LEGS & GRAB A SNACK

3:15 - 4:00 - Purpose Trusts

Selby Rains, *Dallas*
Jackson Walker, LLP

RETURN TO MAIN BALLROOM

4:15 - 4:45 – Corporate Trustees' Top 5 Tips & Concerns - (***No Article***)

Moderator
Brandy Baxter-Thompson, *Dallas*
Baxter-Thompson Law, PLLC

Panelists
Chris Klemme, J.D., *Dallas*
Senior Vice President / DFW Trust Market Lead
American National Bank & Trust
Joby Mills, J.D., *Amarillo*
Senior Vice President & Director of Trust Services
Happy State Bank

FRIDAY, APRIL 5

9:00 - 10:00 - Probate Practice in County Court at Law - Tips from the Bench

Moderator
Scott D. Weber, *Dallas*
Husch Blackwell

Panelists
Hon. Jim Chapman, *Ellis County*
Judge, County Court at Law No. 1
Hon. Lynn Johnson, *Parker County*
Judge, County Court at Law No. 2
Hon. Timothy Linden, *Hunt County*
Judge, County Court at Law No. 1
Hon. Bobby Rich, *Kaufman County*
Judge, County Court at Law No. 2

10:00 - 10:45 - Public Benefits in Guardianship and Probate / Mental Health

Moderator
Lori Leu, *Plano*
Leu & Pierce, P.L.L.C.

Panelists
Hon. Quentin McGown
Associate Judge, Tarrant County Probate Court No. 1
Monica A. Benson, *Fort Worth*
Katten, Benson & Zachry, LLP

10:45 - 11:00 – BREAK

11:00 - 11:55 - Emergency Situations - TROs, Temporary Guardianships, Temporary Administrations - (***No Article***)

Moderator
Natalie S. Brackett, *Fort Worth*
Bourland Wall & Wenzel, P.C.

Panelists
Hon. David W. Jahn
Judge, Denton County Probate Court No. 1
Hon. Christopher Ponder
Judge, Tarrant County Probate Court No. 1
Hon. Ingrid M. Warren
Judge, Dallas County Probate Court No. 2

11:55 – Closing Remarks

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March 29, 2024

COURSE TITLE:	2024 North Texas Probate Bench Bar		
COURSE DATE(S):	04/04/2024 TO 04/05/2024	COURSE LOCATIONS:	Dallas, TX
COURSE NO:	174233194	SPONSOR NO:	A16329

NOTIFICATION OF ACCREDITATION OF CLE ACTIVITY

The above referenced CLE activity that your organization submitted for accreditation in Texas has been reviewed and ACCREDITED as follows:

	ACCREDITED CLE HOURS	ETHICS HOURS
MCLE AND STATE BAR COLLEGE	9.50	1.50

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FIDUCIARY DUTIES AND RELATED LITIGATION: WHAT EVERY ESTATE AND TRUST LAWYER SHOULD KNOW[1]

BY:

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2024 NORTH TEXAS PROBATE BENCH BAR CONFERENCE
ARLINGTON, TEXAS
APRIL 3-5, 2024

1This outline and any related presentation are for educational purposes only and are not intended to establish an attorney-client relationship or provide legal advice. While some areas of the law are settled, other remain subject to different or no interpretations by Texas' appellate court. The author has tried to provide a non-bias article which reflects differing positions that may be taken on matters that have not been clearly decided by the Legislature and/or the Texas Supreme Court. This article cannot nor should not be attached to pleadings as admissions of the author and such use is strictly prohibited.

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Sarah Patel Pacheco is a partner with the law firm of Jackson Walker LLP where she focuses her practice to litigation, administration and tax issues relating to estate, trust, guardianship and related fiduciary appointments. She received her Doctor of Jurisprudence from Southern Methodist University, School of Law, and undergraduate degree in accounting from the University of Texas at Arlington. She has been Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization since 1998.

She is a co-author of the West Publishing's Texas Probate Practice Guide and West Publishing's Texas Wills, Trusts and Estate Planning Practice Guide, and the Editor of the State Bar of Texas' Guardianship Manual (4th Ed).

In 2023, Sarah was named by Texas Monthly as One as the Top 100 Texas Super Lawyers, One of the Top 50 Female Texas Super Lawyers and One as the Top 100 Houston Super Lawyers. She has been repeatedly named by Texas Monthly as One of the Top 50 Female Texas Super Lawyers, One as the Top 100 Houston Super Lawyers and a Texas Super Lawyers. In addition, she has been consistently named as one of The Best Lawyers in America in the practice areas of Trusts and Estates annually since 2006 and Litigation – Trusts & Estates since 2012. She was selected as Best Lawyers' Litigation - Trusts and Estates "Lawyer of the Year" for the Houston Region in 2014, 2017 and 2021.

In addition to serving as Chair of the Guardianship Manuel Committee, she served on the State Bar of Texas Legal Specialization Estate Planning and Probate Exam Commission from 2004-2010, including as its Chair her last term, and served on State Bar of Texas Pattern Jury Charge Oversight Committee for two terms. She has been active in various local and state legal organizations including: Houston Bar Association, Probate, Trust & Estates Section; Chair 2009-2010: CLE Committee; Judicial Polls Committee; 2008-2010: Houston Bar Foundation, Fellow (elected 2004): Houston Young Lawyers Association; Fellow: Texas Young Lawyers Association; Needs of Senior Citizens Committee: American Bar Association: Real Property, Probate and Trust Law and Litigation Sections; Member. She has been member for over 20 years of the Generation-X Estate Planning Forum.

She is a frequent author and speaker for various state and local professional organizations. In addition, she has served on numerous additional CLE planning committees and spoken at over 100 State Bar of Texas events. She has served as the course director for the State Bar of Texas' Advanced Fiduciary Litigation Course, Advanced Estate Planning Strategies Course, Advanced Estate Planning and Probate Course, Advanced Guardianship and Elder Law Course, Building Block of Wills, Trusts and Estate Planning Course, and Nuts and Bolts of Wills, Trusts and Estate Planning Course. In recognition of her contributions to the State Bar of Texas, she was awarded the 2011 Standing Ovation Award by the staff of TexBarCLE.

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I. SCOPE OF ARTICLE

Fiduciary duties and powers are fundamental in virtually all estate and trust matters. And as those who advise these fiduciaries know, it is not a simple role and it becomes increasingly complex with each passing year. Likewise, the role and responsibilities of the professionals representing these fiduciaries is increasingly complex as structures are complicated, distribution standards change, parties are more litigious and the courts of appeal continue to issue new decisions that impact these fiduciaries – and their counsel.

This outline and related presentation addresses some of the fundamental issues that estate and trust lawyers should be familiar with when advising clients on fiduciary duties or in related litigation, including an overview of the applicable law, standing of beneficiaries, standards of care and conduct, burdens, defenses to and remedies for a breach, along with some suggestions of ways to reduce certain claims both against the fiduciary and his or her advisors.

II. COMMON TRUST AND ESTATE FIDUCIARIES

A. Overview

A claim for breach of fiduciary duty requires a fiduciary relationship between the parties. *Meyer v. Cathey*, 167 S.W.3d 327 (Tex. 2005). Most courts have held that it is not possible to give a definition of the term fiduciary that is comprehensive enough to cover all cases. Courts have generally found that a fiduciary is a person "who occupies a position of peculiar confidence towards another." *Montague v. Brassell*, 443 S.W.2d 703 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.). And, it "refers to integrity and fidelity . . . [and] contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction." But, the term can also include "informal relations that exist whenever one party trusts and relies upon another, as well as technical fiduciary relations." *See id.* (*citing* 25 C.J. p. 1118; *Peckham v. Johnson*, Tex. Civ. App., 98 S.W.2d 408; *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 120 A.L.R. 720; *Swiney v. Womack*, 343 Ill. 278, 175 N.E. 419; *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896; *Niland v. Kennedy*, 316 Ill. 253, 147 N.E. 117; *Lindholm v. Nelson*, 125 Kan. 223, 264 P. 50; *Roecher v. Story*, 91 Mont. 28, 5 P.2d 205; *Roberts v . Parsons*, 195 Ky. 274, 242 S.W. 594; *Seely v. Rowe*, 370 Ill. 336, 18 N.E.2d 874; *Bliss v. Bahr*, 161 Or. 79, 87 P.2d 219; *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 138 Tex. 565, 160 S.W.2d 509, 512).

While not every fiduciary relationship is defined, Texas law clearly recognizes the following are fiduciary relationships as a matter of law:

- Trustee to beneficiary. *Huie v. DeShazo*, 922 S.W.2d 920,923 (Tex. 1999);
- Executor to beneficiary. *Huie v. DeShazo*, 922 S.W.2d 920,923 (Tex. 1999);
- Guardian to ward. *Byrd v. Woodruff*, 891 S.W.2d 710 (Tex. App.—Dallas, 1994, writ denied);
- Spouse to spouse. *Schleuter v. Schleuter*, 975 S.W.2d 584, 589 (Tex. 1998);
- Partner to partner. *Bohatch v. Butler, Binion*, 977 S.W.2d 543, 545 (Tex. 1998);
- Agent to principal. *Kinzbach Tool Co. v. Corbett-Wallace*, 160 S.W.2d 509, 512 (Tex. 1942); and
- Attorney to client. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

B. Trustees

One of the most commonly recognized fiduciary relationships is that of a trustee. A

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trustee generally means "the person holding the property in trust, including an original, additional, or successor trustee, whether or not the person is appointed or confirmed by a court." TEX. PROP. CODE § 111.004 (18). A trust may be created by any of the following:

- Property owner's declaration that the owner holds property as trustee for another person;
- Property owner's *inter vivos* transfer of property to another person as trustee for the transferor or a third person;
- Property owner's testamentary transfer to another person as trustee for a third person;
- Appointment under a power of appointment to another person as trustee for the donee of the power or for a third person; or
- Promise to another person whose rights under the promise are to be held in trust for a third person.

See id.

Once a trust is created, the trustee is a fiduciary to all the beneficiaries of the trust, both current and remaindermen, vested and contingent.

C. Personal Representatives

All executors or administrators, temporary, permanent, dependent or independent, owe fiduciary duties to the beneficiaries of the estate and, in some cases, to a surviving spouse whose property is subject to administration. But an executor or administrator is generally not a fiduciary to creditors. *See Mohseni v. Hartman*, 363 S.W.3d 652 (Tex.App.--Hous. [1st Dist]) 2011, n.p.h.) ("under the present statutory scheme, an independent executor does not hold the estate property in trust for the benefit of the estate creditors and therefore does not owe them a fiduciary duty absent any specific undertaking to manage the creditor's interests in the case of a bankrupt estate"); *FCLT Loans, L.P. v. Estate of Bracher*, 93 S.W.3d 469 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *but see Ex parte Buller*, 834 S.W.2d 622 (Tex. App.-Beaumont 1992, orig. proceeding).

D. Guardians

A guardian is a fiduciary to the ward for whom he or she is appointed to serve. This includes a person or entity that is appointed as permanent, temporary or successor guardian.

E. Agents

The attorney in fact or agent is a fiduciary to the principal. TEX. ESTATES CODE §751.101. If properly drafted, a "durable" power of attorney survives the principal's incapacity and, thus, the agent continues to act on behalf of an incapacitated principal. TEX. ESTATES CODE § 751.002.

F. Informal Fiduciary

As previously noted, certain other relationships can be a basis to claim fiduciary duties are owed.. Unlike formal fiduciary relationships – meaning those recognized in Texas as a matter of law – an informal fiduciary relationship is generally based on specific facts that support the existence of a relationship of trust and confidence sufficient to create duties between the parties. *See Crim Truck & Tractor Co. v. Navistar International Transportation Corp*., 823 S.W.2d 591, 594 (Tex. 1992). Informal fiduciary relationships can arise from a moral, social, domestic or purely personal relationship of trust and confidence. *See Ritchie v. Rupe*, 443 S.W.3d 856, 874 n.27 (Tex. 2014); *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *MacDonald v. Follett*, 180 S.W.2d 334, 337 (Tex. 1944).

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The Texas Pattern Jury Charge 104.1 frames the fact question to the jury as follows:

> Did a relationship of trust and confidence exist between Don Davis and Paul Payne?
>
> A relationship of trust and confidence existed if Paul Payne justifiably placed trust and confidence in Don Davis to act in Paul Payne's best interest. Paul Payne's subjective trust and feelings alone do not justify transforming arm's-length dealings into a relationship of trust and confidence. Answer
>
> "Yes" or "No."
>
> Answer: _____

Tex. PJC 104.1.

III. SOURCES OF GUIDANCE AND AUTHORITY

A. Overview

Each fiduciary rule is generally based on multiple sources of authority. No one should be ignored. A discussion of those applicable to the more significant rules follows.

B. Trustees

Trust law is primarily a function of state law. Whenever there is a dispute involving a trust governed by Texas law, state law will control. There are generally three sources of binding authority when construing a Texas trust. They include:

- The trust agreement;
- The Texas Trust Code; and
- Texas common law.

In addition, there are a number of other sources that may provide some guidance – albeit *no clear precedential value*. These sources include:

- The Restatement of Trusts;
- The Uniform Trust Code; and
- Legal Treatises.

A brief discussion of each follows.

1. Binding Authority

(a) *The Trust Instrument*

It is well settled in Texas that the first principle of trust construction is to honor the intent of the settlor. Thus, the terms of a trust as set forth in the governing instrument generally control. This principle has been recognized by Section 111.0035(b) of the Texas Property Code which provides that:

> ***The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust <u>may not</u> limit:***
>
> (1) The requirements imposed under Section 112.031;
> (2) The applicability of Section 114.007 to an exculpation term of a trust;
> (3) The periods of limitation for commencing a judicial proceeding regarding a trust;
> (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:
> 1) is entitled or permitted to receive distributions from the trust; or
> 2) would receive a distribution from the trust if the trust terminated at the time of the demand; and
> (B) To act in good faith and in accordance with the purposes of the trust;
> (5) The power of a court, in the interest of justice, to take action or

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exercise jurisdiction, including the power to:

(A) Modify, reform or terminate a trust or take other action under Section 112.054;

(B) Remove a trustee under Section 113.082;

(C) Exercise jurisdiction under Section 115.001;

(D) Require, dispense with, modify, or terminate a trustee's bond; or

(E) Adjust or deny a trustee's compensation if the trustee commits a breach of trust; or Subsection (6) below is effective for trusts existing or created on or after June 19, 2009.

(6) The applicability of Section 112.038.

TEX. PROP. CODE 111.0035(b) (*emphasis added)*; *see also Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (when language of trust instrument is unambiguous and expresses intentions of settlor, trustee's powers are conferred by instrument and neither court nor trustee can add or take away such power).

(b) Texas *Trust Code Section 111.001 et seq*

As previously discussed, Texas has adopted the Texas Trust Code (located in the Texas Property Code). *See* TEX. PROP. CODE 111.001 *et seq.* The Texas Trust Code applies to all trusts governed by Texas law unless the trust instrument indicates a clear intent otherwise (and only to the extent that the provisions do not limit the matters set forth in Section 111.0035 discussed *supra).*

Therefore, unless the terms of a trust validly provide otherwise, the Texas Trust Code governs:

1) The duties and powers of a trustee;
2) Relations among trustees; and
3) The rights and interests of a beneficiary.

See TEX. PROP. CODE 111.0035(a).

(c) *Texas Common Law*

The powers and duties of a trustee are also governed by common law to the extent (i) the trust instrument does not validly provide otherwise, and (ii) the common law is not inconsistent with the current provisions of the Texas Trust Code. *See* TEX. PROP. CODE § 111.005 ("If the law codified in this subtitle repealed a statute that abrogated or restated a common law rule, that common law rule is reestablished, except as the contents of the rule are changed by this subtitle.")

The common law in Texas, as in many other states, is not as extensive as one may expect. There are a small number of cases from the middle of the 20th century that are cited again and again in most of the subsequent decisions. Many of these cases focus on construction of the agreement, distributions standards and the exercise of a fiduciary's discretion. But in the last decade there has been an increasing number of appellate opinions issued that focus on all aspects of fiduciary duties and litigation. Thus, care must be taken to constantly review these new opinions and their impact on trust and estate matter.

2. Potential Sources of Guidance

In addition to the preceding mandatory sources of guidance, additional guidance, may include:

(a) *Restatement of Trusts*

Texas has not adopted the Restatement of Trusts in totality and it is not binding authority under Texas law. *See*

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RESTATEMENT (SECOND) OF TRUSTS § 1 *et seq* (1959); RESTATEMENT (THIRD) OF TRUSTS § 1 *et seq* (2003). But Texas courts have considered and cited the Restatement (Second) of Trusts in a number of decisions. And they appear to be considering the Restatement (Third) of Trusts on an increasing basis. *See Estate of Boylan,* 2015 WL 598531 (Tex.App.--Fort Worth n.p.h.); *Highland Homes Ltd. v. State,* 448 S.W.3d 403 (Tex. 2014); *Woodham v. Wallace,* 2013 WL 23304 (Tex.App.—Dallas 2013,n.p.h.); *Wolfe v. Devon Energy Production Co., LP*, 382 S.W.3d 434 (Tex.App.—Waco 2012, rev. denied); *See Mohseni v. Hartman,* 363 S.W.3d 652 (Tex.App.—Hous. [1 Dist]) 2011, n.p.h.); *Longoria v. Lasater,* 292 S.W.3d 156 (Tex. App.—San Antonio 2009)(pet. denied); *Alpert v. Riley,* 274 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2008)(pet. denied); *In re Townley Bypass Unified Credit Trust*, 252 S.W.3d 715 (Tex. App.—Texarkana 2008)(pet. denied); *Keisling v. Landrum*, 218 S.W.3d 737 (Tex. App.—Fort Worth 2007, pet. denied); *Pickelner v. Adler*, 229 S.W.3d 516 (Tex. App.—Houston [1st Dist.] 2007)(pet. denied); *Moon v. Lesikar*, 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007)(no pet.); *Marsh v. Frost National Bank,* 129 S.W.2d 174 (Tex. App.—Corpus Christi 2004, pet. denied); *Bergman v. Bergman Davison Webster Charitable Trust*, 2004 WL 24968 (Tex. App.—Amarillo 2004, no writ)(not designated for publication).

Thus, the Restatement (Third) of Trusts may provide guidance not previously addressed in the Restatement (Second) of Trusts. For example, the comments to Section 50 entitled "Enforcement and Construction of Discretionary Interests" provide guidance relating to discretionary distributions that was not included in prior restatements. Specifically, Section 50 provides as follows:

> (1) A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee.
> (2) the benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purposes in granting the discretionary power and in creating the trust.

RESTATEMENT (THIRD) OF TRUSTS § 50 (2003).

But before assuming a Restatement may provide guidance, care should be taken to determine whether the applicable provision of the Texas Property Code conflicts with the Restatement's position. If so, the Restatement should be disregarded.

(b) *Uniform Trust Code*

Approved in 2000 by the National Conference of Commission on Uniform State Laws, the Uniform Trust Code is the first codification of trust law. As of 2021, the Uniform Trust Code, with some variations, has been adopted by the District of Columbia and approximately 35 states.

Texas has <u>not</u> adopted the Uniform Trust Code and there does not appear to be any intention to do so. In fact, legislative history indicates certain provisions of the Texas Trust Code were enacted to expressly disavow attempts to apply certain provisions. But, the Uniform Trust Code may provide some guidance when construing and administering trusts. For example, to the extent that Texas used the Uniform Trust Code as a guide when drafting and enacting Texas' version of the Uniform Principal and

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Income Act in 2003, it does provide guidance on those adopted provisions. Then again, in other situations, Texas has adopted legislation in direct contradiction of its provisions.

(c) *Treatises*

Finally, there are several treatises that provide guidance on construing and administering trusts. For example, a number of Texas courts have cited Scott on Trusts and Bogerts in decisions involving trusts. *See* William F. Frathcer, *Scott on Trusts* (4th ed. 1988); George Gleason Bogert & George Taylor Bogert, *The Law Of Trusts And Trustees* (6th ed. 2006).

C. Personal Representatives

The powers of a personal representative - executor or administrator - of a decedent's estate are based on the governing authority. To the extent a personal representative (generally an executor), is appointed pursuant to the term of a will, the personal representative is "vested with unbridled authority over the estate and is authorized to do any act respecting it which the court could authorize to be done if the entire estate were under its control; or whatever testator himself could have done in his lifetime, *except as restrained by the terms of the will itself*." *Marlin v. Kelly*, 678 S.W.2d 582, 588 (Tex. App.—Houston [14th Dist.] 1984, writ granted)(emphasis added)(*affirmed by Kelley v. Marlin*, 714 S.W.2d 303 (Tex. 1986) (*citing Hutcherson v. Hutcherson*, 135 S.W.2d 757 (Tex. Civ. App.—Galveston 1939, writ ref'd)); *see also* TEX. ESTATES CODE § 356.002.

To the extent a personal representative - executor or administrator - is appointed in a dependent capacity, the personal representative is generally limited to those powers set forth in the Texas Estates Code. *See* TEX. ESTATES CODE Subtitle H.

The duties of both executors and administrators are primarily set forth in the Texas Estates Code. But, common law also governs a personal representative's rights, power and duties to the extent it does not conflict with statutory law. *See* TEX. ESTATES CODE § 351.001. And, a testator may limit some, but not all, of a personal representative's duties under the term of his or her will.

D. Guardians

A guardian's duties are primarily set by statute. Prior to 1993, the statutes that regulated decedents' estates also governed guardianships. These sections did not address the specific needs of individuals subject to a guardianship or allow the courts and guardians the flexibility to custom tailor a guardianship to the particular needs and limitations of each ward.

In 1993, the Texas legislature completely revamped the then-entitled Texas Probate Code in a continued effort to "up-date" the entire guardianship structure. This resulted in the removal of the guardianship statutes from their inclusion with decedents' estates and the other probate statutes and the enactment of Chapter XIII of the Texas Probate Code entitled "Guardianships." Then, in 2014, the Texas legislature updated the entire guardianship structure, providing for more safeguards for proposed wards and augmenting the procedure to attain a guardianship, and enacted Title 3 of the Texas Estates Code entitled "Guardianship and Related Procedures." *See* TEX. ESTATES CODE §§ 1002.001, *et seq*.

If knowledge of the plethora of guardianship sections is not enough, to the extent applicable and not inconsistent with the provisions of the Texas Estates Code, the laws and rules governing estates of decedents still apply to and govern guardianships. *See* TEX. ESTATES CODE § 1001.02.

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In addition, the powers and duties of a guardian are also governed by common law to the extent they are applicable and not inconsistent with the provisions of the Texas Estates Code. *See* TEX. ESTATES CODE § 351.001 ("The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state"); TEX. ESTATES CODE § 1001.002 ("To the extent applicable and not inconsistent with other provisions of this code, the laws and rules governing estates of decedents apply to guardianships").

E. Agents

Subtitle P of the Texas Estates Code governs the execution and construction of a durable power of attorney. *See* TEX. ESTATES CODE §§ 751.001-752.115. Section 752.051 provides a form known as a "statutory" durable power of attorney. A power of attorney, however, is not required to conform or even substantially conform to the statutory forms to be valid in the State of Texas. *See* TEX. ESTATES CODE § 752.003.

Over the last few legislative sessions, the Estates Code has been modified and expanded to provide more clarity on the powers and duties of an attorney in fact. These include clarifications on the agent's powers, duties and other rights as they relate to estate planning, financial accounts, investments, life insurance and trusts. *See* TEX. ESTATES CODE § 751.001 *et seq.* But care should be taken to confirm the effective date of amendment and how or if they apply to previously executed documents.

IV. STANDING & CAPACITY CONSIDERATIONS

A. Generally

One of the first considerations is whether the plaintiff has a cause of action. Unlike other types of civil litigation, the claims sought to be pursued and the resulting damages may range from those personal to the plaintiff, to claims for damages to the *res* and, thus, derivatively for a class of persons, of which the plaintiff is one of many. For example, a plaintiff who is a remainder beneficiary, limited partner or shareholder may only be affected because the entire estate, trust, partnership or corporation has been damaged.

When the claim arises from an estate, trust or entity, consideration must be given to what claims the plaintiff can bring, and whether the plaintiff can sustain those to judgment.

B. Standing

The question of a person's standing is often raised in fiduciary litigation, but not always easy to answer. In short, standing is a party's justiciable interest in a controversy. See *Esty v. Beal Bank S.S.B.,* 298 S.W.3d 280 (Tex. App.—Dallas 2009, no pet); *(citing Nootsie, Ltd. v. Williamson County App. Dist.,* 925 S.W.2d 659, 661–62 (Tex.1996); *Town of Fairview v. Lawler,* 252 S.W.3d 853, 855 (Tex. App.–Dallas 2008, no pet.)). Standing is a necessary component of subject matter jurisdiction and a constitutional prerequisite to maintaining a lawsuit under Texas law. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 444–45 (Tex.1993). Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate. *See id. (citing Cadle Co. v. Lobingier,* 50 S.W.3d 662, 669–70 (Tex. App.—Fort Worth 2001, pet. denied)). And, the test for standing is whether there is a real controversy between the parties that will be actually determined by the judicial declaration sought. *See Tex. Air Control Bd.,* 852 S.W.2d at 446.

1. <u>Vested Standing</u>

It is important to confirm that the plaintiff has a *vested* interest that creates the necessary

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standing to redress any alleged wrongful acts. Beneficiaries of a trust generally have a vested interest that gives them sufficient standing to pursue claims. *See e.g. In re Townley Bypass Unified Credit Trust*, 252 S.W.3d 717 (Tex. App.—Texarkana 2008, pet. denied)(remainder vests when conditions precedent exist other than termination of prior estates).

For example, the Texas Property Code defines an "interested person" as follows:

> A trustee, beneficiary, or any other person having an interest in or 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 and matter involved in the proceeding*.

TEX. PROP. CODE. § 111.004(7)(emphasis added).

And, Texas Property Code Section 115.001 provides the following are necessary parties:

- Beneficiary on whose act or obligation the action is predicated;
- Beneficiary designated in the trust by name;
- Person actually receiving distributions from the trust estate at the time the action is filed; and
- Trustee, if the trustee is serving at the time the action is filed.

2. <u>Potentially Vanishing Standing</u>

Continuation of a plaintiff's standing is not guaranteed. Thus, equal consideration must be given to whether a beneficiary or other possible plaintiff's rights may be subject to divestment or contingent on future events or actions, such as survivorship or revocation. Considerations may include:

- Is the trust revocable by the grantor, trustee or other person?
- Does the trust agreement contain a provision that would allow another person to strip the plaintiff of his or her standing?
- Does the will or trust agreement contain a no contest clause or other provision that could be invoked by the litigation?
- Does the governing agreement or regulations contain a provision that would allow another person to call the plaintiff's interest based on a value, such as book value, that would not include the alleged claims?

For example, a remainder beneficiary of a revocable trust has been held to lack standing to pursue claims regarding such trust. *See Moon v. Lesikar* 230 S.W.3d 800 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). But, the ability to revoke the trust is not the only consideration. Irrevocable trust agreements should also be reviewed to determine if a beneficiary's interest can be divested through a power of appointment vested in the potential defendant or third party. If the interest is subject to a power of appointment, the next question is: Can the power of appointment be exercised prior to the conclusion of the anticipated litigation? If so, the beneficiary or beneficiaries may have what is known as a "vested remainder interest, subject to divestment." *Grohn v. Marquardt*, 487 S.W.2d 214, 215 (Tex. Civ. App.– San Antonio 1972, writ ref'd n.r.e.).

Note that it is only the immediately effective exercise of a power of appointment that may terminate a beneficiary or beneficiary's interests, and, thus, make it "subject to divestment." *Grohn*, 487 S.W.2d at 215. Therefore, most beneficiaries will maintain standing to file a lawsuit regarding

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the trust until the holder of the power of appointment effectuates the removal of the beneficiary or beneficiaries' interest in the trust.

An understanding of the ability to divest a plaintiff of standing is critical. The ability to do so can have substantial benefits if the holder of the power is willing to do so to protect the sued trustee. And, the resulting exercise can remove a plaintiff's standing even after the lawsuit was filed. Once effective, the person no longer has a justiciable interest in the trust and, thus, no standing to pursue any claims relating to the trust. *See* Lauren K. Davis, STANDING AND CAPACITY IN TRUST AND ESTATE LITIGATION, State Bar of Texas, Adv. Estate Planning and Probate Course (2022).

3. <u>Acquiring Standing</u>

Just as a plaintiff's standing can be divested, there are also times that standing can be acquired. For example, an interest in an entity may be transferred to the individual as a result of a purchase, gift, the exercise of a power of appointment, or even under a settlement arrangement. Assuming the interest was validly acquired, standing may be obtained even though the person lacked sufficient standing prior to the transaction.

Furthermore, a plaintiff may acquire standing when the trustee refuses to act. In *Interfirst Bank–Houston, N.A. v. Quintana Petroleum Corp*., the appellate court noted that a beneficiary of a trust generally lacks standing to pursue a claim against someone other than the trust. But, the beneficiary may be able to pursue a claim when the trustee refuses to do so. *See* 699 S.W.2d at 874; *see also Grinnell v. Munson,* 137 S.W.3d 706, 714 (Tex. App.—San Antonio 2004, no pet.*)(*stating that "[a] beneficiary is authorized to enforce an action when the trustee cannot or will not enforce it").

In these cases, it is important to determine if an argument can be made that the acquisition is void – for example, it violates the spendthrift provisions of the trust agreement or the transfer is not effective yet – or that the requirements of *Quintana* have not been established. *See* discussion *infra.*

4. <u>Minors, Incapacitated, and Unborn and Unascertained Beneficiaries</u>

Standing to bring claims of minors, incapacitated persons, and/or unborn or contingent remainder beneficiaries is complicated, to say the least.

With regard to minors, a determination should be made prior to filing whether the claim would be best pursued by a parent, managing conservator, next friend or guardian. TEX. R. CIV. P. 44 (appearance by next friend); TEX. R. CIV. P. 173 (general provision regarding appointment of guardian ad litem in civil litigation); TEX. PROP. CODE § 115.014 (provides for appointment of guardian or attorney ad litem in trust proceedings). And, the court generally has the right to appoint a guardian ad litem or, in certain cases, an attorney ad litem, for the minor. *See* TEX. R. CIV. P. 173 (general civil litigation); TEX. PROP. CODE § 115.014 (trust proceedings).

With regard to incapacitated adults, the claim generally must be pursued by an attorney-in-fact, next friend or guardian. TEX. ESTATES CODE ANN §§ 751.001 *et seq.*; (Durable Power of Attorney Act); TEX. ESTATES CODE § 1105.103 (guardians); TEX. R. CIV. P. 44 (appearance by next friend); TEX. R. CIV. P. 173 (guardian ad litem in civil litigation); TEX. PROP. CODE § 115.014 (ad litem in trust proceedings). And, similar to lawsuits involving minors, courts generally have the right to appoint a guardian ad litem or, in certain cases, an attorney ad litem to represent the incapacitated person or his or her interests in the lawsuit. *See id.*

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But, claims by unborn or contingent remainder beneficiaries, which often arise in trust cases, are the most difficult to address. These nebulous plaintiffs require a determination whether (i) they have a sufficient interest to pursue, and (ii) who has standing to represent them. In some instances, they can be represented by other members of the class or other parties that have similar interests. *See* TEX. PROP. CODE § 115.013(c)(4)(unborn and unascertained beneficiaries may be virtually represented by another party with substantially identical interest in proceeding). And, if the lawsuit is subject to the Texas Property Code, it expressly allows for the appointment of a guardian ad litem for unborn or unascertained beneficiaries. *See* TEX. PROP. CODE § 115.014 (guardian or attorney ad litem in trust proceedings).

When any of the parties are potential plaintiffs, by or through others, consideration should be given to filing a motion to show authority to determine if the representative can establish he or she has the requisite authority to pursue the claim on behalf of the minor, incapacitated person or class. Furthermore, consideration should be given to requesting the appointment of a guardian ad litem and/or attorney ad litem. The appointment may avoid future issues of *res judicata* as to certain parties but also limit the ability of certain parties to convey a contingency fee – which can create a future hurdle when trying to resolve these matters.

5. <u>Charities</u>

If a party to a trust lawsuit is a charity, the charity can engage such private counsel as it chooses. But, regardless of whether the charity is represented by counsel, the Texas Attorney General's office must also be notified of any judicial proceeding which seeks to:

- Terminate a charitable trust/gift or distribute its assets to other than charitable beneficiary;
- Take an action that is different that the stated purpose of the charitable trust/gift stated in the instrument, including a proceeding in which the doctrine of cy-pres is invoked;
- Construe, nullify, or impair the provisions of a testamentary or other instrument creating or affecting a charitable gift/trust;
- Contest or set aside the probate of an alleged will under which includes a charitable gift;
- A contest to an alleged will by a charity;
- Determine matters relating to the probate and administration of an estate involving a charitable gift/trust; and
- Obtain a declaratory judgment involving a charitable gift/trust.

If required, which is in virtually every case in which a charity is named in the instrument, notice must be given to the Texas Attorney General's Office in the following situations:

- Initially, by sending a copy of the pleading by registered or certified mail within 30 days of the filing of the pleading, but no less than 25 days prior to a hearing in the proceeding; and
- Subsequently, when new causes of action or additional parties are added; and
- When any proposed settlement is reached.

Failure to give the required notice can result in a judgment or settlement agreement affecting a charity to be voidable by the Texas Attorney General's Office.

C. Capacity

In addition, a determination should be made whether the plaintiff has the capacity to sue and recover in the capacity he or she is

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suing. For example, the plaintiff may bring a suit in his or her individual capacity, but only have the right to recovery funds as a successor trustee. If capacity is an issue, it is important to file a verified denial by the pleadings.

V. ESTATE AND TRUST FIDUCIARY STANDARDS OF CARE

A. Overview

Each fiduciary is subject to an applicable standard of care, subject to some modification by the governing documents. A discussion of the most common estate and trust standards of care follows.

B. Trustees

A trustee must invest and manage the trust in compliance with the prudent investor rule. TEX. PROP. CODE § 117.003. But a "trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise." *See* TEX. PROP. CODE § 117.004(f).

C. Personal Representatives

A personal representative must act as a prudent person would in caring for their own property. TEX. ESTATES CODE § 351.101.

D. Guardians

A guardian of the estate has the duty to act and manage the ward's estate as a prudent person would manage the person's own property, except as otherwise provided by the Texas Estates Code. TEX. ESTATES CODE § 1151.151.

E. Agents

The Texas Estates Code sections dealing with powers of attorney do not specifically set out an express standard of care for an agent. The statute does, however, set out specific rules of construction and general powers as they pertain to real estate, tangible personal property, stocks and bonds, commodities and options, banking and other financial institutions, business operations, insurance, estate, trust and other beneficiary transactions, claims and litigation, personal and family maintenance, governmental programs, military service, retirement plans, and tax matters. *See* TEX. ESTATES CODE ch. 752.

VI. ESTATE AND TRUST FIDUCIARY STANDARDS OF CONDUCT

A. Overview of Standards of Conduct

Liability or exoneration from liability is often based on standards of conduct: good faith, bad faith, negligence, gross negligence, reckless indifference, etc. It is important to be familiar with how courts will construe such terms when attempting to comply with these obligations.

B. Good Faith

Texas recognizes a standard of good faith that combines subjective and objective tests. *See Lee v. Lee*, 47 S.W.2d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A fiduciary acts in good faith when they: (1) subjectively believe his or her actions were appropriate, and (2) such actions were reasonable in light of existing law. *See id.* The Pattern Jury Charges for Express Trusts defined good faith as "an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct." Tex. PJC 235.11, 235.12.

C. Bad Faith

Bad faith means "acting knowingly or intentionally adverse to the interest of the trust beneficiaries" and with an "improper motive." *See Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ) (disapproved of on other grounds by *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 249 (Tex.

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2002)). A finding of bad faith requires some showing of an improper motive. *See King v. Swanson*, 291 S.W.2d 773, 775 (Tex. Civ. App.—Eastland 1956, no writ). Further, improper motive is an essential element of bad faith. *See Ford v. Aetna Insurance Company*, 394 S.W.2d 693 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.).

D. Negligence.

"Negligence" means "failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances." Tex. PJC 2.1. "Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances." See *id*.; *see also Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984); *Great Atlantic & Pacific Tea Co. v. Evans*, 175 S.W.2d 249, 250–51 (Tex. 1943).

E. Gross Negligence

Gross negligence means more than momentary thoughtlessness, inadvertence, or error of judgment; it means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 20 (Tex. 1994). An act or omission that is merely thoughtless, careless, or not inordinately risky is not grossly negligent. *Id*. at 22. Only when the fiduciary's act or omission is unjustifiable and likely to cause serious harm can it be grossly negligent. *Id*.

Although gross negligence does refer to a different character of conduct than ordinary negligence, a fiduciary's conduct cannot be grossly negligent without being negligent. *See Trevino v. Lightning Laydown, Inc.*, 782 S.W.2d 946, 949 (Tex. App.—Austin 1990, writ denied). Gross negligence means an act or omission that:

> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. & REM. CODE § 41.001(11) (definition of gross negligence); *see also Louisiana-Pacific Corp. v. Andrade*, 19 S.W.3d 245, 246-47 (Tex. 1999); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998) (*citing Moriel*, 879 S.W.2d at 23 (Tex. 1994)).

F. Reckless Indifference

But neither the Pattern Jury Charges nor any Texas reported decision has clearly defined "reckless indifference" in the context of Texas Property Code Section 114.007. But, like gross negligence, it appears to imply that the trustee had subjective knowledge of the risk or improper actions. For example, Texas Penal Code Section 6.03(c) defines a person who acts with "recklessness" if "he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." TEX. PENAL CODE ANN. § 6.03(c)(Vernon 2011). Section 3.06(a) further provides that "[t]he risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *See id*.

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VII. FUNDAMENTAL TRUST AND ESTATE FIDUCIARY DUTIES

A. Overview

Just as there is no single definition of what constitutes a fiduciary relationship, there are no hard and fast rules defining the duties of every fiduciary, and, to a great extent, the duties may overlap considerably. Just what is expected of a "fiduciary" may have been best summarized by Justice Cardozo in the case of *Meinhard v. Salmon*, in which he stated:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. *Wendt v. Fischer*, 243 N. Y. 439, 444, 154 N. E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

249 N.Y. 458, 164 N.E. 545-546, 62 A.L.R. 1 (1928); *see also Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.).

Generally speaking, the duties of a fiduciary may be roughly categorized under four main headings:

- Loyalty;
- Full disclosure;
- Competence; and
- Reasonable exercise of discretion.

It is important to recognize that while different types of fiduciaries have similar duties, they are not all subject to the same duties. For example, the duties of a trustee will differ from those of an executor as it relates to investment returns. *See* Restatement (Second) of Trusts § 6 cmts (1959) ("Although an executor, unlike a trustee, is not ordinarily under a duty to make investments, he may under some circumstances have a power or a duty to invest."); *see also Humane Soc. of Austin and Travis County v. Austin Nat. Bank*, 531 S.W.2d 574 (Tex. 1975) ("a dependent executor of an estate has no such power absent an authorization from the probate court or an express grant of authority from testator").

B. Duty Of Loyalty

The duty of loyalty is fundamental to a fiduciary relationship. This duty generally requires the trustee to place the beneficiary's interest above their own and prohibits the fiduciary from using their position to their benefit at the expense of the beneficiaries. This is strictly applied. Thus, if a fiduciary accepts a gift from the beneficiary, or takes advantage of an opportunity that presents itself as a direct or end result of the fiduciary relationship, it may give rise to a presumption of unfairness and result in the imposition of a harsh liability standard against the fiduciary. *See Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980); *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945).

The most common breach of the duty of loyalty involves a claim of self-dealing. This generally means conduct by the fiduciary that results in a benefit to the fiduciary or some third person (versus the trust or its beneficiaries).

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C. Duty Of Full Disclosure

A fiduciary has much more than the traditional obligation not to make material misrepresentations, he also has an *affirmative* duty to make a full and accurate confession of material information relating to his or her fiduciary activities, transactions, profits, and mistakes, even when, and especially when, it hurts. *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984), *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corn*, 160 S.W.2d 509 (Tex. 1942), *City of Fort Worth v. Pippen*, 439 S.W.2d 660 (Tex. 1969).

The breach of the duty of full disclosure has been argued to be tantamount to fraudulent concealment. *See Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). The beneficiary is not required to prove the elements of fraud. *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965), *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.). Nor is the beneficiary generally required to prove that they "relied" on the fiduciary *to* disclose the information. *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938), *Miller v. Miller*, 700 S.W.2d 941, 947 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). The fiduciary duty of full disclosure operates before and after litigation has been filed and is in addition to any obligations of disclosure imposed by the "discovery provisions of the Texas Rules of Civil Procedure." *See Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984).

Even though a trustee may not have technically violated any other fiduciary duty, the failure to disclose his activities may nonetheless result in liability. For example, the court in *InterFirst Bank Dallas, N.A. v. Risser*, implied that the trustee violated its common law duty of full disclosure by failing to notify the beneficiaries of the sale of a major trust asset. 739 S.W.2d 882 (Tex. App.—Texarkana 1987, writ dism'd by agreement).

Furthermore, omissions or misstatements in accountings could be claimed to violate the common law duty of disclosure, and even previously filed and court approved accountings may be re-examined upon a final accounting. *See Portanova v. Hutchison*, 766 S.W.2d 856 (Tex. App.—Houston [1st Dist.] 1989, no writ); *In re Higganbotham's Estate*, 192 S.W.2d 285 (Tex. Civ. App. 1946, no writ); *Thomas v. Hawpe*, 80 S.W. 129 (Tex. Civ. App.—Dallas 1904, writ ref'd). A trustee or personal representative could be held liable if he knowingly discloses false information or knowingly fails to disclose harmful information regarding his dealings with trust or estate assets. *Cf Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) (holding that trustees and executors who withheld information from beneficiary in order to induce her to enter into agreed judgment committed "extrinsic" fraud justifying bill of review).

D. Duty Of Competency

The duty of competence is not defined by statute but presumes that the fiduciary will act in accordance with the governing instrument and all applicable laws, such as the Texas Property Code and the Texas Estates Code, including the applicable standard of care. *See* discussion *supra.*

The duty of competence requires that the fiduciary take affirmative actions to properly carry out their duties. Furthermore, it presumes that the fiduciary will not delegate their fiduciary duties except as allowed by law. *See* discussion *infra.*

E. Duty To Reasonably Exercise Discretion

A fiduciary has a duty to *reasonably* exercise his or her discretion. *See Sassen v. Tanglegrove Townhouse Condominium*

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*Ass'n***,** 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied). This is most applicable to trustees, and includes the trustee making informed decisions based primarily on the terms of the trust and in a manner that carries out the settlor's intent as set forth in the terms of the trust instrument. Unless the agreement is ambiguous, the settlor's intent must be determined solely by the trust instrument.

But, there are generally no statutory guidelines regarding how discretion must be exercised or what constitutes the reasonable exercise of discretion. And, while some statutes, such as the Texas Property Code, provide some safe harbor rules, what is considered the reasonable exercise of discretion is often open for dispute. *See* discussion *infra.*

VIII. FIDUCIARY BURDENS OF PROOF IN TRUST AND ESTATE MATTERS

A. Overview

It is important to recognize who will have the burden at trial if the action became the subject of a lawsuit involving a fiduciary's liability. The issue of who has the burden to prove or disprove a claim depends on the type of duty or breach alleged.

B. Burden On Complainant

The complainant has the burden at trial to prove a fiduciary breached the following duties:

- Existence of a fiduciary relationship. *See Thigpen v. Locke,* 363 S.W.2d 247 (Tex. 1962);
- Fiduciary not acting competently. *See Jewitt v. Capital National Bank of Austin,* 618 S.W.2d 109 (Tex. App.—Waco 1981, writ ref'd n.r.e.);
- Fraud. *See Archer v. Griffith,* 390 S.W.2d 735 (Tex. 1965);
- Breach of contract. *See Omohundro v. Matthews,* 341 S.W.2d 401 (Tex. 1960);
- Conversion. *See Avila v. Havana Painting Co.,* 761 S.W.2d 398 (Tex. App.—Houston [14th Dist.] 1988, writ den'd);
- Tortious interference with trust administration. *See* TEX. PROP. CODE § 114.031(a)(1);
- Removal of trustee by petition. *See* TEX. PROP. CODE § 113.082; and
- Conspiracy. *See Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation,* 160 S.W.2d 509 (Tex. 1942); *International Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567 (Tex. 1963).

C. Burden On Fiduciary

The fiduciary has the burden at trial to prove he, she, or it did not breach the following duties:

- Self-dealing and presumption of unfairness. *See Texas Bank & Trust Co. v. Moore,* 595 S.W.2d 502 (Tex. 1980);
- Tracing commingled funds. *See Eaton v. Husted,* 172 S.W.2d 493 (Tex. 1943);
- Gifts from beneficiary to fiduciary. *See Sorrell v. Elsen,* 748 S.W.2d 584 (Tex. App.—San Antonio 1988, writ denied);
- Conflict of interest. *See Stephens Cty. Museum, Inc. v Swenson,* 571 S.W.2d 257 (Tex. 1974);
- Usurpation of trust opportunity. *See Huffington v. Upchurch,* 532 S.W.2d 576 (Tex. 1976);
- Purchase, loans, contracts and business transactions of fiduciary in relation to trust or beneficiary. *See Land v. Lee,* 777 S.W.2d 158 (Tex. App.—Dallas, 1989, no writ); *Dominguez v. Brackey Enterprises, Inc.,* 756 S.W.2d 788 (Tex. App.—El Paso 1988, writ denied); *InterFirst Bank Dallas v. Risser,* 739 S.W.2d 882 (Tex. App.—Texarkana 1987, no writ); and

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- Failure to keep records, exercise discretion or obtain information. *See Corpus Christi Bank & Trust v. Roberts,* 597 S.W.2d 752 (Tex. 1980); *Jewitt v. Capital Nat. Bank of Austin,* 618 S.W.2d 109 (Tex. Civ. App.—Waco 1991, writ ref'd n.r.e.).

Pattern jury charges for the trust and estates have been adopted. Some of the more commonly encountered jury questions are attached hereto as Exhibits.

IX. IMPACT OF EXCULPATION OR INDEMNITY PROVISIONS

A. Overview

Fiduciary relationships based on a formal document generally provide some level of exoneration and/or indemnity. Such agreements must be in writing. *See* TEX. BUS. & COM. CODE § 26.01. And, while Texas courts consistently uphold these provisions, they will also strictly construe them. And, not all actions can be protected because various Texas statutes and common law place limits on the extent of these agreements.

B. Statutory Limits

Section 114.007 of the Texas Property Code provides that a trustee cannot be exonerated for the following:

> (a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee of liability for:
> (1) a breach of trust committed:
> (A) in bad faith;
> (B) intentionally; or
> (C) with reckless indifference to the interest of a beneficiary; or
> (b) any profit derived by the trustee from a breach of trust.

TEX. PROP. CODE ANN. § 114.007 (Vernon 2014).

C. Pattern Jury Charges

The Texas Pattern Jury Charges Volume 5, entitled Family & Probate, includes a pattern jury charge on exculpatory clauses. Assuming a trustee is found to have breached one or more duties, the jury is then asked if the trustee's conduct exceeds the exculpation provided in the trust agreement as follows:

> Did Trustee engage in the *conduct inquired about in Question [PJC 235.9-.12 (breach of duty)] in bad faith, or intentionally, or with reckless indifference to the interests of BENEFICIARY?*
>
> Answer "Yes" or "No." Answer: ____

PJC 235.15 (the italicized language should be modified based on the terms of the agreement, subject to the limitations of Section 114.007 discussed *supra*.).

D. Pleading Considerations

When a fiduciary breach may invoke a claim of indemnity or exoneration, consideration should be given to who may be the obligor and whether it can be satisfied by the very fiduciary property sought to be restored. And, pleading considerations include:

- Pleading specifically the indemnity or exoneration provisions as an affirmative defense;
- Seeking a summary judgment to confirm the extent of the indemnity or exoneration provisions as applicable to alleged claims; and
- Seeking a summary judgment on all claims subject to the indemnity or exoneration provisions (such as negligence when there is a gross negligence standard).

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X. POSSIBLE DEFENSES TO A CLAIM FOR BREACH OF FIDUCIARY DUTIES

While a relationship cannot be administered purely on a defensive nature, a fiduciary should be aware of possible defenses available in a future proceeding. Some include:

- No fiduciary relationship or breach fell within scope of fiduciary role. *See Blieden v. Greenspan*, 751 S.W.2d 858 (Tex. 1988);
- Res judicata. *See Coble Wall Trust Co., Inc. v. Palmer*, 859 S.W.2d 475 (Tex. App.—San Antonio 1993, writ denied);
- Accord and Satisfaction. *See King v. Cliett*, 31 S.W.2d 350 (Tex. Civ. App.—Waco 1930, no writ);
- Release. TEX. PROP. CODE § 114.005;
- Estoppel. *See Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App.—Ft. Worth 1967, writ ref'd n.r.e.);
- Waiver. *See Ford v. Culbertson*, 308 S.W.2d 855 (Tex. 1958);
- Ratification. *See Burnett v. First Nat. Bank of Waco*, 536 S.W.2d 600 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.);
- Laches. *See Fitzgerald v. Hull*, 237 S.W.2d 256 (Tex. 1951);
- Avoidance or Exculpatory Clauses. *See Moulton v. Alamo Ambulance Service*, Inc., 414 S.W.2d 444 (Tex. 1967); TEX. PROP. CODE §113.059; and
- Statute of Limitations. TEX. CIV. PRAC. REM. CODE §16.004; *Peek v. Berry*, 184 S.W.2d 272 (Tex. 1944); *see conversely Estate of Degley*, 797 S.W.2d 299 (Tex. App.—Corpus Christi 1990, no writ).

XI. REMEDIES AND RELIEF

A. Remedies for Breach of Fiduciary Duties

If a fiduciary is found to have breached one or more duties, remedies and damages may include one or more of the following:

- Money damages;
- Actual damages for breach of trust. TEX. PROP. CODE 114.001. PJC 115.2;
- Actual damages for quantum merit recovery. PJC 115.6;
- Direct damages resulting from fraud. PJC 115.19;
- Consequential damages caused by fraud. PJC 115.20;
- Monetary loss from negligent misrepresentation. PJC 115.21;
- Money damages for intentional interference with existing contract or wrongful interference with prospective contractual relations. PJC 115.22;
- Disgorgement of compensation. *Burrow v. Arce*, 997 S.W.2d 229, 238-41 (Tex. 1999);
- Exemplary damages. *See* PJC 115.15 comments, 115.36 and 115.37; PJC 110.18 (actual damages for breach of fiduciary duty) and 110.33-.34 (exemplary damages); *Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984); *Bennett v. Reynolds*, No. 08-0074, 2010 WL 2541096 (Tex. 2010)(limits on caps);
- Pre-Judgment interest accrual generally beginning 180 days after the date a defendant receives written notice of the claim or the date suit is filed, whichever is earlier. *See Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 531 (Tex. 1998); *see also Lee v. Lee*, 47 S.W.3d 767, 800 (Tex.

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App.—Houston [14th Dist.] 2001, pet. denied);
- Post Judgment Interest. TEX. FIN. CODE § 304.001.
- Equitable relief. PJC 104.2 (Plaintiff is entitled to equitable relief when fiduciary profits or benefits from transaction with beneficiary);
- Disgorgement. PJC 115.16, 115.17; TEX. PROP. CODE § 114.061(d); *Burrow v. Arce*, 997 S.W.2d 229, 238-41 (Tex. 1999);
- Rescission. *See Allison v. Harrison*, 156 S.W.2d 137, 140 (Tex. 1941)(court may grant rescission of transaction accomplished by breach of fiduciary duty);
- Removal of trustee. TEX. PROP. CODE § 113.082(a)(1), TEX. PROP. CODE § 114.008(a);
- Permanently enjoin trustee from committing a breach. TEX. PROP. CODE § 114.008(a);
- Compel trustee to redress breach of trust. TEX. PROP. CODE § 114.008(a);
- Order trustee to account. TEX. PROP. CODE § 114.008(a);
- Void an act of the trustee. TEX. PROP. CODE § 114.008(a);
- Attorney's fees. TEX. PROP. CODE § 114.064 (equitable and just); TEX. CIV. PRAC. & REM. CODE § 37.009 (equitable and just);
- Constructive trust. *See Consolidated Gas & Equip. Co. v. Thompso*n, 405 S.W.2d 333, 336 (Tex. 1966)(court may impose constructive trust to restore property or profits lost to fiduciary's breach); *International Banker's Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963*); Slay v. Burnett Trust*, 187 S.W.2d 377, 380 (Tex. 1945); and
- Order other appropriate relief. TEX. PROP. CODE § 114.008(a); TEX. CIV. PRAC. & REM. CODE ch. 64, 65.

B. Statutory Relief: Texas Trust Code Section 114.008

Effective January 1, 2006, Section 114.008 of the Texas Property Code was adopted and applied to any acts or omissions relating to a trust that occurred on or after that date. Section 114.008(a) provides that to "remedy a breach of trust that has occurred or might occur, the court may:

- Compel the trustee to perform the trustee's duty or duties;
- Enjoin the trustee from committing a breach of trust;
- Compel the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property;
- Order a trustee to account;
- Appoint a receiver to take possession of the trust property and administer the trust;
- Suspend the trustee;
- Remove the trustee as provided under Section 113.082;
- Reduce or deny compensation to the trustee;
- Subject to Subsection (b), void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or
- Order any other appropriate relief.

TEX. PROP. CODE § 114.008(a).

Note that Section 114.008 provides these remedies can be used even when there is a potential breach of trust. And several recent cases make it clear Section 114.008 can be utilized to provide interim relief. The following are some of the more significant decisions to date that have considered Section 114.008 in the context of granting interim relief:

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- *Moody National Bank v. Moody*, 2022 WL 14205534 (Tex. App. – Houston [1st Dist.] 2022, pet denied)(issued October 25, 2022)
- *Matter of Bumstead Family Irrevocable Trust*, 2022 WL 710159 (Tex. App. – Corpus Christi-Edinburg 2022, pet denied);
- *Estate of Benson*, 2015 WL 5258702 (Tex. App. – San Antonio 2015, pet. dismissed); and
- *Vranac v. Huddleston*, 2008 WL 3412229 (Tex. App. – Dallas 2008, no pet.);

Note *Bumstead* and *Moody* involve the granting of interim relief pursuant to Texas Trust Code Section 114.008, in addition to interim relief available under Texas Rules of Civil Procedure and the Texas Civil Practice and Remedies Code.

1. <u>Recent Texas Trust Code Section 114.008 Cases Supporting Temporary Relief</u>

(a) *Matter of Bumstead Family Irrevocable Trust*, 2022 WL 710159 (Tex. App. – Corpus Christi-Edinburg 2022, pet .denied)

Bumstead was an appeal from a temporary relief hearing involving alleged breaches of fiduciary duty by an alleged successor trustee. 2022 WL 710159 (Tex. App.–Corpus Christi-Edinburg 2022, pet. denied). After a five day evidentiary hearing and post hearing briefing, the trial court entered its Order Granting Interim Relief which essentially granted four forms of relief:

- Temporary injunction,
- Ordered an accounting,
- Appointed a receiver, and
- Suspended the powers of the defendant.

On appeal, the defendant claimed that by granting temporary relief, the court "improperly decide[d] the ultimate merits without 'their due process rights to sufficient notice and the jury that appellants demanded." *Id.* at *19. Specifically, the defendant claimed both in the trial and appellate courts that "[t]he process for the hearing on temporary relief lacked the procedural safeguards and notice requirements of a trial, the illumination of full discovery, and the clarity available through rulings on pending summary judgment motions regarding an exculpatory clause and conveyance of the Hardy Road Property." *Id.* The appellate court unequivocally rejected such a contention, stating:

> Temporary injunctive relief preserves the status quo and does not involve the merits of the case. *See Butnaru*, 84 S.W.3d at 204; *Davis v. Huey*, 571 S.W.2d 859, 861 (Tex. 1978). Because a temporary injunction does not involve the merits of a case, appellants were not entitled to a jury trial. *See Miller v. Stout*, 706 S.W.2d 785, 787 (Tex. App.—San Antonio 1986, no writ); *Loomis Int'l, Inc. v. Rathburn*, 698 S.W.2d 465, 468 (Tex. App.–Corpus Christi–Edinburg 1985, no writ); *see also L.D. Brinkman Inv. Corp. v. Brinkman*, No. 04-16-00651-CV, 2017 WL 1684836, at *3–4 (Tex. App.—San Antonio Apr. 26, 2017, no pet.) (mem. op.) ("Our holding that the appellants were not entitled to a jury trial at the hearing on the temporary injunction is consistent with the applicable standard of review."); *Ross v. Sims*, No. 03-16-00179-CV, 2017 WL 672458, at *7 (Tex. App.—Austin Feb. 15, 2017, no. pet.) (mem. op.) ("And, regardless of his demand for a jury trial, he was not entitled to one as to the application for a temporary injunction.").

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> ***20** Finally, appellants do not cite, and we do not find, any procedural deficiencies in the notice provided for the evidentiary hearing underlying the trial court's order. *See, e.g.*, TEX. R. CIV. P. 695 (governing the notice requirements for a receiver over "fixed and immovable" property). According to the clerk's record and the pleadings, the matter had been set for hearing on February 6, 2020, and then reset for February 21, 2020. At that point, appellants alleged that they had received inadequate notice of the hearing. The matter was ultimately reset. On April 23, 2020, the hearing was set for May 4, 2020, and it ensued on that date.
>
> Based on the foregoing, we overrule appellants' contentions regarding due process and the right to a jury trial

Id. at *19-*20.

The issue of sufficiency of evidence and the trial court's findings in the temporary relief order was another significant appellate point. In support of its rulings, the order contained both general and specific findings to support the granting of temporary relief. But such review is limited to an abuse of discretion standard. *Id*. at *20 (*citing Henry v. Cox*, 520 S.W.3d 28, 33 (Tex. 2017).; *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). *Super Starr Int'l, LLC v. Fresh Tex. Produce, LLC*, 531 S.W.3d 829, 838 (Tex. App.—Corpus Christi–Edinburg 2017, no pet.).

As such, the appellate court held that "[a] trial court does not abuse its discretion if some evidence reasonably supports its decision." *Id*. at *20 (*citing Henry*, 520 S.W.3d at 34; *Butnaru*, 84 S.W.3d at 211; *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 916 (Tex. App.—Dallas 2006, no pet.). And it must " draw all legitimate inferences from the evidence in the light most favorable to the trial court's decision. *Id*. (*citing Marketshare Telecom L.L.C.*, 198 S.W.3d at 916; *Allied Capital Corp. v. Cravens*, 67 S.W.3d 486, 489 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.); *see also Concerned Citizens of Palm Valley, Inc. v. City of Palm Valley*, No. 13-20-00006-CV, 2020 WL 4812641, at *2–3 (Tex. App.—Corpus Christi–Edinburg Aug. 13, 2020, no pet.) (mem. op.)). Thus, the "legal and factual sufficiency of the evidence are not independent grounds of error but are relevant factors in assessing whether the trial court abused its discretion." *Id*. (*citing Super Starr Int'l, LLC*, 531 S.W.3d at 838; *Stewart Beach Condo. Homeowners Ass'n, Inc. v. Gili N Proper Inv., LLC*, 481 S.W.3d 336, 343 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

Thus, after an analysis of the evidence in light of the "high fiduciary standards … imposed on trustees", including good faith, loyalty, duty to disclose and comingling, the appellate court concluded the record evidence supported the temporary relief order. *See id.*

(b) *Moody National Bank v. Moody, 2022 WL 14205534 (Tex. App. – Houston [1st Dist.] 2022, pet. denied).*

Moody was also an appeal from a temporary relief hearing involving alleged breaches of fiduciary duty by Moody National Bank ("MNB"). After an evidentiary hearing, the trial court entered its Order Appointing Receiver. In doing so, the trial court entered an order which contained general and specific findings supporting the temporary relief granted.

MNB filed an interlocutory appeal claiming that "the trial court erred when it (1) appointed a receiver without the joinder of all beneficiaries of the relevant trusts; (2) determined that MNB committed an actual or

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potential breach of trust; (3) appointed a receiver in the absence of any danger of loss, removal, or material injury to the trust property; and (4) the broad powers granted to the receiver impermissibly infringed upon MNB's discretionary authority as trustee." *Id.* at *1. Relying on Texas Trust Code Section 114.3008, the appellate court affirmed the trial court's order appointing a receiver and noted that an appointment under Section 114.008 does not require a finding of "fraud, misconduct, or clear abuse of discretion" in granting temporary relief.

2. Texas Trust Code Section 114.008(a)(1): Compelling Trustee to Perform Trustee's Duty

Section 114.008(a)(1) provides that a court may compel a trustee to perform their trustee's duty or duties when the trustee has breached his or her trust or a breach might occur. TEX. PROP. CODE § 114.008(a)(1).

While Section 114.008(a)(1) provides that a court may compel a trustee to perform his or her duties, even in the case when a breach *may* occur, no cases clearly provide what actions the court may compel when the issue is a prospective breach. Thus, the ability to do will probably be considered in light of two basic principles of trust law.

The first principle is that courts are not to second guess the fiduciary unless there is an "abuse of discretion." *Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 269, 284 (Tex. Civ. App.—Houston, writ ref'd n.r.e). This rule is still valid today: "Texas courts are prohibited by law from interfering with the discretion of the trustee absent a clear showing of fraud or other egregious conduct." *In re Bass*, 171 F.3d 1016 (5th Cir. 1999). The second principle is that any decision by the fiduciary that subverts the "intent of the settlor" may be overturned. *See State v. Rubion*, 308 S.W.2d 4, 9 (Tex. 1957).

The logical conclusion to be drawn from these two principles is that the "intent of the settlor" is the paramount consideration when a fiduciary is exercising their discretion. This gives courts some authority to uphold the trustee's decision, or require the fiduciary to take actions when such actions are contemplated by the agreement and/or require by Texas law. For example, if the beneficiary has historically received distributions and the trustee now refuses to distribute funds due to a complaint or the filing of a lawsuit, then Section 114.008(a)(1) appears to authorize a court to compel distributions during the pendency of a lawsuit. The same could be same for disclosure, etc.

3. Texas Trust Code Section 114.008(a)(2): Enjoining Trustee From Committing Breach Of Trust

Section 114.008(a)(2) authorizes a court to enjoin a trustee that has breached his or her trust or a breach might occur TEX. PROP. CODE §114.008(a)(2). And it is generally *recognized that the primary purpose of injunctive rel*ief is to halt wrongful acts, which is at the very core of trust litigation. The specific purpose of a temporary injunction is to preserve the status quo of the subject matter of the litigation until a final hearing can be held on the merits of the case. *In re Newton*, 146 S.W.3d 648 (Tex. 2004); *Butnaru v. Ford Motor Co*., 84 S.W.3d 198, 204 (Tex. 2002). The status quo is "the last actual, peaceable, noncontested status which preceded the pending controversy." *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 402 (Tex. App. – Houston [14th Dist.] 2000, no pet.).

Thus, it appears, even under Section 114.008, to obtain injunctive relief, the movant must show he or she has (1) a cause of action against the respondent; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *See Estate of Benson*, 2015 WL

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5258702 (Tex. App. – San Antonio 2015, pet. dismissed) ("Texas Rule of Civil Procedure 683 states that every order granting an injunction must "set forth the reasons for its issuance" and "be specific in its terms."). A brief discussion of each of these elements as they apply to trusts follows.

(a) Probable Right Of Recovery

Probate courts possess clear authority and jurisdiction to protect both the named assets of a trust, and the probable assets of a trust. To do so, the applicant must have a valid cause of action against the party seeking to be enjoined. "A cause of action is a factual situation that entitles one person to obtain a remedy in court from another person." *Seghers v. Kormanik*, 03-13-00104-CV, 2013 WL 3336845, at *1 (Tex. App.—Austin, June 26, 2013, no pet.). The Texas Supreme Court evaluated the charge given to probate courts in Texas and found that the courts possessed the authority and direction to issue injunctions to preserve the assets of an estate and to prevent potential dissipation of those assets. In *Lucik v. Taylor*, the Texas Supreme Court held:

> Here, as in *English v. Cobb* the protection from dissipation or transfer of the potential assets of the estate of Lucik directly bears on the ultimate collection and distribution of such properties pursuant to his effective will. As such, the injunctive relief related to a matter "***incident to an estate***" and was within the injunctive powers of the Probate Court of Dallas County.

Lucik, 596 S.W.2d at 516 (emphasis added). *See also Smith v. Lanier*, 998 S.W.2d 324, 336 (Tex. App.—Austin 1999, pet. denied) ("A court has the inherent power to order the surrender of property held by any party to the suit. This inherent power enables the court to preserve its own ability to render effective relief and give effect to its judgment.") (internal citations omitted).

As such, the proper question to ask to determine the probable right of recovery is whether the party seeking injunctive relief is *entitled* to status quo pending final trial. *Walling v. Metcalfe*, 863 S.W.2d 56, 57-58 (Tex. 1993).

(b) Probable, Imminent, and Irreparable Injury

The movant has the burden of proof to show the purported harm is likely to reoccur in the near future. *Butnaru*, 84 S.W.3d at 204. This burden is required to fulfill the clear purpose of injunctive relief: to halt wrongful acts in the course of accomplishment. *Wiese v. Heathlake Cmty. Ass'n, Inc.*, 384 S.W.3d 395, 399 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

The movant should be prepared to establish that there is no adequate remedy at law for its damages – in other words, that it cannot be adequately compensated in damages – or the damages cannot be measured by any certain pecuniary standard. *Twyman v. Twyman*, 2009 WL 2050979, at *5 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.), 2009 WL 2050979, at *5.

But it is also well established that a court can grant temporary injunctive relief to stop the depletion of trust assets. *See Minexa Arizona v. Staubach*, 667 S.W.2d 563, 567–568 (Tex. App.—Dallas 1984, no writ) (holding "[t]he fact that damages may be subject to the most precise calculation becomes irrelevant if the defendants in a case are permitted to dissipate funds specific that would otherwise be available to pay a judgment" when "[s]ome of these funds have allegedly been dissipated by the fiduciaries holding them, while the fiduciaries are seeking to place the remaining funds beyond

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the jurisdiction of the Texas court."); *Gatlin v. GXG, Inc.*, 1994 WL 137233, at *7 (Tex. App.—Dallas April 19, 1994, no writ) (evidence was "sufficient to justify the trial court's conclusion that, if not restrained, Gatlin might continue to divert and conceal assets in his possession pending trial"); *Twyman*, 2009 WL 2050979, at *5 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.), 2009 WL 2050979, at *5 (Trustee's past behavior justified temporary injunction because "allowing her continued access to the Trust funds could lead to more withdrawals that would not be repaid" and because the trust would not be protected from "loss for additional amounts Nancy would be able to withdraw if a temporary injunction were not granted."); *Callahan v. Lipscomb*, 412 S.W.2d 346, 348 (Tex. App.—San Antonio 1967, writ ref'd n.r.e.) ("There is also evidence that appellants are authorized to write checks and draw on the bank account of Pobrecito, Inc., which withdrawals could cause loss and injury to the ultimate beneficiaries of the estate of Mae H. Hausman in the event that it is finally determined that such estate has property rights and interests in Pobrecito.").

And when injunctive relief is sought pursuant to Texas Property (Trust) Section 114.008, there are exceptions to this requirement. *See Twyman v. Twyman*, 2009 WL 2050979, at *5 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.), 2009 WL 2050979, at *5 (lack of adequate remedy at law); *Texas Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529 (Tex. App—Houston [1st Dist.] 1992, no writ) (cannot quantify or compensate injury). The first exception is for actions that are recurrent or continuous. *Sinclair Ref. Co. v. McElree*, 52 S.W.2d 679, 681–82 (Tex. Civ. App.—Dallas 1932, no writ) (neither at equity nor under the statute did appellee's right to injunctive relief depend upon a showing that there existed no adequate remedy at law).

Another exception to showing that there is "no adequate remedy at law" is if such damages are unique and cannot be replaced using traditional money damages. *See Patrick v. Thomas*, 2008 Tex. App. LEXIS 3219 (Tex. App.—Fort Worth, May 1, 2008) (enjoining sale of rare horses), *citing* 103 Harv. L. Rev. 687, 705-706 (1990) (stating if certain goods cannot be replaced by money, then money damages are not adequate remedy for their loss and harm to them may be considered irreparable); *Trickey v. Gumm*, 632 S.W.2d 167 (Tex. App.—Waco 1982, no writ) (one element to consider in determining question of irreparable is whether there may be loss of substantial equity in property); *Texas Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d at 533 (inability to respond in damages).

4. Texas Trust Code Section 114.008(a)(3): Compelling Trustee To Redress Breach of Trust, Including Compelling Trustee To Pay Money or To Restore Property

Section 114.008(a)(3) authorizes a court to compel a trustee to redress a breach of trust when a trustee has breached his or her trust or a breach might occur. TEX. PROP. CODE § 114.008(a)(3). As discussed *supra*, a trustee has a duty to act in accordance with the terms of the trust, the Texas Trust Code, except as properly modified, and Texas common law, except as properly made inapplicable. *See* discussion *supra*. Furthermore, a co-trustee has a duty to prevent a co-trustee from committing a serious breach of trust and compel a co-trustee to redress any serious breach of trust.

Some possible actions that a court may compel on an interim basis include:

- Compelling mandatory distributions;
- Prohibiting unauthorized distributions;

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- Pursuing a claim or cause of action of the trust before limitations expire – including against a co-trustee;
- Provide access to books and records;
- File tax returns;
- Paid trust expenses and debts;
- Preserve trust records or assets;
- Obtain insurance; and
- Acting in accordance with specific terms and conditions of the trust agreement.

But, similar to Section 114.008(a)(1) there is no clear appellate decision how Section 114.008(a)(3) will be interpreted to apply to interim relief.

5. Texas Trust Code Section 114.008(a)(4): Ordering Trustee To Account

Section 114.008(a)(4) authorizes a court to order a trustee to account when a trustee has breached his or her trust or a breach might occur. TEX. PROP. CODE § 114.008(a)(2). The duty to account may arise in a number of ways.

For example, some trust agreements require a trustee to periodically provide some or all the beneficiaries a periodic accounting. To the extent required by the terms of the trust, the trustee should provide the requisite beneficiaries an accounting that complies with the time and content of the mandated accounting. The failure to meet these requirements can be held to be a breach of trust and an accounting can be compelled. *See* discussion *infra.*

Furthermore, regardless of whether the trust mandates an accounting requirement, a trust beneficiary may make a written demand on the trustee for an accounting covering all transactions since the last accounting, or since the creation of the trust, whichever is later. If the trustee fails or refuses to deliver the accounting within 90 days of the request, unless extended by a court, the beneficiary of the trust may file suit to compel the trustee to do so either. *See* discussion *infra.*

But, Section 114.008(a)(4) is not limited to beneficiaries or even interested persons. Rather, the section provides that to remedy a breach of trust that has occurred, or might occur, the court can order, among other things, an accounting. While standing will likely be an issue, an accounting could be sought under Section 114.008 even if a party may not clearly meet the definition of an interested person required by Section 113.151.

And *Bumstead* made it clear that a trustee, even if suspended and without fiduciary funds to pay for an accountant, can be ordered to provide a Trust Code complaint accounting. *See Bumstead*, 2022 WL 710159 at *27-*28. Furthermore, *Bumstead* confirms that an appellate issue on the inability to account may be waived if not raised first with the trial court.

6. Texas Trust Code Section 114.008(a)(5): Appointing Receiver To Take Possession Of Trust Property And Administer Trust

Section 114.008(a)(5) authorizes a court to appoint a receiver to take possession of trust property and administer the trust when a trustee has breached his or her trust or a breach might occur. TEX. PROP. CODE § 114.008(a)(5). A probate court can also appoint a receiver in order to "promote judicial efficiency and economy." *See Estate of Treviño*, 195 S.W.3d 223, 228 (Tex. App.—San Antonio 2006, no pet.); TEX. ESTATES CODE § 32.001(b); *cf.* TEX. ESTATES CODE § 1354.001(a)(1) (permitting receiver to avoid danger of injury, loss, or waste of incapacitated persons estate).

Note a movant under Section 114.008 is *not required* to establish the usual

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requirements for a receiver appointed under the Rules of Equity. *Estate of Benson*, 2015 WL 5258702, at *6 (Tex. App.—San Antonio 2013, pet. dism'd) (considered application of requirements of Texas Civil Practice & Remedies Code Section 64.001(a)(6)) (emphasis added). In *Benson*, the appellate court affirmed the appointment of a receiver because the trustee, among other breaches of duty, severed communications with the beneficiaries of the trust, "began moving trust assets," took "actions that could affect the value of the trust assets," and relocated and concealed the trust bookkeeper. And in upholding the appointment, the appellate court held that there was no need to satisfy the "rules of equity" and show irreparable harm and inadequate remedy at law. *Id*. at *7.

While it appears the decision in *Benson* negates the necessity for a trial court to comply with Section 64 of the Texas Civil Practices and Remedies Code, the argument could still be made that trial courts must comply with Section 64 when appointing a receiver in the trust context. Thus, without additional appellate court guidance, it is difficult to know if all appellate courts throughout the state will follow the logic from *Estate of Benson* as it relates to the appointment of receivers in the trust context.

Also, *Bumstead* suggest that the receiver of a terminate trust will not be allowed to make terminating distributions as the court considered that exceeding preserving the "status quo." *Bumstead*, 2022 WL 710159 at *18 ("[I]t is not the purpose of a temporary injunction to transfer property from one person to another, but rather to preserve the original status of the property pending a final decision on the rights of the parties.. . . [thus] to the extent that the trial court's order envisions any change in ownership of trust assets by sale or distribution, the trial court erred.').

7. <u>Texas Trust Code Section 114.008(a)(6): Suspending Trustee</u>

Section 114.008(a)(6) of the Texas Property Code further provides that a court *may* "suspend the trustee" in order to remedy a breach of trust that has occurred or might occur. While this remedy is contemplated by the Texas Trust Code, it is rarely employed by trial courts. In fact, since the most recent enactment of Section 114.008 there is only one case of record where a trial court suspended a trustee.

In *Vranac v. Huddleston*, when two of three acting co-trustees filed a motion to suspend the third co-trustee pending their request for removal under Section 113.082, the 14th Judicial District of Dallas County, Texas granted the motion to suspend the third co-trustee. This matter was submitted for an interlocutory appeal; however, in a short decision the Dallas Court of Appeals held that an order suspending a trustee under Texas Trust Code Section 114.008 was not ripe for an interlocutory appeal under Section 51.014 of the Texas Civil Practices and Remedies Code. *See Vranac v. Huddleston*, 2008 WL 3412229 at *1 (Tex. App. – Dallas 2008, no pet.).

In *Bumstead*, however, the appellate court held that when the trustee's powers are suspended due to the appointment of a receiver, the issue is subject to interlocutory review. *Bumstead*, 2022 WL 710159 at *14 (*citing* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (a)(1)). As such, the explicit appointment of a receiver was sufficient to distinguish *Bumstead* from the holding *Vranac v. Huddleston*, finding an order suspending powers of the trustee alone was subject to interlocutory appeal. *See* 2008 WL 3412229 at *1 (Tex. App.—Dallas, no pet). Thus, consideration should be given if suspension alone would be sufficient to avoid

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the possible interlocutory appellate delays that may result and/or the appoint of a receiver is needed, as in *Bumstead*, to protect the assets pending trial.

8. Texas Trust Code Section 114.008(a)(7): Removing Trustee Provided Under Section 113.082

Section 114.008(a)(7) authorizes a court to remove a trustee *pursuant to Section 113.082* when a trustee has or might breach his or her trust. TEX. PROP. CODE § 114.008(a)(5). A strong argument can be made that even though 114.008 provides for removal, the court should first comply with the standards set forth under Section 113.082 of the Texas Property Code which provides that a court may remove a trustee and deny part or all of the trustee's compensation if: (1) the trustee materially violated or attempted to violate the terms of the trust and the violation or attempted violation results in a material financial loss to the trust; (2) the trustee becomes incompetent or insolvent; or (3) in the discretion of the court, for other cause. TEX. PROP. CODE § 113.082 (emphasis added); *see also Lee v. Lee*, 47 S.W.3d 767 (Tex. App. – Houston [14th dist.] 2001, pet. denied).

Furthermore, in *Akin v. Dahl* the Texas Supreme Court explicitly stated that in order to remove a trustee for breach of fiduciary duty, or otherwise, a trial court must make a ruling as a matter of law. *See Akin v. Dahl*, 661 S.W.2d 911, 913 (Tex. 1983) (contemplating removal of trustee for improper conduct and hostility). And, if the complained of conduct is controverted or denied, a fact question exists that *must be submitted to the jury*. *Id.*

Therefore, based on the decisions in *Lee v. Lee* and *Akin v. Dahl*, in contemplating removal of a trustee under Section 113.082, a trial court is probably required to first make a ruling as matter of law that the trustee committed a breach. This is arguably a ruling on the merits. Thus, while Section 114.008 contemplates the removal of a trustee as an interim remedy, it may be cause for reversal without the predicate findings required by Section 113.082.

9. Texas Trust Code Section 114.008(a)(8): Reducing or Denying Trustee Compensation

Section 114.008(a)(8) authorizes a court to reduce or deny a trustee's compensation when a trustee has breached his or her trust or a breach might occur. TEX. PROP. CODE § 114.008(a)(8) . Unfortunately, there are no cases that address applying this particular subsection on an interim basis.

10. Texas Trust Code Section 114.008(a)(9): Voiding Act of Trustee; Imposing Lien or Constructive Trust on Trust Property; Recovering Property or Proceeds

Section 114.008(a)(9) authorizes a court to "void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property" when a trustee has breached his or her trust or a breach might occur. TEX. PROP. CODE § 114.008(a)(9) . But, a "person other than a beneficiary who, without knowledge that a trustee is exceeding or improperly exercising the trustee's powers, in good faith assists a trustee or in good faith and for value deals with a trustee is protected from liability as if the trustee had or properly exercised the power exercised by the trustee." TEX. PROP. CODE § 114.008(b). Unfortunately, there are no cases that address applying this particular subsection on an interim basis.

11. Texas Trust Code Section 114.008(a)(10): Ordering Other Appropriate Relief

Section 114.008(a)(10) authorizes a court

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to order any other appropriate relief when a trustee has breached his or her trust or a breach might occur. TEX. PROP. CODE § 114.008(a)(10) . Unfortunately, there are no cases that address applying this particular subsection on an interim basis. Until defined or limited, it clearly provides a basis to ask for virtually any relief – equitable or statutory – that may be sought in other cases involving fiduciary relationships to protect the trust pending trial.

XII. COMMONLY ENCOUNTERED FIDUCIARY COMPLAINTS

A. What is Required Under the Duty to Account

An executor, trustee, guardian, or agent has a duty to maintain complete books and records relating to his or her actions and administration. Therefore, the fiduciary should establish an organized system to maintain the books and records at the onset of the relationship and continue to maintain them during the administration. It is preferable to maintain detailed financial records that reflect all assets on hand, all sources and uses of cash, all receipts, all expenses, all distributions, and all investments. Utilizing one of the various financial computer programs is one of the most effective and least costly means to maintain up-to-date books and records. And, the fiduciary should maintain all such information for the duration of the relationship or entity at issue.

It is advisable for a fiduciary to provide regular periodic accountings to all interested persons. Accountings not only allow a fiduciary to comply with his or her duty of disclosure, they also often commence the statute of limitations with regard to transactions adequately disclosed. Corporate fiduciaries generally provide accountings monthly or quarterly through detailed statements. An individual fiduciary should consider providing an accounting at least annually. Regardless of the period covered, the accounting should reflect all receipts and disbursements, and characterize each as receiving or expending income or principal. The type of accounting depends on the fiduciary relationship.

1. Trustees Accounting

Some trust agreements require a trustee to periodically provide some or all the beneficiaries a periodic accounting. To the extent required by the terms of the trust, the trustee should provide the requisite beneficiaries an accounting that complies with the time and content of the mandated accounting. Failure to meet these requirements can be held to be a breach of trust.

Furthermore, regardless of whether the trust mandates an accounting requirement, a trust beneficiary may make a written demand on the trustee for an accounting covering all transactions since the last accounting, or since the creation of the trust, whichever is later. *See* TEX. PROP. CODE § 113.151(a). Section 113.151 provides in part as follows:

> 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 the creation of the trust, whichever is later.

See TEX. PROP. CODE § 113.151(a).

If requested, the trustee is required to prepare and provide an accounting that complies with Section 113.152 of the Texas Property Code. The form of the accounting requires a written statement of accounts that shows:

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

See TEX. PROP. CODE § 113.152.

If the trustee fails or refuses to deliver the accounting within 90 day of the request, unless extended by a court, the beneficiary of the trust may file suit to compel the trustee to do so. *See* TEX. PROP. CODE § 113.151(a). If the court finds that the beneficiary's interest in the trust is sufficient to require an accounting by the trustee, it may order the trustee to account to all the trust beneficiaries. *Id.* But, a trustee is not required to account more frequently than once every 12 months unless ordered to do so by the court. *Id.* Also, if a beneficiary successfully compels an accounting, 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." *Id.*

Likewise, an interested person may file suit to compel the trustee to account to the interested person. *Id.* at § 113.151(b). If the court finds that the nature of the interest, the claim against the trust, or the effect of the trust administration on the interested person is sufficient to require an accounting by the trustee, the court may require the trustee to account to the interested person. *Id.*

Finally, as previously discussed, a settlor may not limit "any common-law duty to keep a beneficiary of an irrevocable trust who is 25 years of age or older informed during any time 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." TEX. PROP. CODE 111.0035(c). Therefore, any attempts to override the accounting requirement for a person over 25 who meet the statutory requirements should be ignored.

2. <u>Personal Representatives Accounting</u>

With regard to an independent personal representative of an estate, a beneficiary can demand an accounting fifteen months after their appointment. Once demanded, the independent personal representative has sixty days from the receipt of the request to prepare and provide an accounting that complies with Section 404.001 of the Texas Estates Code. The accounting must be sworn and subscribed by the independent personal representative and set forth, in detail, the following information:

- The property belonging to the estate that has come into the personal representative's hands;
- Any disposition that has been made of such property;
- All debts that have been paid;
- The debts and expenses, if any, still owing by the estate;
- The property of the estate, if any, still remaining in the personal representative's hands;
- Such other facts as may be necessary to have a full and definite understanding of the exact condition of the estate; and

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- Such facts, if any, that show why the administration should not be closed and the estate distributed.

See Tex. Estates Code § 404.001.

A dependent personal representative is required to file an annual accounting, until discharged, which includes the following information:

- All property that has come to the dependent personal representative's knowledge or into their possession not previously listed or inventoried as property of the estate.
- Any changes in the property of the estate which have not been previously reported.
- A complete account of receipts and disbursements for the period covered by the account, and the source and nature thereof, with receipts of principal and income to be shown separately.
- A complete, accurate and detailed description of the property being administered, the condition of the property and the use being made thereof, and, if rented, the terms upon and the price for which rented.
- The cash balance on hand and the name and location of the depository wherein such balance is kept; also, any other sums of cash in savings accounts or other form, deposited subject to court order, and the name and location of the depository thereof.
- A detailed description of personal property of the estate and other data necessary to identify the same fully, and how and where held for safekeeping.
- A statement that, during the period covered by the account, all due tax returns have been filed and that all taxes due and owing have been paid and a complete account of the amount of the taxes, the date the taxes were paid, and the governmental entity to which the taxes were paid.
- If any tax return due to be filed or any taxes due to be paid are delinquent on the filing of the account, description of the delinquency and reasons for the delinquency.
- A statement personal representative has paid all required bond premiums for the accounting period.

TEX. ESTATES CODE § 359.001(b).

3. <u>Agent Accounting</u>

An agent has a duty to account to his or her principal for actions taken on the principal's behalf. Due to ongoing concerns, Texas Estates Code Section 751.104 was enacted to impose a statutory duty to account. *See* TEX. ESTATES CODE § 751.104.

But, Section 751.104 was not intended to limit the principal's ability to impose additional requirements on or instructions to his or her attorney-in-fact. *See* TEX. ESTATES CODE § 751.106. Therefore, a durable power of attorney may also include additional requirements relating to his or her agent's duty to account and inform. *See id*. For example, a principal may require their agent to account not only to the principal's representatives but also to his or her spouse and the spouse's representatives, including the spouse's guardian or attorney-in-fact. An agent may also be required to keep certain family members, financial advisors, or other individuals designated by the principal, informed and apprised of the agent's activities on behalf of the principal. The power of attorney should be reviewed to determine if any additional reporting or accounting requirements were included beyond the statutory requirements.

B. How a Trustee Makes Distributions

Any trustee should understand the applicable distribution standard or standards

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of the trust. They may include mandatory distribution standard which does not require the exercise of a trustee's discretion or may impose discretionary distribution standards that are ascertainable or unascertainable.

A fiduciary that establishes a process of determining how they intend to exercise their discretion is less subject to challenge than a fiduciary with no process in place. Thus, trustees that can present a well thought out and reasonable decision-making process for distributions are often victorious, even if their decisions appear to contradict the language of a trust, (*i.e. Penix v. First National Bank of Paris*, 260 S.W.2d at 63), or the clear intent of the settlor, (i.e., *Coffee v. Rice*, 408 S.W.2d 269 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e)).

In order to properly exercise his or her discretion, a fiduciary cannot make decisions in a vacuum. The fiduciary will generally need to obtain information from the beneficiary in order to make a fully informed distribution decision. Furthermore, a beneficiary may require certain information from the fiduciary in order to properly assess whether to make a distribution request and understand the manner in which the fiduciary exercises his or her discretion.

1. <u>Consider Requesting Information From Beneficiary</u>

Perhaps one of the more difficult issues is determining the information that a trustee feels is needed to justify a distribution. Some trustees desire to obtain extensive information from the beneficiary to "paper" their file. But this can lead to feelings of ill-will and invasion of privacy towards the trustee. Other trustees go to the opposite extreme and request no information. This can lead to claims of breach of fiduciary duty against the trustee by other beneficiaries who may eventually request that the trustee's prior distributions be justified.

The Restatement's position is that "the trustee generally may rely on the beneficiary's representations and on readily available, minimally intrusive information requested of the beneficiary." RESTATEMENT (THIRD) OF TRUSTS § 50 cmt e(1). But when the trustee has reason to believe that the information is incomplete or inaccurate, the trustee should request additional information. *See id.*

Relevant information may include the living expenses of the beneficiary and under the general rule of construction, the other resources reasonably available to the beneficiary for his support. Information that is commonly requested by trustees includes the following:

- Income and cash flow information;
- Financial statements;
- Copies of other trust documents under which the beneficiary has a right to funds or request a distribution;
- Copies of tax returns;
- Copies of all tuition and similar agreements relating to the beneficiary's education and maintenance;
- Copies of receipts or invoices for any amounts to be reimbursed;
- Information regarding a beneficiary's employment status and efforts to obtain such employment;
- Status of the beneficiary's housing and medical insurance, and any other information regarding their support that the trustees deem relevant; and
- Notification of any significant changes in any beneficiary's housing, education, development or medical needs.

While the preceding is not intended to be an exhaustive list or be required in all situations, it provides a general listing of the information that may be periodically

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requested by a trustee to consider a distribution request.

2. Consider Providing Information to the Beneficiary

Information regarding distributions is a two-way street. Just as a trustee may seek information to support a distribution request, a beneficiary is entitled to information in order to request a distribution or justify a trustee's distribution decision. The Restatement (Third) of Trusts provides that among a trustee's fiduciary duties is the (i) general duty to act, reasonably informed, with impartiality among the various beneficiaries and interests (Section 79), and (ii) duty to provide the beneficiaries with information concerning the trust and its administration (Section 82). The Restatement concludes "this combination of duties entitles the beneficiaries (and also the court) not only to accounting information but also to relevant, general information concerning the bases upon which the trustee's discretionary judgments have been or will be made. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt g (general observations on relevant factors in interpretation of discretionary powers).

C. How Multiple Interests are Balanced

Executors and trustees are often faced with the task of balancing various and sometimes divergent interests. A fiduciary should be careful not to favor one interest over another, unless expressly authorized by the governing instrument. *See* TEX. PROP. CODE § 117.008 ("trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries"). A classic example arises when a fiduciary considers investment decisions and returns on investments. Sometimes an investment may generate a larger degree of return for the income beneficiary and a smaller return for the remaindermen.

But, trustees generally do not owe fiduciary duties to third parties or those that may indirectly benefit from the terms of the instrument, such as an individual to whom a beneficiary owes a duty of support. Therefore, in exercising his or her discretion, the fiduciary's primary concern should be what is in the best interest of the beneficiaries of the instrument. *See* TEX PROP. CODE § 117.008 ("trustee shall invest and manage the trust assets solely in the interest of the beneficiaries").

D. How Powers and Duties Are Delegated Among Cotrustees

A trustee may delegate to his or her cotrustee the performance of a trustee's function unless prohibited by the trust. *See* TEX. PROP. CODE §113.085(e), as amended by Acts 80th Legislature Ch. 451 § 7, effective September 1, 2007. Section 113.085 has been amended several times during the last decade, thus it is important to consider the statute in effect during the relevant time period.

For example, effective September 1, 2007, Section 113.085(a) was amended to remove the words "that are unable to reach a unanimous decision" as there was a concern it changed pre-2005 law and thus it was revised to state that "cotrustees may act by majority decision." And, in 2009, Section 113.085 was again amended to address situations when a cotrustee is suspended or disqualified or when an action is needed because a cotrustee is unable to participate.

Thus, Section 113.085, as in effect since September 1, 2009, provides as follows:

(a) Cotrustees may act by majority decision.
(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

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(c) A cotrustee shall participate in the performance of a trustee's function unless the cotrustee:
  (1) is unavailable to perform the function because of absence, illness, suspension under this code or other law, disqualification, if any, under this code, disqualification under other law, or other temporary incapacity; or
  (2) has delegated the performance of the function to another trustee in accordance with the terms of the trust or applicable law, has communicated the delegation to all other cotrustees, and has filed the delegation in the records of the trust.

(d) If a cotrustee is unavailable to participate in the performance of a trustee's function for a reason described by Subsection (c)(1) and prompt action is necessary to achieve the efficient administration or purposes of the trust or to avoid injury to the trust property or a beneficiary, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may delegate to a cotrustee the performance of a trustee's function unless the settlor specifically directs that the function be performed jointly. Unless a cotrustee's delegation under this subsection is irrevocable, the cotrustee making the delegation may revoke the delegation.

TEX. PROP. CODE § 113.085.

Therefore, when naming cotrustees, the settlor should keep in mind that one cotrustee may appoint another to function as an agent for those duties that may lawfully be delegated unless he or she expressly prohibits delegation as between cotrustees. TEX. PROP. CODE § 113.085(e), as amended by Acts 80th Legislature Ch. 451 § 7, effective September 1, 2007; *see also Bunn v. City of Laredo*, 213 S.W. 320 (Tex. Civ. App.—San Antonio 1919, no writ). For example, if only one of several trustees qualifies to act as an agent, a deed by that one alone will pass title to a purchaser under Texas law.

E. Whether a Trustee Can Delegate Powers and Duties To Others

The fiduciary's duty of competence generally includes restrictions on delegating fiduciary duties. For example, except as allowed by law, the trustee is under an obligation to personally administer the trust and is under a duty not to delegate acts that the trustee should personally perform.

Texas' general rule is generally consistent with Section 80 of the Restatement (3rd) of Trusts entitled Duty with Respect to Delegation. Section 80 states:

(1) A trustee has a duty to perform the responsibilities of the trusteeship personally, except as a prudent person of comparable skill might delegate those responsibilities to others.
(2) In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising or monitoring agents, the trustee has a duty to exercise fiduciary discretion and to act as a prudent person of comparable skill would act in similar circumstances.

But Section 117.011 permits a trustee to delegate investment and management decisions to an agent if certain conditions are met, and subject to certain limitations. TEX. PROP. CODE § 117.011. The trustee is not responsible for the decisions of the agent provided the trustee exercises the appropriate

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judgment and care in selecting the agent (and meets the statutory requirements). This includes establishing the scope and terms of the authority delegated to the agent, investigating the agent's credentials (including the agent's performance history, experience, and financial stability), verifying the agent's professional license and registration, and confirming that the agent is bonded and insured. *Id.* In order to have protection, a trustee should, at a minimum:

- Select an agent with reasonable care, skill and caution;
- Establish the scope and terms of obligation with reasonable care, skill and caution; and
- Periodically review the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation with reasonable care, skill, and caution.

If done properly, the trustee cannot be held liable for the decisions and actions of the duly engaged agent. Note that any limitations on the trustee's liability do not alleviate the agent's liability to the trust. Section 117.001(b) expressly provides that an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. But, a trustee cannot, however, avoid liability for the actions of its agent when:

- The agent is an affiliate (see new definition) of the trustee;
- The delegation agreement requires arbitration; or
- The delegation agreement shortens the statute of limitation.

Still, the new Texas delegation standard should be easier for trustees to meet than the former delegation provisions.

Furthermore, Section 113.018 confirms the extent of powers that maybe (subject to limitations in the agreement) be given to agents. Section 113.018, as amended in 2017, now reads as follows:

> Sec. 113.018. EMPLOYMENT AND APPOINTMENT OF AGENTS.
>
> (b) A trustee may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate.
> (c) Without limiting the trustee's discretion under Subsection (a), a trustee may grant an agent powers with respect to property of the trust to act for the trustee in any lawful manner for purposes of real property transactions.
> (d) A trustee acting under Subsection (b) may delegate any or all of the duties and powers to:
> (1) execute and deliver any legal instruments relating to the sale and conveyance of the property, including affidavits, notices, disclosures, waivers, or designations or general or special warranty deeds binding the trustee with vendor's liens retained or disclaimed, as applicable, or transferred to a third-party lender;
> (2) accept notes, deeds of trust, or other legal instruments;
> (3) approve closing statements authorizing deductions from the sale price;
> (4) receive trustee's net sales proceeds by check payable to the trustee;
> (5) indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the sale;

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(6) take any action, including signing any document, necessary or appropriate to sell the property and accomplish the delegated powers;
(7) contract to purchase the property for any price on any terms;
(8) execute, deliver, or accept any legal instruments relating to the purchase of the property or to any financing of the purchase, including deeds, notes, deeds of trust, guaranties, or closing statements;
(9) approve closing statements authorizing payment of prorations and expenses;
(10) pay the trustee's net purchase price from funds provided by the trustee;
(11) indemnify and hold harmless any third party who accepts and acts under a power of attorney with respect to the purchase; or
(12) take any action, including signing any document, necessary or appropriate to purchase the property and accomplish the delegated powers.

(e) A trustee who delegates a power under Subsection (b) is liable to the beneficiaries or to the trust for an action of the agent to whom the power was delegated.

(f) A delegation by the trustee under Subsection (b) must be documented in a written instrument acknowledged by the trustee before an officer authorized under the law of this state or another state to take acknowledgments to deeds of conveyance and administer oaths. A signature on a delegation by a trustee for purposes of this subsection is presumed to be genuine if the trustee acknowledges the signature in accordance with Chapter 121, Civil Practice and Remedies Code.

(g) A delegation to an agent under Subsection (b) terminates six months from the date of the acknowledgment of the written delegation unless terminated earlier by:
(1) the death or incapacity of the trustee;
(2) the resignation or removal of the trustee; or
(3) a date specified in the written delegation.

(h) A person who in good faith accepts a delegation under Subsection (b) without actual knowledge that the delegation is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely on the delegation as if:
(1) the delegation were genuine, valid, and still in effect;
(2) the agent's authority were genuine, valid, and still in effect; and
(3) the agent had not exceeded and had properly exercised the authority.

(i) A trustee may delegate powers under Subsection (b) if the governing instrument does not affirmatively permit the trustee to hire agents or expressly prohibit the trustee from hiring agents.

TEX. PROP. CODE § 113.018, as amended by Acts 85th Legislature, Ch. 62, effective September 1, 2017.

F. What Actions Cotrustees Can Be Liable For

Unless the instrument provides otherwise, Texas Property Code Section 114.006 addresses when a cotrustee is liable

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for the acts of other cotrustees. Section 114.006 provides that:

(a) A trustee who does not join in an action of a cotrustee is not liable for the cotrustee's action, unless the trustee does not exercise reasonable care as provided by Subsection (b).
(b) Each trustee shall exercise reasonable care to:
    (1) prevent a cotrustee from committing a serious breach of trust; and
    (2) compel a cotrustee to redress a serious breach of trust.
(c) Subject to Subsection (b), a dissenting trustee who joins in an action at the direction of the majority of the trustees and who has notified any cotrustee of the dissent in writing at or before the time of the action is not liable for the action.

See TEX. PROP. CODE § 114.006.

G. How a Trustee Can Be Compensated & Reimbursement

Unless the terms of the trust instrument provide otherwise, a trustee is entitled to *reasonable* compensation from the trust for acting as trustee. *See* TEX. PROP. CODE § 114.061. Section 114.061 provides as follows:

(a) Unless the terms of the trust provide otherwise and except as provided in Subsection (b) of this section, the trustee is entitled to reasonable compensation from the trust for acting as trustee.
(b) If the trustee commits a breach of trust, the court may in its discretion deny him all or part of his compensation.

TEX. PROP. CODE § 114.061.

The trustee is entitled to compensation even if the trust instrument does not address compensation. *See id*.; *see also City of Austin v. Austin Nat. Bank*, 488 S.W.2d 586 (Tex. Civ. App.—Austin 1972 writ granted), *aff'd in part and rev'd in part on other grounds*, 503 S.W.2d 759 (Tex. 1973)(trustee is entitled to be paid for his or her work on behalf of trust estate).

What remains unclear is exactly how a trustee's compensation should be determined and what is reasonable. Traditionally, a trustee has been compensated based on a percentage of the assets contained in the trust, and other factors such as the extent of the risk, the responsibilities of the trustee, the degree of difficulty in administering the trust, and the skill and success of the trustee. RESTATEMENT (SECOND) OF TRUSTS § 242 cmt. b.

And, while a trustee is not permitted to profit individually in the course of trust transactions, this does not prohibit a trustee from being compensated for their services. Compensation for services actually rendered does not make a trustee a beneficiary of a trust or disqualify him or her from serving as trustee. *See McCauley v. Simmer*, 336 S.W.2d 872 (Tex. Civ. App.—Houston [1st Dist.] 1960, writ dism'd). But, a trustee should make effort to both disclose any compensation received and the basis for such compensation to reduce future claims and attempts to disgorge the compensation as excessive.

Likewise, unless modified by the trust instrument, a trustee is entitled to reimbursement for:

(1) Advances made for the convenience, benefit, or protection of the trust or its property;
(2) Expenses incurred while administering or protecting the trust

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or because of the trustee's holding or owning any of the trust property; and

(3) Expenses incurred for any action taken under Section 113.025.

TEX. PROP. CODE § 114.063.

And, while a trustee's attorneys' fees and expenses appear to fall within these statutory provisions and/or the express provisions of the trust, many beneficiary-litigants will argue to the contrary. They instead insist to be awarded under Section 114.064, which provides:

> In any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just.

TEX. PROP. CODE § 114.064.

XIII. RECOGNIZE THERE ARE CRIMINAL IMPLICATIONS RELATED TO ESTATE AND TRUST FIDUCIARIES

A. Penal Code Section 31.03: Theft.

Section 31.03 of the Texas Penal Code provides that it is a criminal offense when a person "unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE § 31.03(a) . While Section 31.03 does not specifically apply to fiduciaries, anyone deemed to be acting in that capacity could also be charged with an offense under this section in addition to more specific offenses. *See Billings v. State* 725 S.W.2d 757 (Tex. App.—Houston [14th Dist.} 1987, no writ) (conviction under general theft statute would not be reversed even though prohibited conduct was covered by more special statute prohibiting fiduciary from misapplying fiduciary property, where both statutes were graded equally depending upon value of property misappropriated, and prosecution under either statute subjected offender to same range of punishment).

If charged with theft, the severity of the offense will range from a Class C misdemeanor for property less than $50, to a first-degree felony for property in excess of $200,000. *See* TEX. PENAL CODE § 31.03(e). However, when the legal owner is an elderly person, the possible punishment is increased to the next higher category of offense. *See* TEX. PENAL CODE § 31.03(f).

B. Penal Code Section 32.45: Misapplication of Fiduciary Property.

Section 32.45 of the Texas Penal Code provides that it is a criminal offense for a person, with a legal or statutory duty to act, to "intentionally, knowingly, or recklessly misapply property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held." TEX. PENAL CODE § 32.45(b).

Section 32.45(a)(1) defines a fiduciary to include an attorney in fact, agent, trustee, guardian or anyone else acting in a fiduciary capacity. TEX. PENAL CODE § 32.45(c) . The offender will be charged with an offense dependent on the value of the misappropriated property. They range from a Class C misdemeanor for property less than $20, to a first-degree felony for property in excess of $200,000.

TEX. PENAL CODE § 32.45(c) .

C. Penal Code Section 32.46: Securing Execution of Document by Deception

Section 32.46 of the Texas Penal Code addresses fraud based on the execution of documents by deception. Section 32.46(a) provides that a "person commits an offense if, with intent to defraud or harm any person,

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he, by deception, "causes another to sign or execute any document affecting property or service or the pecuniary interest of any person." TEX. PENAL CODE § 32.46(c) . The punishment depends on the value of the property involved. It is felony when the value is $1,500 and the degree depends of the actual value. *See id.*

D. Penal Code Section 32.53. Exploitation of Child, Elderly Individual, or Disabled Individual

Section 32.53 was added to the Texas Penal Code. TEX. PENAL CODE § 32.53. It specifically adopts the definitions of "child," "elderly individual," and "disabled individual" in Texas Penal Code Section 22.04. It also defines exploitation to mean "the illegal or improper use of a child, elderly individual, or disabled individual or of the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain." *Id.* A person can be guilty of a third degree felony if they "intentionally, knowingly, or recklessly cause the exploitation of a child, elderly individual, or disabled individual." *See id.*

E. Penal Code Section 48.051: Duty to Report Abuse, Neglect or Exploitation.

To the extent that a guardian or other becomes aware of any specific acts of abuse, neglect, or exploitation, he or she is required to report it to the Texas Department of Human Services and Department of Protective and Regulatory Services. *See* TEX. HUM. RES. CODE § 48.051. Section 48.051(c) provides that the duty imposed to report the abuse, neglect, or exploitation, include a person "whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional." *See id.*

Therefore, not only is a guardian required to report such abuse, neglect, or exploitation, but also an attorney ad litem, guardian ad litem, employee of the ward's 867 trust, etc.

The required report may be made orally or in writing but must include the following:

- the name, age, and address of the elderly or disabled person;
- the name and address of any person responsible for the elderly or disabled person's care;
- the nature and extent of the elderly or disabled person's condition;
- the basis of the reporter's knowledge; and
- any other relevant information.

See TEX. HUM. RES. CODE § 48.051(d).

A person may be subject to criminal charges if he or she fails to report the abuse, neglect, or exploitation as required by Section 48.051. *See* TEX. HUM. RES. CODE § 48.052(a) . If discovered, he or she may be charged with a Class A misdemeanor. *See* TEX. HUM. RES. CODE § 48.052(b).

XIV. CONSIDERATIONS FOR THE FIDUCIARY'S ADVISORS

A. Recognize That Almost Anything May Be Discoverable And Act And Write Accordingly

Because of the nature of the fiduciary relationship, it is possible virtually any document could be discovered (rightly or wrongly) in litigation. It should never be presumed that any written communication would be protected from disclosure. Perhaps no form of communication has raised more issues in the last few years than emails. As this form of communication is rapidly becoming the norm with many clients, they have become a favorite of litigators. Furthermore, individuals have a tendency to say things in email that they would not say in

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more formal communications, including personal comments that can be taken out of context in subsequent litigation. It is therefore suggested that every document be written in a manner that assumes that a potential adverse litigant may read it in the future.

B. Be Clear Who The Advisor Represents

With regard to attorneys, the existence of an attorney-client relationship may be either express or implied from the parties' conduct. *See Perez v. Kirk & Carrigan,* 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied). Once established, the attorney-client relationship gives rise to corresponding duties on the attorney's part. Thus, an advisor engaged by a fiduciary should be careful never to unintentionally create the impression that he or she represents or is advising a beneficiary, creditor or other third party. These impressions can be formed via meetings, letters and other communications with third parties. Ways to reduce such potential claims include the following:

- Any meetings should be preceded with a statement that the advisor only represents the fiduciary;
- A written notice of non-representations can be given to any potential beneficiaries and creditors in the initial letter or contact;
- An acknowledgement of no representation may be requested before any meetings with the third parties;
- The advisor should not generally answer any questions regarding the third parties rights; and
- Documents to be signed by the third party should not be prepared by the advisor, if possible.

While the preceding list is not exclusive or even mandatory, these reflect efforts to reduce claims made in actual proceedings over the past few years.

C. Be Careful In All Written Communications With Beneficiaries & Third Parties

It is common when representing a fiduciary to communicate with the beneficiaries of the estate or trust on the fiduciary's behalf. These contacts may create, however, a claim that the professional advisor owes a duty to the beneficiary, creditor, etc. Thus, it is suggested that any written communication with any potential non-client reiterate (i) who the advisor represents, and (ii) that the advisor does not represent the recipient.

Furthermore, it is advisable for fiduciary advisors to avoid preparing documents, such as waivers, disclaimers, etc., for non-clients. But, given the realities of the estate and trust area, it is sometimes necessary for the fiduciary's advisor to prepare such documents. If the attorney is providing the non-client a document for execution, the correspondence should clearly suggest that the recipient have the document reviewed by his or her own advisors. Finally, any letter to a potential beneficiary should be written, if possible, in a manner that confirms, each time, that the advisor is not providing advice to the recipient.

D. Avoid Making Alleged Representations And Use Disclaimers Of Reliance When Appropriate

It is common for interested parties to request that a fiduciary make certain express representations to verify certain facts or conditions. Representations may be used to confirm assets, liabilities, past events or other matters that an interest party deems relevant to an estate or trust. While such information is needed or even mandatory to meet certain fiduciary duties, the attorney or other advisor for the fiduciary should avoid being the one making such representations. When he or she does, and it turns out to be incorrect, the

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attorney or other advisor may face claims of negligent misrepresentation.

Thus, the Texas Supreme Court's sanctioning of the use of disclaimers of reliance in documents to mitigate potential claims of reliance or negligent misrepresentation can be a useful tool. *See Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997); *Atlantic Lloyds Insurance Company v. Butler*, 137 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2004, pet. filed July 6, 2004)(disclaimer of reliance in settlement agreement conclusively negated other parties alleged reliance on any representations or lack of disclosure by other parties). A disclaimer of reliance may provide as follows:

> Each party confirms and agrees that such party (i) has relied on his or her own judgment and has not been induced to sign or execute this Agreement by promises, agreements or representations not expressly stated herein, (ii) has freely and willingly executed this Agreement and hereby expressly disclaims reliance on any fact, promise, undertaking or representation made by the other party, save and except for the express agreements and representations contained in this Agreement, (iii) waives any right to additional information regarding the matters governed and effected by this Agreement, (iv) was not in a significantly disparate bargaining position with the other party, and (v) has been represented by legal counsel in this matter.

E. Consider the Possible Rights Of Successor Fiduciaries

Attorneys and other advisor's representing a fiduciary should consider that there may claims by the successor fiduciary, including seeking to access to information and claims of privity. For example, when a fiduciary has been removed or died, a successor fiduciary is generally imposed with a duty to redress his or her predecessor's actions. The question then becomes whether the successor is entitled to the predecessor's legal files.

In *Huie v. DeShazo*, the Texas Supreme Court made it clear that an attorney representing a trustee represents only the trustee and not trust beneficiaries. 922 S.W.2d 920 (Tex. 1996). But for years, no Texas appellate court had clearly addressed this issue in the context of an estate or guardianship and at least one trial court has ordered the turnover of the prior attorney's files.

More recently, at least one appellate court has held that no standing, and thus no privity exists as it relates a lawyer representing a former personal representative and their successor. In *Messner v. Boon*, the Texarkana Court of Appeals held that a successor personal representative lacked standing to assert a legal malpractice claim against an attorney retained by the former personal representative. 466 S.W.3d 191, 206 (Tex. App.—Texarkana 2015, pet. granted, judgment vacated w.r.m.).

And in 2021, the Texarkana Court of Appeals held that an attorney representing a former administrator and trustee owned no duties to the successor fiduciaries. *See Hodge v. Joyce W. Lindauer Att'y*,2021 WL 4527902 (Tex. App.—Texarkana 2021, no pet.). In *Hodge*, the successor trustee and successor administrator, along with others, sued the lawyer who represented the former trustee and former administrator for "breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, aiding and abetting conversion, constructive fraud, fraud, civil conspiracy, and negligence" relating to the prior representation. After noting the holding of *Huie* and the long-standing principal that neither an estate or trust is a legal entity, the

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appellate court held that the plaintiffs did not have standing to pursue such claims against an "attorney retained by a prior personal representative of an estate belongs to prior personal representative, not successor personal representative. *See* at *1.

F. Be Cognizant Of The Discovery Rule

While the standard statute of limitation on breach of fiduciary duty is four years, the discovery rule can toll this applicable period for years into the future. The Texas Supreme Court has twice held a fiduciary's misconduct to be inherently undiscoverable. *See Willis v. Maverick*, 760 S.W.2d 642, 547 (Tex. 1988) (attorney-malpractice actions subject to discovery rule because of fiduciary relationship between attorney and client and client's lack of actual or constructive knowledge of injury); *Slay v. Burnett Trusts*, 187 S.W.2d 377, 394 (1945) (trustee). The discovery of such claims may relate to the fiduciary's actions or inactions. As a result, consideration should be given to retaining files and other information or documentation relevant to these engagements far beyond the standard period.

G. Take The High Road

Finally, common sense probably provides the best guide to avoiding fiduciary-related litigation. When representing a fiduciary, both the fiduciary and his or her attorney (as the fiduciary's agent) appear to be held to a higher standard. Thus, care should be taken by both in carrying out their respective roles. Some final suggestions include:

- Avoid "Rambo" litigation;
- Be cognizant of a fiduciary's duties of disclosure;
- Do not allow fiduciary-client to use attorney's services to enable a clear breach of his or her duties;
- Consider when to put matters in writing and when not to – even to the fiduciary; and
- Appropriate payment and segregation of fees and expense;

XV. CONCLUSION

In short, fiduciary duties lead to fiduciary litigation. Hopefully, the proceeding discussion provides some reminders of issues to be aware of when addressing fiduciary

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XVI. EXHIBITS

Exhibit A

Texas Pattern Jury Charge on Breach of Duty by Trustee—Other Than Self-Dealing

QUESTION ___

Did *TRUSTEE* fail to comply with one or more of the following duties?

Answer "Yes" or "No" as to each.

[List duties alleged to have been breached and the standard of care applicable to each, using language from the trust document, Texas Trust Code, or common law, as appropriate. See comment below].

1. Answer: _____
2. Answer: _____
3. Answer: _____

PJC 236.9

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Exhibit B

Texas Pattern Jury Charge on
Breach of Duty by Trustee—Self-Dealing—Duties Not Modified or Eliminated by Trust

QUESTION ___

Did *TRUSTEE* comply with his fiduciary duty to *BENEFICIARY* in connection with *[describe self-dealing transaction]*?

TRUSTEE owed *BENEFICIARY* a fiduciary duty. To prove he complied with this duty in connection with *[describe self-dealing transaction]*, *TRUSTEE* must show that—

a. the transaction in question was fair and equitable to BENEFICIARY; and

b. TRUSTEE made reasonable use of the confidence placed in him by SETTLOR; and

c. TRUSTEE acted in good faith and in accordance with the purposes of the trust in connection with the transaction in question; and

d. TRUSTEE placed the interests of BENEFICIARY before his own, did not use the advantage of his position to gain any benefit for himself at the expense of BENEFICIARY, and did not place himself in any position where his self-interest might conflict with his obligations as trustee; and

e. TRUSTEE fully and fairly disclosed to BENEFICIARY all material facts known to TRUSTEE concerning the transaction in question that might affect Beneficiary's rights.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

PJC 236.10

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Exhibit C

Texas Pattern Jury Charge on
Breach of Duty by Trustee—Self-Dealing—Duties Modified But Not Eliminated by Trust

QUESTION ___

Did *TRUSTEE* comply with his duties as trustee in connection with the *purchase of trust property*?

TRUSTEE complied with *his* duties if *his purchase of the trust property was for fair and adequate consideration* and *he* acted in good faith and in accordance with the purposes of the trust.

"Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

by trust).

PJC 235.11

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Exhibit D

Texas Pattern Jury Charge on
Breach of Duty by Trustee—Self-Dealing—Duty of Loyalty Eliminated

QUESTION ___

Did *TRUSTEE* fail to comply with *his* duty as trustee when *he purchased the trust property*?

A trustee fails to comply with his duty as trustee if he fails to act in good faith or fails to act in accordance with the purposes of the trust.

Good faith" means an action that is prompted by honesty of intention and a reasonable belief that the action was probably correct.

Answer "Yes" or "No."

Answer: _____

PJC 235.12

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Exhibit E

Texas Pattern Jury Charge on
Liability of Cotrustees—Not Modified by Document

If you have answered Question _____ ["Yes"] ["No"], *[see comment]* then answer the following question. Otherwise, do not answer the following question.

QUESTION 1

Was TRUSTEE's failure to insure the trust property a serious breach of his duties as trustee?

Answer "Yes" or "No."

Answer: _____

If you have answered Question 1 "Yes," then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Did OTHER TRUSTEE exercise reasonable care to prevent TRUSTEE from failing to insure the trust property and to compel TRUSTEE to redress the failure to insure the trust property?

Answer "Yes" or "No"

Answer: _____

PJC 235.17

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Exhibit F

Texas Pattern Jury Charge on
Liability of Successor Trustees—Not Modified by Document

If you have answered Question _____ ["Yes"] ["No"], *[see comment]* then answer the following question. Otherwise, do not answer the following question.

QUESTION ____

Did *SUCCESSOR TRUSTEE,* the successor trustee, fail to comply with duties with respect to the conduct of *PREDECESSOR TRUSTEE,* the predecessor trustee?

A successor trustee fails to comply with his duties with respect to the conduct of a predecessor trustee if the successor trustee knows or should have known that the predecessor trustee failed to comply with his duties and the successor trustee *(1) improperly permits the situation to continue or (2) fails to make a reasonable effort to compel the predecessor trustee to deliver the trust property or (3) fails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor trustee.*

Answer "Yes" or "No."

Answer: _____

PJC 235.18

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"CLICK BAIT" FOR THE COURTS & OTHER MANDAMUS PRACTICE TIPS

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With Steven K. Hayes, *"Click Bait" for the Courts & Other Mandamus Practice Tips*, STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED CIVIL TRIALS COURSE, Chapter 24 (2022).

With Kirk Cooper, *Help Us Help You: Brief-writing & Oral Argument Tips from Court Staff*, STATE BAR OF TEXAS PROF. DEV. PROGRAM, CIVIL APPELLATE 101 COURSE, Chapter 10 (2020).

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Charting a Summary Judgment: Tips for Getting or Resisting Summary Judgment, STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED CIVIL TRIALS COURSE, Chapter 7.2 (2019).

With Margot B.T. Stander and Cliffie Wesson, *More Appealing, Professionalism in the Courts of Appeals*, STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED CIVIL APPELLATE PRACTICE COURSE, Chapter 9 (2013).

Intermediate Appellate Court Use of Rule 38.1(i): Epidemic or False Alarm?, 24 APPELLATE ADVOCATE 403 (2012).

Frequently Abused Rules of Appellate Procedure in the Intermediate Appellate Courts & Some Traps in the TRAPs, STATE BAR OF TEXAS PROF. DEV. PROGRAM, APPELLATE PRACTICE 101 COURSE, Chapter 12 (2011).

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TABLE OF CONTENTS

I. INTRODUCTION

The following paper reviews recent supreme court and intermediate court mandamus cases,[1] provides some recent mandamus statistics, and includes comments on best practices contributed anonymously by staff attorneys of the intermediate courts of appeals.[2] Nothing in this paper should be taken as the recommendation or view of a specific court, justice, or individual.

II. ABBREVIATION KEY

This paper uses the following abbreviations:

- RPI: real party in interest.
- TRO: temporary restraining order.
- RTP: responsible third party.
- ESI: electronically stored information.
- DWOJ: dismissal for want of jurisdiction.
- UM/UIM: uninsured motorist/underinsured motorist.
- SAPCR: suit affecting the parent-child relationship.
- MSA: mediated settlement agreement (featured heavily in family law).
- OAG: Office of Attorney General (also featured heavily in family law).
- UCCJEA: Uniform Child Custody Jurisdiction and Enforcement Act.
- DFPS: Department of Family and Protective Services.
- TCPA: Texas Citizens Participation Act.
- TMLA: Texas Medical Liability Act.
- PUC: Public Utilities Commission.
- TRAP: Texas Rule of Appellate Procedure.
- TCPA: Texas Citizens Participation Act.

Any mention of relief in a case parenthetical should be read as a grant of mandamus relief. Additionally, although the primary focus of this paper is on civil mandamus cases, occasionally, as in Section III.A.3., criminal cases may be referenced when their examples are equally applicable to civil cases.

III. WHO: Identifying the respondent

The supreme court and intermediate appellate courts have overlapping mandamus jurisdiction, *see State v. Naylor*, 466 S.W.3d 783, 793 (Tex. 2015), but the supreme court has jurisdiction over more types of respondents, and the fourteen intermediate courts of appeals are limited to their respective districts.[3] Please note that a relator can seek mandamus relief directly in the supreme court in rare instances, *see id.*, but "the remedy of mandamus must be pursued in the lower courts unless it is made plain that urgent

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[1]Note that for ease in identifying cases helpful within the reader's jurisdiction, footnotes containing citations to cases from more than one of the fourteen intermediate courts are organized first by court number and then by most recent date. *See* The Bluebook: A Uniform System of Citation R.1.4, at 65 (Harvard L. Rev. Ass'n et al. eds., 21st ed. 2020) (stating that authorities should be ordered in a logical manner). However, where redundant parentheticals could be eliminated by use of "same," the order of citation may instead reflect this convenience.

[2]I am grateful for the proofreading and editing assistance from Second Court of Appeals staff attorneys Lisa West, Rebecca Heinemann, and Charles Hill and from my former law school classmate, Deanna Belknap, and for the comments of and guidance provided by members of the Texas Association of Appellate Court Attorneys and co-presenter Steve Hayes.

[3]The soon-to-be-formed Fifteenth Court of Appeals, in contrast, will have statewide jurisdiction. *See* Tex. Gov't Code Ann. § 22.201(p). This paper's focus is on the fourteen intermediate courts of appeals.

necessity calls for the exercise of the original jurisdiction of the Supreme Court," *In re Corpus Christi Liquefaction, LLC*, 588 S.W.3d 275, 278 (Tex. 2019) (orig. proceeding) (per curiam) (quoting *Love v. Wilcox*, 28 S.W.2d 515, 521 (Tex. 1930) (orig. proceeding)). A litigant's misunderstanding of the law "is not a compelling reason" for the supreme court to consider a mandamus argument that has not first been reviewed in the intermediate appellate court. *State v. Naylor*, 466 S.W.3d 783, 793–94 (Tex. 2015). And because jurisdiction is determined by statute, the proceeding—original or appellate—will be dismissed (or denied) unless the filing party has brought their request via the appropriate, statutorily determined procedural vehicle. *See* Tex. Gov't Code Ann. § 22.221; *Conner v. State*, 588 S.W.3d 702, 704 (Tex. App.—Waco 2019, order) (per curiam) (dismissing motion filed in closed appeal because intermediate appellate court no longer had jurisdiction).

A. Potential respondents as to whom the intermediate court may issue mandamus relief

1. Most respondents in the fourteen intermediate courts are current trial judges.

"The respondent," most of the time, is the trial court judge currently presiding over a case. A party petitioning for mandamus relief will file its complaint about that judge in the intermediate appellate court district in which the trial court is located. *See* Tex. Gov't Code Ann. § 22.221(b); *see also* Section VII.A., *infra*. Under Government Code Section 22.221, an intermediate appellate court—or one of its justices—may issue a writ of mandamus against a judge of a district, statutory county, statutory probate, or county court in the appellate court's district; a judge of a district court who is acting as a magistrate at a court of inquiry under Code of Criminal Procedure Chapter 52 in the appellate court's district; or an associate judge of a district or county court appointed by a judge under Family Code Chapter 201 in the appellate court's district. Tex. Gov't Code Ann. § 22.221(b); *see also* Tex. Const. art. V, § 6(a) (providing that intermediate appellate courts "shall have such other jurisdiction, original and appellate, as may be prescribed by law"); *In re Rodriguez*, No. 13-21-00003-CV, 2021 WL 79289, at *1–2 (Tex. App.—Corpus Christi–Edinburg Jan. 8, 2021, orig. proceeding) (mem. op.) (DWOJ when relator sought to compel trial court located outside of appellate court's district to rule on his motion but failed to show that mandamus was necessary to enforce the appellate court's jurisdiction).[4]

2. Mandamus may also lie against respondents related to an election or political party convention.

Other potential respondents for relief in the intermediate courts may be public or political-party officials in connection with an election or a political-party convention. *See* Tex. Elec. Code Ann. § 273.061(a); *In re Petricek*, 629 S.W.3d 913, 916–18 (Tex. 2021) (orig. proceeding); *In re Durnin*, 619 S.W.3d 250, 251 (Tex. 2021) (orig. proceeding); *see also In re Anthony*, 642 S.W.3d 588, 588–91 (Tex. 2022) (orig. proceeding) (construing Election Code Section 141.031 and granting relief from city secretary's rejection of mayoral candidate's application that did not list an occupation because candidate was retired and therefore had no occupation to list).[5] However, "Texas courts do not sit as general overseers

[4]*See also Memon v. Meisner*, Nos. 13-20-00340-CV, -426-CV, 2020 WL 6343339, at *1, *3 (Tex. App.—Corpus Christi–Edinburg Oct. 28, 2020, pet. denied) (mem. op.) (DWOJ of combined appeal and mandamus when notice of appeal in transferred case was untimely and court lacked jurisdiction over mandamus after it dismissed the appeal).

[5]*See also In re Davis*, 607 S.W.3d 862, 863 (Tex. App.—Austin 2020, orig. proceeding) (granting relief when party chairs received proof that RPIs were ineligible but failed to comply with statutory duty to declare ineligibility), *mand. conditionally granted sub nom. In re Green Party of Tex.*, 630 S.W.3d 36 (Tex. 2020) (granting relief from Austin court's declaring the candidates ineligible); *In re Linder*, No. 03-19-00553-CV, 2019 WL 3978582, at *1 (Tex. App.—Austin Aug. 22, 2019, orig. proceeding) (mem. op.) (granting relief by ordering city council to modify proposition ballot language on citizen-initiated ordinance when council's language inadequately described proposed ordinance); *In re Sifuentes*, No. 04-21-00041-

of election processes; they sit only to resolve any concrete and justiciable disputes that may arise." *In re Khanoyan*, 637 S.W.3d 762, 764 (Tex. 2022) (orig. proceeding) (denying relief based on "settled precedents that sharply limit judicial authority to intervene in ongoing elections"); *see In re Morris*, 663 S.W.3d 589, 593–94 (Tex. 2023) (orig. proceeding) (denying relief and noting that after an election, courts "have a far more robust role to play in evaluating the results and the process by which those results were obtained" and that "[n]one of the relief requested in this pre-election challenge warrants a departure" from the court's noninterference principles); *see also In re Self*, 652 S.W.3d 829 (Tex. 2022) (orig. proceeding) (denying relief when relators sought to remove Libertarian party opponents from the ballot for failure to pay a statutory filing fee "[n]early four months" after the facts giving rise to their claims without an explanation for the delay and seeking relief within the 18 days remaining before the Election Code deadline).

3. Mandamus may also lie against other respondents who interfere with the intermediate court's jurisdiction.

The intermediate court can issue "all other writs necessary to enforce the jurisdiction of the court." Tex. Gov't Code Ann. § 22.221(a). This means that the respondent could be a district clerk or court reporter, but *only* if that individual is interfering with the *intermediate* court's jurisdiction. *See id.*; *see also In re Sheppard*, No. 02-17-00141-CV, 2017 WL 2351094, at *1 (Tex. App.—Fort Worth May 5, 2017, orig. proceeding) (mem. op.) ("The intermediate courts of appeals have no authority to issue a writ of mandamus against a district clerk unless the clerk is interfering with the court's jurisdiction.").[6] That is, if there is no filed notice of appeal and the respondent is not a trial judge in one of the categories listed in the statute,[7] then unless the petition involves an election or political party, the appellate court will likely

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CV, 2021 WL 640249, at *1 (Tex. App.—San Antonio Feb. 19, 2021, orig. proceeding) (mem. op.) (granting relief when city secretary misconstrued city charter's term-limits provision); *In re Dominguez*, 621 S.W.3d 899, 901, 907 (Tex. App.—El Paso 2021, orig. proceeding) (denying relief when RPI met election code residency requirements); *In re Fierro*, 642 S.W.3d 1, 2–3 (Tex. App.—El Paso 2021, orig. proceeding) (denying relief when RPI satisfied constitutional residency requirements); *In re Powell*, No. 14-20-00035-CV, 2020 WL 262721, at *1 (Tex. App.—Houston [14th Dist.] Jan. 17, 2020, orig. proceeding) (mem. op.) (dismissing petition to compel election officials to put name on ballot after relator subsequently filed motion to dismiss); *In re Walker*, 595 S.W.3d 841, 842–43 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding) (granting relief because party chair had ministerial duty to declare candidate ineligible if presented with public records conclusively showing ineligibility).

[6] *See also In re Sepulveda*, No. 05-10-01144-CV, 2010 WL 3609540, at *1 (Tex. App.—Dallas Sept. 17, 2010, orig. proceeding) (mem. op.) (denying relief against court reporter as moot after reporter's record filed); *In re Steptoe*, No. 14-19-00672-CR, 2019 WL 4511331, at *1 (Tex. App.—Houston [14th Dist.] Sept. 19, 2019, orig. proceeding) (mem. op., not designated for publication) (DWOJ when relator failed to show that issuance of writ against district clerk was necessary to enforce court's jurisdiction); *cf.* Tex. Gov't Code Ann. § 24.011 (stating that a *district* court judge may grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari, and supersedeas, "and all other writs necessary to the enforcement of the court's jurisdiction"); *In re Breckles*, No. 08-22-00048-CR, 2022 WL 804106, at *1–2 (Tex. App.—El Paso Mar. 17, 2022, orig. proceeding) (mem. op., not designated for publication) (DWOJ after holding that record did not demonstrate district clerk's interference with appellate court's jurisdiction but noting that when a district clerk refuses to accept a pleading presented for filing, the party presenting the document may seek relief by filing an application for writ of mandamus in the *district* court).

[7] For example, a justice of the peace is not listed in the statute. *See In re Garcia*, No. 13-18-00651-CV, 2018 WL 6219254, at *1–2 (Tex. App.—Corpus Christi–Edinburg Nov. 28, 2018, orig. proceeding) (mem. op.) (DWOJ when court did not have jurisdiction to issue a writ against a justice of the peace and relators failed to show that requested relief was otherwise necessary to enforce court's jurisdiction). Nor is

dismiss the petition for writ of mandamus for want of jurisdiction. *See In re Davis*, No. 01-19-00246-CR, 2019 WL 2292633, at *1 (Tex. App.—Houston [1st Dist.] May 30, 2019, orig. proceeding) (mem. op., not designated for publication) (DWOJ when court reporter's action of not transcribing video recordings did not concern a pending appeal).[8] The fourteen intermediate courts of appeals lack authority under TRAP 29.3 to afford statewide relief to nonparties. *In re Abbott*, 645 S.W.3d 276, 280, 283 (Tex. 2022) (orig. proceeding) (noting that TRAP 29.3 provides only the limited authority to preserve the parties' rights, not the general authority to reinstate temporary injunctions of any nature).

B. Potential respondents as to whom the supreme court may issue mandamus relief

The supreme court (or a supreme court justice) may issue writs not only against a statutory county court, statutory probate court, or district court judge but also against a court of appeals or a court of appeals justice, as well as "any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals." Tex. Gov't Code Ann. § 22.002(a); *see also* Tex. Const. art. V, § 3(a) ("The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.").

The supreme court (or a supreme court justice) may issue a writ of mandamus to compel a county court judge, statutory probate court judge, or district judge to proceed to trial and judgment in a case. Tex. Gov't Code Ann. § 22.002(b). And only the supreme court has the authority to issue a writ of mandamus, injunction, or any "other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform." *Id.* § 22.002(c); *see In re City of Galveston*, 622 S.W.3d 851, 855 (Tex. 2021) (orig. proceeding); *see also In re Stetson Renewables Holdings, LLC*, 658 S.W.3d 292, 297 (Tex. 2022) (orig. proceeding) (denying relief sought against comptroller because "courts should not interfere in the executive's administration of the state government by mandamus unless the law shows that an official's conduct (or lack of conduct) is unlawful and not an exercise of discretion"); *In re Brown*, 614 S.W.3d 712, 714 (Tex. 2020) (orig. proceeding) (granting relief on petition brought by wrongfully convicted relator when comptroller violated "purely ministerial" duty under the Tim Cole Act).[9]

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a court reporter. *In re Smiley*, No. 14-19-00946-CR, 2019 WL 7372058, at *1 (Tex. App.—Houston [14th Dist.] Dec. 31, 2019, orig. proceeding) (mem. op., not designated for publication).

[8]*See also In re Grimes*, No. 01-19-00212-CR, 2019 WL 1716003, at *1 (Tex. App.—Houston [1st Dist.] Apr. 18, 2019, orig. proceeding) (mem. op., not designated for publication) (DWOJ because court had no power to issue writ against county clerk when not required to enforce its jurisdiction); *In re Watson*, No. 03-21-00231-CV, 2021 WL 2006478, at *1 (Tex. App.—Austin May 19, 2021, orig. proceeding) (mem. op.) (same as to comptroller); *In re Oxford*, No. 03-21-00205-CV, 2021 WL 2006479, at *1 (Tex. App.—Austin May 19, 2021, orig. proceeding) (mem. op.) (same as to district attorney); *In re Haverkamp*, No. 13-20-00059-CV, 2020 WL 486665, at *1 (Tex. App.—Corpus Christi–Edinburg Jan. 29, 2020, orig. proceeding) (mem. op.) (same as to university committee and other nonjudicial officials); *In re Albarado*, No. 13-18-00629-CV, 2018 WL 5993952, at *1 (Tex. App.—Corpus Christi–Edinburg Nov. 15, 2018, orig. proceeding) (mem. op.) (same as to district clerk); *cf. In re Kruglov*, No. 14-20-00383-CR, 2020 WL 5522813, at *1 (Tex. App.—Houston [14th Dist.] Sept. 15, 2020, orig. proceeding) (mem. op., not designated for publication) (noting that appellate jurisdiction is implicated when the county clerk fails to forward a notice of appeal).

[9]The Tim Cole Act, codified in Civil Practice and Remedies Code Chapter 103, sets out how a person who has been wrongfully imprisoned may be eligible for compensation and health-benefits coverage from the State. *See generally* Tex. Civ. Prac. & Rem. Code Ann. §§ 103.001–.154; *In re Lester*, 602 S.W.3d

C. What happens when the respondent (figuratively) disappears

1. New judges will result in an abatement.

Reviewing a new judge is a possible get-out-of-mandamus-free pass for the appellate courts because "[m]andamus will not issue against a new judge for what a former one did." *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 228 (Tex. 2008) (orig. proceeding). Under TRAP 7.2(b), "[i]f the case is an original proceeding under Rule 52, the court must abate the proceeding to allow the successor to reconsider the original party's decision." Tex. R. App. P. 7.2(b); *see In re Eagleridge Operating, LLC*, 642 S.W.3d 518, 524 (Tex. 2022) (orig. proceeding) (noting that after briefs on the merits were filed in the supreme court, it abated the original proceeding under TRAP 7.2(b) to allow the successor trial judge to reconsider the original ruling). However, TRAP 7.2(b) "does not require indefinite abatement." *In re Facebook, Inc.*, 625 S.W.3d 80, 86 n.2 (Tex. 2021) (orig. proceeding) (stating that over four months was sufficient time to allow a successor judge to reconsider the original judge's decision), *cert. denied sub nom Doe v. Facebook*, *Inc.*, 142 S. Ct. 1087 (2022). So when relying on a mandamus abatement to buy some negotiating time, be aware that the intermediate appellate court is also watching the clock!

2. Recused judges will result in either abatement or denial.

The supreme court addressed mandamus as to recused judges in *In re Blevins*. In that case, a mandamus proceeding arising from a SAPCR, the trial judge recused after signing the complained-of order transferring possession of two children from the foster parents to their father (who had been deported to Mexico), and a replacement judge was assigned. 480 S.W.3d 542, 542–43 (Tex. 2013) (orig. proceeding) (per curiam). The supreme court decided to leave to the intermediate courts' discretion whether to deny such a mandamus petition or to abate for reconsideration by the new judge, stating,

> We conclude that under circumstances such as those before us, appellate courts should either deny the petition for mandamus, as was done in [*In re*] *Toups Law Firm*[, No. 10-10-00226-CV, 2010 WL 3911420 (Tex. App.—Waco Oct. 6, 2010, orig. proceeding) (mem. op.)] and [*In re*] *Shellhorse*[*,* No. 10-10-00111-CV, 2010 WL 2706115 (Tex. App.—Waco July 7, 2010, orig. proceeding) (mem. op.)] or abate the proceedings pending consideration of the challenged order by the new trial judge, as was done in [*In re*] *Gonzales*[, 391 S.W.3d 251 (Tex. App.—Austin 2012, orig. proceeding)]. Because mandamus is a discretionary writ, the appellate court involved should exercise discretion to determine which of the two approaches affords the better and more efficient manner of resolving the dispute.

Id. at 544; *see In re Hays*, No. 07-21-00019-CV, 2021 WL 1741880, at *1 (Tex. App.—Amarillo Apr. 1, 2021, orig. proceeding) (dismissing as moot when trial judge who signed attorney disqualification order recused and newly assigned judge reconsidered and denied the motion to disqualify).

D. Same judge on the way back down

Whether a petition for writ of mandamus succeeds or fails, the case will return to its originating trial court and judge (barring, of course, an election-cycle bench change or a recusal). Accordingly, the mandamus petition should be as neutral as possible: If the trial judge's action is clearly abusive or erroneous enough to support mandamus relief, the record will do most of the talking.

469, 471 (Tex. 2020) (orig. proceeding). As to Tim Cole Act cases, Civil Practice and Remedies Code Section 103.051 provides that an applicant may challenge the comptroller's denial of a compensation claim by bringing an action for mandamus relief in the supreme court. *Lester*, 602 S.W.3d at 472 (citing Tex. Civ. Prac. & Rem. Code Ann. § 103.051(d)–(e); Tex. Gov't Code Ann. § 22.002(c)).

IV. WHAT: (Mostly) two items required to get relief

"Mandamus relief is an extraordinary remedy requiring the relator to show that (1) the trial court clearly abused its discretion and (2) the relator lacks an adequate remedy on appeal." *In re Acad., Ltd.*, 625 S.W.3d 19, 25 (Tex. 2021) (orig. proceeding) (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36, 138 (Tex. 2004) (orig. proceeding)).[10] Mandamus is flexible, *see id.* at 36, and "a proper vehicle . . . to correct blatant injustice that otherwise would elude review by the appellate courts," *In re Reece*, 341 S.W.3d 360, 374 (Tex. 2011) (orig. proceeding) (referencing *Prudential Ins. of Am.*, 148 S.W.3d at 138). As the supreme court has explained, "some calls are so important—and so likely to change a contest's outcome—that the inevitable delay of interim review is nevertheless worth the wait." *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 461 (Tex. 2008) (orig. proceeding). But sometimes the calls are important only to the parties. And sometimes there's gamesmanship and strategy at play. And there can seem to be exceptions to every rule, which is why mandamus is a frustrating practice area: It's a moving target, wrapped in a riddle, enshrouded in a mystery.[11]

A. Clear Abuse of Discretion

The trial court abuses its discretion when it fails to correctly analyze or apply the law to the undisputed facts, when it acts arbitrarily or unreasonably, or when its ruling is based on factual assertions unsupported by the record. *See In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302–03 (Tex. 2016) (orig. proceeding) (per curiam); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). The abuse of discretion standard "has different applications in different circumstances." *Walker*, 827 S.W.2d at 839. "The relator must establish that the trial court could reasonably have reached only one decision." *Id.* at 840; *see In re Murrin Bros. 1885, Ltd.*, 603 S.W.3d 53, 56 (Tex. 2019) (orig. proceeding) ("Mandamus relief is only appropriate when the relators have established that only one outcome in the trial court was permissible under the law."). The supreme court has noted, for example, that when all of a case's facts and circumstances "unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion." *In re State Farm Mut. Auto. Ins.*, 629 S.W.3d 866, 877–78 (Tex. 2021) (orig. proceeding) (quoting *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956), and holding trial court abused its discretion by denying motions to bifurcate UM/UIM trials).

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[10]Note that while a relator must show both a clear abuse of discretion **AND** an inadequate appellate remedy, the reviewing court may deny relief based on the lack of one without reaching the other. And on reconsideration, the appellate court could determine that there was no abuse of discretion after all. *See*, *e.g., In re Larsen*, 635 S.W.3d 386, 388 (Tex. App.—San Antonio 2021), *op. withdrawn & superseded on reconsideration*, No. 04-21-00046-CV, 2021 WL 4555814 (Tex. App.—San Antonio Oct. 6, 2021, orig. proceeding) (mem. op.). In the initial *Larsen* opinion, the intermediate court granted relief from death-penalty and monetary sanctions imposed for spoliation of evidence after the relator showed that nothing in the trial court revealed a duty to preserve evidence and that it lacked an adequate appellate remedy. 635 S.W.3d at 388–89. On reconsideration en banc on the RPI's motion, however, the court changed course, determined that the relator had failed to show an abuse of discretion, and denied the mandamus petition. 2021 WL 4555814, at *1.

[11]*Cf.* Corneill A. Stephens, *Escape from the Battle of the Forms: Keep It Simple, Stupid*, 11 Lewis & Clark L. Rev. 233, 253 n.89 (2007) (citing Winston S. Churchill, The First Month of War (radio broadcast Oct. 1, 1939), *in* 6 Winston S. Churchill: His Complete Speeches 1897–1963, at 6160 (Robert Rhodes James ed., 1974)); BrainyQuote, *Winston Churchill Quotes*, https://www.brainyquote.com/quotes/winston_churchill_156896 (quoting Churchill's 1939 description of Russia as "a riddle wrapped in a mystery inside an enigma") (last visited May 22, 2022).

1. Deference

Deference is the name of the game when it comes to the way a trial judge manages his or her court, *see In re Mahindra, USA Inc.*, 549 S.W.3d 541, 550 (Tex. 2018) (orig. proceeding), and the reviewing court may not substitute its judgment for the trial court's judgment in "matters committed to the trial court's discretion." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). Likewise, the court of appeals will defer to the trial court's factual determinations that have evidentiary support. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding). Conflicting inferences requiring factual resolution will preclude the grant of relief because the appellate court is not a fact-finding court; it may only issue a writ of mandamus when the evidence presented and the outcome required are both truly clear. *In re Dominguez*, 621 S.W.3d 899, 906 (Tex. App.—El Paso 2021, orig. proceeding).

2. Legal determinations

The court of appeals will review a trial court's legal determinations de novo. *Labatt Food Serv., L.P.*, 279 S.W.3d at 643. A trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker*, 827 S.W.2d at 840. For example, in *In re State*, the supreme court held that the trial court abused its discretion when it failed to properly apply severance requirements by allowing the plaintiffs to sever a condemnation case into eight separate cases (resulting from the landowners' subdivision of property into eight parcels after the State sought condemnation). 355 S.W.3d 611, 612–14 (Tex. 2011) (orig. proceeding). In noting that both parties—in eight separate cases on an issue (property value) that could be tried once—would be paying the same lawyers and the same experts, the court concluded that the trial court "abused its discretion by ordering a severance that, by breaking up a deeply interrelated set of legal and factual issues, prejudices the parties and causes great inconvenience." *Id.* at 614.

B. Inadequate appellate remedy

Without limitations on review, mandamus would cease to be an extraordinary writ. *Walker*, 827 S.W.2d at 842. Mandamus disrupts trial proceedings and forces the parties to address issues in an appellate court that might otherwise be resolved as discovery progresses and evidence is developed at trial. *Id.*[12] Moreover, the cost and delay involved in mandamus proceedings can be substantial—years can pass awaiting rulings on collateral discovery matters. *Id.* (noting that original proceeding involving collateral discovery matters had delayed trial on the merits by two years). One of the principal reasons that mandamus should remain restricted is to avoid interlocutory appellate review of errors that, ultimately, may prove to be harmless. *Id.* at 843.

With the above in mind, an appellate remedy's inadequacy "has no comprehensive definition," but determining it usually requires a "careful balance of jurisprudential considerations" that "implicate both public and private interests." *In re Ford Motor Co.*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding) (per curiam) (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding)); *see also In re McAllen Med. Ctr. Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding) ("Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review."). This balance depends heavily on the circumstances of each case and must be guided by analyzing principles rather than applying simple rules that treat cases as categories.[13] *McAllen Med. Ctr.*, 275 S.W.3d at 464. Mandamus relief is supposed to be limited to situations involving "manifest and urgent necessity and not for grievances that may be addressed by other remedies." *City of Hous. v. Hous. Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 580 (Tex. 2018); *cf. Dipprey v. Double Diamond, Inc.*, 637 S.W.3d 784, 792 (Tex. App.—Eastland 2021, no pet.) (noting that bench trial focused on interpretation of governing documents and various contracts); *In re Dipprey*, 582 S.W.3d 531, 533, 535

[12]This assertion is illustrated in practice by some of the dismissal cases in the mandamus matrix.

[13]Although this is generally true, based on the research presented in this paper, it appears that there are certain categories of original proceedings that are more likely to result in mandamus relief.

(Tex. App.—Eastland 2018, orig. proceeding) (denying relief when trial court's interlocutory ruling on documents' legal interpretation could be corrected on appeal); *In re Double Diamond, Inc.*, 582 S.W.3d 535, 536, 538 (Tex. App.—Eastland 2018, orig. proceeding) (mem. op.) (same).

"An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). But "when the benefits [of mandamus review] outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate." *Id.* In evaluating the benefits and detriments, the court will "consider whether mandamus will preserve important substantive and procedural rights from impairment or loss," *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding), such as when "the appellate court would not be able to cure the error, when the party's ability to present a viable claim or defense is vitiated, or when the error cannot be made part of the appellate record," *ERCOT, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 641 (Tex. 2021) (orig. proceeding) (quoting *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding) (per curiam)).

The court should also consider whether mandamus will allow it "to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments" and "whether mandamus will spare litigants and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *Team Rocket*, 256 S.W.3d at 262 (quoting *Prudential Ins. Co. of Am.*, 148 S.W.3d at 136).

V. WHEN: Avoiding Laches

Waiting too long to file a petition for writ of mandamus can be a mistake if there is no objectively good reason to delay. *See In re Am. Airlines, Inc.*, 634 S.W.3d 38, 43 (Tex. 2021) (orig. proceeding) (citing *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (orig. proceeding) (per curiam) (delay warranted); *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367–68 (Tex. 1993) (orig. proceeding) (unjustified delay)); *see also In re Hotze*, 627 S.W.3d 642, 644–45 (Tex. 2020) (orig. proceeding) (denying relief when relators delayed challenging governor's proclamation for more than 10 weeks and failed to seek relief first in the lower courts, and election was already underway, threatening voter confusion).[14]

While "mandamus is not an equitable remedy, equitable principles largely govern its issuance." *In re Dawson*, 550 S.W.3d 625, 631 (Tex. 2018) (orig. proceeding) (per curiam) (citing *Int'l Profit Assocs., Inc.*, 274 S.W.3d at 676). "To invoke the equitable doctrine of laches, the [RPI] ordinarily must show an unreasonable delay [by the relator] in asserting its rights, and also the [RPI's] good faith and detrimental change in position because of the delay." *In re Laibe Corp.*, 307 S.W.3d 314, 318 (Tex. 2010) (orig. proceeding) (per curiam) (citing *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 80 (Tex. 1989)); *see In re*

[14]One of the supreme court's most recent cases addressing delay is *In re Whataburger*, 645 S.W.3d 188 (Tex. 2022). That case began in 2013, when the trial court denied the relator's motion to compel arbitration. *Id.* at 192. The relator brought an accelerated interlocutory appeal, and the El Paso court reversed but did not address RPI's cross-points. *Id.* The supreme court granted RPI's petition for review and remanded the case to the El Paso court, which rejected all but one of RPI's arguments and remanded the case to the trial court; the El Paso court's mandate issued in January 2018. *Id.* On remand to the trial court, the relator filed a supplemental motion to compel arbitration, which the trial court denied in July 2018. *Id.* The trial court clerk did not give anyone notice of the ruling at that time. *Id.* at 193 & n.9 (citing Rule of Civil Procedure 306a(3)). Five months later—after the deadline for filing an accelerated appeal—the relator learned of the order and sought reconsideration and a determination of the date that it received notice. *Id.* at 193. The trial court denied the motion for reconsideration in May 2019, and in June 2019, it determined that relator had not received notice until after 90 days. *Id.* The relator then sought mandamus relief in the El Paso court, which issued a non-substantive denial 18 months later (January 2021). *Id.* The supreme court granted mandamus relief because—in addition to finding that the trial court had erred by denying the motion to compel arbitration—the relator had been deprived of an adequate appellate remedy. *Id.* at 198.

RSR Corp., 568 S.W.3d 663, 666 (Tex. 2019) (orig. proceeding) (per curiam) ("This case lies at the intersection of dilatoriness and waiver.").[15] An RPI can waive a laches argument by failing to complain about a relator's lack of timeliness in the trial court (and/or in the court of appeals), particularly if the relator had a good reason to wait. *See In re Chefs' Produce of Hous., Inc.*, 667 S.W.3d 297, 302 n.3 (Tex. 2023) (noting that even if RPI had raised laches in the trial court or court of appeals, such an argument was meritless when relator sought reconsideration and then mandamus relief shortly after the supreme court issued *In re Allstate Indemn. Co.*, 622 S.W.3d 870 (Tex. 2021): "Seeking reconsideration—and when that failed, mandamus relief—in light of a significant, on-point opinion from the state's civil court of last resort is hardly dilatory").

While "a party should [not] be allowed to wait indefinitely for the development of favorable authority before pursuing mandamus relief," when a relator postpones filing a petition for writ of mandamus to await issuance of pending seminal authority from the supreme court, an almost four-month delay may not be unreasonable as a matter of law. *In re MAF Indus., Inc.*, No. 13-20-00255-CV, 2020 WL 6158248, at *3 (Tex. App.—Corpus Christi–Edinburg Oct. 19, 2020, orig. proceeding) (mem. op.) (noting that *In re Mobile Mini, Inc.*, 596 S.W.3d 781 (Tex. 2020) (orig. proceeding) (per curiam), a seminal RTP case, was decided during the four-month interim between the trial court's order and the mandamus petition's filing). In *MAF*, the court noted that *Mobile Mini* was decided four days after the trial court's order denying the relator's motion for leave to designate an RTP and that the RPI did not make an argument about good faith and detrimental change in position because of the delay, which the RPI would have to establish as the party asserting laches. *Id.*; *see also In re Farmers Tex. Cnty. Mut. Ins.*, No. 13-21-00083-CV, 2021 WL 3889425, at *5 (Tex. App.—Corpus Christi–Edinburg Aug. 31, 2021, orig. proceeding) (mem. op.) (concluding that delay between order's August 26, 2020 filing and mandamus petition's March 19, 2021 filing was not unreasonable when the supreme court handed down *In re State Farm Mut. Auto. Ins.*, 629 S.W.3d 866 (Tex. 2021), on the same issues, on the same day the petition was filed, and RPI did not argue about any good faith and detrimental changes in position).

VI. WHY: Categories of grants and denials

The following section examines recent cases to determine why the courts granted relief. These cases and others were used to develop the categories for the matrix discussed below; some of the categories also contain recent or otherwise applicable supreme court cases for reference.

A. Cases resulting in relief

1. Discovery

Over the past five fiscal years (September 1, 2018–August 31, 2023), in civil cases, complaints about discovery were granted more often than any other mandamus petition. This is because there are as many potential discovery violations as there are discovery rules, and many such violations cannot be remedied on appeal, as described by the supreme court:

> [a]n appellate remedy may not be adequate where (1) an appellate court cannot cure the discovery error, such as when confidential information is erroneously made public, (2) the party's ability to present a viable claim or defense—or reasonable opportunity to develop the merits of the case—is 'severely compromised' so that the trial would be a waste of resources, or (3) discovery is disallowed and cannot be made part of the appellate record

[15] *See also In re Kyle Fin. Grp.*, 562 S.W.3d 795, 800 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (granting relief from order granting RPI's motion to disqualify relators' counsel when record showed that RPI had waived right to seek disqualification of counsel through a lengthy and unexplained 13-month delay in their motion, which was filed two months before trial).

such that a reviewing court is unable to evaluate the effect of the trial court's error based on the record.

In re K & L Auto Crushers, LLC, 627 S.W.3d 239, 256 (Tex. 2021) (orig. proceeding). Recent examples of mandamus relief in the context of discovery include:

- When RPI has no standing to bring a Rule 202 proceeding, *In re UBS Fin. Servs. Inc.*, No. 14-20-00087-CV, 2020 WL 5902955, at *1, *4 (Tex. App.—Houston [14th Dist.] Oct. 6, 2020, orig. proceeding) (mem. op.),[16] or the trial court issues an improper order under Rule 202. *See In re Ramirez*, No. 13-21-00215-CV, 2022 WL 627155, at *1 (Tex. App.—Corpus Christi–Edinburg Mar. 3, 2022, orig. proceeding) (mem. op.).[17]

- When production would violate a privilege. *See In re Halliburton Energy Servs., Inc.*, No. 01-22-00009-CV, 2022 WL 2513478, at *1 (Tex. App.—Houston [1st Dist.] July 7, 2022, orig. proceeding) (mem. op.) (granting relief from order granting motion to compel privileged documents when real party's privilege-log request was premature); *In re Alexander*, 580 S.W.3d 858, 865–70 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding) (granting relief from order compelling production in violation of attorney–client and work-product privileges); *see also In re Tex. Dep't of Transp.*, 639 S.W.3d 289 (Tex. App.—Corpus Christi–Edinburg 2021, orig. proceeding) (granting relief when relator met requirements of statutory privilege). Relief is frequently required under these circumstances because once information is disclosed, "loss of confidentiality is irreversible. The bell, once rung, cannot be un-rung, and neither dissemination nor use can be effectively restrained." *In re Bass*, No. 05-21-00102-CV, 2021 WL 3276879, at *2 (Tex. App.—Dallas July 30, 2021, orig. proceeding) (mem. op.) (crime-fraud exception).[18]

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[16]*See also In re City of Dall.*, No. 05-18-00289-CV, 2018 WL 5306925, at *1, *6 (Tex. App.—Dallas Oct. 26, 2018, orig. proceeding) (mem. op.) (granting relief when trial court erroneously granted Rule 202 petition because RPI failed to plead sufficient facts to demonstrate trial court's subject matter jurisdiction and to demonstrate a basis for overcoming governmental immunity).

[17]In *Ramirez*, the former employee of "a constellation of health care companies" sought to set aside an order allowing his presuit deposition to be taken under Rule 202 when counsel for some of those companies had already deposed him in a related suit that had the same nucleus of operative facts, similar parties, and the same or similar causes of action. 2022 WL 627155, at *1, *3, *10 (noting that RPIs' evidence and argument indicated that the requested presuit discovery was unnecessary because the RPIs already had "more than enough information to institute litigation without resorting to Rule 202"); *see In re Hernandez*, No. 13-21-00244-CV, 2022 WL 627232, at *1 (Tex. App.—Corpus Christi–Edinburg Mar. 3, 2022, orig. proceeding) (mem. op.) (same facts and outcome as *Ramirez*, 2022 WL 627155, at *1–10); *In re Estrada*, No. 13-21-00206-CV, 2022 WL 627234, at *1 (Tex. App.—Corpus Christi–Edinburg Mar. 3, 2022, orig. proceeding) (mem. op.) (same); *see also In re City of Tatum*, 567 S.W.3d 800, 805, 809 (Tex. App.—Tyler 2018, orig. proceeding) (granting relief from Rule 202 order when Rule 202 hearing consisted entirely of counsel's arguments and was not supported by the requisite findings), *dism'd as moot*, 2019 WL 141260, at *1 (Tex. App.—Tyler Jan. 9, 2019, orig. proceeding) (mem. op.).

[18]*See also In re Topletz*, No. 05-20-00634-CV, 2020 WL 6073877, at *1 (Tex. App.—Dallas Oct. 15, 2020, orig. proceeding) (mem. op.) (granting relief from postjudgment discovery orders on amount and timing of relator's payments to his attorneys); *In re WHC, LLC*, 570 S.W.3d 349, 354 (Tex. App.—El Paso 2018, orig. proceeding) (granting relief from order requiring disclosure of privileged documents because "[w]hether the documents are prejudicial or harmful to [relator] is not part of the inquiry when evaluating

- When the RPI fails to meet its burden on trade secrets. *See In re Kongsberg Inc.*, 563 S.W.3d 915, 916–17 (Tex. App.—Beaumont 2018, orig. proceeding) (granting relief when trial court erred by finding that RPIs met their burden to prove that the discovery of trade secrets was necessary to the litigation).[19] *But see In re ExxonMobil Corp.*, 635 S.W.3d 631, 635 (Tex. 2021) (orig. proceeding) (per curiam) (holding that a trial court abuses its discretion when it fails to consider whether it could have permitted discovery of confidential or protected trade-secret information under issuance of a protective order).

- When the ordered nonparty discovery violates the Rules of Civil Procedure. *See In re Target Corp.*, No. 02-21-00120-CV, 2021 WL 3144481, at *1, *4 (Tex. App.—Fort Worth July 26, 2021, orig. proceeding) (mem. op.) (granting relief when trial court issued order granting motion to conduct second inspection after it lost jurisdiction over nonparty).[20]

- When the trial court errs by ordering a deposition. *In re C.A.*, No. 02-21-00018-CV, 2021 WL 2753533, at *1 (Tex. App.—Fort Worth July 1, 2021, orig. proceeding) (mem. op.) (granting relief because trial

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whether the communications are privileged and shielded from disclosure"); *see also In re Christus Santa Rosa Healthcare Corp.*, 617 S.W.3d 586, 593 (Tex. App.—San Antonio 2020, orig. proceeding) (medical peer-review privilege); *In re Burdick*, No. 04-19-00833-CV, 2020 WL 1159049, at *1 (Tex. App.—San Antonio Mar. 11, 2020, orig. proceeding) (mem. op.) (spousal privilege); *In re Charles*, No. 01-18-01112-CV, 2019 WL 2621749, at *1 (Tex. App.—Houston [1st Dist.] June 27, 2019, orig. proceeding) (mem. op.) (Fifth Amendment privilege regarding parallel criminal proceeding); *In re Nichol*, 602 S.W.3d 595, 598 (Tex. App.—El Paso 2019, orig. proceeding) (same).

[19]*See also In re 4X Indus., LLC*, 639 S.W.3d 801 (Tex. App.—Houston [14th Dist.] 2021, orig. proceeding) (mem. op.) (granting relief when RPI failed to meet its burden to obtain trade secret information under Rule of Evidence 507).

[20]*See also In re Gen. Datatech, LP*, No. 02-20-00315-CV, 2020 WL 6534341, at *1–2 (Tex. App.—Fort Worth Nov. 6, 2020, orig. proceeding) (mem. op.) (granting relief from trial court's order denying nonparty relator's motion to quash because merits-based discovery was not authorized during pending interlocutory appeal on denial of motion to compel arbitration); *In re Univ. of Tex. at San Antonio*, No. 04-20-00439-CV, 2021 WL 185529, at *1, *4 (Tex. App.—San Antonio Jan. 20, 2021, orig. proceeding) (mem. op.) (granting relief from order compelling production of nonparty's medical records when relator did not have possession, custody, or control of employee-nonparty's medical records or a right to possession equal or superior to the employee's); *In re Saddles Blazin, LLC*, No. 09-20-00209-CV, 2021 WL 377247, at *1 (Tex. App.—Beaumont Feb. 4, 2021, orig. proceeding) (mem. op.) (granting relief from nonparty deposition order when nonparty was a former employee living out-of-state and was not a director, manager, or governing person of the company nor an expert for the company); *In re Berry*, 578 S.W.3d 173, 175 (Tex. App.—Corpus Christi–Edinburg 2019, orig. proceeding) (granting relief after trial court allowed service of a subpoena and notice of oral deposition on nonparty witness through substituted service, which is not allowed by Rule 205.1). *But see In re United Fire Lloyds*, 578 S.W.3d 572, 575 (Tex. App.—Tyler 2019, orig. proceeding) (mem. op.) (granting relief on relator's challenge to trial court's order quashing relator's depositions on written questions to nonparties), *dism'd as moot*, 2019 WL 1923063, at *1 (Tex. App.—Tyler Apr. 30, 2019, orig. proceeding) (mem. op.).

court abused its discretion by compelling deposition of alleged incapacitated adult without first conducting an examination sufficient to make an independent competency ruling).[21]

- When the trial court improperly denies a motion to compel. *In re FEDD Wireless LLC.*, 567 S.W.3d 470, 473, 480 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding) (granting relief when trial court denied relators' motion to compel production of document attached by RPIs to their summary-judgment motion that RPIs argued was inadvertently produced attorney–client privileged communication; RPIs did not timely invoke TRCP 193.3(d)'s snap-back privilege and relators had no adequate appellate remedy).

- When the trial court's orders compelling discovery are overbroad, *see In re Tex. Christian Univ.*, No. 02-20-00350-CV, 2021 WL 126578, at *1 (Tex. App.—Fort Worth Jan. 14, 2021, orig. proceeding) (mem. op.),[22] or require disclosure of irrelevant information unsupported by the pleadings, *see In re*

[21]*See also In re Cook Compression LLC*, No. 04-20-00517-CV, 2020 WL 6928397, at *1, *4 (Tex. App.—San Antonio Nov. 25, 2020, orig. proceeding) (mem. op.) (granting relief from order granting motion to compel apex deposition when hearing was decided on arguments and no evidence was admitted); *In re Landstar Ranger, Inc.*, No. 06-20-00047-CV, 2020 WL 5521136, at *1, *6 (Tex. App.—Texarkana Sept. 15, 2020, orig. proceeding) (mem. op.) (granting relief from order overruling relator's motion for protective order as to its out-of-state corporate representatives when the trial court failed to account for supreme court's COVID-19 safety-procedure requirements in ordering representatives to personally appear for depositions); *In re Jay Mgmt. Co.*, No. 09-19-00159-CV, 2019 WL 3720102, at *1, *4 (Tex. App.—Beaumont Aug. 8, 2019, orig. proceeding) (mem. op.) (granting relief from order compelling nonparty oil-and-gas operator to produce a corporate representative for deposition and to produce documents related to the lease operations from 2006 to present in tax appraisal suit when "the trial court's order compelling the discovery present[ed] a vastly overbroad fishing expedition"); *In re Garrison Prop. & Cas. Ins.*, No. 12-20-00190-CV, 2020 WL 6164982, at *1 (Tex. App.—Tyler Oct. 21, 2020, orig. proceeding) (mem. op.) (granting partial relief from order directing relator to produce its corporate representative for deposition), *dism'd as moot*, 2020 WL 6588600, at *1 (Tex. App.—Tyler Nov. 10, 2020, orig. proceeding) (mem. op.).

[22]*See also In re Stagner*, No. 01-18-00758-CV, 2020 WL 370565, at *1 (Tex. App.—Houston [1st Dist.] Jan. 23, 2020, orig. proceeding) (mem. op.) (granting relief from overbroad discovery requests); *In re CAR Fin. Servs., Inc.*, No. 02-20-00157-CV, 2020 WL 4213839, at *1 (Tex. App.—Fort Worth July 23, 2020, orig. proceeding) (mem. op.) (same); *In re Reyes*, No. 02-20-00071-CV, 2020 WL 1294923, at *2 (Tex. App.—Fort Worth Mar. 19, 2020, orig. proceeding) (mem. op.) (same); *In re State Farm Lloyds*, No. 02-20-00163-CV, 2020 WL 5242414, at *6 (Tex. App.—Fort Worth Sept. 3, 2020, orig. proceeding) (mem. op.) (same); *In re Thermigen, LLC*, No. 05-20-00246-CV, 2020 WL 1809501, at *1 (Tex. App.—Dallas Apr. 9, 2020, orig. proceeding) (mem. op.) (same); *In re Mireles-Poulat*, No. 09-21-00333-CV, 2022 WL 709871, at *1 (Tex. App.—Beaumont Mar. 10, 2022, orig. proceeding) (mem. op.) (same); *In re Liberty Ins.*, No. 09-21-00098-CV, 2021 WL 3778557, at *1–2 (Tex. App.—Beaumont Aug. 26, 2021, orig. proceeding) (mem. op.) (same); *In re Daimler Trucks N. Am. LLC*, No. 09-20-00145-CV, 2020 WL 7251471, at *1, *4 (Tex. App.—Beaumont Dec. 10, 2020, orig. proceeding) (mem. op.) (same); *In re Elara Signature Homes, Inc.*, 611 S.W.3d 62, 64 (Tex. App.—Beaumont 2020, orig. proceeding) (same); *In re Hochheim Prairie Cas. Ins.*, No. 09-19-00158-CV, 2019 WL 3330593, at *1–2 (Tex. App.—Beaumont July 25, 2019, orig. proceeding) (mem. op.) (same); *In re Vaco*, No. 10-20-00229-CV, 2021 WL 2022065, at *1, *3 (Tex. App.—Waco May 19, 2021, orig. proceeding) (mem. op.) (same); *In re UPS Ground Freight, Inc.*, 629 S.W.3d 441, 451 (Tex. App.—Tyler 2020, orig. proceeding) (op. on reh'g) (same), *dism'd as moot*, 2020 WL 5949240, at *1 (Tex. App.—Tyler Oct. 7, 2020, orig. proceeding) (mem. op.); *In re UPS Ground Freight, Inc.*, No. 12-19-00412-CV, 2020 WL 975357, at *1, *4 (Tex. App.—Tyler Feb. 28, 2020, orig. proceeding) (mem. op.) (same), *dism'd as moot*, 2020 WL 1599521, at *1 (Tex. App.—Tyler Apr. 2,

Compton, No. 11-20-00154-CV, 2020 WL 4519562, at *1, *4–5 (Tex. App.—Eastland Aug. 6, 2020, orig. proceeding) (mem. op.). *But cf. In re Liberty Cnty. Mut. Ins. Co.*, No. 22-0321, 2023 WL 7930099, at *1, *3 (Tex. Nov. 17, 2023) (orig. proceeding) (granting relief from denial of discovery when request for ten years of medical records was not overbroad—relator sought medical records from five years before the car accident and five years after because RPI had been involved in five other car accidents during that time, some of which caused injuries similar to those that she sustained in the accident at issue).

- When the party seeking discovery does not meet its burden for obtaining federal income tax returns. *In re Yamin*, No. 14-20-00280-CV, 2020 WL 4873021, at *1, *5 (Tex. App.—Houston [14th Dist.] Aug. 20, 2020, orig. proceeding) (mem. op.) (granting relief from order to produce personal federal income tax returns when RPI did not meet burden to show relevance and materiality and had already received relators' net worth information).[23]

- When the trial court compels access to personal electronic devices without more than mere skepticism or bare allegations of failure to comply with discovery duties. *See In re Shipman*, 540 S.W.3d 562, 567 (Tex. 2018) (orig. proceeding) (per curiam) (stating that as a threshold to accessing electronic devices, the requesting party must show that the responding party has somehow defaulted in its obligation to search its records and produce the requested data); *In re Wilcox*, No. 09-20-00271-CV, 2021 WL

2020, orig. proceeding) (mem. op.); *In re Hyundai Motor Co.*, No. 12-19-00417-CV, 2020 WL 1445303, at *1, *6 (Tex. App.—Tyler Mar. 25, 2020, orig. proceeding) (mem. op.) (same), *dism'd as moot*, 2020 WL 1599528, at *1 (Tex. App.—Tyler Apr. 2, 2020, orig. proceeding) (mem. op.); *In re Serv. Corp. Int'l*, No. 13-19-00177-CV, 2019 WL 2442881, at *1, *6 (Tex. App.—Corpus Christi–Edinburg June 12, 2019, orig. proceeding) (mem. op.) (same); *In re APTWT, LLC*, 612 S.W.3d 85, 87 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding [mand. dism'd]) (same). *But see In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 251–52 (Tex. 2021) (orig. proceeding) (stating that a request is not overbroad simply because it may call for some information of doubtful relevance and that the sheer volume of a discovery request does not by itself render the request irrelevant or overbroad as a matter of law).

After the Tyler court granted relief twice regarding overbroad discovery requests, but insufficiently narrowed them, the supreme court got involved. *See In re UPS Ground Freight, Inc.*, 646 S.W.3d 828, 831 (Tex. 2022) (orig. proceeding). The court noted that the lawsuit arose from a motor-vehicle accident involving a single UPS driver, so confidential drug-test results for UPS drivers who were neither involved nor implicated in causing the accident were irrelevant because they did not make any fact consequential to the wrongful-death plaintiff's claims more or less probable that the single UPS driver involved in the accident was negligent on the occasion in question. *Id.* at 832. The court held that the trial court erred by compelling disclosure of confidential drug-test records of nonparty UPS employees who had no alleged involvement in the accident, and it granted mandamus relief. *Id.* at 832–33.

[23] *See In re Holman*, No. 12-21-00145-CV, 2021 WL 5237945, at *1, *6 (Tex. App.—Tyler Nov. 10, 2021, orig. proceeding) (mem. op.) (granting partial relief when relator failed to show that tax returns were material or to explain why other financial documents were insufficient sources of the information sought), *dism'd as moot*, 2021 WL 5707164, at *1 (Tex. App.—Tyler Dec. 1, 2021, orig. proceeding) (mem. op.); *In re Bella Corp.*, No. 12-21-00090-CV, 2021 WL 3671334, at *1 (Tex. App.—Tyler Aug. 18, 2021, orig. proceeding) (granting relief from net-worth discovery order), *dism'd as moot*, 2021 WL 3778564, at *1 (Tex. App.—Tyler Aug. 25, 2021, orig. proceeding) (mem. op.); *In re Boone*, 629 S.W.3d 372, 373, 376 (Tex. App.—San Antonio 2020, orig. proceeding) (granting relief from order granting motion to obtain defendant's net worth that did not follow Civil Practice and Remedies Code Section 41.0115's requirements).

1031141, at *3–4 (Tex. App.—Beaumont Mar. 18, 2021, orig. proceeding) (mem. op.) (granting relief when discovery order lacked the proportionality and restraint required by *Shipman*).[24]

- When the trial court orders overbroad discovery of cell phone data. *See In re Kuraray Am., Inc.*, 656 S.W.3d 137 (Tex. 2022) (orig. proceeding). In *Kuraray*, a multidistrict-litigation chemical-release case, plaintiffs sought cell-phone data from five employer-issued phones to determine whether employees in the plant's control room might have been distracted by their phones when they should have been alerted to changing plant conditions that led to the release. *Id.* at 139–41, 143 (holding that the trial court's discovery order was overbroad when it compelled production of cell-phone data for a six-week or four-month period without a showing that each employee's use of his cell phone on the day of the release could have been a contributing cause of the release). The supreme court set out the following principles to guide management of cell-phone-data discovery: (1) To be entitled to production of cell-phone data, the party seeking it must allege or provide some evidence of cell-phone use by the person whose data is sought at a time when it could have been a contributing cause of the incident on which the claim is based; (2) If the party seeking discovery meets this initial burden, the trial court may order production of cell-phone data if its temporal scope is tailored to encompass *only* the period in which the cell-phone use could have contributed to the incident; and (3) If the initial production indicates that cell-phone usage could have contributed to the incident, then a trial court may consider whether additional discovery regarding cell-phone use beyond that timeframe may be relevant. *Id.* at 142.

- When the trial court orders overbroad discovery under specific statutory schemes (e.g., TCPA, TMLA)[25] or signs discovery orders in violation of an interlocutory-appeal stay. *See In re Kinder Morgan Prod. Co., LLC*, No. 11-20-00027-CV, 2020 WL 1467281, at *4 (Tex. App.—Eastland Mar. 26, 2020, orig. proceeding) (mem. op.).

- When the trial court improperly denies a motion to compel a medical examination of a personal-injury plaintiff under Rule 204.1. *In re Sherwin-Williams Co.*, 668 S.W.3d 368, 370 (Tex. 2023) (orig.

[24]*See also In re Cooley*, No. 05-21-00445-CV, 2022 WL 304706, at *1, *3 (Tex. App.—Dallas Feb. 2, 2022, orig. proceeding) (mem. op.) (holding that RPI did not meet burden of going forward with evidence to show that relator had defaulted on her obligation to search records and produce the requested data (i.e., metadata) and that a search of relator's electronic device could recover the relevant materials); *In re UV Logistics, LLC*, No. 12-20-00196-CV, 2021 WL 306205, at *1, *5 (Tex. App.—Tyler Jan. 29, 2021, orig. proceeding) (mem. op.) (granting relief from order compelling discovery of certain ESI as overbroad), *dism'd as moot*, 2021 WL 1045739, at *1 (Tex. App.—Tyler Mar. 18, 2021, orig. proceeding) (mem. op.).

[25]*See In re SSCP Mgmt., Inc.*, 573 S.W.3d 464, 467 (Tex. App.—Fort Worth 2019, orig. proceeding) (granting relief from orders to respond to numerous discovery requests during the pendency of TCPA motions that had been filed but not yet ruled on; under those circumstances, discovery must be specified, limited, and relevant to the motion to dismiss); *In re IntelliCentrics, Inc.*, No. 02-18-00280-CV, 2018 WL 5289379, at *1, *5 (Tex. App.—Fort Worth Oct. 25, 2018, orig. proceeding) (mem. op.) (denying relief on relator's complaint that order required it to respond to overbroad and irrelevant discovery requests during a proceeding on a TCPA motion to dismiss when relator did not include reporter's record from hearing, limiting review to question of whether order was sufficiently "specified and limited" under the statute); *In re Smith ex rel. Smith*, 634 S.W.3d 108, 110 (Tex. App.—Dallas 2020, orig. proceeding) (granting relief when trial court's pre-TMLA-expert-report discovery order denied motion to compel production of publicly available nursing home policies and procedures). *Smith* was superseded by *In re LCS SP, LLC*, 640 S.W.3d 848, 850 (Tex. 2022) (orig. proceeding), in which the supreme court held that the nursing home's general policies and procedures fell outside the narrow scope of pre-report discovery permitted in TMLA cases and granted mandamus relief from the Dallas court's grant of mandamus relief.

proceeding) (addressing good-cause requirement in a spinal-injury case); *In re Auburn Creek Ltd. P'ship*, 655 S.W.3d 837, 839 (Tex. 2022) (orig. proceeding) (addressing timeliness and good cause in a carbon-monoxide exposure case); *see In re Charney*, No. 09-21-00028-CV, 2021 WL 2371251, at *1–3 (Tex. App.—Beaumont June 10, 2021, orig. proceeding) (mem. op.) (granting relief from denial of motion to have personal-injury plaintiff submit to a neuropsychological examination when the plaintiff alleged traumatic brain injury).[26]

- When the trial court improperly appoints a special master, i.e., without the parties' consent or findings that the case is exceptional and that good cause exists for the master's appointment. *In re Alford*, 645 S.W.3d 315, 316–17 (Tex. App.—Dallas 2022, orig. proceeding) (citing Rule of Civil Procedure 171 and noting that no discovery disputes were pending at the time the trial court appointed the special master). A special master may not be appointed merely because a case is complicated or because the trial court is busy. *Id.* at 317.

- When the trial court requires a relator to create documents that do not exist or that are held by others, in violation of Rule of Civil Procedure 196.3 regarding requested documents or tangible things within the relator's "possession, custody[,] or control." *In re Mireles-Poulat*, No. 09-21-00333-CV, 2022 WL 709871, at *3 (Tex. App.—Beaumont Mar. 10, 2022, orig. proceeding) (mem. op.); *see also In re Rius Rentals, LLC*, No. 11-21-00211-CV, 2021 WL 5115548, at *1 (Tex. App.—Eastland Nov. 4, 2021, orig. proceeding) (mem. op.) (granting partial relief when trial court denied motion to compel solely on the ground that RPI could not be required to create a document by signing an authorization). In *Rius Rentals*, the Eastland court noted a split in authority regarding whether signing an authorization creates a document, observing that the Corpus Christi court holds that it does (but has subsequently criticized that opinion) while Dallas and Amarillo hold that it does not. 2021 WL 5115548, at *4–5.

- When the trial court misinterprets a discovery rule. *See In re Ford Motor Co.*, No. 13-22-00083-CV, 2022 WL 3704628, at *1 (Tex. App.—Corpus Christi–Edinburg Aug. 26, 2022, orig. proceeding) (mem. op.) (construing Rule of Civil Procedure 193.7). In *Ford Motor*, the relator argued that the trial court had abused its discretion by requiring it to admit or object to the authenticity of thousands of documents produced during discovery—some of which included documents from third parties such as the government, suppliers, vendors, and the media—when RPI had not yet provided actual notice of the documents intended for use at trial. *Id.* at *1, *3. The court granted relief, holding that the order requiring the relator to examine all the documents it had produced to determine their authenticity without regard to whether those documents would be used during pretrial hearings or at trial, rather than focusing its efforts on the documents that would actually be used, was "a waste of time and money, and the burden of the procedure outweighs any putative benefit." *Id.* at *9.

- When the trial court grants discovery to a party who fails to follow the Rules of Civil Procedure. *In re Treatment Equip. Co.*, No. 02-19-00202-CV, 2019 WL 3295633, at *1 (Tex. App.—Fort Worth July 23, 2019, orig. proceeding) (mem. op.) (granting relief from order to respond to discovery that was not properly requested); *cf. In re Christianson Air Conditioning & Plumbing, LLC*, 639 S.W.3d 671, 674

[26] *See In re Phoenix Servs., LLC*, No. 04-18-00446-CV, 2018 WL 5622049, at *1, *5 (Tex. App.—San Antonio Oct. 31, 2018, orig. proceeding) (mem. op.) (granting relief when trial court denied motion to compel neuropsychological examination under Rule 204 in car-crash case in which plaintiff alleged traumatic brain injury). *But cf. In re Estabrook*, No. 10-20-00175-CV, 2020 WL 6192923, at *1, *4 (Tex. App.—Waco Oct. 21, 2020, orig. proceeding) (mem. op.) (granting partial relief when trial court abused its discretion by ordering relator to submit to a compulsory neuropsychological exam under Rule 204 when order's scope was overbroad).

(Tex. 2022) (orig. proceeding) (holding that when specific jurisdiction is asserted, Rule 120a discovery need not relate exclusively to the jurisdictional issue but rather may overlap with the merits if the information sought is essential to prove at least one part of the plaintiff's personal-jurisdiction theory).

2. Void order

If the trial court lacks jurisdiction and enters a void order, mandamus relief may be granted. *Patel v. Nations Renovations, LLC*, 661 S.W.3d 151, 153 (Tex. 2023) (orig. proceeding). In *Patel*, the court determined that a judgment describing itself as "final" was actually final such that the trial court's plenary power had expired long before it undertook to revise the judgment. *Id.* Because the order granting the motion to modify the judgment was void, the supreme court directed the trial court to withdraw it. *Id.* at 156; *see In re State Farm Fire & Cas. Co.*, No. 01-22-00099-CV, 2022 WL 1462940, at *1 (Tex. App.—Houston [1st Dist.] May 10, 2022, orig. proceeding) (mem. op.) (granting relief when trial court lacked plenary power to sign order granting RPI's motion to reinstate);[27] *see also In re Panchakarla*, 602 S.W.3d

[27]*See also In re Anderson*, No. 01-20-00123-CV, 2020 WL 4873550, at *1 (Tex. App.—Houston [1st Dist.] Aug. 20, 2020, orig. proceeding) (mem. op.) (granting relief from void order); *In re L.J.*, No. 02-21-00083-CV, 2021 WL 1685963, at *1 (Tex. App.—Fort Worth Apr. 29, 2021, orig. proceeding) (mem. op.) (same); *In re Solidwood Forest Express, LLC*, No. 14-21-00144-CV, 2021 WL 1420987, at *1–2 (Tex. App.—Houston [14th Dist.] Apr. 15, 2021, orig. proceeding) (mem. op.) (same); *In re CIT Bank, N.A.*, No. 14-19-00884-CV, 2020 WL 1528162, at *1–2 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020, orig. proceeding) (mem. op.) (same); *In re Butterfield*, No. 01-18-00903-CV, 2019 WL 2127613, at *1 (Tex. App.—Houston [1st Dist.] May 16, 2019, orig. proceeding) (mem. op.) (granting relief when trial court took jurisdiction in violation of UCCJEA); *In re Tex. Conference of Seventh-Day Adventists*, 652 S.W.3d 136, 140 (Tex. App.—Fort Worth 2022, orig. proceeding) (granting relief when trial court lacked jurisdiction under ecclesiastical-abstention doctrine); *In re Alief Vietnamese All. Church*, 576 S.W.3d 421, 423 (Tex. App.—Houston [1st Dist.] 2019, orig. proceeding) (same); *In re First Christian Methodist Evangelistic Church*, No. 05-18-01533-CV, 2019 WL 4126604, at *1 (Tex. App.—Dallas Aug. 30, 2019, orig. proceeding) (mem. op.) (same); *In re Duddlesten*, No. 01-18-00561-CV, 2018 WL 6694710, at *1 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, orig. proceeding) (mem. op.) (granting relief on denial of plea to the jurisdiction); *In re T.O.*, No. 02-20-00016-CV, 2020 WL 1808291, at *1 (Tex. App.—Fort Worth Apr. 9, 2020, orig. proceeding) (mem. op.) (granting relief when trial court signed order granting new trial in SAPCR after plenary power expired); *In re Siebold*, No. 01-21-00437-CV, 2022 WL 24051, at *1 (Tex. App.—Houston [1st Dist.] Jan. 4, 2022, orig. proceeding) (mem. op.) (granting relief when trial court lacked plenary power to reinstate case); *In re Mikooz Mart*, No. 05-19-01355-CV, 2019 WL 6696035, at *1 (Tex. App.—Dallas Dec. 9, 2019, orig. proceeding) (mem. op.) (same); *In re S. Mgmt. Servs., Inc.*, No. 05-19-00653-CV, 2019 WL 3244492, at *1 (Tex. App.—Dallas July 19, 2019, orig. proceeding) (mem. op.) (same); *In re Ortega*, No. 05-18-01499-CV, 2019 WL 244556, at *2–3 (Tex. App.—Dallas Jan. 17, 2019, orig. proceeding) (mem. op.) (granting relief when trial court's plenary power expired before it granted intervenor's motion for new trial); *In re Doggett*, No. 12-19-00300-CV, 2019 WL 5956676, at *5 (Tex. App.—Tyler Nov. 13, 2019, orig. proceeding) (mem. op.) (granting relief from void order entered after plenary power expired), *dism'd as moot*, 590 S.W.3d 701, 701–02 (Tex. App.—Tyler 2019, orig. proceeding) (mem. op.); *In re Vallejo*, Nos. 13-20-00235-CV, -239-CV, 2020 WL 5050639, at *1, *4 (Tex. App.—Corpus Christi–Edinburg Aug. 20, 2020, orig. proceeding) (mem. op.) (dismissing appeal and granting relief from void new-trial order signed after plenary power expired); *In re Pena*, No. 13-18-00627-CV, 2019 WL 943371, at *1, *5 (Tex. App.—Corpus Christi–Edinburg Feb. 26, 2019, orig. proceeding) (mem. op.) (granting relief from trial court's void order granting motion to extend postjudgment deadlines when RPIs and trial court failed to follow Rule 306a's requirements); *In re Young*, No. 14-21-00645-CV, 2022 WL 3452892, at *1 (Tex. App.—Houston [14th Dist.] Aug. 18, 2022, orig. proceeding) (mem. op.) (granting relief when order was signed after plenary power expired); *In re Sema*, No. 14-22-00347-CV,

536, 539 (Tex. 2020) (orig. proceeding) (per curiam) ("If a trial court issues an order []beyond its jurisdiction,[] mandamus relief is appropriate because such an order is void ab initio."). When the trial court's order is void, there is no need to show an inadequate appellate remedy. *State Farm Fire & Cas. Co.*, 2022 WL 1462940, at *4.

Likewise, when a court interferes with another court's jurisdiction or with an agency's exclusive jurisdiction, or the jurisdictional limits in the pleadings are not met, mandamus relief may be granted. *See In re Tex. Dep't of Family & Protective Servs.*, No. 04-22-00085-CV, 2022 WL 2820937, at *1–2 (Tex. App.—San Antonio July 20, 2022, orig. proceeding) (mem. op.) (holding that trial court's order violated the Separation of Powers clause by interfering with DFPS's duties);[28] *see also In re Cahue*, No. 02-20-00254-CV, 2020 WL 5522995, at *1 (Tex. App.—Fort Worth Sept. 15, 2020, orig. proceeding) (mem. op.) (granting relief when trial court interfered with Dallas County court's jurisdiction by consolidating lawsuit with Tarrant County case because amount in controversy in relator's suit was outside of Tarrant County court's jurisdictional limit); *In re Vilore Foods Co.*, No. 04-19-00860-CV, 2020 WL 1159060, at *1 (Tex. App.—San Antonio Mar. 11, 2020, orig. proceeding) (mem. op.) (granting relief in worker's comp case when record conclusively established that RPI did not exhaust her administrative remedies);[29] *In re Tex.-New Mexico Power Co.*, 604 S.W.3d 608, 609–10 (Tex. App.—Waco 2020, orig. proceeding) (granting relief when trial court should have dismissed proceeding for want of jurisdiction instead of abating it when RPIs' PUC proceedings for administrative relief were pending).[30]

Mandamus relief may also be available to correct a trial court's erroneous denial of jurisdiction over a particular motion. *See In re Scott Pelley, P.C.*, No. 05-21-00314-CV, 2021 WL 3891595, at *1, *4–

2022 WL 3205317, at *1 (Tex. App.—Houston [14th Dist.] Aug. 9, 2022, orig. proceeding) (mem. op.) (same); *In re Chong*, No. 14-19-00368-CV, 2019 WL 2589968, at *1, *4 (Tex. App.—Houston [14th Dist.] June 25, 2019, orig. proceeding) (mem. op.) (granting relief because improper lis pendens is a void action); *In re Round Rock ISD*, No. 03-21-00472-CV, 2021 WL 4350299, at *1 (Tex. App.—Austin Sept. 24, 2021, orig. proceeding) (mem. op.) (granting relief from ex parte TRO after concluding that it was procedurally void).

[28] *See also In re Tex. Dep't of Family & Protective Servs.*, No. 04-22-00196-CV, 2022 WL 2442169, at *1 (Tex. App.—San Antonio July 6, 2022, orig. proceeding) (mem. op.) (granting relief from order void for violating Separation of Powers clause); *In re Tex. Dep't of Family & Protective Servs.*, No. 04-22-00096-CV, 2022 WL 2135572, at *1 (Tex. App.—San Antonio June 15, 2022, orig. proceeding) (mem. op.) (same); *In re Tex. Dep't of Family & Protective Servs.*, No. 04-22-00040-CV, 2022 WL 1751377, at *1 (Tex. App.—San Antonio June 1, 2022, orig. proceeding) (same); *In re Tex. Dep't of Family & Protective Servs.*, No. 04-22-00226-CV, 2022 WL 1751013, at *1 (Tex. App.—San Antonio June 1, 2022, orig. proceeding) (mem. op.) (same). In this series of cases from June 1 to July 20, 2022, the San Antonio court performed the same Separation-of-Powers analysis to grant relief to DFPS from trial court orders that specifically interfered with the legislative delegation of authority to DFPS.

[29] *See also In re Old Republic Risk Mgmt.*, No. 12-19-00144-CV, 2019 WL 2462486, at *1, *6 (Tex. App.—Tyler June 12, 2019, orig. proceeding) (mem. op.) (granting relief from order denying plea to the jurisdiction based on failure to exhaust workers' compensation administrative remedies), *dism'd as moot*, 2019 WL 2710251, at *1 (Tex. App.—Tyler June 28, 2019, orig. proceeding) (mem. op.).

[30] *See also In re Tex.-New Mexico Power Co.*, No. 10-19-00166-CV, 2019 WL 3822274, at *1 (Tex. App.—Waco Aug. 14, 2019, orig. proceeding) (mem. op.) (granting relief from denial of motion to dismiss for administrative exhaustion in PUC). *But see In re Tex.-New Mexico Power Co.*, 625 S.W.3d 42, 44 n.14, 45 (Tex. 2021) (orig. proceeding) (denying mandamus relief when plaintiffs' claim did not fall within PUC's exclusive original jurisdiction); *In re Oncor Elec. Delivery Co.*, 630 S.W.3d 40, 52 (Tex. 2021) (orig. proceeding) (same).

5 (Tex. App.—Dallas Aug. 31, 2021, orig. proceeding) (mem. op.) (granting relief when trial court told the parties it did not have jurisdiction to rule on motion concerning RPI's $400,000 supersedeas deposit; orders concerning supersedeas are part and parcel of the trial court's effectuating the judgment and carrying out the appellate court's decision).

And mandamus relief should be granted when a trial court signs an order while a motion to recuse is pending. *See In re Smale*, No. 12-19-00372-CV, 2020 WL 2078789, at *1, *3 (Tex. App.—Tyler Apr. 30, 2020, orig. proceeding) (granting relief from severance order rendered void when trial court signed it while relator's motion to recuse was pending), *dism'd as moot*, 2020 WL 2177230, at *1 (Tex. App.—Tyler May 6, 2020, orig. proceeding) (mem. op.). Or if a senior judge assigned to hear a recusal improperly overrules a timely-filed objection to his assignment. *See In re Magnolia Prop. Mgmt.*, No. 13-20-00112-CV, 2020 WL 1887760, at *1, *8 (Tex. App.—Corpus Christi–Edinburg Apr. 14, 2020, orig. proceeding) (mem. op.) (granting relief when senior judge assigned to hear recusal overruled relator's objection to his assignment under Government Code Section 74.053 because objection was timely filed prior to any hearing, making disqualification automatic).

3. Family law

Some substantive areas have specific rules that must be followed for the trial court to enter an order. Family law, for example, can frequently give rise to cases involving mandamus relief under the following circumstances:

- Improper temporary orders. *See In re J.W.*, No. 02-18-00419-CV, 2019 WL 2223216, at *1, *5 (Tex. App.—Fort Worth May 23, 2019, orig. proceeding) (mem. op.) (granting relief when temporary orders had effect of violating family-law statute).[31] *But see In re Goddard*, No. 12-18-00355-CV, 2019 WL

[31] *See In re Howley*, No. 03-21-00318-CV, 2021 WL 5750190, at *1, *4 (Tex. App.—Austin Dec. 3, 2021, orig. proceeding) (mem. op.) (granting relief from part of trial court's temporary orders requiring father to pay retroactive child support in an increased amount); *In re Zook*, No. 03-21-00180-CV, 2021 WL 2964264, at *1 (Tex. App.—Austin July 15, 2021, orig. proceeding) (mem. op.) (granting relief when trial court entered temporary order authorizing attorney ad litem to have children vaccinated without parent's consent in contravention of statute's plain language); *In re Barker*, No. 03-21-00036-CV, 2021 WL 833970, at *1 (Tex. App.—Austin Mar. 4, 2021, orig. proceeding) (mem. op.) (granting relief when trial court issued temporary order changing party with right to designate child's primary residence without evidence to support statutory findings); *In re Bird*, No. 03-20-00222-CV, 2020 WL 7063583, at *1, *3–4 (Tex. App.—Austin Dec. 3, 2020, orig. proceeding) (mem. op.) (same); *In re E.W.O.*, No. 10-19-00050-CV, 2019 WL 962570, at *1 (Tex. App.—Waco Feb. 27, 2019, orig. proceeding) (mem. op.) (same); *see also In re O'Connor*, No. 03-21-00159-CV, 2021 WL 3868758, at *1, *3 (Tex. App.—Austin Aug. 31, 2021, orig. proceeding) (mem. op.) (granting relief from temporary order requiring relator to pay $4,205 in attorney's fees to RPI's attorney because there was no evidence that the fees were necessary to protect child's safety and welfare); *In re Mansfield*, No. 04-19-00249-CV, 2019 WL 2439104, at *1 (Tex. App.—San Antonio June 12, 2019, orig. proceeding) (mem. op.) (same regarding order to pay RPI $5,000 in appellate attorney's fees during pendency of relator's family-law appeal); *In re Chesser*, No. 10-21-00039-CV, 2021 WL 2385801, at *1 (Tex. App.—Waco June 9, 2021, orig. proceeding) (mem. op.) (granting relief from temporary orders when no evidence of relator's net resources was presented to impose guideline child support). *But see In re Amoroso*, No. 10-19-00419-CV, 2020 WL 4218067, at *1 (Tex. App.—Waco July 17, 2020, orig. proceeding) (mem. op.) (denying relief from SAPCR order granting RPI's emergency motion for enforcement of temporary orders because relator did not preserve his complaint in the trial court).

If there is no evidence to support one of the trial court's required findings in temporary orders to remove children from their parents, mandamus relief may be granted. *See In re Berryman*, 629 S.W.3d

456866, at *1. *3–4 (Tex. App.—Tyler Feb. 6, 2019, orig. proceeding) (mem. op.) (granting relief from order vacating temporary protective order in pending SAPCR and divorce), *dism'd as moot*, 2019 WL 623564, at *1 (Tex. App.—Tyler Feb. 14, 2019, orig. proceeding) (mem. op.).

- Lack of statutory standing to file a SAPCR. *See In re Clay*, No. 02-18-00404-CV, 2019 WL 545722, at *1 (Tex. App.—Fort Worth Feb. 12, 2019, orig. proceeding [mand. denied]) (mem. op.) (granting partial relief to relator as to the RPIs who failed to establish their standing to intervene in SAPCR).[32]

- Failure to compel mandatory transfer of a SAPCR. *See In re R.H.*, No. 02-20-00342-CV, 2020 WL 7776794, at *1, *3 (Tex. App.—Fort Worth Dec. 31, 2020, orig. proceeding) (mem. op.) (granting relief on SAPCR transfer).[33] However, an untimely motion to transfer gives a trial court no authority to transfer a cause to another court. *In re A.M.C.*, No. 14-22-00154-CV, 2022 WL 3452906, at *1 (Tex. App.—Houston [14th Dist.] Aug. 18, 2022, orig. proceeding) (mem. op.) (granting relief from void transfer order when parent filed a motion to transfer without any pleadings requesting modification or enforcement and did not file such pleadings until after the trial court granted the transfer motion); *see also In re Bass*, No. 07-23-00017-CV, 2023 WL 3021086, at *3 (Tex. App.—Amarillo Apr. 20, 2023, orig. proceeding) ("The trial court had no discretion to grant an untimely transfer.").

- Refusal to render judgment on a Mediated Settlement Agreement (MSA) or setting the MSA aside and granting a new trial without legal basis. *See In re Bouajram*, No. 02-21-00072-CV, 2021 WL 3673856,

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453, 455, 460–62 (Tex. App.—Tyler 2020, orig. proceeding) (granting relief from trial court's temporary order that was based on conclusory assertions and failed to allege sufficient facts to support a finding of abuse or neglect), *dism'd as moot*, 2020 WL 6380339, at *1 (Tex. App.—Tyler Oct. 30, 2020, orig. proceeding) (mem. op.); *In re T.M.*, No. 14-20-00703-CV, 2021 WL 865363, at *1, *4–5 (Tex. App.—Houston [14th Dist.] Mar. 9, 2021, orig. proceeding) (mem. op.) (granting relief from trial court's temporary order when there was no evidence that DFPS had made any effort to enable the child to return home); *In re K.L.M.*, No. 14-19-00713-CV, 2019 WL 6001170, at *5 (Tex. App.—Houston [14th Dist.] Nov. 14, 2019, orig. proceeding) (mem. op.) (granting relief when there was no evidence that DFPS made reasonable efforts to protect the child short of removal or to support required findings).

[32]*See In re Ramirez*, No. 03-21-00145-CV, 2021 WL 1991269, at *1 (Tex. App.—Austin May 19, 2021, orig. proceeding) (mem. op.) (granting relief when trial court incorrectly denied relator's petition to intervene); *In re Torres*, 614 S.W.3d 798, 800 (Tex. App.—Waco 2020, orig. proceeding) (granting relief when trial court erred by denying grandparents' motion and granted former foster parents leave to intervene because former foster parents did not have standing under applicable family law statutes); *see also In re Ortegon*, 616 S.W.3d 48, 49 (Tex. App.—San Antonio 2020, orig. proceeding [mand. dism'd]) (granting mandamus relief in SAPCR when trial court excluded report and limited testimony of guardian ad litem in underlying suit, stripping guardian ad litem of authority to which he was statutorily entitled).

[33]*See also In re Mathes*, No. 03-20-00379-CV, 2020 WL 7063684, at *1 (Tex. App.—Austin Dec. 3, 2020, orig. proceeding) (mem. op.) (granting relief when trial court refused to transfer SAPCR under mandatory venue provision); *In re Bird*, No. 12-18-00291-CV, 2019 WL 210829, at *1 (Tex. App.—Tyler Jan. 16, 2019, orig. proceeding) (mem. op.) (same), *dism'd as moot*, 2019 WL 386843, at *1 (Tex. App.—Tyler Jan. 31, 2019, orig. proceeding) (mem. op.); *In re Paredes*, No. 13-20-00509-CV, 2021 WL 317643, at *1 (Tex. App.—Corpus Christi–Edinburg Jan. 27, 2021, orig. proceeding) (mem. op.) (same); *In re B.E.*, No. 13-20-00234-CV, 2020 WL 4218796, at *1 (Tex. App.—Corpus Christi–Edinburg July 22, 2020, orig. proceeding) (mem. op.) (same).

at *1, *3–4 (Tex. App.—Fort Worth Aug. 17, 2021, orig. proceeding) (mem. op.) (granting conditional relief when trial court had no basis to set aside MSA or grant new trial).[34]

- Erroneously permitting nonparent access to a child over a fit parent's objection. *See In re C.J.C.*, 603 S.W.3d 804, 811, 820 (Tex. 2020) (orig. proceeding).[35]

- Contempt in the child-support enforcement context, *see In re C.F.*, 576 S.W.3d 761, 766, 769–72 (Tex. App.—Fort Worth 2019, orig. proceeding) (granting relief in child support enforcement proceeding on void commitment order and void contempt findings),[36] or other family-law context.[37]

- Improper exercise of jurisdiction over a child contrary to the UCCJEA. *See In re Dean*, 393 S.W.3d 741, 743–44 (Tex. 2012) (orig. proceeding).[38]

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[34]*In re Willeford*, No. 04-20-00495-CV, 2021 WL 356242, at *1–2 (Tex. App.—San Antonio Feb. 3, 2021, orig. proceeding) (mem. op.) (granting relief when trial court granted motion for new trial after parties executed an MSA on which a final judgment was properly rendered and RPI provided no evidence with his new-trial motion or at the hearing); *In re Tex. Dep't of Family & Protective Servs.*, No. 12-19-00289-CV, 2019 WL 4125970, at *1 (Tex. App.—Tyler Aug. 30, 2019, orig. proceeding) (mem. op.) (dismissing relator's petition, which challenged grant of jury-trial request after parties entered MSA, after relator filed a motion to dismiss as moot); *In re Young*, No. 12-18-00341-CV, 2019 WL 141380, at *1, *3 (Tex. App.—Tyler Jan. 9, 2019, orig. proceeding) (mem. op.) (granting relief from trial court's new-trial order that had the effect of setting aside MSA without legal basis), *dism'd as moot*, 2019 WL 210824, at *1 (Tex. App.—Tyler Jan. 16, 2019, orig. proceeding) (mem. op.).

[35]*See In re B.A.B.*, No. 07-21-00259-CV, 2022 WL 1687122, at *5 (Tex. App.—Amarillo May 26, 2022, orig. proceeding) (mem. op.) (granting relief to relator-father when RPIs provided insufficient evidence to overcome fit-parent presumption); *In re B.F.*, No. 02-20-00283-CV, 2020 WL 6074108, at *4 (Tex. App.—Fort Worth Oct. 15, 2020, orig. proceeding) (mem. op.) (granting relief because unrelated RPI did not overcome fit-parent presumption); *In re S.D.*, No. 14-20-00851-CV, 2021 WL 3577852, at *1, *7–8 (Tex. App.—Houston [14th Dist.] Aug. 10, 2021, orig. proceeding) (mem. op.) (same as to grandparent).

[36]*See In re Koomar*, No. 09-20-00114-CV, 2020 WL 5805571, at *1–5 (Tex. App.—Beaumont Sept. 30, 2020, orig. proceeding) (mem. op.) (granting relief from void judgment of contempt in SAPCR).

[37]*See In re Athans*, No. 09-20-00074-CV, 2020 WL 1770903, at *1 (Tex. App.—Beaumont Apr. 9, 2020, orig. proceeding) (mem. op.) (granting relief from potentially void contempt order when trial court refused to consider evidence of allegedly void marriage); *see also In re Johnston*, No. 07-22-00177-CV, 2022 WL 17821583, at *3 (Tex. App.—Amarillo Dec. 20, 2022, orig. proceeding) (mem. op.) (noting that an entire contempt judgment is void when a single punishment is assessed for multiple contemptuous acts, some for which contempt could not be assessed, and observing that contempt order was void when it found that parent committed 41 violations, 28 of which could not support the contempt order).

[38]*See also In re Papenfuss*, No. 09-22-00127-CV, 2022 WL 2720455, at *1 (Tex. App.—Beaumont July 14, 2022, orig. proceeding) (mem. op.) (granting partial relief when record did not reflect any communication between the trial court and the child's home state's court to determine whether the home state court had declined to exercise jurisdiction); *In re Minschke*, No. 13-20-00508-CV, 2021 WL 1844240, at *1 (Tex. App.—Corpus Christi–Edinburg May 7, 2021, orig. proceeding) (mem. op.) (granting relief from trial court's order retaining jurisdiction and directing trial court to issue an order regarding forum non conveniens).

- Violation of specific statutory deadlines or requirements. *See In re J.R.*, 622 S.W.3d 602, 603, 606 (Tex. App.—Fort Worth 2021, orig. proceeding) (granting relief because trial court lacked subject matter jurisdiction based on termination-of-parental-rights statutory dismissal date); *see also In re S.Q.*, No. 10-19-00473-CV, 2020 WL 4360781, at *1, *4 (Tex. App.—Waco July 29, 2020, orig. proceeding) (mem. op.) (granting relief when DFPS did not satisfy statutory requirements to remove child).

- Failing to include the OAG in child-support modification proceedings. *See In re Off. of Att'y Gen. of Tex.*, No. 13-20-00133-CV, 2020 WL 1951544, at *1 (Tex. App.—Corpus Christi–Edinburg Apr. 23, 2020, orig. proceeding) (mem. op.) (granting relief when release order on OAG's child-support lien was signed without notice to OAG, rendering it void); *In re Off. of the Att'y Gen. of Tex.*, No. 13-18-00474-CV, 2018 WL 5274147, at *1 (Tex. App.—Corpus Christi–Edinburg Oct. 23, 2018, orig. proceeding) (mem. op.) (same on order that eliminated past-due child-support arrearage).

- Improper denial of a jury trial demand. *In re Maness*, No. 05-21-00465-CV, 2021 WL 5410412, at *1 (Tex. App.—Dallas Nov. 19, 2021, orig. proceeding) (mem. op.). While the denial of a jury trial can be addressed by appeal or mandamus, in the sensitive context of child-custody or possession proceedings, courts have regularly granted mandamus relief. *Id.* at *1–2 (holding that appeal from a bench trial would be inadequate because the child should not have to suffer the delay of a second trial before parental rights and obligations can be established).

- Failing to follow statutory requirements regarding a referral to arbitration under the parties' written agreements in a SAPCR or divorce action. *See In re Ayad*, 655 S.W.3d 285, 289–91 (Tex. 2022) (orig. proceeding) (granting relief when Family Code Sections 6.6015(a) and 153.00715(a) provided that the trial court "may order arbitration only if [it] determines that the contract [containing the arbitration agreement] is valid and enforceable").

4. Pending items and other ministerial duties

To obtain mandamus relief based on a trial court's failure to perform a ministerial duty, the relator must show that the trial court (1) had a legal duty to perform a nondiscretionary act; (2) was asked to perform that act; and (3) refused to do so. *In re UpCurve Energy Partners, LLC*, 632 S.W.3d 254, 256 (Tex. App.—El Paso 2021, orig. proceeding) (citing *O'Connor v. First Ct. of Appeals*, 837 S.W.2d 94, 97 (Tex. 1992) (orig. proceeding)). "An act is ministerial when the law clearly spells out the duty the official must perform with sufficient certainty that it leaves nothing to the official's discretion." *In re City of Galveston*, 622 S.W.3d 851, 855 (Tex. 2021) (orig. proceeding).

Considering and ruling on a motion that is properly filed and before the trial court is a ministerial, nondiscretionary act. *UpCurve*, 632 S.W.3d at 257. Trial courts also have a duty to tend to and schedule cases to expeditiously dispose of them. *In re Reiss*, No. 05-22-00575-CV, 2022 WL 2236089, at *1 (Tex. App.—Dallas June 21, 2022, orig. proceeding) (mem. op.) (citing *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 843 (Tex. 2014)). Accordingly, a refusal to rule in a timely fashion frequently results in a grant of mandamus relief ordering the trial court to rule (but, of course, not *how* to rule). *See In re Josefsberg*, No. 01-21-00179-CV, 2021 WL 2149831, at *1, *3 (Tex. App.—Houston [1st Dist.] May 27, 2021, orig. proceeding) (mem. op.) (granting relief when dismissal sought on limitations question involving Rule 202 petition had been pending for 20 months).

The mandamus record must show both that the motion was submitted to the trial court for a ruling and that the trial court has not ruled on the motion within a reasonable time. *See In re Est. of Burnett*, No. 14-20-00757-CV, 2020 WL 6878564, at *1 (Tex. App.—Houston [14th Dist.] Nov. 24, 2020, orig. proceeding) (mem. op.) (granting relief on petition seeking ruling on five-month-old agreed motion to transfer). Determining whether a reasonable time has elapsed depends on the case's circumstances. *See In re Freeport LNG, LLC*, No. 01-21-00701-CV, 2022 WL 2251649, at *1 (Tex. App.—Houston [1st Dist.] June 23, 2022, orig. proceeding) (mem. op.) (granting relief when summary-judgment motions were left

pending for over a year).[39] "Reasonable time" considerations may include the trial court's actual knowledge of the motion, its overt refusal to act, the state of the trial court's docket, and the existence of other judicial

[39]*See also In re SMS Fin. XV, L.L.C.*, No. 01-19-00850-CV, 2020 WL 573247, at *1 (Tex. App.—Houston [1st Dist.] Feb. 6, 2020, orig. proceeding) (mem. op.) (granting relief when motion in debt-collection/revival-of-judgment case was left pending for more than a year); *In re Baylor Coll. of Med.*, No. 01-19-00105-CV, 2019 WL 3418504, at *1 (Tex. App.—Houston [1st Dist.] July 30, 2019, orig. proceeding) (mem. op.) (same when TMLA motions to dismiss for failure to serve expert report were pending for over 10 months and relators lacked an adequate appellate remedy for judge's failure to rule within a reasonable time); *In re Tomball Tex. Hosp. Co.*, No. 01-19-00242-CV, 2019 WL 3418569, at *5 (Tex. App.—Houston [1st Dist.] July 30, 2019, orig. proceeding) (mem. op.) (same on TMLA motion pending for 19 months and summary-judgment motion pending for over 14 months); *In re Univ. of Tex. MD Anderson Cancer Ctr.*, No. 01-19-00201-CV, 2019 WL 3418567, at *1 (Tex. App.—Houston [1st Dist.] July 30, 2019, orig. proceeding) (mem. op.) (same on plea to jurisdiction pending for more than year); *In re The Univ. of Tex. MD Anderson Cancer Ctr.*, No. 01-19-00202-CV, 2019 WL 3418568, at *1–2 (Tex. App.—Houston [1st Dist.] July 30, 2019, orig. proceeding) (mem. op.) (same on TMLA motion to dismiss pending over a year); *In re Alexander*, No. 03-21-00221-CV, 2021 WL 2587173, at *1 (Tex. App.—Austin June 24, 2021, orig. proceeding) (mem. op.) (denying petition when complaint about trial court's failure to rule on motion was rendered moot when trial court ruled on it); *In re Kothmann*, No. 04-21-00154-CV, 2021 WL 2211459, at *1 (Tex. App.—San Antonio June 2, 2021, orig. proceeding) (mem. op.) (dismissing petition in which relators complained of trial court's failure to set a hearing on a pending motion as moot after relators filed motion to dismiss when trial court held a hearing and ruled); *In re Hudspeth Cnty.*, No. 08-21-00169-CV, 2021 WL 5078823, at *1 (Tex. App.—El Paso Nov. 2, 2021, orig. proceeding) (mem. op.) (granting relief when relators requested rulings on their plea to the jurisdiction in a workers' compensation lawsuit at least four times, including twice after the trial court received supplemental briefing; delay of 9 months (after supplemental briefing) and 14 months (since initial hearing) was not reasonable); *In re Day*, No. 13-21-00311-CV, 2022 WL 37770, at *1 (Tex. App.—Corpus Christi–Edinburg Jan. 4, 2022, orig. proceeding) (mem. op. on reh'g) (granting relief when relator's demand for accounting in a probate proceeding was filed more than 15 months earlier, his motion to compel was filed more than 13 months earlier, and his affirmative request for a ruling on the motions was more than 5 months earlier when the record failed to indicate any special docket conditions or other matters preventing the trial court from ruling and the underlying proceeding had been pending since 2015); *In re McAllen Hosps., L.P.*, No. 13-20-00210-CV, 2020 WL 2611272, at *1 (Tex. App.—Corpus Christi–Edinburg May 22, 2020, orig. proceeding) (mem. op.) (granting relief directing trial court to rule on relator's TMLA motion to dismiss and motion for summary judgment, both which had been pending for almost a year after the hearing); *In re Amir-Sharif*, No. 13-19-00573-CV, 2019 WL 6795864, at *1–3 (Tex. App.—Corpus Christi–Edinburg Dec. 12, 2019, orig. proceeding) (mem. op.) (granting relief on relator's petition to compel trial court to comply with Rule 18a recusal procedures when trial court's failure to follow the rule's clear terms—to either sign and file an order of recusal or disqualification or sign and file an order referring the motion to the regional presiding judge—had not occurred, rendering any subsequent order void); *In re Hoffman*, No. 14-21-00697-CV, 2022 WL 288046, at *1 (Tex. App.—Houston [14th Dist.] Feb. 1, 2022, orig. proceeding) (mem. op.) (granting relief when motion for arbitration had been pending for almost 16 months, preventing case from proceeding); *In re Robbins*, 622 S.W.3d 600, 601 (Tex. App.—Houston [14th Dist.] 2021, orig. proceeding) (granting relief by directing trial court to rule on pending discovery motions); *In re Ramos*, 598 S.W.3d 472, 473 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding) (granting relief and ordering trial court to rule on motion pending for almost a year); *In re Nomarco, Inc.*, No. 14-20-00129-CV, 2020 WL 1181705, at *1 (Tex. App.—Houston [14th Dist.] Mar. 12, 2020, orig. proceeding) (mem. op.) (granting relief to compel trial court to rule on special appearances heard nine months earlier); *In re Elizon Master Participate Tr. I*, No. 14-19-00593-CV, 2019 WL 3727364, at *1 (Tex. App.—Houston [14th Dist.] Aug. 8, 2019, orig. proceeding) (mem. op.) (compelling trial court to rule on relator's motion for substituted service but

and administrative matters that must be addressed first, *In re Joel Kelly Ints.*, No. 05-19-00559-CV, 2019 WL 2521725, at *1 (Tex. App.—Dallas June 19, 2019, orig. proceeding) (mem. op.), as well as the pending motion's seriousness and complexity and the trial court's inherent power to control its own docket, *In re UpCurve Energy Partners, LLC*, 632 S.W.3d 254, 257 (Tex. App.—El Paso 2021, orig. proceeding). "[N]o 'bright line' separates a reasonable time period from an unreasonable one." *In re McAllen Hosps., L.P.*, No. 13-20-00210-CV, 2020 WL 2611272, at *5 (Tex. App.—Corpus Christi–Edinburg May 22, 2020, orig. proceeding) (mem. op.) (internal quotation omitted; collecting cases).

"There is no adequate remedy at law for a trial court's failure to rule because fundamental requirements of due process mandate an opportunity to be heard." *Id.* at *4 (internal quotation omitted). The trial court's refusal to rule on a dispositive motion, for example, might require a relator to defend against claims that could be resolved without going to trial. *In re Freeport LNG, LLC*, No. 01-21-00701-CV, 2022 WL 2251649, at *3 (Tex. App.—Houston [1st Dist.] June 23, 2022, orig. proceeding) (mem. op.). A failure to rule on a motion to compel prevents a party from obtaining discovery that may be helpful in its defense. *In re Eagle Ship Mgmt., LLC*, No. 01-21-00427-CV, 2022 WL 479926, at *1 (Tex. App.—Houston [1st Dist.] Feb. 17, 2022, orig. proceeding) (mem. op.) (granting relief when relators filed motion to compel in November 2020 and had not received a ruling by May 2021).

5. New trial after a jury verdict

An appellate court may review on mandamus a trial court's order granting a new trial after a jury has rendered its verdict. *In re Rudolph Auto., LLC*, 674 S.W.3d 289, 299–302 (Tex. 2023) (orig. proceeding) (summarizing earlier supreme court jurisprudence addressing new trials after jury verdicts). In *Rudolph*, the court granted relief after reviewing and applying the following previously announced principles to the trial court's reasons for granting a new trial:

> First, trial courts retain considerable authority to grant new trials. Indeed, their special vantage point makes it essential that they be willing to do so when they observe problems that threaten the integrity of the process and, therefore, the reliability of the verdict. Second, however, disregarding a jury's verdict is an unusually serious act that imperils a constitutional value of immense importance—the authority of a jury. Such a step may be taken only when clearly supported by sound reasons. Third, while it is unlikely that a judge would ever order a new trial for a constitutionally suspect purpose, an explanation is necessary to ensure that only *valid* reasons supported by the record underlie the new-trial order and that all parties and the public understand what those reasons are. Finally, the appellate courts' mandamus review is not limited to assessing the *facial* validity of the new-trial order but necessarily extends to the underlying merits—including the conclusion that the reason provided is a mistake of law or unsupported by the record. Because trial courts have no authority to grant a new trial without a valid reason, if the order is predicated on legal error or lacks record support, mandamus should issue to require the withdrawal of the new-trial order.
>
> These principles work together, with all levels of the judiciary performing distinct tasks in service of a common goal: ensuring that our civil-justice system honors the jury-trial right by requiring new trials when, and only when, the law authorizes that result.

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dismissing petition as moot after trial court granted motion); *In re ABC Assembly LLC*, No. 14-19-00419-CV, 2019 WL 2517865, at *3 (Tex. App.—Houston [14th Dist.] June 18, 2019, orig. proceeding) (mem. op.) (granting relief to direct trial judge to rule on relator's motion for entry of judgment on jury verdict pending about eight months).

In re Rudolph Auto., LLC, 674 S.W.3d 289, 302 (Tex. 2023) (orig. proceeding); *see also In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688–90 (Tex. 2012) (orig. proceeding) (granting relief when trial court's use of "and/or" and "in the interest of justice and fairness" in new-trial order caused ambiguity); *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 206 (Tex. 2009) (orig. proceeding) (requiring a trial court to set out the reasons for setting aside a jury verdict and granting a new trial).

A trial court does not abuse its discretion by ordering a new trial after a jury verdict if its stated reason "is legally appropriate" and "is specific enough to indicate that [it] did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand." *In re Bent*, 487 S.W.3d 170, 173 (Tex. 2016) (orig. proceeding) (quoting *United Scaffolding*, 377 S.W.3d at 688–89).[40] In *Randolph Auto*, the court concluded that each of the trial court's four reasons for setting aside the jury's verdict and granting a new trial lacked viability. 674 S.W.3d at 302–14 (concluding that "[p]roceeding with the ordinary post-trial process [here] will avoid potential infringement on the parties' jury-trial right and save them, the witnesses, the public, and the judicial system the massive expense and inconvenience of an unneeded second trial" and directing the trial court to vacate the new-trial order, harmonize the verdict, and proceed with the post-trial stages of litigation).

6. Mandatory venue

"In mandatory venue cases, mandamus relief is available without proof of an inadequate appellate remedy if the trial court clearly abused its discretion." *In re Fox River Real Est. Holdings, Inc.*, 596 S.W.3d 759, 763 (Tex. 2020) (orig. proceeding); *see* Tex. Civ. Prac. & Rem. Code Ann. §§ 15.011–.020, .0642; *In re Fisher*, 433 S.W.3d 523, 528–29 (Tex. 2014) (orig. proceeding).[41] "[I]nterlocutory review of a trial

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[40]*See also In re Cash*, No. 03-20-00062-CV, 2020 WL 1881037, at *1 (Tex. App.—Austin Apr. 16, 2020, orig. proceeding) (mem. op.) (facially invalid new-trial order); *In re 3 Atoms, LLC*, No. 07-19-00243-CV, 2019 WL 3820407, at *1, *3 (Tex. App.—Amarillo Aug. 14, 2019, orig. proceeding) (mem. op.) (same); *In re Thibodeaux*, No. 09-20-00008-CV, 2020 WL 1465985, at *1 (Tex. App.—Beaumont Mar. 26, 2020, orig. proceeding) (mem. op.) (same); *In re State*, No. 14-18-00773-CV, 2018 WL 5074536, at *1 (Tex. App.—Houston [14th Dist.] Oct. 18, 2018, orig. proceeding) (mem. op.) (same); *see also In re Gallup*, No. 03-19-00313-CV, 2020 WL 5507271, at *1, *5 (Tex. App.—Austin Sept. 10, 2020, orig. proceeding) (mem. op.) (granting relief from new-trial order after factual-sufficiency review); *In re DCP Operating Co.*, No. 07-18-00416-CV, 2019 WL 1908147, at *1 (Tex. App.—Amarillo Apr. 29, 2019, orig. proceeding) (mem. op.) (same); *In re Thibodeaux*, No. 09-20-00255-CV, 2020 WL 7756073, at *1 (Tex. App.—Beaumont Dec. 30, 2020, orig. proceeding) (mem. op.) (same); *In re Pantalion*, 575 S.W.3d 382, 383 (Tex. App.—Beaumont 2019, orig. proceeding) (same); *In re Torres*, No. 13-20-00237-CV, 2020 WL 5582368, at *1 (Tex. App.—Corpus Christi–Edinburg Sept. 17, 2020, orig. proceeding) (mem. op.) (same); *In re Mooney*, No. 14-20-00556-CV, 2021 WL 3576947, at *1 (Tex. App.—Houston [14th Dist.] Aug. 10, 2021, orig. proceeding) (mem. op.) (same); *In re Torres*, No. 07-19-00220-CV, 2019 WL 3437758, at *1 (Tex. App.—Amarillo July 30, 2019, orig. proceeding) (mem. op.) (granting relief from trial court's new-trial order when the trial court had originally correctly granted plea to the jurisdiction on ecclesiastical-abstention doctrine).

[41]*See also In re Kirbyville Consol. ISD*, No. 09-19-00209-CV, 2019 WL 3720269, at *1 (Tex. App.—Beaumont Aug. 8, 2019, orig. proceeding) (mem. op.) (granting relief from trial court's order denying motion to transfer venue when mandatory venue provision governed claims); *In re McCown*, Nos. 10-20-00128-CV, -129-CV, 2020 WL 4875579, at *1 (Tex. App.—Waco Aug. 10, 2020, orig. proceeding) (mem. op.) (granting relief per Estates Code when trial court entered orders transferring probate proceedings to district court when there were pending motions seeking appointment of a statutory probate court judge); *In re EOG Res., Inc.*, No. 12-18-00054-CV, 2018 WL 3197612, at *1 (Tex. App.—Tyler June

court's failure to enforce a mandatory venue provision is available only through a writ of mandamus." *Wagner v. Apache Corp.*, 627 S.W.3d 277, 288 (Tex. 2021). Nonmandatory venue determinations are generally not reviewable by mandamus "absent extraordinary circumstances." *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding); *see In re Custom Home Builders of Cent. Tex. Inc.*, 647 S.W.3d 419, 425–27 (Tex. App.—San Antonio 2021, orig. proceeding) (identifying split in the courts regarding whether a construction-defect suit falls under Civil Practice and Remedies Code Section 15.011 and following the First court, which holds that it does, in contrast to the Third and Thirteenth courts).

7. Responsible third party

If Chapter 33 of the Civil Practice and Remedies Code (torts, DTPA) applies, then the trier of fact shall determine the percentage of responsibility for the alleged harm as to each claimant, defendant, settling person, and properly designated RTP. Tex. Civ. Prac. & Rem. Code Ann. §§ 33.002(a), .003. An RTP is any person who is alleged to have "caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these." *Id.* § 33.011(6).

"Trial courts have no discretion to deny a timely filed motion to designate [RTP] absent a pleading defect and an opportunity to cure," and, ordinarily, there is no adequate remedy by appeal. *In re Coppola*, 535 S.W.3d 506, 507, 509–10 (Tex. 2017) (orig. proceeding). Thus "a relator need only establish a trial court's abuse of discretion to demonstrate entitlement to mandamus relief with regard to a trial court's denial of a timely-filed section 33.004(a) motion." *Id.* at 510.[42] "[T]he statute . . . presumes that motions for leave to designate *named* persons will be granted based on lenient pleading requirements, while motions to designate *unknown* persons will be denied unless the defendant satisfies strict pleading requirements."

29, 2018, orig. proceeding) (mem. op.) (granting relief on order refusing to transfer venue), *dism'd as moot*, 2018 WL 4214205, at *1 (Tex. App.—Tyler Sept. 5, 2018, orig. proceeding) (mem. op.). A trial court also abuses its discretion when it unilaterally transfers a case to itself in violation of local governing rules. *See In re Hous. Livestock Show & Rodeo, Inc.*, No. 01-18-00825-CV, 2019 WL 2376120, at *1, *7 (Tex. App.—Houston [1st Dist.] June 6, 2019, orig. proceeding) (mem. op.) (granting relief when trial court lacked authority under the local rules to unilaterally transfer a case to itself, resulting in circumvention of the rules governing random case assignment).

[42] *See In re Bertrand*, 602 S.W.3d 691, 693–94 (Tex. App.—Fort Worth 2020, orig. proceeding) (granting relief on trial court's denial of the relators' joint motion for leave to designate RTPs); *In re Kilmer*, No. 05-20-00814-CV, 2021 WL 1290734, at *4 (Tex. App.—Dallas Apr. 7, 2021, orig. proceeding) (mem. op.) (granting relief when trial court erroneously struck a designated RTP); *In re Cook*, 629 S.W.3d 591, 598 (Tex. App.—Dallas 2021, orig. proceeding [mand. denied]) (op. on reh'g en banc) (granting relief from denial of motion to designate RTP because relator's pleading met "fair notice" standard); *In re Vector Contracting, Inc.*, No. 09-19-00311-CV, 2019 WL 5607907, at *1 (Tex. App.—Beaumont Oct. 31, 2019, orig. proceeding) (mem. op.) (granting relief when trial court erred by refusing to allow relator to designate RTP); *In re MAF Indus., Inc.*, No. 13-20-00255-CV, 2020 WL 6158248, at *1 (Tex. App.—Corpus Christi–Edinburg Oct. 19, 2020, orig. proceeding) (mem. op.) (granting relief when trial court abused its discretion by denying relator's motion for leave to designate RTP); *In re Cordish Co.*, 617 S.W.3d 909, 911 (Tex. App.—Houston [14th Dist.] 2021, orig. proceeding) (same); *see also In re YRC Inc.*, 646 S.W.3d 805, 807 (Tex. 2022) (orig. proceeding) (granting relief to allow relator-defendant to designate RPI-plaintiff's employer as RTP sixty-two days before the suit's third trial setting and more than five years after the injury when the motion was timely filed more than 60 days before the then-pending trial date; there was no applicable limitations period for the plaintiff to join his employer because the plaintiff's exclusive remedy was worker's compensation).

In re Gonzales, 619 S.W.3d 259, 263–64 (Tex. 2021) (orig. proceeding) (per curiam) (holding trial court abused its discretion by failing to properly apply statutory RTP requirements).

Mandamus likewise protects a plaintiff's right under Section 33.004(d) "to not have to try her case against an empty chair." *In re Dawson*, 550 S.W.3d 625, 630 (Tex. 2018) (orig. proceeding). That is, depending on the facts, a plaintiff should get the same relief when a trial court erroneously grants a defendant leave to designate an RTP. *Id.* at 631 (noting that "what's sauce for the goose is sauce for the gander"). In *Dawson*, the relator opposed the RPI's motion for leave to designate an RTP when the RPI failed to supplement its disclosure responses before limitations ran. *Id.* at 628. The court noted that the RPI's initial discovery responses did not give the relator timely notice of whom it intended to designate as an RTP and concluded that the trial court had abused its discretion because the RPI's discovery responses did not satisfy its obligations under Rule 194.2(*l*) and Section 33.004(d). *Id.* at 629–30. However, when a defendant discloses an RTP after limitations but in a timely-filed discovery response, the failure to disclose the RTP's identity is "the natural consequence of [the plaintiff's] decision to wait to file suit until limitations were nearing terminus." *In re Mobile Mini, Inc.*, 596 S.W.3d 781, 784–85 (Tex. 2020) (orig. proceeding) (per curiam) (granting relief to allow defendant to designate RTP even though defendant disclosed RTP after limitations had expired).

The supreme court has recently summarized part of the RTP review process as follows:

> Although trial courts have no discretion to deny a timely filed motion to designate [RTP] absent a pleading defect and an opportunity to cure, the trial court must strike the designation if, after an adequate time for discovery, (1) a party asserts that no evidence supports the designated person's responsibility for the claimant's injury or damage, and (2) the defendant fails to "produce[ ] sufficient evidence to raise a genuine issue of fact." Consistent with the statute's language, our courts of appeals have described the standard of review as mirroring a no-evidence summary judgment.

In re Eagleridge Operating, LLC, 642 S.W.3d 518, 525–26 (Tex. 2022) (orig. proceeding) (citing Tex. Civ. Prac. & Rem. Code Ann. §33.004(*l*)); *see also Gregory v. Chohan*, 670 S.W.3d 546, 566 (Tex. 2023) ("The similarity between the statutory responsible-third-party standard and the no-evidence summary judgment standard is obvious."). In *Eagleridge*, the court held that because the trial court did not abuse its discretion by striking the RTP designation, it did not have to decide whether an order striking an RTP designation—as opposed to one denying an RTP designation in the first instance—should be subject to the inadequate-appellate-remedy test. 642 S.W.3d at 526.[43]

8. Otherwise exceeding or abusing authority

As in the preceding examples, mandamus relief may be granted if the trial court fails to apply the law or rules correctly, *see In re Kelm*, 569 S.W.3d 232, 233–34 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding), such as by failing to follow the applicable substantive or procedural law, *see In re Team Indus. Servs., Inc.*, No. 01-21-00212-CV, 2021 WL 1845981, at *1–3 (Tex. App.—Houston [1st Dist.] May 7, 2021, orig. proceeding) (mem. op.).[44] There are many other ways this can happen:

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[43]*See In re Valley Baptist Med. Ctr.*, No. 13-22-00177-CV, 2022 WL 2231335, at *1 (Tex. App.—Corpus Christi–Edinburg June 21, 2022, orig. proceeding) (mem. op.) (denying petition seeking relief from order striking RTP designations because relator failed to establish an abuse of discretion or inadequate appellate remedy).

[44]In *In re Kelm*, the First court granted relief to compel the trial court to vacate orders in a guardianship proceeding when those orders did not follow the Estates Code requirements, the ward's liberty interest was implicated, and there was no adequate remedy as to the ward's attorney's disqualification. 569

- Improper resolution of the case's merits in a TRO. *In re State*, No. 23-0994, 2023 WL 8540008, at *1 (Tex. Dec. 11, 2023) (vacating TRO at attorney general's request after doctor sought pre-authorization for a patient's abortion instead of following statutory requirements).

- Failure to enforce a valid and unambiguous Rule 11 agreement. *In re Schlumberger Tech. Corp.*, No. 11-19-00204-CV, 2019 WL 5617632, at *1 (Tex. App.—Eastland Oct. 24, 2019, orig. proceeding) (mem. op.) (granting relief because trial court had ministerial duty to enforce valid and unambiguous Rule 11 agreement).

- Improper denial of a Rule 91a (matter-of-law) motion. *See In re Hous. Astros, LLC*, No. 14-20-00769-CV, 2021 WL 2965268, at *1 (Tex. App.—Houston [14th Dist.] July 15, 2021, orig. proceeding) (mem. op.) (granting relief on relator's Rule 91a motion when RPIs could not sue for their disappointment in a cheating scandal based on their season tickets).[45] *But see In re First Rsrv. Mgmt., L.P.*, 671 S.W.3d 653, 663–64 (Tex. 2023) (orig. proceeding) (denying mandamus relief despite merit-worthy Rule 91a motion because the court did not know how directing the MDL court to grant the Rule 91a motion would disrupt proceedings stayed during bankruptcy).

- Improper striking of a jury trial demand. *See In re Pool*, No. 03-18-00299-CV, 2019 WL 287940, at *1 (Tex. App.—Austin Jan. 23, 2019, orig. proceeding) (mem. op.) (construing statute and granting relief when trial court denied requested jury trial on appeal from municipal court's dangerous-dog determination); *In re Hulcher Servs., Inc.*, 568 S.W.3d 188, 189 (Tex. App.—Fort Worth 2018, orig. proceeding) (mem. op.) (granting relief from trial court's order striking jury demand).

- Improper joinder under Rule of Civil Procedure 39. *In re Kappmeyer*, 668 S.W.3d 651, 658–60 (Tex. 2023) (noting that the fact that the ultimate judgment could affect nonparties does not in itself require

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S.W.3d 232, 236–41 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding); *see also In re Robinett*, No. 03-21-00649-CV, 2022 WL 382008, at *1 (Tex. App.—Austin Feb. 9, 2022, orig. proceeding) (mem. op.) (granting relief when trial court abused its discretion by appointing a temporary administrator without bond contrary to Estates Code's express requirement where limited exception did not apply). In *In re Team Industry Services*, the First court granted relief when no new subpoena was served on a particular witness, the older subpoenas for that witness no longer complied with Rule of Civil Procedure 176.1 because the place had changed, the time had passed, and the witness had moved more than 150 miles from the courthouse. 2021 WL 1845981, at *1–2. A trial court's failure to follow the Rules of Civil Procedure—particularly those pertaining to discovery—may result in mandamus relief. *See* Section VI.A.1., *supra*; *see also In re Saddles Blazin, LLC*, No. 09-19-00302-CV, 2019 WL 5607905, at *1 (Tex. App.—Beaumont Oct. 31, 2019, orig. proceeding) (mem. op.) (granting relief when trial court's amended docket control order retroactively imposed deadlines for filing amended pleadings and designating experts).

[45] *See also In re Springs Condos., L.L.C.*, No. 03-21-00493-CV, 2021 WL 5814292, at *1 (Tex. App.—Austin Dec. 8, 2021, orig. proceeding) (mem. op.) (granting relief when trial court abused its discretion by denying relator's Rule 91a motion because RPI's claims were time-barred); *In re Sams*, No. 05-22-00150-CV, 2022 WL 3354137, at *1, *3 (Tex. App.—Dallas Aug. 15, 2022, orig. proceeding) (mem. op.) (granting relief on improper denial of Rule 91a motion based on affirmative defense of attorney immunity); *In re Canfora*, No. 01-21-00128-CV, 2021 WL 4095580, at *1 (Tex. App.—Houston [1st Dist.] Sept. 9, 2021, orig. proceeding) (mem. op.) (granting relief on improper denial of Rule 91a motion based on affirmative defenses of attorney immunity and judicial-proceedings privilege); *see generally Haynes & Boone, LLP v. NFTD, LLC*, 631 S.W.3d 65, 67 (Tex. 2021) (defining scope of attorney-immunity defense).

their joinder under Rule 39 and granting relief because the trial court's order requiring relators to bear the expense of joining several hundred parties to their suit put them "in danger of succumbing to the burden of litigation"); *see also In re Austin Hous. Fin. Corp.*, No. 03-22-00091-CV, 2022 WL 2960796, at *1 (Tex. App.—Austin July 27, 2022, orig. proceeding) (mem. op.) (granting relief from trial court's order on plea in abatement based on nonjoinder that failed to meet Rule 39's requirements); *In re Boyaki*, 587 S.W.3d 479, 481–84 (Tex. App.—El Paso 2019, orig. proceeding) (op. on reh'g) (granting relief from trial court's order requiring relators to file an amended petition joining two additional defendants as indispensable parties when nothing in the record indicated that the proposed additional defendants had an interest in the action's subject matter, relators had released them, and the record did not show that the trial court could not effectively and completely adjudicate the dispute without joinder).

- Improper denial of a motion to sever and abate extra-contractual claims in an underlying UM/UIM coverage suit. *See generally In re State Farm Mut. Auto Ins.*, 629 S.W.3d 866, 877–78 (Tex. 2021) (orig. proceeding) (holding trial court abused its discretion by denying motions to bifurcate); *In re James River Ins.*, No. 14-20-00390-CV, 2020 WL 6143163, at *1 (Tex. App.—Houston [14th Dist.] Oct. 20, 2020, orig. proceeding) (mem. op.).[46]

- Improper denial of a motion to dismiss under a specific statutory scheme. *In re Wade*, 566 S.W.3d 375, 377 (Tex. App.—Fort Worth 2018, orig. proceeding) (granting relief when trial court denied relators' motion to dismiss under Civil Practice and Remedies Code Chapter 128 for failure of RPIs to serve sport-shooting-range expert report).[47]

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[46]*See also In re Farmers Tex. Cnty. Mut. Ins.*, No. 02-20-00352-CV, 2021 WL 1421439, at *1 (Tex. App.—Fort Worth Apr. 15, 2021, orig. proceeding) (mem. op.) (granting relief in light of supreme court's 2021 *State Farm* opinion on bifurcated trials); *In re Allstate Fire & Cas. Ins. Co.*, No. 03-21-00515-CV, 2022 WL 120263, at *1 (Tex. App.—Austin Jan. 12, 2022, orig. proceeding) (mem. op.) (same); *In re State Farm Mut. Auto Ins.*, 623 S.W.3d 526, 527 (Tex. App.—Dallas 2021, orig. proceeding) (same); *In re Allstate Fire & Cas. Ins.*, No. 04-18-00676-CV, 2018 WL 6624885, at *1 (Tex. App.—San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.) (granting relief when trial court erred by not abating RPI's extra-contractual claims while his breach-of-contract claim for UIM benefits remained pending); *In re Geico Cnty. Mut. Ins.*, No. 05-21-00226-CV, 2021 WL 3754576, at *1 (Tex. App.—Dallas Aug. 25, 2021, orig. proceeding) (mem. op.) (granting relief when law is well settled that extra-contractual claims should be severed and abated pending a judicial determination of liability under UM/UIM policy); *In re Germania Select Ins.*, No. 11-20-00176-CV, 2020 WL 5741595, at *1 (Tex. App.—Eastland Sept. 25, 2020, orig. proceeding) (mem. op.) (granting relief when trial court lifted abatement of extracontractual claims in UM/UIM case); *In re Farmers Tex. Cnty. Mut. Ins.*, No. 13-21-00083-CV, 2021 WL 3889425, at *1, *10 (Tex. App.—Corpus Christi–Edinburg Aug. 31, 2021, orig. proceeding) (mem. op.) (granting relief on motion to abate claim for UM/UIM benefits after concluding that a request for abatement rather than a motion to bifurcate does not change the analysis under *State Farm*); *see also In re Progressive Cas. Ins.*, No. 12-20-00220-CV, 2020 WL 6065933, at *1 (Tex. App.—Tyler Oct. 14, 2020, orig. proceeding) (mem. op.) (granting relief from order denying relator's motion to sever and abate extracontractual claims in boat-insurance case), *dism'd as moot*, 2020 WL 6380342, at *1 (Tex. App.—Tyler Oct. 30, 2020, orig. proceeding) (mem. op.).

[47]Note that in 2020, the supreme court addressed whether a trial court can vacate an earlier grant of a TCPA motion. The Dallas court granted mandamus relief in *In re Nusbaum*, No. 05-19-01016-CV, 2019 WL 4594213, at *1 (Tex. App.—Dallas Sept. 23, 2019, orig. proceeding) (mem. op.), determining that the trial court lacked authority to vacate an earlier grant of a TCPA motion and relying on *In re Hartley*, 599

- Application of the wrong evidentiary standard to criminal contempt. *In re Jensen*, No. 03-20-00207-CV, 2020 WL 4462803, at *1 (Tex. App.—Austin July 15, 2020, orig. proceeding) (mem. op.) (granting writ of habeas corpus on criminal contempt order and associated confinement originating in eviction suit when trial judge applied clear-and-convincing-evidence standard instead of beyond-a-reasonable doubt standard, rendering order void).

- Improper grant of a plea in abatement on a title issue when appeal of forcible-detainer issue could proceed to trial de novo. *In re Guzman*, No. 04-20-00589-CV, 2021 WL 603359, at *1, *3 (Tex. App.—San Antonio Feb. 17, 2021, orig. proceeding), *mem. op. withdrawn & superseded*, 2021 WL 2211458, at *4 (Tex. App.—San Antonio June 2, 2021, orig. proceeding) (mem. op. on reh'g) (reaching same conclusion).

- Failure to follow Civil Practice and Remedies Code Chapter 61's requirements for a writ of attachment, *see In re Warrior Energy Servs. Corp.*, 599 S.W.3d 110, 112, 114–15 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding), or other terms for release of funds from the trial court's registry, *see In re Mittelsted*, 651 S.W.3d 630, 632 (Tex. App.—Houston [14th Dist.] 2022, orig. proceeding).[48] In *Warrior Energy*, the court granted relief when the trial court ordered the relator-defendant to deposit $2 million into trial court's registry before breach-of-contract claims against it had been adjudicated; Chapter 61's requirements were not met, and there was no showing that the disputed funds were in danger of being lost or depleted. 559 S.W.3d at 112, 114–15. In *Mittelsted*, the court granted relief when the trial court allowed an estate's dependent administrator to pay estate expenses from funds the relator had deposited into the court's registry to suspend enforcement of a judgment pending appeal because the purpose of such a deposit in lieu of bond is security for the judgment pending appeal, and a trial court may not release such a deposit while the appeal remains pending. 651 S.W.3d at 636–37.

S.W.3d 574 (Tex. App.—Dallas 2019, orig. proceeding) (mem. op.). *Hartley* was superseded by *In re Panchakarla*, in which the supreme court held that TCPA deadlines do not deprive trial court of authority, after the timely granting a TCPA dismissal motion, to exercise its plenary authority to reconsider and vacate the order after the TCPA ruling deadline passes. 602 S.W.3d 536, 538 (Tex. 2020) (orig. proceeding) (per curiam).

[48] *See also In re Lavender*, No. 02-22-00309-CV, 2022 WL 3723306, at *1, *4 (Tex. App.—Fort Worth Aug. 30, 2022, orig. proceeding) (mem. op.) (granting relief when trial court ordered relators to deposit into court's registry lump-sum and ongoing rent but failed to meet requirements of rule in *Castilleja v. Camero*, 414 S.W.2d 431 (Tex. 1967), requiring a dispute about the particular funds); *In re AP Gulf States, Inc.*, No. 10-19-00081-CV, 2019 WL 1561575, at *1 (Tex. App.—Waco Apr. 10, 2019, orig. proceeding) (mem. op.) (granting relief to vacate order requiring relator's insurer to tender and deliver $6,820,885.58 into the court's registry when there was insufficient evidence in the record to show the funds were in danger of being lost or depleted); *In re Walker*, No. 10-18-00373-CV, 2018 WL 6543969, at *1 (Tex. App.—Waco Dec. 10, 2018, orig. proceeding) (mem. op. and order) (granting relief when rodeo tickets in trial court's registry were set to expire and relator was tickets' registered owner); *In re Lone Star Nat'l Bank*, No. 13-18-00487-CV, 2018 WL 4997282, at *1 (Tex. App.—Corpus Christi–Edinburg Oct. 15, 2018, orig. proceeding) (mem. op.) (granting relief on relator's petition to dismiss the underlying lawsuit in accordance with its nonsuit when RPI did not have a pending affirmative claim for relief in garnishment action); *In re Breitburn Operating LP*, No. 14-21-00337-CV, 2022 WL 2920679 (Tex. App.—Houston [14th Dist.] July 26, 2022, orig. proceeding) (mem. op.) (granting relief from order directing relator to deposit over $13.4 million into the trial court's registry).

- Failure to follow statutory terms. *See In re J&S Utils., LLC*, No. 05-20-00696-CV, 2020 WL 6883170, at *2–3 (Tex. App.—Dallas Nov. 24, 2020, orig. proceeding) (mem. op.) (granting relief when Property Code expressly provided for evidentiary hearing notwithstanding trial court's local procedural rule); *see also In re Rent Space Mgmt. LLC*, No. 05-22-00460-CV, 2022 WL 2437599, at *1 (Tex. App.—Dallas July 5, 2022, orig. proceeding) (mem. op.) (granting relief when Rule of Civil Procedure 510.8(d)(1) is "applicable nonbankruptcy law" and concluding that the trial court was obligated to issue to relator a writ of possession for business premises upon the termination of the bankruptcy stay).

- Failure to follow the first-filed rule. *See In re Tex. Christian Univ.*, 571 S.W.3d 384, 387, 392 (Tex. App.—Dallas 2019, orig. proceeding) (op. on reh'g) (granting relief when trial court abused its discretion by denying relator's plea in abatement because first-filed rule applied without exception under the case's circumstances).

- Improper compelling of a nonparty to attend mediation. *See In re Vinson*, 632 S.W.3d 1, 2 (Tex. App.—El Paso 2019, orig. proceeding) (granting relief when trial court compelled nonparty insurance adjuster in car-crash case to attend mediation).

- Failure to follow bill-of-review procedure. *See In re Envo Specialties LLC*, No. 09-18-00481-CV, 2019 WL 1182202, at *1 (Tex. App.—Beaumont Mar. 14, 2019, orig. proceeding) (mem. op.) (granting relief when trial court abused its discretion by setting aside judgment in a bill-of-review proceeding).

- Failure to follow dismissal-for-want-of-prosecution procedure. *See In re Bordelon*, 578 S.W.3d 197, 198 (Tex. App.—Tyler 2019, orig. proceeding) (mem. op.) (granting relief on denial of motion to dismiss for want of prosecution when plaintiff's case had been pending with minimal activity for over 5 years), *dism'd as moot*, 2019 WL 2021681, at *1 (Tex. App.—Tyler May 8, 2019, orig. proceeding) (mem. op.); *see also In re Seidler Oil & Gas Dev., LLC*, No. 12-22-00009-CV, 2022 WL 1038102, at *1 (Tex. App.—Tyler Apr. 6, 2022, orig. proceeding) (mem. op.) (granting relief on denial of motion to dismiss for want of prosecution when plaintiff's case had been pending with minimal activity for over 4.5 years and for over 14 months after bankruptcy closed and stay was lifted), *dism'd as moot*, 2022 WL 1286559, at *1 (Tex. App.—Tyler Apr. 29, 2022, orig. proceeding) (mem. op.).

- Improper interference with the administrative phase of a condemnation proceeding. *See In re ETC Tex. Pipeline, Ltd.*, No. 03-22-00387-CV, 2022 WL 3048238, at *1, *3 (Tex. App.—Austin Aug. 3, 2022, orig. proceeding) (mem. op.) (granting relief when trial court abated administrative phase to allow premature discovery not authorized by eminent-domain statutes).

- Improper refusal to grant a plea in abatement consistent with Insurance Code Section 542A.005. *In re Westchester Surplus Lines Ins. Co.*, No. 07-22-00329-CV, 2023 WL 4488269, at *3–5 (Tex. App.—Amarillo July 10, 2023, orig. proceeding) (mem. op.) (comparing notice letters' deficiencies to statutory requirements); *In re James River Ins. Co.*, No. 07-22-00357-CV, 2023 WL 4487722, at *2 (Tex. App.—Amarillo July 10, 2023, orig. proceeding) (mem. op.) (same).

- Failure to grant a motion to show authority under Rule of Civil Procedure 12. *See In re Kinder Morgan SACROC, LP*, 672 S.W.3d 27 (Tex. 2023) (orig. proceeding) (denying relief but referring the trial court to *Pecos Cnty. Appraisal Dist. v. Irann-Sheffield ISD*, 672 S.W.3d 401 (Tex. 2023)—the "tax ferret" case—to reconsider its ruling).

9. Disqualification of counsel

The supreme court has stated that "[d]isqualification of counsel is a severe remedy that can result in significant expense to clients, disrupt the orderly progress of litigation, and deprive a party of the counsel

of its choice." *In re Murrin Bros. 1885, Ltd.*, 603 S.W.3d 53, 57 (Tex. 2019) (orig. proceeding). Accordingly, "improper disqualification [i]s a clear abuse of discretion for which there is no adequate remedy by appeal," *In re Guar. Ins. Servs.*, 343 S.W.3d 130, 132 (Tex. 2011) (orig. proceeding) (per curiam), as is "[t]he inappropriate denial of a motion to disqualify," *Murrin Bros. 1885, Ltd.*, 603 S.W.3d at 57. *See In re Elusive Holdings, Inc.*, No. 03-19-00809-CV, 2020 WL 1869029, at *1, *3 (Tex. App.—Austin Apr. 15, 2020, orig. proceeding) (mem. op.) (granting relief when trial court ordered relator's attorney disqualified in lawsuit against former shareholder/RPI without requiring RPI to show evidence requiring the disqualification and did not apply proper "substantial relationship" standard).[49]

10. Improper forum

a. Forum-selection clause

"[N]o adequate remedy by appeal [exists] when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute." *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009) (orig. proceeding) (per curiam); *see In re Nationwide Ins. of Am.*, 494 S.W.3d 708, 710 (Tex. 2016) (orig. proceeding) (granting relief when the party who initiated the Texas litigation failed to establish that the mandatory forum-selection clause was waived or otherwise unenforceable).[50]

In *Nationwide*, the court stated that a trial court that refused to enforce a contractual forum-selection clause would abuse its discretion "absent clear evidence that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial." 494 S.W.3d at 712 (quoting *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231–32 (Tex. 2008) (orig. proceeding)). The court added that "it would ordinarily be unreasonable or unjust for a court to enforce a forum-selection clause after it has been waived," and, borrowing from its arbitration jurisprudence, it stated that waiver would occur if the party had "substantially invoke[ed] the judicial process to the other party's detriment or prejudice." *Id.* at 712–13 (observing that "substantial" depends on context).

b. Forum non conveniens

Generally, a forum-non-conveniens decision "is committed to the trial court's sound discretion." *In re Mahindra, USA Inc.*, 549 S.W.3d 541, 545 (Tex. 2018) (orig. proceeding). "When a court denies a motion to dismiss [on forum-non-conveniens grounds] . . . the movant cannot obtain a final judgment, and no immediate appeal is available," making mandamus an appropriate remedy to correct an abuse of discretion. *Id.*; *In re CEVA Ground US, LP.*, No. 01-19-00760-CV, 2020 WL 1429929, at *1 (Tex. App.—

[49] *See also In re Velasquez*, No. 04-21-00457-CV, 2022 WL 1479046, at *1 (Tex. App.—San Antonio May 11, 2022, orig. proceeding) (mem. op.) (granting relief from trial court's denial of relator's motion to disqualify RPI's attorney, who also was or might be a witness necessary to establish an essential fact in RPI's case); *In re Luecke*, 569 S.W.3d 313, 315 (Tex. App.—Austin 2019, orig. proceeding) (granting relief when RPIs failed to establish that disqualification of relator's attorney was proper under the circumstances when they provided only allegations of possible prejudice and unsupported argument); *In re Jones*, No. 12-19-00354-CV, 2019 WL 7373848, at *1 (Tex. App.—Tyler Dec. 31, 2019, orig. proceeding) (mem. op.) (granting relief in part on disqualification of relator's counsel), *dism'd as moot*, 2020 WL 219237, at *1 (Tex. App.—Tyler Jan. 15, 2020, orig. proceeding) (mem. op.).

[50] *See also In re EP Floors Corp.*, No. 14-18-00610-CV, 2018 WL 4354688, at *1 (Tex. App.—Houston [14th Dist.] Sept. 13, 2018, orig. proceeding) (mem. op.) (granting relief when trial court erred by denying motion to dismiss based on mandatory forum-selection clause in parties' contract); *In re Rosewood Priv. Invs., Inc.*, No. 05-18-00166-CV, 2018 WL 4403749, at *1 (Tex. App.—Dallas Sept. 17, 2018, orig. proceeding) (mem. op.) (granting relief from trial court's refusal to enforce forum-selection clause because the clause was enforceable and RPI did not establish that that an exception to enforcement applied).

Houston [1st Dist.] Mar. 24, 2020, orig. proceeding) (mem. op.) (granting relief when trial court denied relator's motion to dismiss on forum-non-conveniens grounds).

11. Sanctions

Mandamus may be available when the trial court does not defer payment on a monetary-sanctions order until final judgment. *In re Casey*, 589 S.W.3d 850, 851, 856 (Tex. 2019) (orig. proceeding) (per curiam). This is because "the magnitude of monetary sanctions made payable before rendition of an appealable order could have a preclusive effect on the violating party's access to the courts and should not ordinarily be used to dispose of litigation." *Id.* at 855 (quoting *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991) (orig. proceeding)). The court noted that the focus should be "on the *effect* of a monetary sanction that must be paid before it can be superseded and appealed, not on a specific amount or purpose of the sanction." *Id.* at 856. The trial court must also have a legal basis upon which to support the sanctions order. *In re Gilbreath*, No. 07-20-00244-CV, 2021 WL 450970, at *1 (Tex. App.—Amarillo Feb. 8, 2021, orig. proceeding) (mem. op.) (granting relief from sanctions order when none of the recited grounds supported the order).

Other sanctions, such as those applicable to discovery, may also entitle a relator to mandamus relief. *See In re N. Hous. Pole Line, L.P.*, No. 09-19-00384-CV, 2020 WL 97578, at *1 (Tex. App.—Beaumont Jan. 9, 2020, orig. proceeding) (mem. op.). In *North Houston Pole Line*, the court granted relief from discovery sanctions striking an expert report, expert witness, and "anything related to" the event data recorder, as well as any further inspection or re-download of data, when relator's expert had obtained data from the vehicle's event data recorder while the vehicle was in storage and without first seeking permission or consent from the vehicle's registered owner (RPI's mother) and without disclosing the data extraction to the RPI until four months later. *Id.* The court granted relief when the trial court failed to consider or explain why a lesser sanction would not accomplish the same goal and it was not apparent from the record that the trial court directed the sanction against the specific offender, contrary to the rules governing discovery sanctions. *Id.*; *see In re Xterra Constr., LLC*, 582 S.W.3d 652, 654 (Tex. App.—Waco 2019, orig. proceeding) (granting relief from order on motion for discovery sanctions for spoliation of evidence); *see also In re Wheeler*, No. 09-22-00251-CV, 2022 WL 3908531, at *1 (Tex. App.—Beaumont Aug. 31, 2022, orig. proceeding) (mem. op.) (granting relief from pretrial order striking all of relator's designated non-retained testifying experts on causation in personal injury case because relator's failure to inform his doctors about his prior injuries does not mean that his experts' opinions are unreliable or inadmissible under Rule of Evidence 702); *In re On Track Experience, LLC*, No. 03-21-00304-CV, 2021 WL 4876949, at *1 (Tex. App.—Austin Oct. 20, 2021, orig. proceeding) (mem. op.) (granting mandamus relief from discovery-sanction order that struck a waiver signed by RPI and excluded it from being used in any proceeding or trial in the underlying matter).

Likewise, whether exercised pursuant to Chapter 10, Rule 13, or its inherent power, a trial court's discretion to impose sanctions is subject to at least one important limitation: Sanctions may only be imposed when the person or party against whom the sanction is sought has received notice and an adequate opportunity to respond. *In re Champagne*, No. 03-21-00426-CV, 2021 WL 4976719, at *2 (Tex. App.—Austin Oct. 27, 2021, orig. proceeding) (mem. op.). In *Champagne*, a family-law case, the trial court abused its discretion by awarding attorney's fees as a sanction against the relator-father when the RPI-mother's request for interim attorney's fees made no reference that she sought attorney's fees as a sanction and the trial court provided no notice before the hearing that it was considering sanctions, depriving the relator-father of an adequate opportunity to respond. *Id.* at *2–3. Another limitation on a court's inherent power to sanction is the necessity of a finding of bad faith abuse of the judicial process. *In re Tex. Dep't of Family & Protective Servs.*, No. 04-22-00014-CV, 2022 WL 2960224, at *7 (Tex. App.—San Antonio July 27, 2022, orig. proceeding) (mem. op.) (citing *Brewer v. Lennox Hearth Prods., L.L.C.*, 601 S.W.3d 704, 718–19 (Tex. 2020)). In this DFPS case, the court granted mandamus relief from a trial court's order that DFPS pay more than $1.6 million in sanctions for failing to find a foster-home placement for a fourteen-year-old special-needs child, because—among other things—the trial court had failed to make a predicate bad-faith

finding. *Id.* at *1, *7 (referencing *Brewer*'s noting that errors in judgment, lack of diligence, unreasonableness, negligence, and even gross negligence—without more—do not equate to bad faith).

12. Civil Practice and Remedies Code Section 18.001 affidavits and counteraffidavits

Mandamus relief may be appropriate when the trial court erroneously strikes a Section 18.001[51] counteraffidavit that satisfies the statutory expertise- and reasonable-notice requirements. *In re Allstate Indem. Co.*, 622 S.W.3d 870, 877–883 & n.9 (Tex. 2021) (orig. proceeding) (refraining from holding that mandamus relief will be appropriate in every such case).[52] A trial court's doubts about admissibility and reliability are not proper bases for striking a Section 18.001 counteraffidavit. *Id.* at 879–80. A trial court also abuses its discretion when, without a valid legal basis, it precludes the party offering the counteraffidavit from contesting at trial the medical expenses' reasonableness. *Id.* at 882. Further, "a counteraffidavit's inclusion of a causation opinion has no bearing on its validity under Section 18.001(f)"; provided that the counteraffidavit complies with Section 18.001(f), the mere inclusion of such an opinion is not a proper basis for striking it. *In re Chefs' Produce of Hous., Inc.*, 667 S.W.3d 297, 302 (Tex. 2023) (orig. proceeding) (applying *Allstate*).

13. Complained-of order still in effect

Mandamus relief may be granted when the parties indicate the issue has been resolved but the trial court's complained-of order remains in effect, *In re Nestle Waters N. Am., Inc.*, No. 14-21-00004-CV, 2021 WL 507454, at *1 (Tex. App.—Houston [14th Dist.] Feb. 11, 2021, orig. proceeding) (mem. op.) (granting relief from discovery order when RPIs withdrew intention to take depositions but trial court's order denying motion to quash was still in effect), or when the RPI unilaterally withdraws a controversial discovery request as appellate scrutiny becomes imminent, *see In re Contract Freighters, Inc.*, 646 S.W.3d 810, 812 (Tex. 2022) (orig. proceeding). In *Contract Freighters*, after the supreme court requested a response to the relator's petition complaining of overbroad discovery orders, the RPIs' counsel notified the relator's counsel that the RPIs had withdrawn a complained-of discovery request, although the RPIs' counsel did not inform the trial court about the withdrawal, and the trial court did not vacate its order. 646 S.W.3d at 813. The RPIs then moved to dismiss the relator's mandamus petition as moot. *Id.* "But mootness is not readily found, particularly when a party has taken steps to cause mootness." *Id.* The RPIs provided no

[51]Under Civil Practice and Remedies Code Section 18.001, an affidavit stating that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a judge's or jury's factfinding that the amount charged was reasonable and that the service was necessary unless a controverting affidavit is served under Section 18.001's rules. Tex. Civ. Prac. & Rem. Code Ann. § 18.001(b). A Section 18.001 affidavit is a procedural device designed to streamline proof of medical expenses' reasonableness and necessity. *Allstate Indem. Co.*, 622 S.W.3d at 881. In the absence of a proper controverting affidavit, a claimant may rely on an affidavit setting forth the necessity and reasonableness of medical expenses to avoid adducing expert testimony on those issues at trial and, if she does so, the uncontroverted affidavit is sufficient—but not necessarily conclusive—evidence to support a factfinding "that the amount charged was reasonable or that the service was necessary." *Id.* (quoting Tex. Civ. Prac. & Rem. Code Ann. § 18.001(b)). A party seeking to recover her past medical expenses must prove that the amounts paid or incurred are reasonable, so a claimant who does not avail herself of the Section 18.001 procedure must present expert testimony to establish the reasonableness of her medical expenses, even if the amount is undisputed. *Id.* at 876.

[52]*See also In re Brown*, No. 12-18-00295-CV, 2019 WL 1032458, at *1 (Tex. App.—Tyler Mar. 5, 2019, orig. proceeding) (mem. op.) (granting relief from trial court's order striking relators' Chapter 18 counteraffidavit), *dism'd as moot*, 2019 WL 1760103, at *1 (Tex. App.—Tyler Apr. 10, 2019, orig. proceeding) (mem. op.).

enforceable assurances via a Rule 11 agreement, a binding covenant, or anything else—like a signed agreement accompanying a request to vacate the order—that would provide sufficient certainty that they would not refile the same or similar requests if the mandamus petition were dismissed. *Id.* at 814. The court noted, "Unilateral and unenforceable withdrawal of discovery, without any assurances that the withdrawal is definite, and at the very hour 'appellate courts are looking,' does not moot a discovery dispute." *Id.* (referencing *In re Allied Chem. Corp.*, 227 S.W.3d 652, 655 (Tex. 2007) (orig. proceeding)). Concluding that the issue was not moot, the court then reached the petition's merits and held that the RPIs' discovery requests were impermissibly broad. *Id.* at 814–15 ("[RPIs] do not attempt to show how a nationwide search over a five-year period reasonably advances their claims against [relator].").

14. Possible relief from grant of interlocutory bill of review

In *In re Miramontes*, the El Paso court observed that there is a split of authority in the intermediate courts as to whether mandamus relief is available when a trial court grants an interlocutory bill of review. 648 S.W.3d 590, 599–600 (Tex. App.—El Paso 2022, orig. proceeding) (citing *In re Office of Att'y Gen.*, 276 S.W.3d 611, 620 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding) (noting the split)). The Houston courts and the Austin court hold that a litigant's right to appeal the final judgment presents an adequate appellate remedy while the San Antonio, Dallas, Corpus Christi, and Waco courts hold that mandamus relief may be available to review an interlocutory bill of review because the ability to review a final judgment does not necessarily present an "adequate" remedy. *Id.* at 599–600 & nn.8–9 (counting cases). The El Paso court did not decide in *Miramontes* on which side of the split it would fall because it concluded that there was no clear abuse of discretion. *Id.* at 600.[53]

B. Cases resulting in no relief

1. Failure to follow the rules

A petition for writ of mandamus will be denied when the relator does not establish that he, she, or it is entitled to relief. *In re Builders Equip. & Tool Co.*, No. 14-21-00079-CV, 2021 WL 3629203, at *1 (Tex. App.—Houston [14th Dist.] Aug. 17, 2021, orig. proceeding) (mem. op.) (discovery); *In re Dupuy*, No. 14-20-00865-CV, 2021 WL 3576743, at *1 (Tex. App.—Houston [14th Dist.] Aug. 10, 2021, orig. proceeding) (mem. op.) (Rule 91a). *See generally* Appendix A. For example, a deficient mandamus record or other failure to follow TRAP 52's requirements will generally result in a denial of relief. *See In re Porter*, No. 06-21-00066-CV, 2021 WL 3435004, at *1 (Tex. App.—Texarkana Aug. 6, 2021, orig. proceeding) (mem. op.) (denying petition when relators failed to provide a sufficient mandamus record).[54]

[53] *Miramontes* involved a probate case complicated by the decedent's kidnapping and subsequent conflicting dates of death, the timing of the death of his insurance policy's primary beneficiary, and his secondary beneficiary's failure serve the decedent's brother, who stood to inherit from the deceased beneficiary and who then filed a petition for bill of review, which the trial court granted. *Id.* at 593–99.

[54] *See also In re Gilead Scis., Inc.*, No. 06-21-00027-CV, 2021 WL 1537482, at *2 (Tex. App.—Texarkana Apr. 20, 2021, orig. proceeding) (mem. op.) (denying petition when relators failed to provide a sufficient mandamus record); *In re Safeco Ins. Co. of Ind.*, No. 06-21-00024-CV, 2021 WL 1521977, at *1 (Tex. App.—Texarkana Apr. 19, 2021, orig. proceeding) (mem. op.) (same); *In re Long*, 607 S.W.3d 443, 444 (Tex. App.—Texarkana 2020, orig. proceeding) (same); *In re Stutsman*, No. 06-20-00064-CV, 2020 WL 5580185, at *1 (Tex. App.—Texarkana Sept. 18, 2020, orig. proceeding) (mem. op.) (denying mandamus relief when petition was not authenticated as required by TRAP 52.3(j)); *In re H.F.C.*, No. 13-18-00693-CV, 2019 WL 92006, at *1 (Tex. App.—Corpus Christi–Edinburg Jan. 3, 2019, orig. proceeding) (mem. op.) (DWOJ relator's "notice of intent to file a petition for writ of mandamus and motion to stay" when she did not file a petition and thus court had no jurisdiction to consider her motion to stay); *In re*

2. Mootness

Mootness is a question of law. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). As noted throughout this paper, mootness can result in the dismissal of a petition for writ of mandamus. The supreme court has identified the following occasions when a case becomes moot: (1) a justiciable controversy no longer exists between the parties; (2) the parties no longer have a legally cognizable interest in the case's outcome; (3) the court can no longer grant the requested relief or otherwise affect the parties' rights or interests; or (4) any decision would constitute an impermissible advisory opinion. *ERCOT, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, 619 S.W.3d 628, 634–35 (Tex. 2021) (orig. proceeding). In *Panda Power*, the court observed, "Under these principles, a trial court's entry of a final judgment will often moot an interlocutory appeal or mandamus petition that challenges a prior trial-court order." *Id.* at 635. In such a case, the substantive issue presented in the interlocutory appeal or mandamus petition merges into the final judgment but renders the interlocutory appeal or mandamus "procedurally moot." *Id.* at 635–36.

There are many ways a petition for writ of mandamus can become moot:

- The trial court reconsiders the challenged order and vacates its previous decision or issues a subsequent order that resolves the issue. *See In re Kasegwe*, No. 01-20-00730-CV, 2021 WL 3083101, at *1 (Tex. App.—Houston [1st Dist.] July 22, 2021, orig. proceeding) (mem. op.); *see also In re Midcoast G&P (Okla.) L.P.*, No. 07-21-00109-CV, 2021 WL 2213239, at *1 (Tex. App.—Amarillo June 1, 2021, orig. proceeding) (mem. op.) (dismissed on relator's motion based on petition's subject having been rendered moot by subsequent trial court order).[55]

Rogers, No. 13-19-00358-CV, 2019 WL 3519052, at *1 (Tex. App.—Corpus Christi–Edinburg Aug. 1, 2019, orig. proceeding) (mem. op.) (denying relief on incarcerated pro se relator's petition to transfer venue of underlying case when petition failed to comply with TRAPs 52.3, 52.7); *In re Scott*, No. 13-18-00542-CV, 2018 WL 4701682, at *1 (Tex. App.—Corpus Christi–Edinburg Oct. 1, 2018, orig. proceeding) (mem. op.) (denying relator's petition seeking to compel trial court to rule on his motion for settlement hearing in underlying personal injury suit when relator failed to provide an appendix or record).

There are other rules that can also affect a relator's petition, such as those affecting vexatious litigants. *See In re Dunsmore*, No. 07-21-00173-CV, 2021 WL 4101073, at *1 (Tex. App.—Amarillo Sept. 9, 2021, orig. proceeding) (mem. op.) (dismissing vexatious litigant's mandamus petition because he failed to obtain an order from the local administrative judge permitting the filing); *In re Johnson*, No. 13-21-00078-CV, 2021 WL 1352762, at *1 (Tex. App.—Corpus Christi–Edinburg Apr. 12, 2021, orig. proceeding) (mem. op.) (dismissing relator's mandamus petition when, as a vexatious litigant, he had failed to obtain a prefiling order in the underlying matter and had failed to support his petition with an order from the appropriate administrative judge granting him permission to file the original proceeding after receiving at 10-day dismissal notice); *see generally* Tex. Civ. Prac. & Rem. Code Ann. §§ 11.001–.104 (statutory provisions applicable to vexatious litigants). A vexatious litigant can apply for a writ of mandamus in the intermediate appellate court if the local administrative judge denies him or her permission to file suit. *See id.* § 11.102(f).

[55]*See also In re Jimenez*, No. 13-21-00199-CV, 2021 WL 3603321, at *1 (Tex. App.—Corpus Christi–Edinburg Aug. 13, 2021, orig. proceeding) (dismissing as moot relator's petition to vacate TRO and other orders after relators filed a motion to dismiss as moot based on trial court's having "corrected its errors"); *In re Cuellar*, No. 13-20-00362-CV, 2020 WL 7413726, at *1 (Tex. App.—Corpus Christi–Edinburg Dec. 17, 2020, orig. proceeding) (mem. op.) (dismissing petition as moot after successor judge vacated the complained-of SAPCR temporary orders); *In re Janvier*, No. 13-20-00005-CV, 2020 WL 241951, at *1 (Tex. App.—Corpus Christi–Edinburg Jan. 14, 2020, orig. proceeding) (mem. op.)

- The parties settle or nonsuit the underlying case. *See In re San Jacinto Coll.*, No. 01-21-00180-CV, 2021 WL 1970401, at *1 (Tex. App.—Houston [1st Dist.] May 18, 2021, orig. proceeding) (mem. op.) (dismissing as moot when underlying suit nonsuited).[56]

- The trial judge (finally) rules on the pending motion. *See In re Pete*, No. 14-21-00073-CR, 2021 WL 2978682, at *1 (Tex. App.—Houston [14th Dist.] July 15, 2021, orig. proceeding) (mem. op.) (dismissing as moot in part because trial court had ruled on pending motions); *In re Advantage Cars.com*, No. 01-20-00863-CV, 2021 WL 1217326, at *1 (Tex. App.—Houston [1st Dist.] Apr. 1, 2021, orig. proceeding) (mem. op.) (dismissing as moot after trial court ruled on pending RTP motion).[57]

- The trial judge enters a final, appealable order, depriving the relator of the argument that he has no adequate appellate remedy. *See In re Mendell*, No. 01-20-00750-CV, 2021 WL 1181198, at *1 (Tex. App.—Houston [1st Dist.] Mar. 30, 2021, orig. proceeding) (mem. op.).

- The supreme court denies a related motion for rehearing and the intermediate court's mandate issues. *See In re City of Hous.*, No. 14-20-00768-CV, 2020 WL 6930520, at *1 (Tex. App.—Houston [14th Dist.] Nov. 25, 2020, orig. proceeding) (mem. op.).

(dismissing as moot on relator's motion after trial court granted her motion to transfer SAPCR); *In re Warrior Energy Servs. Corp.*, No. 14-20-00739-CV, 2021 WL 2461486, at *1 (Tex. App.—Houston [14th Dist.] June 17, 2021, orig. proceeding) (mem. op.) (dismissing after new presiding judge vacated complained-of order releasing funds held in court's registry).

[56]*See also In re Robenalt*, No. 12-20-00231-CV, 2020 WL 7392771, at *1 (Tex. App.—Tyler Dec. 16, 2020, orig. proceeding) (mem. op.) (dismissing as moot after relator nonsuited underlying proceeding); *In re Aerofund Fin., Inc.*, No. 13-19-00071-CV, 2019 WL 1412543, at *1 (Tex. App.—Corpus Christi–Edinburg Mar. 28, 2019, orig. proceeding) (mem. op.) (dismissing relator's petition seeking to compel trial court to enforce forum-selection clause after parties filed a joint motion to dismiss on the grounds that they had settled); *In re Cytec Indus., Inc.*, No. 13-18-00505-CV, 2018 WL 6815505, at *1 (Tex. App.—Corpus Christi–Edinburg Dec. 27, 2018, orig. proceeding) (mem. op.) (dismissing relator's petition to vacate order striking RTP on relator's motion to dismiss on grounds that the parties had entered into a settlement agreement).

[57]*See also In re Robinson*, No. 12-18-00233-CV, 2018 WL 4214203, at *1 (Tex. App.—Tyler Sept. 5, 2018, orig. proceeding) (mem. op.) (dismissing on relator's motion and as moot when trial court subsequently set relator's motion for a hearing); *In re Bernsen*, No. 13-18-00507-CV, 2018 WL 4844105, at *1 (Tex. App.—Corpus Christi–Edinburg Oct. 4, 2018, orig. proceeding) (mem. op.) (dismissing as moot relator's petition seeking to compel trial court to rule on Rule 91a motion when relator filed a joint motion to dismiss petition after trial court signed an order denying the Rule 91a motion); *In re WFG Nat'l Title Ins.*, No. 14-21-00299-CV, 2021 WL 2546159, at *1 (Tex. App.—Houston [14th Dist.] June 22, 2021, orig. proceeding) (mem. op.) (dismissing after trial court ruled on pending motion to compel responses to postjudgment discovery).

- The TRO about which the relator complains expires by its terms. *In re Ogazon*, No. 01-21-00080-CV, 2021 WL 1096316, at *1 (Tex. App.—Houston [1st Dist.] Mar. 23, 2021, orig. proceeding) (mem. op.).[58]

- The complained-of issue resolves itself without appellate-court interference. *See In re Cruz*, No. 01-21-00009-CV, 2021 WL 380436, at *1 (Tex. App.—Houston [1st Dist.] Feb. 4, 2021, orig. proceeding) (mem. op.) (dismissing mandamus petition after complaint about in-person deposition order was resolved by taking Zoom deposition).[59]

3. No standing

A mandamus petition may be dismissed if the relator cannot demonstrate standing. *In re Kherkher*, 604 S.W.3d 548, 550 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding) (DWOJ for lack of standing after relator sought to compel party chair to declare RPI ineligible based on constitutional residency requirements).

4. No predicate ruling

"[T]he right to mandamus relief generally requires a predicate request for action by the respondent, and the respondent's erroneous refusal to act." *In re Coppola*, 535 S.W.3d 506, 510 (Tex. 2017) (orig. proceeding) (per curiam) (citing *In re Perritt*, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding) (per curiam)). This requirement is rarely excused, and the relator must show that "the request would have been futile and the refusal little more than a formality." *Perritt*, 992 S.W.2d at 446. The failure to secure a

[58]*See also In re Melody Cap. Mgmt. LLC*, No. 14-19-00392-CV, 2019 WL 2518382, at *1 (Tex. App.—Houston [14th Dist.] June 18, 2019, orig. proceeding) (mem. op.) (DWOJ when petition to vacate TRO became moot after trial court entered temporary injunction); *In re Tex. State Univ.*, No. 03-19-00364-CV, 2019 WL 2707971, at *1 (Tex. App.—Austin June 27, 2019, orig. proceeding) (mem. op.) (dismissing mandamus petition as moot when TRO expired on its own terms).

[59]*See also In re Gray*, 578 S.W.3d 212 (Tex. App.—Tyler 2019, orig. proceeding) (mem. op.) (dismissing as moot on relators' motion after parties resolved discovery dispute through Rule 11 agreement); *In re City of Aransas Pass*, No. 13-21-00224-CV, 2021 WL 3556666, at *1 (Tex. App.—Corpus Christi–Edinburg Aug. 11, 2021, orig. proceeding) (mem. op.) (dismissing as moot relator's petition to compel trial court to quash deposition notices directed at city officials when relator filed an unopposed motion to dismiss because the parties had reached an agreement concerning the matters in dispute); *In re Allstate Fire & Cas. Ins.*, No. 13-20-00573-CV, 2021 WL 2966102, at *1 (Tex. App.—Corpus Christi–Edinburg July 14, 2021, orig. proceeding) (mem. op.) (same as to corporate-representative deposition); *In re State Farm Auto. Mut. Ins.*, No. 13-19-00372-CV, 2019 WL 3807875, at *1 (Tex. App.—Corpus Christi–Edinburg Aug. 13, 2019, orig. proceeding) (mem. op.) (dismissing as moot on joint motion to dismiss after parties reached an agreement and an amended discovery order was entered); *In re Soc'y of Our Lady of the Most Holy Trinity*, No. 13-19-00129-CV, 2019 WL 2064140, at *1 (Tex. App.—Corpus Christi–Edinburg May 9, 2019, orig. proceeding) (mem. op.) (dismissing as moot relator's petition seeking to compel production of settlement agreement between plaintiff and settling defendant after plaintiff voluntarily produced settlement agreement); *In re Allstate Vehicle & Prop. Ins.*, No. 13-19-00089-CV, 2019 WL 1510526, at *1 (Tex. App.—Corpus Christi–Edinburg Apr. 8, 2019, orig. proceeding) (mem. op.) (dismissing as moot relator's petition seeking to compel trial court to strike petitions in intervention filed by RPIs upon relator's motion notifying court that the parties had finalized an agreement resolving the issues raised in the original proceeding); *In re Nickels & Dimes Inc.*, No. 14-21-00149-CV, 2021 WL 1420934, at *1 (Tex. App.—Houston [14th Dist.] Apr. 15, 2021, orig. proceeding) (mem. op.) (dismissing after parties entered an agreement on the discovery order at issue).

predicate ruling can result in denial of a mandamus petition without consideration of the merits. *See In re Bay Watch Dolphin Tours 1, LLC*, No. 14-20-00790-CV, 2020 WL 7121463, at *1 (Tex. App.—Houston [14th Dist.] Dec. 4, 2020, orig. proceeding) (mem. op.) (denying petition when relator had not presented its objections to receivership and turnover orders in the trial court and made no showing that the predicate-request requirement should be relaxed).

An email from the trial court may be sufficient to support a mandamus petition when it is sufficiently clear and direct. *In re Scott Pelley, P.C.*, No. 05-21-00314-CV, 2021 WL 3891595, at *3 n.4 (Tex. App.—Dallas Aug. 31, 2021, orig. proceeding) (mem. op.) (citing *In re Yamaha Golf-Car Co.*, No. 05-19-00292-CV, 2019 WL 1512578, at *2 (Tex. App.—Dallas Apr. 8, 2019, orig. proceeding) (mem. op.)). Mandamus may also be based on an oral ruling that is clear, specific, enforceable, and adequately shown by the record. *In re Serv. Corp. Int'l*, No. 13-19-00177-CV, 2019 WL 2442881, at *2 (Tex. App.—Corpus Christi–Edinburg June 12, 2019, orig. proceeding) (mem. op.).

5. Unripe

A mandamus petition may be dismissed for want of jurisdiction when the relator's rights are not yet at risk of being materially affected. *See In re Younger*, 659 S.W.3d 453, 455–56 (Tex. 2022) (Blacklock, J., concurring in denial of mandamus relief) ("This court cannot intervene based on tenuous speculation about what other courts might do in the future at the request of a party who may never ask."); *In re Burns*, No. 05-19-01352-CV, 2020 WL 881018, at *1 (Tex. App.—Dallas Feb. 24, 2020, orig. proceeding) (mem. op.). In *Burns*, the relators complained about the trial court's order granting RPI's motion for net-worth discovery under Civil Practice and Remedies Code Section 41.0015. *Id.* Because the underlying case was a TMLA case in which discovery was stayed until the threshold expert report was served and until the healthcare defendant had a judicial determination of the report's adequacy on interlocutory appeal, the relator's rights were not yet at risk, and the court dismissed the mandamus proceeding for want of jurisdiction. *Id.*; *see also In re Kuraray Am., Inc.*, No. 14-19-00582-CV, 2019 WL 3727321, at *1 (Tex. App.—Houston [14th Dist.] Aug. 8, 2019, orig. proceeding) (mem. op.) (dismissed on relator's unopposed motion stating that petition was premature).

VII. WHERE: Location, location, location

To equalize the caseload among the appellate districts, "[t]he supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer." Tex. Gov't Code Ann. § 73.001. The transferee court has jurisdiction over the transferred appeal without regard to the district in which the case was originally tried and to which it is returnable on appeal. *Id.* § 73.002. However, original proceedings usually are not transferable.[60] *See*, *e.g.*,

[60]Historically, along with original proceedings, other cases that could not be transferred included interlocutory appeals, denials of writs of habeas corpus, appeals in extradition cases, appeals regarding the amount of bail set in a criminal case, and appeals from trial courts and pretrial courts in multidistrict litigation, as well as those cases that, in the opinion of the transferor court's chief justice, "contained extraordinary circumstances or circumstances indicating that emergency action may be required." *See* Supreme Court of Tex., Policies for Transfer of Cases Between Courts of Appeals, Misc. Docket No. 06-9136 (Sept. 22, 2006). That provision has been revised to exclude only transfer of original proceedings and appeals from trial courts and pretrial courts in multidistrict litigation, appeals involving termination of parental rights, and those cases that, in the opinion of the transferor court's chief justice, "contain extraordinary circumstances or circumstances indicating that emergency action may be required." *Id.*, Misc. Docket No. 22-9025. However, the supreme court may transfer a specific mandamus case from one intermediate court to another when the circumstances require it. *See*, *e.g.*, Supreme Court of Tex., Transfer of Case From the Eleventh Court of Appeals to the Second Court of Appeals, Misc. Docket No. 23-9099 (Dec. 4, 2023) (explaining that all three justices on the Eleventh Court of Appeals had recused themselves,

Supreme Court of Tex., Transfer of Cases from Courts of Appeals, Misc. Docket No. 22-9025 (Mar. 29, 2022). Additionally, when an appeal is transferred, the transferee court usually lacks mandamus jurisdiction in a separate-but-related original proceeding over the trial court in the transferor court's appellate district if there is no showing that the transferee court's appellate jurisdiction is implicated. *See In re Foster*, No. 07-20-00190-CV, 2020 WL 4577717, at *1 (Tex. App.—Amarillo Aug. 7, 2020, orig. proceeding) (mem. op.) (DWOJ when relator asked court to which her appeal was transferred to mandamus a trial court that was not in its geographic district but failed to show how her requested relief was necessary to enforce the transferee court's appellate jurisdiction over the transferred case); *In re MBH Real Est., LLC*, No. 07-20-00142-CV, 2020 WL 3118699, at *1 (Tex. App.—Amarillo June 10, 2020, orig. proceeding) (mem. op.) (same).

A. Fifteen intermediate appellate courts

The 254 counties in Texas are divided up among fourteen intermediate appellate court districts; there is also one recently-created statewide intermediate appellate court district.[61] *See* Tex. Gov't Code Ann. § 22.201(a) (fifteen courts), § 22.202 (First—Houston), § 22.203 (Second—Fort Worth), § 22.204 (Third—Austin), § 22.205 (Fourth—San Antonio), § 22.206 (Fifth—Dallas), § 22.207 (Sixth—Texarkana), § 22.208 (Seventh—Amarillo), § 22.209 (Eighth—El Paso), § 22.210 (Ninth—Beaumont), § 22.211 (Tenth—Waco), § 22.212 (Eleventh—Eastland), § 22.213 (Twelfth—Tyler), § 22.214 (Thirteenth—Corpus Christi–Edinburg), § 22.215 (Fourteenth—Houston), § 22.2151 (Fifteenth). Eighty justices are apportioned among the fourteen courts by statute, and the newly created Fifteenth Court will add three to five more justices to that tally; some courts have only three justices, which is the minimum required for a panel, *see id.* § 22.222(a), while others have more. *See id.* § 22.216(a)–(n-2).

My Westlaw searches captured 5,275 original proceedings using the word "mandamus" in the fourteen courts during the September 1, 2018–August 31, 2023 period, as set out in Section VII.C. below. Of these 5,275 cases, only 336 cases relevant to civil practitioners involved a grant of mandamus relief, which reflects a 6.37% average grant rate as to overall mandamus cases (that is, relevant-case grants divided by total cases captured, 336/5,275). However, this average ignores the appellate district variations set out below.

1. Houston is biggest in terms of population and numbers of mandamus petitions and appellate justices.

The First and Fourteenth courts' districts, which are composed of Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington Counties, *id.* § 22.201(b), (o), account for approximately 22% (6,647,303) of the estimated 30 million people living in Texas. *See* U.S.

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requiring transfer of mandamus petition to another intermediate appellate court); *id.*, Transfer of Case From the Third Court of Appeals to the Seventh Court of Appeals, Misc. Docket No. 23-9009 (Feb. 27, 2023) (ordering transfer without explanation). In the underlying case involving order 23-9009, the Third Court requested the transfer in the interest of judicial economy because it had already transferred the related appeal to the Seventh Court per the supreme court's order 22-9115, in January 2023. *See* Third Court's February 24, 2023 letter filed in *In re MacGeorge*, No. 03-23-00076-CV.

[61]This paper does not address the newly created Fifteenth Court of Appeals, which is a statewide intermediate appellate court with some additional differences from the existing fourteen. *See generally* Tex. Gov't Code Ann. § 22.201(p) ("The Fifteenth Court of Appeals District is composed of all counties in this state."); *see also id.* § 22.221(c-1) (limiting the Fifteenth Court's original jurisdiction to "writs arising out of matters over which the court has exclusive intermediate appellate jurisdiction under Section 22.220(d)"); § 73.001(b) (stating that the supreme court may not transfer any case or proceeding properly filed in the Fifteenth Court to another court of appeals for docket equalization). For example, the Fifteenth Court has no criminal jurisdiction. *See* Tex. Code Crim. Proc. Ann. arts. 4.01(2), 4.03, 44.25.

Census, https://www.census.gov/quickfacts/fact/table/TX,US/PST045222 (last visited Dec. 5, 2023) (hereinafter, U.S. Census).[62] The combined total number of mandamus opinions captured in a search of these courts during the five-year period was 1,568—approximately 29.73% of the total 5,275 mandamus opinions captured for the fourteen courts over the same period (hereinafter "statewide total"). Of the 1,568 opinions, only 82 granted relief in relevant cases, for a cumulative rate of 5.22%. Individually, the First court's rate over the five-year-period, comparing relevant civil grants to total mandamus opinions captured in the search, was 3.73% (29 grants/778 cases) and the Fourteenth court's rate (under the same criteria) was 6.71% (53 grants/790 cases).[63] The First and Fourteenth courts each have nine justices. Tex. Gov't Code Ann. § 22.216(a), (n).

2. Fort Worth has fewer mandamus petitions than might be supported by its population.

The Second court's district is composed of Archer, Clay, Cooke, Denton, Hood, Jack, Montague, Parker, Tarrant, Wichita, Wise, and Young Counties, *id.* § 22.201(c), accounting for approximately 12.25% (3,679,274) of the state's estimated population. *See* U.S. Census. The total number of mandamus opinions captured in a search for this court during the five-year period was 343—approximately 6.50% of the statewide total over the same period. Of these 343 opinions, only 15 granted relief in relevant cases; the Second court's relevant civil grant rate for the five-year period was 4.37%.[64] The Second court has seven justices. Tex. Gov't Code Ann. § 22.216(b).

3. Austin's state-population share is slightly less than its state-wide share of mandamus petitions.

The Third court's district is composed of Bastrop, Bell, Blanco, Burnet, Caldwell, Coke, Comal, Concho, Fayette, Hays, Irion, Lampasas, Lee, Llano, McCulloch, Milam, Mills, Runnels, San Saba, Schleicher, Sterling, Tom Green, Travis, and Williamson Counties, *id.* § 22.201(d), accounting for approximately 11.09% (3,331,432) of Texas's estimated population. *See* U.S. Census. The total number of mandamus opinions captured in a search for this court during the five-year period was 612—approximately 11.60% of the statewide total over the same period. Of these 612 opinions, only 30 granted relief in relevant cases; the Third court's relevant civil grant rate for the five-year period was 4.9%.[65] The Third court has six justices. Tex. Gov't Code Ann. § 22.216(c).

4. San Antonio's share of state mandamus will likely grow with its increasing population.

The Fourth court's district is composed of Atascosa, Bandera, Bexar, Brooks, Dimmit, Duval, Edwards, Frio, Gillespie, Guadalupe, Jim Hogg, Jim Wells, Karnes, Kendall, Kerr, Kimble, Kinney,

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[62]As of the most recent census population estimates (July 1, 2022), Texas (30,029,572 inhabitants) accounts for 9% of the country's 333,287,557 inhabitants. *See* U.S. Census.

[63]For comparative purposes, the Houston courts' cumulative rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 5.4%; individually, the First court's grant rate was 4.16% and the Fourteenth court's grant rate was 6.62%. Their cumulative rate for the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 5.25%; individually, the First court's grant rate was 4.11% and the Fourteen court's grant rate was 6.33%.

[64]For comparative purposes, the Fort Worth court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 10.80%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 9.83%.

[65]For comparative purposes, the Austin court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 5.03%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 5.25%.

LaSalle, McMullen, Mason, Maverick, Medina, Menard, Real, Starr, Sutton, Uvalde, Val Verde, Webb, Wilson, Zapata, and Zavala Counties, *id.* § 22.201(e), accounting for approximately 10.55% (3,168,621) of Texas's estimated population. *See* U.S. Census. The total number of mandamus opinions captured in a search for this court during the five-year period was 411—approximately 7.79% of the statewide total over the same period. Of the 411 opinions, only 26 granted relief in relevant cases; the Fourth court's relevant civil grant rate for the five-year period was 6.33%.[66] The Fourth court has seven justices. Tex. Gov't Code Ann. § 22.216(d).

5. Dallas's share of state mandamus is higher than its share of state population.

The Fifth court's district is composed of Collin, Dallas, Grayson, Hunt,[67] Kaufman, and Rockwall Counties, *id.* § 22.201(f), accounting for approximately 14.34% (4,306,523) of the state's estimated 30 million people. *See* U.S. Census. However, because Hunt is also covered by another appellate district, by subtracting half of its 108,282 in population, the total is closer to 4,252,382, which is approximately 14.16% of the state's population. The total number of mandamus opinions captured in a search of this court during the four-year period was 953—approximately 18.07% of the statewide total over the same period. Of the 953 opinions, only 49 granted relief in relevant cases; the Fifth court's relevant civil grant rate for the five-year period was 5.14%.[68] The Fifth court has thirteen justices. Tex. Gov't Code Ann. § 22.216(e).

6. Texarkana has substantially fewer mandamus petitions than its population would support.

The Sixth court's district is composed of Bowie, Camp, Cass, Delta, Fannin, Franklin, Gregg,[69] Harrison, Hopkins, Hunt, Lamar, Marion, Morris, Panola, Red River, Rusk, Titus, Upshur, and Wood Counties. *Id.* § 22.201(g). These counties account for approximately 2.69% (808,155) of Texas's estimated population. *See* U.S. Census. However, because five of these counties—Gregg, Hunt, Rusk, Upshur, and Wood—are covered by other appellate districts, by subtracting half of their combined 376,403 population (188,201), the total is closer to 619,953, accounting for just over 2% of the state's population. The total number of mandamus opinions captured in a search for this court during the five-year period was 25—approximately 0.47% of the statewide total over the same period. Of the 25 opinions, only 3 granted relief in relevant cases; the Sixth court's relevant civil grant rate for the five-year period was 12%.[70] The Sixth court has three justices. Tex. Gov't Code Ann. § 22.216(f).

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[66]For comparative purposes, the San Antonio court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 12.07%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 11.00%.

[67]Hunt County falls within two court of appeals districts: Dallas (5th) and Texarkana (6th).

[68]For comparative purposes, the Dallas court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 5.32%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 5.06%.

[69]Gregg, Rusk, Upshur, and Wood Counties fall within two court of appeals districts: Texarkana (6th) and Tyler (12th).

[70]For comparative purposes, the Texarkana court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 5.88%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 12.50%.

7. Amarillo's share of state mandamus is barely more than its share of state population.

The Seventh court's district is composed of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Foard, Garza, Gray, Hale, Hall, Hansford, Hardeman, Hartley, Hemphill, Hockley, Hutchinson, Kent, King, Lamb, Lipscomb, Lubbock, Lynn, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, Terry, Wilbarger, Wheeler, and Yoakum Counties, *id.* § 22.201(h), accounting for 2.96% (890,133) of Texas's estimated population. *See* U.S. Census. The total number of mandamus opinions captured in a search for this court during the five-year period was 178—approximately 3.37% of the statewide total over the same period. Of the 178 opinions, only 11 granted relief in relevant cases; the Seventh court's relevant civil grant rate for the five-year period was 6.18%.[71] The Seventh court has four justices. Tex. Gov't Code Ann. § 22.216(g).

8. El Paso's share of state mandamus is slightly less than its share of state population.

The Eighth court's district is composed of Andrews, Brewster, Crane, Crockett, Culberson, El Paso, Hudspeth, Jeff Davis, Loving,[72] Pecos, Presidio, Reagan, Reeves, Terrell, Upton, Ward, and Winkler Counties, *id.* § 22.201(i), accounting for approximately 3.23% (970,299) of Texas's estimated population. *See* U.S. Census. The total number of mandamus opinions captured in a search for this court during the five-year period was 163—approximately 3.09% of the statewide total over the same period. Of the 163 opinions, only 7 granted relief in relevant cases; the Eighth court's relevant civil grant rate for the five-year period was 4.29%.[73] The Eighth court has three justices. Tex. Gov't Code Ann. § 22.216(h).

9. Beaumont's share of the state's mandamus cases matches its share of the state's population.

The Ninth court's district is composed of Hardin, Jasper, Jefferson, Liberty, Montgomery, Newton, Orange, Polk, San Jacinto, and Tyler Counties, *id.* § 22.201(j), accounting for approximately 4.4% (1,320,226) of Texas's estimated population. *See* U.S. Census. The total number of mandamus opinions captured in a search for this court during the five-year period was 214—approximately 4.06% of the statewide total over the same period. Of the 214 opinions, only 29 granted relief in relevant cases; the Ninth court's relevant civil grant rate for the five-year period was 13.55%.[74] The Ninth court has four justices. Tex. Gov't Code Ann. § 22.216(i).

10. Waco captured a share of state mandamus greater than its share of state population.

The Tenth court's district is composed of Bosque, Burleson, Brazos, Coryell, Ellis, Falls, Freestone, Hamilton, Hill, Johnson, Leon, Limestone, Madison, McLennan, Navarro, Robertson, Somervell, and

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[71]For comparative purposes, the Amarillo court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 4.95%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 4.23%.

[72]Fun fact: Since the July 1, 2021 census data population estimates, Loving County has dropped from 57 to 51 inhabitants and still has fewer people than any of the other 253 counties in the state. *See* U.S. Census.

[73]For comparative purposes, the El Paso court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 5.05%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 4.58%.

[74]For comparative purposes, the Beaumont court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 17.12%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 14.11%.

Walker Counties, *id.* § 22.201(k), accounting for approximately 4.44% (1,334,114) of Texas's estimated population. *See* U.S. Census. The total number of mandamus opinions captured in a search of this court during the five-year period was 284—approximately 5.38% of the statewide total over the same period. Of the 284 opinions, only 15 granted relief in relevant cases; the Tenth court's relevant civil grant rate for the five-year period was 5.28%.[75] The Tenth court has three justices. Tex. Gov't Code Ann. § 22.216(j).

11. Eastland has fewer mandamus cases than anywhere else, skewing its grant rate.

The Eleventh court's district is composed of Baylor, Borden, Brown, Callahan, Coleman, Comanche, Dawson, Eastland, Ector, Erath, Fisher, Gaines, Glasscock, Haskell, Howard, Jones, Knox, Martin, Midland, Mitchell, Nolan, Palo Pinto, Scurry, Shackelford, Stephens, Stonewall, Taylor, and Throckmorton Counties, *id.* § 22.201(*l*), accounting for approximately 2.7% (809,478) of Texas's estimated population. *See* U.S. Census. The total number of mandamus opinions captured in a search of this court during the five-year period was 18—approximately 0.34% of the statewide total over the same period. Of the 18 opinions, 7 granted relief in relevant cases; the Eleventh court's relevant civil grant rate for the five-year period was 38.89%.[76] The Eleventh court has three justices. Tex. Gov't Code Ann. § 22.216(k).

12. Tyler's share of statewide mandamus petitions is greater than its share of state population.

The Twelfth court's district is composed of Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Rains, Rusk, Sabine, San Augustine, Shelby, Smith, Trinity, Upshur, Van Zandt, and Wood Counties, *id.* § 22.201(m), accounting for approximately 3.36% (1,009,767) of Texas's estimated population. *See* U.S. Census. However, because four of these counties—Gregg, Rusk, Upshur, and Wood—are covered by another appellate district, by subtracting half of their combined 268,121 population (134,060), the total is closer to 875,706, accounting for almost 3% of the state's population. The total number of mandamus opinions captured in a search of this court during the five-year period was 213—approximately 4.04% of the statewide total over the same period. Of the 213 opinions, only 31 granted relief in relevant cases; the Twelfth court's relevant civil grant rate for the five-year period was 14.55%.[77] The Twelfth court has three justices. Tex. Gov't Code Ann. § 22.216(*l*).

13. Corpus Christi has fewer mandamus petitions than its population would support.

The Thirteenth court's district is composed of Aransas, Bee, Calhoun, Cameron, DeWitt, Goliad, Gonzales, Hidalgo, Jackson, Kenedy, Kleberg, Lavaca, Live Oak, Matagorda, Nueces, Refugio, San Patricio, Victoria, Wharton, and Willacy Counties, *id.* § 22.201(n), accounting for approximately 7.1% (2,130,650) of Texas's estimated population. *See* U.S. Census. The total number of mandamus opinions captured in a search for this court during the five-year period was 293—approximately 5.55% of the statewide total over the same period. Of the 293 opinions, only 31 granted relief in relevant cases; the

[75]For comparative purposes, the Waco court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 7.32%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 5.78%.

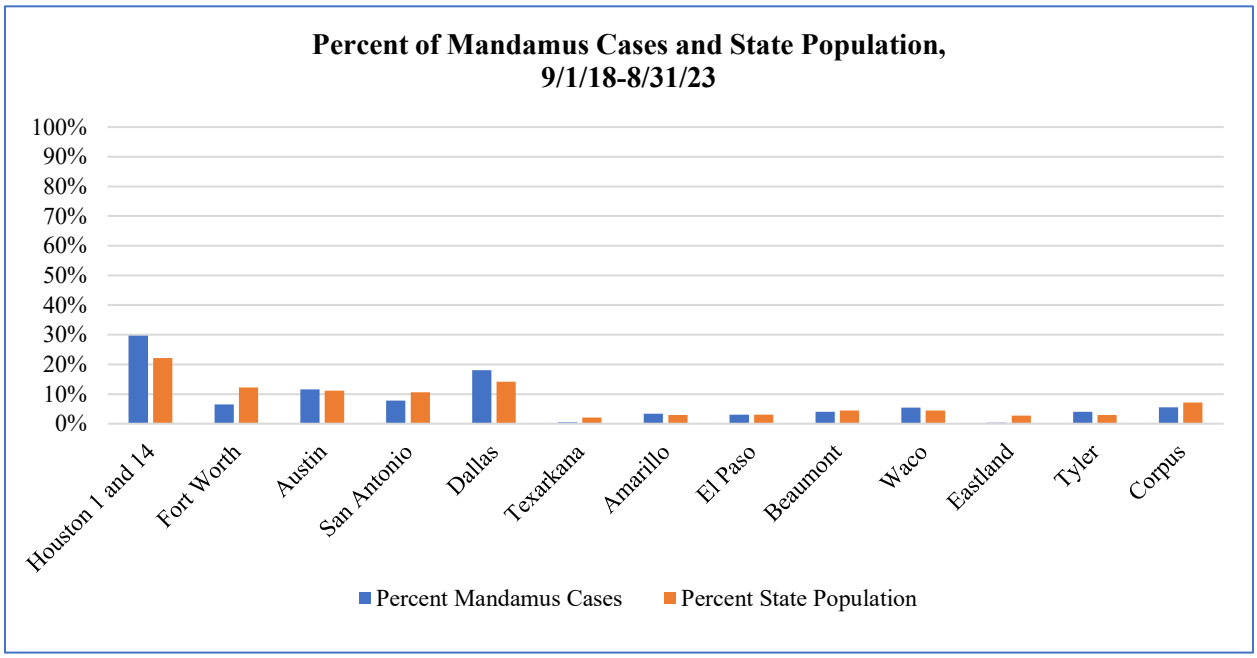
[76]For comparative purposes, the Eastland court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 30.77%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 31.25%.

[77]For comparative purposes, the Tyler court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 14.93%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 12.99%.

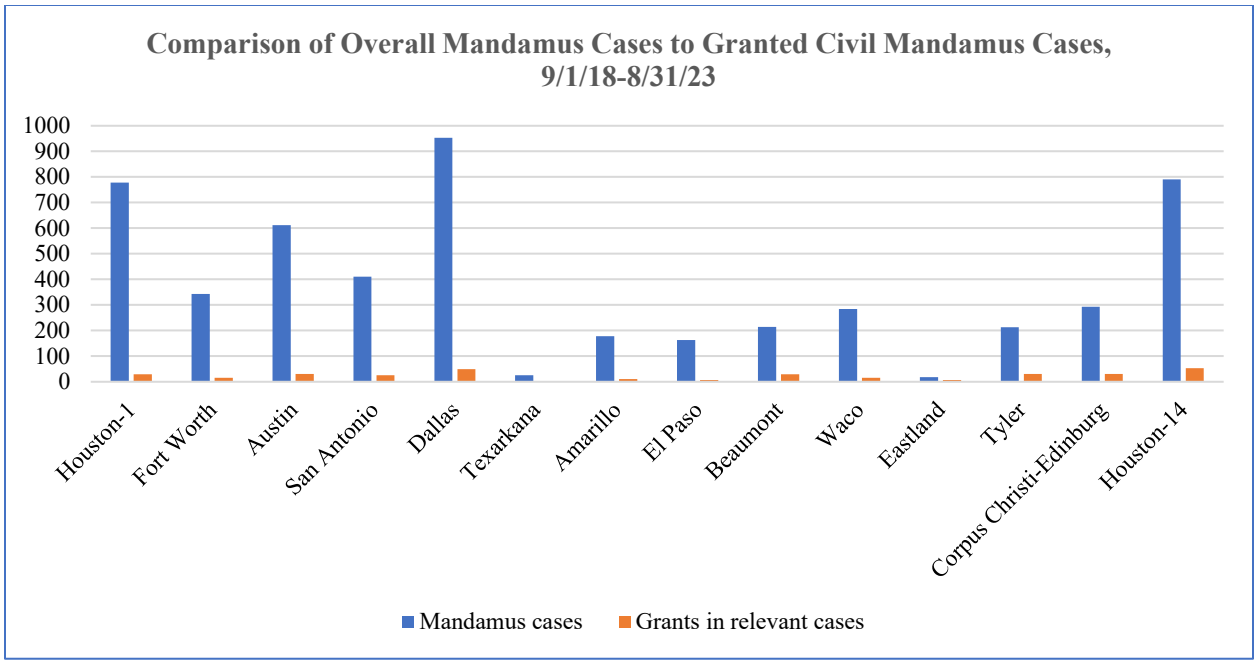
Thirteenth court's relevant civil grant rate for the five-year period was 10.58%.[78] The Thirteenth court has six justices. Tex. Gov't Code Ann. § 22.216(m).

B. Mandamus grant-rate summary

Based on the analyses presented in this paper, and as set out above, the average grant rate in non-criminal-related mandamus petitions in the fourteen intermediate courts over the previous five fiscal years (9/1/18–8/31/23) is approximately 6.37%. However, also as noted above, this rate ignores some factors—including population and number of mandamus petitions filed—that can skew the average.



[78]For comparative purposes, the Corpus Christi court's grant rate for the three-year period addressed in the 2021 paper (September 1, 2018–August 31, 2021) on the same criteria was 10%. Its grant rate in the 2022 paper (adding September 1, 2021–August 31, 2022) on the same criteria was 9.70%.



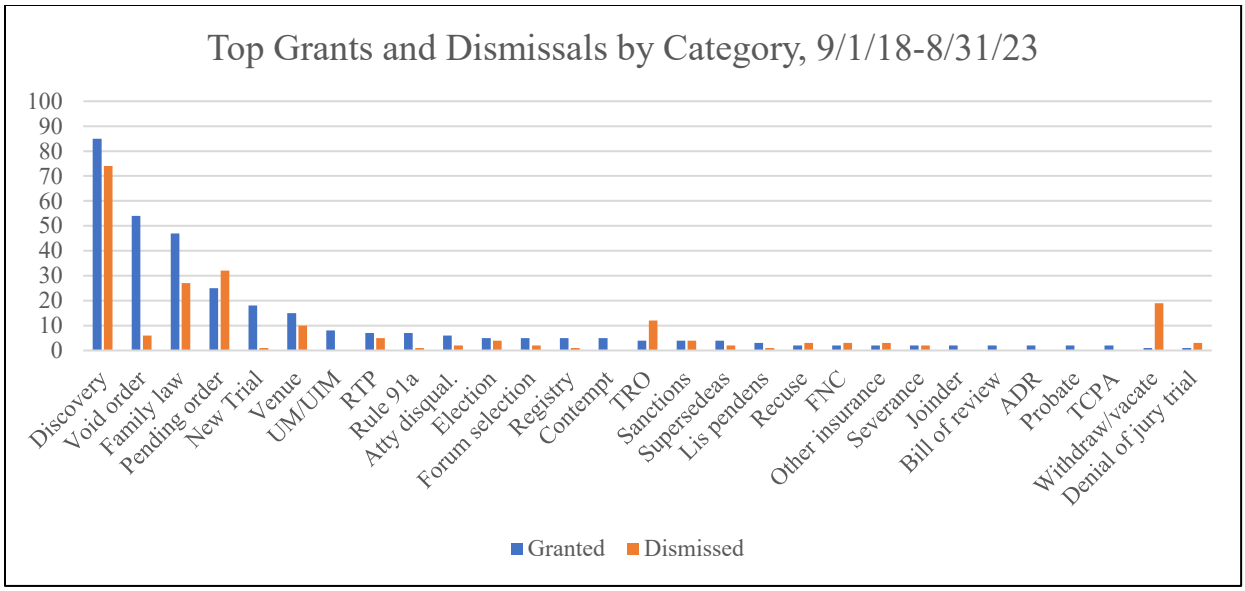
C. Mandamus grant-deny matrix

The following matrix sets out the topics (substantive and procedural) and dispositions accumulated from a review of mandamus opinions from the fourteen intermediate courts for the five-fiscal-year period, September 1, 2018–August 31, 2023.

VERY IMPORTANT CAVEAT: Although Westlaw allows for tailored searches, it is **NOT** foolproof. These figures are based on the available data and in no way should be taken as 100% accurate and conclusive. Rather, they are only accurate to the extent that Westlaw's search algorithms are accurate. Additionally, some cases involved multiple orders or parties and types of relief, so I used my best judgment to determine the primary category into which they fell. These figures should nonetheless provide some guidance in determining by topic the likelihood of success or failure on a petition for writ of mandamus in the various fourteen courts, bearing in mind that each mandamus case ultimately will turn on its own facts and applicable law and compliance with TRAP 52's requirements.

Petition	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	85	74	60	47
Void/juris./Q of law	54	6	1	6
Family law	47	27	12	19
Ruling on pending items	25	32	17	23
New trial order	18	1	0	1
Venue/dominant juris.	15	10	6	7
UM/UIM abate/bifurcate	8	0	0	0
RTP	7	5	4	2
Rule 91a	7	1	1	1
Attorney disqualification	6	2	0	2

Election	5	4	1	3
Forum selection clause	5	2	2	0
Funds in court's registry	5	1	1	0
Contempt	5	0	0	0
TRO	4	12	7	8
Sanctions	4	4	3	2
Supersedeas	4	2	2	1
Lis pendens	3	1	1	1
Recuse/disqualify judge	2	3	1	2
Forum non conveniens	2	3	3	0
Other insurance	2	3	2	1
Severance	2	2	2	1
Joinder	2	0	0	0
Bill of review	2	0	0	0
ADR	2	0	0	0
Probate/Heirship	2	0	0	0
TCPA	2	0	0	0
Withdraw/vacate order	1	19	9	16
Denial of jury trial	1	3	2	2
CPRC 18.001 affidavit	1	1	1	0
Continuance/scheduling	1	1	1	1
Eviction	1	1	1	1
Stay or injunction	1	1	1	1
Comity	1	0	0	0
Rule 165a dismissal	1	0	0	0
CPRC Ch. 128 motion to dismiss	1	0	0	0
jury reimbursement	1	0	0	0
other ancillary proceedings	1	0	0	0
Did not specify in opinion	0	154	127	62
Non-judge respondent	0	9	1	8
Vexatious litigant	0	5	0	5
Turnover or garnishment	0	3	2	1
Receivership	0	2	1	1
Intervention	0	1	1	1
Jury instructions	0	1	1	1
Motion to show authority	0	1	1	1
Guardianship	0	1	1	0
Exemplary damages	0	1	1	0
Condemnation	0	1	0	1
TOTAL	**336**	**400**	**277**	**229**



A note about dismissals: In some of the intermediate courts, the relator (or occasionally the RPI)[79] will file a motion to dismiss (or an unopposed, agreed, or joint motion to dismiss)[80] in an original proceeding because something has occurred in the underlying case to render the petition for writ of mandamus moot. Perhaps the trial court changed its ruling in response to the original proceeding's filing,[81] or the parties

[79]*See In re Whitney*, No. 09-19-00078-CV, 2019 WL 1561813, at *1 (Tex. App.—Beaumont Apr. 11, 2019, orig. proceeding) (mem. op.) (dismissing on RPI's unobjected-to motion when trial court withdrew complained-of discovery orders); *In re Jackson-Houston E., Ltd.*, No. 13-18-00501-CV, 2018 WL 4397980, at *1 (Tex. App.—Corpus Christi–Edinburg Sept. 14, 2018, orig. proceeding) (mem. op.) (dismissing as moot relator's petition seeking to compel trial court to grant pretrial disclosure of settlement allocation when RPIs advised court that settlement allocations had been shared with relator).

[80]*See In re Heidrich*, No. 09-20-00178-CV, 2020 WL 5239961, at *1 (Tex. App.—Beaumont Sept. 3, 2020, orig. proceeding) (mem. op.) (dismissing on parties' joint motion after trial court heard joint motion to conduct trial via Zoom during pandemic); *In re Becker*, No. 12-21-00128-CV, 2021 WL 3671210, at *1 (Tex. App.—Tyler Aug. 18, 2021, orig. proceeding) (mem. op.) (dismissing on relator's motion); *In re Burcham*, No. 12-18-00297-CV, 2018 WL 5797335, at *1 (Tex. App.—Tyler Nov. 5, 2018, orig. proceeding) (mem. op.) (same); *In re Johnson*, No. 13-19-00218-CV, 2019 WL 2063994, at *1 (Tex. App.—Corpus Christi–Edinburg May 9, 2019, orig. proceeding) (mem. op.) (dismissing as moot relator's petition complaining that trial court allowed discovery to proceed before ruling on pending TCPA motion after parties filed an agreed motion to dismiss the original proceeding).

[81]*See In re C.G.*, No. 01-21-00544-CV, 2022 WL 3722314, at *1 (Tex. App.—Houston [1st Dist.] Aug. 30, 2022, orig. proceeding) (mem. op.) (dismissing petition as moot in family-law case after trial court held subsequent hearings, rendering challenged temporary order moot); *In re Campos*, No. 01-21-00247-CV, 2022 WL 3650129, at *1 (Tex. App.—Houston [1st Dist.] Aug. 25, 2022, orig. proceeding) (mem. op.) (dismissing as moot on motion after abatement for successor judge to consider complained-of discovery order resulted in the order's vacation); *In re Chaiken*, No. 01-21-00200-CV, 2022 WL 3588716, at *1 (Tex. App.—Houston [1st Dist.] Aug. 23, 2022, orig. proceeding) (mem. op.) (same as to sanctions order); *In re Morley*, No. 10-20-00328-CV, 2021 WL 402092, at *1 (Tex. App.—Waco Feb. 3, 2021, orig. proceeding) (mem. op.) (dismissing as moot when trial court subsequently granted all relief requested by

settled the underlying matter[82] or worked out a discovery issue between themselves, or a final judgment was entered (allowing for an adequate appellate remedy), or something else unique to the case occurred.[83] In some instances, the court will grant the motion to dismiss but will also indicate that the original proceeding has become moot (meaning it would have been dismissed even without the motion).[84] This is why the charts above and below have both "total dismissals" and also a separate indication of whether the dismissal was on motion or for mootness, although in many cases, the court's dismissal order reflected both.[85] Of course, sometimes the dismissals don't "stick." *See*, *e.g.*, *In re Ramos*, No. 13-19-00039-CV, 2019 WL 1051415, at *1 (Tex. App.—Corpus Christi–Edinburg Mar. 7, 2019, orig. proceeding) (mem. op.), *superseded,* 2019 WL 1930111, at *1 (Tex. App.—Corpus Christi–Edinburg May 1, 2019, orig.

relator in divorce proceeding); *In re J.B. Hunt Transp., Inc.*, No. 14-22-00277-CV, 2022 WL 2070663, at *1 (Tex. App.—Houston [14th Dist.] June 9, 2022, orig. proceeding) (mem. op.) (dismissing as moot when trial court vacated its complained-of discovery order); *In re Dolgencorp of Tex. Inc.*, No. 13-20-00540-CV, 2021 WL 317649, at *1 (Tex. App.—Corpus Christi–Edinburg Jan. 27, 2021, orig. proceeding) (mem. op.) (dismissing petition as moot upon relator's agreed motion to dismiss after, among other things, trial court vacated challenged orders).

[82]*See In re Freeport-McMoRan Oil & Gas LLC*, No. 01-21-00722-CV, 2022 WL 3589156, at *1 (Tex. App.—Houston [1st Dist.] Aug. 23, 2022, orig. proceeding) (mem. op.) (dismissing on relator's motion after the parties settled the claims in the underlying case); *In re Morton & 2855-NW, LLC*, No. 14-22-00311-CV, 2022 WL 3268649, at *1 (Tex. App.—Houston [14th Dist.] Aug. 11, 2022, orig. proceeding) (mem. op.) (same); *In re WCF, LLC*, No. 14-22-00310-CV, 2022 WL 3269069, at *1 (Tex. App.—Houston [14th Dist.] Aug. 11, 2022, orig. proceeding) (mem. op.) (same); *In re Kensington Commons Partners LP*, No. 14-22-00088-CV, 2022 WL 2678856, at *1 (Tex. App.—Houston [14th Dist.] July 12, 2022, orig. proceeding) (mem. op.) (same); *In re Ellis*, No. 13-19-00481-CV, 2020 WL 830836, at *1 (Tex. App.—Corpus Christi–Edinburg Feb. 18, 2020, orig. proceeding) (mem. op.) (same); *In re John Christner Trucking, LLC*, No. 13-19-00120-CV, 2019 WL 2240381, at *1 (Tex. App.—Corpus Christi–Edinburg May 24, 2019, orig. proceeding) (mem. op.) (same).

[83]*See In re O-2 Holdings, LLC*, No. 01-21-00522-CV, 2022 WL 3722316, at *2 (Tex. App.—Houston [1st Dist.] Aug. 30, 2022, orig. proceeding) (mem. op.) (dismissing as moot nonparty's mandamus petition when requested relief from trial court's appointment of master in chancery was granted in a party's mandamus petition).

[84]*See In re Deeds*, No. 10-19-00005-CV, 2019 WL 310048, at *1 (Tex. App.—Waco Jan. 23, 2019, orig. proceeding) (mem. op.) (dismissing on relator's unopposed motion in which relator asserted that mandamus petition had become moot).

[85]*See In re Corley*, No. 09-21-00095-CV, 2021 WL 2964277, at *1 (Tex. App.—Beaumont July 15, 2021, orig. proceeding) (mem. op.) (dismissing on relator's motion in which he asserted that the trial court had vacated the complained-of new-trial order, rendering the mandamus moot).

proceeding) (mem. op.).[86] And sometimes a court will dismiss an original proceeding after warning the relator that failure to comply with the court's orders will result in a dismissal.[87]

D. Categories of granted petitions in the 14 Court of Appeals

I reviewed information from the preceding five fiscal years (September 1, 2018–August 31, 2023) through tailored Westlaw searches to see what kind of petitions for writ of mandamus the courts of appeals granted during that time.[88] The matrix above is the composite of those search results. As noted in Section VII.C. above, although Westlaw allows for tailored searches, it is not foolproof. These figures are at best a rough **estimate** based on the available data.

1. First Court of Appeals (Houston-1)

Over the past few years, I have reviewed 149 cases after filtering the 778 cases derived from the Westlaw mandamus search.[89] Of the 149 cases that I reviewed, 21 involved criminal matters with no

[86]In *Ramos*, in March 2019, the court initially dismissed as moot the relator's petition complaining of a facially invalid new-trial order after the RPIs filed an unopposed notice of settlement, informing the court that the parties had reached an agreement resolving the claims between them. 2019 WL 1051415, at *1. However, by May 2019, the petition had apparently been reinstated because the court granted mandamus relief and held that the new-trial order was facially invalid. *Ramos*, 2019 WL 1930111, at *1, *3.

[87]*See In re Tex. Dep't of Family & Protective Servs.*, No. 04-22-00336-CV, 2022 WL 2960244, at *1 (Tex. App.—San Antonio July 27, 2022, orig. proceeding) (mem. op.) (dismissing after putting relator on notice that failure to comply with the court's orders would result in dismissal of mandamus petition).

[88]To collect information about mandamus opinions in the intermediate courts of appeals, I structured a Westlaw search for the five-year period (September 1, 2018–August 31, 2023), which would—in theory—identify all of the opinions in mandamus case in which relief was granted but exclude those in which relief was denied. To do this, I began with this Westlaw search: CO(court name) & "original proceeding," narrowed by date, 09/01/2018–08/31/2023, and then added "mandamus" and grant! and % deny to the search parameters. This translates as an instruction to search the identified court for the term "original proceeding," then narrow by the date range, and then search for the term "mandamus" with the word "grant" (and its variations) but not the word "deny." I then reviewed the cases caught in the narrowed search to identify whether they arose from a civil matter (including family law) or from a criminal-law-related matter, and I kept only the ones arising from a civil matter. An original-proceedings search is available on each court's individual website, but the Westlaw search allows for more flexibility in tailoring by keyword. I openly acknowledge that the Westlaw search parameters that I have used may exclude some opinions in which a court might grant some relief but deny other relief (it also captured cases in which the court stated that it had granted emergency relief but then ultimately denied or dismissed the petition); I am nonetheless reasonably confident that it caught more than it excluded, given the sheer quantity of cases that I reviewed.

[89]My original search, CO(Houston) & "original proceeding," narrowed by date 09/01/2018–08/31/2022, resulted in 657 cases for the First Court. Adding "mandamus" to the search parameters reduced the case numbers to 608, and adding grant! reduced the numbers further, to 242. Adding % deny reduced the count to 121. (I reviewed 86 of these cases in 2021 and 35 in 2022.) For this latest update, I ran the same search, narrowed by date 09/01/2018–08/31/2023, which captured 835 cases for the First Court. Adding "mandamus" reduced the count to 778, and adding grant! reduced the numbers further, to 315. Adding % deny reduced the count to 149 for the five-year period, with 28 new cases at the end of FY 2023.

bearing on the research at hand and 5 were direct appeals that contained the key words, leaving 123 relevant cases. The court granted relief in 29 of the remaining 123 cases over the five-year period. Dividing those 29 grants by the initial 778 cases caught in the general "mandamus" search amounts to a grant rate of approximately 3.73% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	5	19	15	6
Void/jurisdiction/Q of law	9	1	1	1
Family law	2	7	6	2
Ruling on pending items	9	16	10	11
Venue/dominant juris.	1	3	2	3
RTP		2	1	1
Rule 91a	1			
TRO		2	1	1
Sanctions		2	1	1
Lis pendens		1	1	1
Recuse/disqualify trial judge		1	1	
Forum non conveniens	1	2	2	
Severance		1	1	1
TCPA	1			
CPRC 18.001 affidavit		1	1	
Stay or injunction		1	1	1
Did not specify in opinion		30	29	10
Non-judge respondent		2		2
Receivership		1	1	
Motion to show authority		1	1	1
Guardianship		1	1	
TOTAL	**29**	**94**	**76**	**42**

2. Second Court of Appeals (Fort Worth)

I have set out below the grant and dismissal cases I reviewed after filtering the 343 cases derived from the Westlaw mandamus search.[90] Of the 37 cases, there were 15 grants and 6 dismissals (there were

[90]I began with CO(Fort Worth) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 343 opinions. Adding & grant! resulted in 75 cases and adding % deny to the search parameters resulted in 37 cases. I will note again that the Westlaw search cannot catch everything. Although I conducted some deep dives into the Fort Worth court to find cases that I knew ***should*** have appeared based on my personal knowledge, for consistency, I am using the same searches here as I conducted for the other courts. The chart above and the composite numbers in the sections above have been updated to reflect this. The court granted mandamus relief in *In re Gamble*, No. 02-22-00429-CV, 2023 WL 5283129 (Tex. App.—Fort Worth Aug. 17, 2023, orig. proceeding) (RTP); *In re D.M.L.*, No. 02-22-00451-CV, 2022 WL 17841837 (Tex. App.—Fort Worth Dec. 22, 2022, orig. proceeding) (mem. op.) (SAPCR); *In re Lavender*, No. 02-22-00309-CV, 2022 WL 3723306 (Tex. App.—Fort Worth Aug. 30, 2022, orig. proceeding) (mem. op.) (registry); *In re Tex. Conf. of Seventh-Day Adventists*, 652 S.W.3d 136 (Tex. App.—Fort Worth 2022, orig. proceeding) (Ecclesiastical abstention doctrine); *In re Bouajram*, No.

also 3 appeals with the relevant keywords, 8 denials, and 5 criminal cases). Dividing the 15 grants by the initial 343 mandamus cases amounts to a grant rate of approximately 4.37% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	5			
Void order/jurisdiction/Q of law	3			
Family law	3			
New trial	1			
RTP	1			
Trial court's registry	1			
Did not specify in opinion		6	5	1
CPRC Ch. 128 motion to dismiss	1			
TOTAL	**15**	**6**	**5**	**1**

3. Third Court of Appeals (Austin)

I reviewed 174 cases after filtering 612 cases derived from the Westlaw mandamus search.[91] Of these, 61 cases remained after I filtered out 7 direct appeals caught by search terms, 19 criminal-related mandamus cases, 79 various orders (to file a response or a status report, to stay the underlying proceeding

02-21-00072-CV, 2021 WL 3673856 (Tex. App.—Fort Worth Aug. 17, 2021, orig. proceeding) (mem. op.) (MNT); *In re Target Corp.*, No. 02-21-00120-CV, 2021 WL 3144481 (Tex. App.—Fort Worth July 26, 2021, orig. proceeding) (mem. op.) (discovery); *In re C.A.*, No. 02-21-00018-CV, 2021 WL 2753533 (Tex. App.—Fort Worth July 1, 2021, orig. proceeding) (mem. op.) (discovery); *In re L.J.*, No. 02-21-00083-CV, 2021 WL 1685963 (Tex. App.—Fort Worth Apr. 29, 2021, orig. proceeding) (mem. op.) (void order); *In re Gen. Datatech, LP*, No. 02-20-00315-CV, 2020 WL 6534341 (Tex. App.—Fort Worth Nov. 6, 2020, orig. proceeding) (mem. op.) (discovery); *In re B.F.*, No. 02-20-00283-CV, 2020 WL 6074108 (Tex. App.—Fort Worth Oct. 15, 2020, orig. proceeding) (mem. op.) (SAPCR); *In re T.O.*, No. 02-20-00016-CV, 2020 WL 1808291 (Tex. App.—Fort Worth Apr. 9, 2020, orig. proceeding) (mem. op.) (SAPCR/void order); *In re Reyes*, No. 02-20-00071-CV, 2020 WL 1294923 (Tex. App.—Fort Worth Mar. 19, 2020, orig. proceeding) (mem. op.) (discovery); *In re Treatment Equip. Co.*, No. 02-19-00202-CV, 2019 WL 3295633 (Tex. App.—Fort Worth July 23, 2019, orig. proceeding) (mem. op.) (discovery); *In re J.W.*, No. 02-18-00419-CV, 2019 WL 2223216 (Tex. App.—Fort Worth May 23, 2019, orig. proceeding) (mem. op.) (SAPCR); *In re Wade*, 566 S.W.3d 375 (Tex. App.—Fort Worth 2018, orig. proceeding) (CPRC Ch. 128).

The court dismissed in *In re Garden Design, Inc.*, No. 02-23-00259-CV, 2023 WL 5114978 (Tex. App.—Fort Worth Aug. 10, 2023, orig. proceeding) (mem. op.); *In re Planet Home Lending LLC*, No. 02-23-00099-CV, 2023 WL 2913727 (Tex. App.—Fort Worth Apr. 12, 2023, orig. proceeding) (mem. op.); *In re McShirley*, No. 02-22-00453-CV, 2022 WL 17351580, at *1 (Tex. App.—Fort Worth Dec. 1, 2022, orig. proceeding) (mem. op.); *In re Stedfast Baptist Church*, No. 02-21-00295-CV, 2021 WL 4427181 (Tex. App.—Fort Worth Sept. 27, 2021, orig. proceeding) (mem. op.); *In re State*, No. 02-21-00028-CV, 2021 WL 836873 (Tex. App.—Fort Worth Mar. 5, 2021, orig. proceeding) (mem. op.); *In re Antero Res. Corp.*, No. 02-19-00276-CV, 2019 WL 3491424 (Tex. App.—Fort Worth Aug. 1, 2019, orig. proceeding) (mem. op.).

[91]I began with CO(Austin) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 612 cases. Adding & grant! resulted in 225 cases and adding % deny to the search parameters resulted in 174 cases. (I reviewed 97 cases in 2021, 39 in 2022, and 38 in 2023.)

order, or to abate, among other things), and 8 denials. Out of the 61 relevant cases, the court granted relief in 30 cases over the five-year period. Dividing those 30 grants by the initial 612 mandamus cases amounts to a grant rate of approximately 4.9% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	3	4	3	4
Family law	10	1	1	
Ruling on pending items	1	2		2
New trial	2			
Venue/dom. jurisdiction	2			
UM/UIM	1			
Attorney disqualification	2			
Elections	2			
Contempt	1			
Rule 91a	1			
Denial of jury trial	1			
Improper joinder	1			
Withdrew/vacated order		1	1	1
TRO	2	1		1
Probate/heirship	1			
Did not specify in opinion		18	17	7
Non-judge respondent		2		2
Receivership		1		1
Jury instructions		1	1	1
TOTAL	**30**	**31**	**23**	**19**

4. Fourth Court of Appeals (San Antonio)

I reviewed 116 cases after filtering 411 cases derived from the Westlaw mandamus search.[92] Of these, 59 cases remained after I filtered out 4 direct appeals caught by the search terms, 25 denials that

[92]I began with CO(San Antonio) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 411 cases. Adding & grant! resulted in 228 cases and adding % deny to the search parameters resulted in 181 cases. I then added % habeas, % "Operation Lone Star," and % immigration, reducing the capture to 116. (I reviewed 33 of these cases in 2021, 31 in 2022, and 52 in 2023.) I added the extra exclusionary terms because "Operation Lone Star has resulted in thousands of unresolved misdemeanor prosecutions in border counties across the state," *In re Santiago Villalobos*, No. 04-23-00538-CR, 2023 WL 4750833, at *1 (Tex. App.—San Antonio July 26, 2023, orig. proceeding) (mem. op., not designated for publication) (Martinez, C.J., concurring), resulting in a corresponding increase in mandamus filings by defendants who lack federal authorization to return to the United States to participate in their pending state court criminal cases and who seek mandamus relief from the trial courts' refusals to rule on their motions for continuance or to challenge the denial of those motions for continuances sought to avoid appearing in the country without authorization. *See In re Sanchez*, 675 S.W.3d 339, 340 (Tex. App.—San Antonio 2023, orig. proceeding) (op. on reh'g) (discussing the lack of an adequate appellate remedy for a constitutional challenge to the denial of a motion for continuance in proceedings arising from Operation Lone Star). In *Sanchez*, the court noted, "There is a real risk that the

slipped through, and 28 criminal original proceedings. Out of the 59 relevant cases, the court granted relief in 26 cases over the five-year period. Dividing those 26 grants by the initial 411 mandamus cases amounts to a grant rate of approximately 6.33% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	7	2	2	2
Void order/jurisdiction/Q of law	8			
Family law	5	3		3
Ruling on pending items		2	1	1
New trial	1			
Venue/dominant juris.	1			
UM/UIM abatement/bifurcation	1			
Attorney disqualification	1			
Elections	1			
Sanctions	1			
Did not specify in opinion		26	19	8
TOTAL	**26**	**33**	**22**	**14**

5. Fifth Court of Appeals (Dallas)

I reviewed 112 cases after filtering 953 cases derived from the Westlaw mandamus search.[93] Of these, 102 cases remained after I filtered out the 4 direct appeals caught by search terms, 4 criminal-related mandamus cases, and 2 denials that slipped through. Out of the 102 relevant cases, 53 involved some form of dismissal—on relator's unopposed or agreed motion, a dismissal as moot, a dismissal for want of jurisdiction or failure to follow the Rules of Appellate Procedure, or some combination thereof.[94] Relief

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cases of noncitizens who have been removed from the country will never be tried, diminishing their ability to seek appellate review of rulings like this [the denial of motions for continuance of pretrial hearings until defendants are legally able to re-enter the country]." *Id.* at 340.

[93]I began with CO(Dallas) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 953 cases. Adding & grant! resulted in 423 cases and adding % deny to the search parameters resulted in 141 cases. Because Dallas sees more of a variety of original proceedings than other courts, I then added % injunction!, resulting in 125 cases and % "quo warranto," resulting in 124 cases, and % "habeas," resulting in 112 cases. (I reviewed 62 of these cases in 2021, 29 in 2022, and 21 in 2023.)

[94]Dismissing on relator's or the parties' request because they resolved the matter, settled, or nonsuited: *See In re Sunoco Retail LLC*, No. 05-22-00955-CV, 2022 WL 16847695, at *1 (Tex. App.—Dallas Nov. 10, 2022, orig. proceeding) (mem. op.); *In re Nat'l Sur. Corp*., No. 05-19-01119-CV, 2023 WL 5621843, at *1 (Tex. App.—Dallas Aug. 31, 2023, orig. proceeding) (mem. op.); *In re PJD Law Firm, PLLC*, No. 05-23-00048-CV, 2023 WL 4072116, at *1 (Tex. App.—Dallas June 20, 2023, orig. proceeding) (mem. op.); *In re Aspen Heights Constr., LLC*, No. 05-22-00475-CV, 2022 WL 3572688, at *1 (Tex. App.—Dallas Aug. 19, 2022, orig. proceeding) (mem. op.); *In re Pumpco, Inc.*, No. 05-22-00697-CV, 2022 WL 3040669, at *1 (Tex. App.—Dallas Aug. 2, 2022, orig. proceeding) (mem. op.); *In re Garza*, No. 05-21-01139-CV, 2022 WL 909006, at *1 (Tex. App.—Dallas Mar. 29, 2022, orig. proceeding) (mem. op.); *In re SRPF B/Quadrangle Prop., LLC*, No. 05-21-00642-CV, 2021 WL 6124336, at *1 (Tex. App.—Dallas

Dec. 28, 2021, orig. proceeding) (mem. op.); *In re City of Dallas*, No. 05-21-00222-CV, 2021 WL 4932137, at *1 (Tex. App.—Dallas Oct. 22, 2021, orig. proceeding) (mem. op.); *In re Chase Myrick, Scale & Change LLC*, No. 05-21-00437-CV, 2021 WL 4236879, at *1 (Tex. App.—Dallas Sept. 17, 2021, orig. proceeding) (mem. op.); *In re Burns*, No. 05-21-00418-CV, 2021 WL 3941946, at *1 (Tex. App.—Dallas Sept. 2, 2021, orig. proceeding) (mem. op.); *In re Irving Long Term Care, LLC*, No. 05-21-00141-CV, 2021 WL 3477715, at *1 (Tex. App.—Dallas Aug. 6, 2021, orig. proceeding) (mem. op.); *In re Barnes*, No. 05-21-00266-CV, 2021 WL 1809900, at *1 (Tex. App.—Dallas May 6, 2021, orig. proceeding) (mem. op.); *In re KNL Transp., Inc.*, No. 05-20-00948-CV, 2021 WL 320834, at *1 (Tex. App.—Dallas Feb. 1, 2021, orig. proceeding) (mem. op.); *In re Tex. Alcohol & Beverage Comm'n*, No. 05-20-00935-CV, 2020 WL 6736897, at *1 (Tex. App.—Dallas Nov. 17, 2020, orig. proceeding) (mem. op.); *In re Tasca Holdings, LLC*, No. 05-19-01446-CV, 2020 WL 219313, at *1 (Tex. App.—Dallas Jan. 15, 2020, orig. proceeding) (mem. op.); *In re Tarrant Cnty. Republican Party*, No. 05-19-01571-CV, 2019 WL 7340147, at *1 (Tex. App.—Dallas Dec. 30, 2019, orig. proceeding) (mem. op); *In re Hill*, No. 05-19-00394-CV, 2019 WL 6522188, at *1 (Tex. App.—Dallas Dec. 4, 2019, orig. proceeding) (mem. op.); *In re Sightline Search, Inc.*, No. 05-19-00998-CV, 2019 WL 5387920, at *1 (Tex. App.—Dallas Oct. 22, 2019, orig. proceeding) (mem. op.); *In re Kirk*, No. 05-19-00781-CV, 2019 WL 5288371, at *1 (Tex. App.—Dallas Oct. 18, 2019, orig. proceeding) (mem. op.); *In re Arnold*, No. 05-19-00843-CV, 2019 WL 3812061, at *1 (Tex. App.—Dallas Aug. 14, 2019, orig. proceeding) (mem. op.); *In re Rockhill Ins.*, No. 05-18-01018-CV, 2018 WL 4611627, at *1 (Tex. App.—Dallas Sept. 26, 2018, orig. proceeding) (mem. op.); Dismissing because trial court ruled or entered final judgment: *In re Johnston*, No. 05-22-01058-CV, 2022 WL 16630285, at *1 (Tex. App.—Dallas Nov. 2, 2022, orig. proceeding) (mem. op.); *In re Beard*, No. 05-21-00393-CV, 2021 WL 3412452, at *1 (Tex. App.—Dallas Aug. 4, 2021, orig. proceeding) (mem. op.); *In re Gentry*, No. 05-20-00442-CV, 2021 WL 2281767, at *1 (Tex. App.—Dallas June 4, 2021, orig. proceeding) (mem. op.); *In re Reynolds*, No. 05-20-00660-CV, 2020 WL 5626900, at *1 (Tex. App.—Dallas Sept. 21, 2020, orig. proceeding) (mem. op.); Dismissing because RPI produced discovery: *In re Atmos Energy Corp.*, No. 05-21-00228-CV, 2021 WL 3412458, at *1 (Tex. App.—Dallas Aug. 4, 2021, orig. proceeding) (mem. op.); Dismissing on relator's motion: *In re Chen*, No. 05-22-01246-CV, 2023 WL 2550141, at *1 (Tex. App.—Dallas Mar. 17, 2023, orig. proceeding) (mem. op.); *In re Hayes*, No. 05-23-00111-CV, 2023 WL 2009939, at *1 (Tex. App.—Dallas Feb. 15, 2023, orig. proceeding) (mem. op.); *In re Bessac*, No. 05-22-00484-CV, 2022 WL 3754534, at *1 (Tex. App.—Dallas Aug. 30, 2022, orig. proceeding) (mem. op.); *In re Crossmark Inc.*, No. 05-22-00413-CV, 2022 WL 2093029, at *1 (Tex. App.—Dallas June 10, 2022, orig. proceeding) (mem. op.); *In re Daico Supply Co.*, No. 05-20-00963-CV, 2021 WL 2309989, at *1 (Tex. App.—Dallas June 7, 2021, orig. proceeding) (mem. op.); *In re Allstate Fire & Cas. Ins.*, No. 05-19-01564-CV, 2020 WL 4013146, at *1 (Tex. App.—Dallas July 16, 2020, orig. proceeding) (mem. op.); *In re Summer Infant (USA), Inc.*, No. 05-19-00807-CV, 2019 WL 3229171, at *1 (Tex. App.—Dallas July 18, 2019, orig. proceeding) (mem. op.); *In re Hensley*, No. 05-18-00932-CV, 2018 WL 5095100, at *1 (Tex. App.—Dallas Oct. 19, 2018, orig. proceeding) (mem. op.); *In re Monnig*, No. 05-18-00986-CV, 2018 WL 4927226, at *1 (Tex. App.—Dallas Oct. 11, 2018, orig. proceeding) (mem. op.); Dismissing because trial court vacated challenged order: *In re Interpret, LLC*, No. 05-23-00057-CV, 2023 WL 1431643, at *1 (Tex. App.—Dallas Feb. 1, 2023, orig. proceeding) (mem. op.); *In re Bailey*, No. 05-22-00280-CV, 2022 WL 1420978, at *1 (Tex. App.—Dallas May 5, 2022, orig. proceeding) (mem. op.); *In re Pitts*, No. 05-22-00291-CV, 2022 WL 1089921, at *1 (Tex. App.—Dallas Apr. 12, 2022, orig. proceeding) (mem. op.); *In re Barnes*, No. 05-21-00861-CV, 2022 WL 456547, at *1 (Tex. App.—Dallas Feb. 15, 2022, orig. proceeding) (mem. op.); *In re Dondero*, No. 05-20-00066-CV, 2020 WL 5939033, at *1 (Tex. App.—Dallas Oct. 7, 2020, orig. proceeding) (mem. op.); *In re Reynolds & Reynolds Co.*, No. 05-20-00429-CV, 2020 WL 1815828, at *1 (Tex. App.—Dallas Apr. 10, 2020, orig. proceeding) (mem. op.); *McLane Co. v. Ewing*, No. 05-19-00334-CV, 2020 WL 219325, at *1 (Tex. App.—Dallas Jan. 15, 2020, no pet.); *In re Garmin Int'l, Inc.*, No. 05-19-00767-CV, 2019 WL 4010824, at *1 (Tex. App.—Dallas Aug. 26, 2019, orig. proceeding) (mem. op.); DWOJ: *In re Wilkerson*, Nos. 05-21-00439-CV, -440-CV, -441-CV, 2023 WL 4419392, at *1 (Tex. App.—

was granted in the remaining 49 cases over the five-year period. Dividing those 49 grants by the initial 953 mandamus cases amounts to a grant rate of approximately 5.14% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	11	11	7	9
Void order/jurisdiction/Q of law	13			
Family law	8	2		2
Ruling on pending items	1	1		1
New trial	1			
Venue	1	1	1	
UM/UIM abate/bifurcate	2			
RTP	2			
Supersedeas	3	1	1	1
Forum selection	1			
Rule 91a	2			
Recuse/disqualify judge		1		1
Denial of jury trial		1		1
Lis pendens	1			
Withdraw/vacate order		4	3	3
TRO		1	1	1
Continuance/scheduling		1	1	1
Eviction	1			
Did not specify in opinion		29	23	16
Jury reimbursement	1			
Ancillary proceedings	1			
TOTAL	**49**	**53**	**37**	**36**

Dallas July 10, 2023, orig. proceeding) (mem. op.); *In re Patterson*, No. 05-21-00780-CV, 2021 WL 4947195, at *1 (Tex. App.—Dallas Oct. 25, 2021, orig. proceeding) (mem. op.); *In re Cooper*, No. 05-21-00777-CV, 2021 WL 4472609, at *1 (Tex. App.—Dallas Sept. 30, 2021, orig. proceeding) (mem. op.); *In re Gallagher*, No. 05-20-00691-CV, 2020 WL 5651653, at *1 (Tex. App.—Dallas Sept. 23, 2020, orig. proceeding) (mem. op.); *In re Burns*, No. 05-19-01352-CV, 2020 WL 881018, at *1 (Tex. App.—Dallas Feb. 24, 2020, orig. proceeding) (mem. op.); *In re Walton*, No. 05-20-00024-CV, 2020 WL 401765, at *1 (Tex. App.—Dallas Jan. 24, 2020, orig. proceeding) (mem. op.) (dismissing initially), *vacated*, No. 05-20-00024-CV, 2020 WL 1430360 (Tex. App.—Dallas Mar. 24, 2020, orig. proceeding) (denying petition for failure to comply with mandamus requirements); Dismissing for failure to follow the appellate court's orders: *In re Castillo*, No. 05-22-01317-CV, 2022 WL 18046968, at *1 (Tex. App.—Dallas Dec. 30, 2022, orig. proceeding) (mem. op.); *In re Lopez*, No. 05-22-00710-CV, 2022 WL 3151976, at *1 (Tex. App.—Dallas Aug. 8, 2022, orig. proceeding) (mem. op.); *In re Allen*, No. 05-21-00762-CV, 2022 WL 190304, at *1 (Tex. App.—Dallas Jan. 21, 2022, orig. proceeding) (mem. op.).

6. Sixth Court of Appeals (Texarkana)

I reviewed 16 cases after filtering 25 cases derived from the Westlaw mandamus search.[95] Of these, 3 cases remained in which the court granted relief over the five-year period. Dividing those 3 grants by the initial 25 mandamus cases amounts to a grant rate of approximately 12% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	1			
Forum selection clause	1			
Comity	1			
TOTAL	**3**			

7. Seventh Court of Appeals (Amarillo)

I reviewed 47 cases after filtering 178 cases derived from the Westlaw mandamus search.[96] Of these, 22 cases remained after I filtered out the 4 direct appeals, 6 orders caught by search terms, and 15 criminal-related mandamus cases. Out of the 22 relevant cases, the court granted relief in 11 cases over the five-year period. Dividing those 11 grants by the initial 178 mandamus cases amounts to a grant rate of approximately 6.18% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery		1	1	
Family law	2	1	1	
Ruling on pending items		1	1	
New trial	3			
Attorney disqualification		1		1

[95]I began with CO(Texarkana) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 25 cases. Adding & grant! resulted in 16 cases and adding % deny to the search parameters resulted in 4 cases, one of which was an appeal containing the keywords and one of which was a criminal DWOJ, leaving 2 grants; refiltering resulted in an additional criminal mandamus (a grant) plus one more civil grant, bringing the civil grant total to 3: *In re Walmart Inc.*, No. 06-22-00017-CV, 2022 WL 1572272, at *1 (Tex. App.—Texarkana May 19, 2022, orig. proceeding) (mem. op.) (granting relief to enforce forum selection clause); *In re Gilead Scis., Inc.*, No. 06-21-00030-CV, 2021 WL 4466006, at *1 (Tex. App.—Texarkana Sept. 30, 2021, orig. proceeding) (mem. op.) (granting relief because comity required a stay of Texas proceedings); *In re Landstar Ranger, Inc.*, No. 06-20-00047-CV, 2020 WL 5521136, at *1 (Tex. App.—Texarkana Sept. 15, 2020, orig. proceeding) (mem. op.) (granting relator's petition to vacate trial court's order overring its motion for protective order regarding proposed depositions of relator's out-of-state corporate representatives when the trial court failed to account for COVID-19 safety procedures when it ordered the representatives to personally appear for their depositions).

[96]I began with CO(Amarillo) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 178 cases. Adding & grant! resulted in 112 cases and adding % deny to the search parameters resulted in 47 cases. (I reviewed 26 of these cases in 2021, 8 in 2022, and 13 in 2023.)

Sanctions	1			
Contempt	1			
Withdraw/vacate order		1	1	1
Stay or injunction	1			
ADR	1			
Did not specify in opinion		4	2	2
Vexatious litigant		2		2
Other insurance	2			
TOTAL	**11**	**11**	**6**	**6**

8. Eighth Court of Appeals (El Paso)

I reviewed 44 cases after filtering 163 cases derived from the Westlaw mandamus search.[97] Of these, 24 cases remained after I filtered out 1 direct appeal caught by search terms, 15 criminal-related mandamus cases, and 4 denials. 17 of the remaining 24 cases involved a dismissal, usually on the relator's unopposed motion.[98] The court granted relief in 7 cases over the five-year period. Dividing those 7 grants by the initial 163 mandamus cases amounts to a grant rate of approximately 4.29% over the five-year period.

[97]I began with CO(El Paso) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 163 cases. Adding & grant! resulted in 105 cases and adding % deny to the search parameters resulted in 44 cases. (I reviewed 28 of these cases in 2021, 9 in 2022, and 7 in 2023.)

[98]*See In re Sotelo*, No. 08-21-00168-CV, 2022 WL 1210571, at *1 (Tex. App.—El Paso Apr. 25, 2022, orig. proceeding) (mem. op.) (treating parties' joint letter informing court that petition has been rendered moot as motion to dismiss); *In re Prof'l Food Sys.*, No. 08-08-00200-CV, 2021 WL 5564435, at *1 (Tex. App.—El Paso Nov. 29, 2021, orig. proceeding) (mem. op.) (granting motion for voluntary dismissal of mandamus action); *In re Abbott*, No. 08-21-00140-CV, 2021 WL 4929910, at *1 (Tex. App.—El Paso Oct. 22, 2021, orig. proceeding) (mem. op.) (dismissing as moot when TRO expired); *In re Rico*, No. 08-21-00119-CV, 2021 WL 3464253, at *1 (Tex. App.—El Paso Aug. 6, 2021, orig. proceeding) (mem. op.) (dismissing on relator's motion after parties settled dispute); *In re Narvaez*, No. 08-19-00133-CV, 2020 WL 1809173, at *1 (Tex. App.—El Paso Apr. 9, 2020, orig. proceeding) (mem. op.) (same); *In re Jurecky*, No. 08-19-00134-CV, 2019 WL 5205994, at *1 (Tex. App.—El Paso Oct. 16, 2019, orig. proceeding) (mem. op.) (same); *In re Soule*, No. 08-20-00218-CV, 2021 WL 508343, at *1 (Tex. App.—El Paso Feb. 11, 2021, orig. proceeding) (mem. op.) (dismissing on relators' unopposed motion); *In re Nelson*, No. 08-20-00175-CV, 2020 WL 6193927, at *1 (Tex. App.—El Paso Oct. 22, 2020, orig. proceeding) (mem. op.) (same); *In re FirstLight Fed. Credit Union*, No. 08-20-00201-CV, 2020 WL 7121691, at *1 (Tex. App.—El Paso Dec. 2, 2020, orig. proceeding) (dismissing on relator's unopposed motion after RPIs filed an amended petition in the trial court that resolved relator's issues); *In re Green*, No. 08-20-00128-CR, 2020 WL 4915591, at *1 (Tex. App.—El Paso Aug. 21, 2020, orig. proceeding) (mem. op.) (DWOJ when relator sought to mandamus trial judge outside of court's district and did not implicate court's appellate jurisdiction); *In re Jackson*, No. 08-20-00026-CV, 2020 WL 562983, at *1 (Tex. App.—El Paso Feb. 5, 2020, orig. proceeding) (mem. op.) (same); *In re Narvaez*, No. 08-19-00133-CV, 2019 WL 4668513, at *1 (Tex. App.—El Paso Sept. 25, 2019, orig. proceeding) (mem. op.) (dismissing in part on unopposed motion for partial dismissal by some RPIs while petition remained pending against remaining RPIs); *In re Malooly*, 587 S.W.3d 844, 845 (Tex. App.—El Paso 2019, orig. proceeding) (dismissing on agreed motion as to some relators based on settlement and denying relief for want of a record showing entitlement to relief as to remaining relator).

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	3			
Ruling on pending items	2			
RTP		1	1	1
Elections		1		1
Joinder	1			
TRO		1		1
ADR	1			
Did not specify in opinion		13	10	3
Vexatious litigant		1		1
TOTAL	**7**	**17**	**11**	**7**

9. Ninth Court of Appeals (Beaumont)

I reviewed 52 cases after filtering 214 cases derived from the Westlaw mandamus search.[99] Of these, 40 cases remained after I filtered out 7 criminal-related mandamus cases, 4 denials, and 1 appeal with the keywords. Out of the 40 relevant cases, 11 were dismissals; the court granted relief in 29 cases over the five-year period. Dividing those 29 grants by the initial 214 mandamus cases amounts to a grant rate of approximately 13.55% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	15	2	2	1
Void order	1			
Family law	1			
Ruling on pending items	1	1	1	
New trial	3			
Venue	1	1		1
RTP	1			
Elections		1		1
Sanctions	2			
Contempt	2			
Recusal		1		1
Withdraw/vacate order		1	1	1
TRO		1		1
Continuance/scheduling	1			
Bill of review	1			
Did not specify in opinion		3	2	3
TOTAL	**29**	**11**	**6**	**9**

[99]I began with CO(Beaumont) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 214 opinions. Adding & grant! resulted in 114 cases and adding % deny to the search parameters resulted in 52 cases. (I reviewed 26 of these cases in 2021, 12 in 2022, and 14 in 2023.)

10. Tenth Court of Appeals (Waco)

I reviewed 54 cases after filtering 284 cases derived from the Westlaw mandamus search.[100] Of these, 23 cases remained after I filtered out 25 criminal-related mandamus cases, a dissent from the denial of mandamus relief, and 5 denials. Out of the 23 relevant cases, there were 8 dismissals; the court granted relief in 15 cases over the five-year period. Dividing those 15 grants by the initial 284 mandamus cases amounts to a grant rate of approximately 5.28% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	3			
Void order/jurisdiction/Q of law	2			
Family law	5	2		2
Venue/dom. juris.	2			
Elections	1			
Funds in court's registry	2			
Did not specify in opinion		6	5	2
TOTAL	**15**	**8**	**5**	**4**

11. Eleventh Court of Appeals (Eastland)

I reviewed 11 cases after filtering 18 cases derived from the Westlaw mandamus search.[101] Of these, 8 cases remained after I filtered out 2 denials and an appeal with the keywords. Out of the 8 relevant cases, one was a dismissal; the court granted relief in 7 cases over the five-year period. Dividing those 7 grants by the initial 18 mandamus cases amounts to a grant rate of approximately 38.89% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	4			
Void order/jurisdiction/Q of law	1			
Venue	1			
UM/UIM abatement/bifurcation	1			
Did not specify in opinion		1		1
TOTAL	**7**	**1**		**1**

[100]I began with CO(Waco) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 284 opinions. Adding & grant! resulted in 82 cases and adding % deny to the search parameters resulted in 54 cases. (I reviewed 35 of these cases in 2021, 10 in 2022, and 9 in 2023.)

[101]I began with CO(Eastland) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 18 opinions. Adding & grant! resulted in 14 cases and adding % deny to the search parameters resulted in 7 cases. However, that search excluded at least 4 other mandamus opinions, so I reviewed a total of 11. (I reviewed 7 of these cases in 2021, 2 in 2022, and 2 in 2023.)

12. Twelfth Court of Appeals (Tyler)

I reviewed 78 cases after filtering 213 cases derived from the Westlaw mandamus search.[102] Of these, 61 cases remained after I filtered out the 15 criminal-related mandamus cases and 2 direct appeals with the keywords. Out of the 61 relevant cases, 10 were "true" dismissals[103]—the remainder of the dismissals were brief dismissal-as-moot opinions that followed the granting of mandamus relief when the trial court complied with the court's orders. The court granted relief in 31 cases over the five-year period. Dividing those 31 grants by the initial 213 mandamus cases amounts to a grant rate of approximately 14.55% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	12	2	2	
Void order/jurisdiction/Q of law	3			
Family law	4			
Ruling on pending items		1	1	1
New trial	1			
Venue	1			
UM/UIM abate/bifurcate	1			
Attorney disqualification	1			
Sanctions		1	1	
Forum selection clause	1			
Rule 91a	2			
Denial of Jury trial		1	1	
Severance	1			

[102]I began with a Westlaw search, CO(Tyler) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 213 opinions. Adding & grant! resulted in 145 cases and adding % deny to the search parameters resulted in 78 cases. (I reviewed 48 of these cases in 2021, 9 in 2022, and 21 in 2023.)

[103]*See In re Salter Creek Res., LLC*, No. 12-22-00309-CV, 2022 WL 17685751, at *1 (Tex. App.—Tyler Dec. 14, 2022, orig. proceeding) (mem. op.) (dismissing on relators' motion after parties reached an agreement); *In re Reule*, No. 12-22-00271-CV, 2022 WL 17350927, at *1 (Tex. App.—Tyler Nov. 30, 2022, orig. proceeding) (mem. op.) (DWOJ because vexatious litigant did not get permission); *In re Yoes*, No. 12-22-00239-CV, 2022 WL 4393025, at *1 (Tex. App.—Tyler Sept. 22, 2022, orig. proceeding) (mem. op.) (DWOJ); *Redmon v. Inselmann*, No. 12-22-00116-CV, 2022 WL 1616993, at *1 (Tex. App.—Tyler May 18, 2022, orig. proceeding) (mem. op.) (dismissing on relator's motion); *In re Becker*, No. 12-21-00128-CV, 2021 WL 3671210, at *1 (Tex. App.—Tyler Aug. 18, 2021, original proceeding) (mem. op.) (same); *In re Robenalt*, No. 12-20-00231-CV, 2020 WL 7392771, at *1 (Tex. App.—Tyler Dec. 16, 2020, orig. proceeding) (mem. op.) (dismissing as moot after relator nonsuited); *In re Tex. Dep't of Family & Protective Servs.*, No. 12-19-00289-CV, 2019 WL 4125970, at *1 (Tex. App.—Tyler Aug. 30, 2019, orig. proceeding) (mem. op.) (dismissing after parties entered MSA and relator filed motion to dismiss as moot); *In re Gray*, 578 S.W.3d 212 (Tex. App.—Tyler 2019, orig. proceeding) (mem. op.) (dismissing as moot on relators' motion after parties resolved discovery dispute through Rule 11 agreement); *In re Burcham*, No. 12-18-00297-CV, 2018 WL 5797335, at *1 (Tex. App.—Tyler Nov. 5, 2018, orig. proceeding) (mem. op.) (dismissing on relator's motion); *In re Robinson*, No. 12-18-00233-CV, 2018 WL 4214203, at *1 (Tex. App.—Tyler Sept. 5, 2018, orig. proceeding) (mem. op.) (dismissing on relator's motion and as moot).

Lis pendens	1			
TRO	1			
CPRC 18.001 affidavit	1			
Rule 165a dismissal	1			
Did not specify in opinion		4	3	1
Vexatious litigant		1		1
TOTAL	**31**	**10**	**8**	**3**

13. Thirteenth Court of Appeals (Corpus Christi–Edinburg)

I reviewed 102 cases after filtering 293 cases derived from the Westlaw mandamus search.[104] Of these, 74 cases remained after I filtered out 4 direct appeals caught by search terms, 22 criminal-related mandamus cases, and 2 denials. Out of the 74 relevant cases, there were 43 dismissals, one of which subsequently became a grant of relief on reinstatement.[105] The court granted relief in 31 cases over the five-year period. Dividing those 31 grants by the initial 293 mandamus cases amounts to a grant rate of approximately 10.58% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	7	13	12	10
Void order/jurisdiction/Q of law	5	3		3
Family law	2	5	4	4
Ruling on pending items	2	1	1	1
New trial order	4	1		1
Venue	2			
UM/UIM abate/bifurcate	1			
RTP	1	1	1	
Attorney disqualification	1	1		1
Forum selection clause		2	2	
Rule 91a		1	1	1
Recuse/disqualify judge	2			
Forum non conveniens	1			
Withdraw/vacate order	1	3	2	2
TRO		2	2	2
Bill of review	1			
Probate	1			
Did not specify in opinion		3	1	3
Non-judge respondent		2		2

[104]I began with CO(Corpus) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 293 opinions. Adding & grant! resulted in 265 cases and adding % deny to the search parameters resulted in 102 cases. (I reviewed 57 of these cases in 2021, 22 in 2022, and 23 in 2023.)

[105]*See In re Ramos*, No. 13-19-00039-CV, 2019 WL 1051415, at *1 (Tex. App.—Corpus Christi–Edinburg Mar. 7, 2019, orig. proceeding) (mem. op.), *superseded*, No. 13-19-00039-CV, 2019 WL 1930111 (Tex. App.—Corpus Christi–Edinburg May 1, 2019, orig. proceeding) (mem. op.).

Vexatious litigant		1		1
Other insurance		3	2	1
Intervention		1	1	1
TOTAL	**31**	**43**	**29**	**33**

14. Fourteenth Court of Appeals (Houston-14)

I reviewed 190 cases after filtering 790 cases derived from the Westlaw mandamus search.[106] Of these, 135 cases remained after I filtered out 13 direct appeals caught by search terms, 40 criminal-related mandamus cases, and 6 denials, but I also stumbled upon 4 cases that fell within the relevant period but were somehow excluded in the original search. Out of the 135 relevant cases, there were 82 dismissals, and the court granted relief in 53 cases over the five-year period. Dividing those 53 grants by the initial 790 mandamus cases amounts to a grant rate of approximately 6.71% over the five-year period.

Petition topic	Granted	Total dismissals	Dismissed on relator's or agreed motion	Dismissed for mootness, other lack of juris., or failure to comply with TRAPs
Discovery	9	20	16	15
Void order/jurisdiction/Q of law	9	2		2
Family law	5	6		6
Ruling on pending items	9	7	2	6
New trial	2			
Venue	3	5	3	3
UM/UIM abatement	1			
RTP	2	1	1	
Attorney disqualification	1			
Elections	1	2	1	1
Funds in court's registry	2	1	1	
Sanctions		1	1	1
Supersedeas	1	1	1	
Forum selection	2			
Contempt	1			
Rule 91a	1			
Jury trial		1	1	1
Severance	1	1	1	
Forum non conveniens		1	1	
Lis pendens	1			
Withdraw/vacate order		9	1	8
TRO	1	4	3	1
Eviction		1	1	1
Did not specify in opinion		11	11	5
Non-judge respondent		3	1	2

[106]I began with a Westlaw search, CO(Houston) & "original proceeding" narrowed by date, 09/01/2018–08/31/2023, and added "mandamus," resulting in 790 cases for the Fourteenth court. Adding grant! reduced the quantity to 396 and adding % deny reduced the count to 190. (I reviewed 112 of these cases in 2021, 34 in 2022, and 44 in 2023.)

Turnover or garnishment		3	2	1
Condemnation		1		1
TCPA	1			
Exemplary damages showing		1	1	
TOTAL	**53**	**82**	**49**	**54**

VIII. Appendix: HOW (TRAP 52)

A. The players

Original proceedings come in a variety of flavors—habeas corpus, mandamus, prohibition, injunction, and quo warranto, *see* Tex. R. App. P. 52.1, and for any of these, you must use the caption, "*In re* [name of relator],"[107] *id.*, which is the person seeking relief. Tex. R. App. P. 52.2. As noted above, the person against whom relief is sought is the "respondent." *Id.* And any person whose interest would be directly affected by the relief sought—i.e., the ex-spouse or ex-business partner—is the RPI and must be included in the case, particularly since he or she will be the one filing a response if the court requests one. *Id.* Very rarely will a respondent, usually a trial judge, file a response, leading the Fort Worth court to note the following:

> [T]he failure of a real party in interest to defend the ruling made the subject of an original proceeding leaves the court to which the writ may be directed without representation before the reviewing court. Trial courts should expect a vigorous defense from those in whose favor they have ruled. The absence of such a defense reflects poorly on the credibility of the prevailing party and their counsel, not the trial court's exercise of discretion in their favor.

In re T.H., 650 S.W.3d 224, 235 n.4 (Tex. App.—Fort Worth Oct. 21, 2021, orig. proceeding). In other words, if you convince the trial court to rule in your favor and a mandamus ensues, defend the trial court's decision. Additionally, if you represent the RPI and the court requests a response that addresses specific issues, it's a good idea to address those specific issues. *See In re Gilbreath*, No. 07-20-00244-CV, 2021 WL 450970, at *3 (Tex. App.—Amarillo Feb. 8, 2021, orig. proceeding) (mem. op.) (noting that the court requested a response addressing three specific issues but that RPI's response "ignor[ed] this court's actual inquiry and rephrase[ed] the question as two issues").

B. Checklists and such

Much like an appellate brief, a petition for writ of mandamus has a required form and contents—ignore these at your peril because clerks have checklists! *See* Tex. R. App. P. 52.3. The rule itself helps you identify what type of case might be original proceeding-worthy—i.e., "a suit for damages, a contempt proceeding for failure to pay child support, or the certification of a candidate for inclusion on an election ballot"—and the bases for the appellate court's jurisdiction. Tex. R. App. P. 52.3(d), (e). And if trying to bypass the intermediate court, your petition "must state the compelling reason why the petition was not first presented to the court of appeals." *Id.* Additionally, unlike an appellate brief, you must certify that you have reviewed the petition and have "concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record." Tex. R. App. P. 52.3(j). With some exceptions, the response must conform to TRAP 52.3's requirements. Tex. R. App. P. 52.4.

Reminder: If you are the relator, make sure to get a ruling by the trial court on which you can bring your complaint (unless, of course, your complaint is the trial court's refusal to rule)! *See In re Coppola*,

[107]Typos happen, so be careful to note the nomenclature distinction between a "realtor" and a "relator." Few original proceedings involve the sale of real estate. *But cf. In re State*, 355 S.W.3d 611, 612–14 (Tex. 2011) (orig. proceeding) (involving condemnation of real property).

535 S.W.3d 506, 510 (Tex. 2017) (orig. proceeding); *In re Perritt*, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding) (per curiam).

Rule change: Like TRAP 38.1(a) (identity of parties and counsel in an appellate brief), TRAP 52.3(a) has been amended (effective August 1, 2022) to require the petition to include a complete list of the names of all counsel appearing in the trial or appellate courts, their firm name at the time of the appearance, and—for current counsel—their mailing address, telephone number, and email address. Tex. R. App. P. 52.3(a). If new counsel is added, or if any current counsel changes firm affiliation during the case's pendency, the party's lead counsel must notify the clerk by filing a supplemental disclosure. *Id.*

Please note that most of the fourteen courts post their internal operating procedures and local rules online; many update them annually. Accordingly, before filing a petition for writ of mandamus or other original proceeding, please check to see if there are any new requirements to follow for the court in which the petition will be filed.

C. The appendix and the record

Unlike a human appendix, your mandamus appendix is absolutely essential to the health of your mandamus petition, so please read the list of necessary contents carefully. *See* Tex. R. App. P. 52.3(k)(1). When filing a response, your appendix need not contain any item already contained in the relator's appendix. Tex. R. App. P. 52.4(e). Pro tip for the attorneys representing the RPI: It's helpful if you point out where the item is already contained in the relator's appendix!

The relator assembles the mandamus record, *see* Tex. R. App. P. 52.7, and must provide the appellate court with a sufficient record to establish a right to mandamus relief. *Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992) (orig. proceeding). For example, if an evidentiary hearing is held in the trial court, the relator has the burden of providing the reporter's record from that hearing. *Id.* (noting that without the reporter's record of the evidentiary hearing, the reviewing court "cannot determine on what basis the trial judge and the special master reached their conclusions").

The relator is responsible for filing with the petition a certified or sworn copy of every document that is material to his or her claim for relief and that was filed in any underlying proceeding, as well as a properly authenticated reporter's record of any relevant testimony from any underlying proceeding, including exhibits that were offered in evidence, or a statement that no testimony was adduced in connection with the matter. Tex. R. App. P. 52.7(a). The relator and any party who files materials for inclusion in the record must simultaneously serve on each party materials not previously served on that party as part of the record in another original appellate proceeding in the same or another court and an index listing the materials filed and describing them in sufficient detail to identify them. Tex. R. App. P. 52.7(c).

The reviewing court will consider the record that was before the trial court when it took the complained-of action. *See In re Sanchez*, 571 S.W.3d 833, 837 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding) (holding that relators failed to establish abuse of discretion in denial of motion to compel physical examination when—contrary to exhibits presented in mandamus record—relators certified that "[n]o exhibits were offered in evidence at the hearing, and no testimony was adduced in connection with the matter complained of" and the trial court's order indicated that it considered only the motion and counsels' arguments); *see also In re Kotsanis*, No. 23-0319, 2023 WL 7930094, at *1 (Tex. Nov. 17, 2023) (Huddle, J., concurring). In *Kotsanis*, Justice Huddle, concurring in the denial of relief when the relator complained of an abuse of discretion by the trial court's refusal to permit a court reporter to transcribe a hearing, noted that nothing in the record showed that the relator had asked the trial court for a court reporter or objected to the reporter's absence. 2023 WL 7930094, at *1. Instead, the relator sought relief on affidavits created for the mandamus that described what happened at the hearing and a copy of an email requesting a court reporter that counsel averred was sent to the court coordinator. *Id.* Because the court "does not consider materials attached to a petition in the first instance," Justice Huddle explained how to obtain the necessary documents for a mandamus petition, stating,

> [T]he Rules of Appellate Procedure tell us the answer [to how to complain about the lack of a court reporter]: file a formal bill of exception and follow the steps in Rule [of Appellate Procedure] 33.2 to ensure that the bill of exception gets included in the record. Relator here did not comply with Rule 33.2, nor did she file any other motion or written objection with the trial court that might have preserved her complaint. Relator's failure to preserve her complaint for our review justifies denial of mandamus relief.

Id. at *1–2 (citations omitted).

In two Fourteenth-court opinions that involved the same relator, a justice filed a dissenting opinion to the denial of mandamus relief, opining that the court should have sent the relator a ten-day notice of dismissal for failing to comply with Rule 52.7(a). *In re Watson*, No. 14-21-00462-CV, 2021 WL 3883615, at *1 (Tex. App.—Houston [14th Dist.] Aug. 31, 2021, orig. proceeding) (mem. op.) (Spain, J., dissenting) (RTP); *In re Watson*, No. 14-21-00370-CV, 2021 WL 3883604, at *1 (Tex. App.—Houston [14th Dist.] Aug. 31, 2021, orig. proceeding) (mem. op.) (Spain, J., dissenting) (discovery). *Cf. In re Barton*, No. 14-21-00039-CR, 2021 WL 970882, at *1 (Tex. App.—Houston [14th Dist.] Mar. 16, 2021, orig. proceeding) (mem. op.) (dismissing because relator's petition did not comply with TRAP 52.3(j), 52.7(a)(1), and 52.7(a)(2) after giving him an opportunity to cure). Regardless of how badly a trial court may have abused its discretion, a relator still must file a mandamus petition that is compliant with the rules of appellate procedure. *See In re B.C.*, No. 14-20-00784-CV, 2021 WL 98811, at *1 (Tex. App.—Houston [14th Dist.] Jan. 12, 2021, orig. proceeding) (mem. op.) (dismissing family-law related petition after relator failed to file petition compliant with TRAP 52.3(j), 52.7 within ten days).

D. Relief

Relief comes in two flavors—temporary and "other." More often than not, relief will be denied, and the court may hand down an opinion when doing so, but it is not required to do so. Tex. R. App. P. 52.8(d). The denial of relief is often terse, and the court may opt not to inform the relator why relief was denied. *But cf. In re Johnson*, No. 05-22-00051-CV, 2022 WL 1055370, at *1–2 (Tex. App.—Dallas Apr. 8, 2022, orig. proceeding) (mem. op.) (explaining denial was based lack of authenticated record and lack of jurisdiction).[108] As with an appeal, you increase your chances of the court's reaching the merits if you follow all procedural requirements.

1. Temporary relief

The court can grant temporary relief without requesting a response to the mandamus petition, but it must request a response to grant any other relief. Tex. R. App. P. 52.4. To obtain temporary relief, the relator should file a motion to stay any underlying proceedings or for any other temporary relief pending the court's action on the petition. Tex. R. App. P. 52.10(a). In addition to filing a motion, the relator should

[108]The Dallas court has also issued mandamus-denial opinions with explanations regarding failure to provide a certified or sworn copy of orders or the record. *See, e.g., In re Herod*, No. 05-22-00239-CV, 2022 WL 883905, at *1 (Tex. App.—Dallas Mar. 25, 2022, orig. proceeding) (mem. op.) (denying petition without prejudice to refiling a petition with a record that complies with TRAP 52).

denote on the front cover of the petition that temporary relief is requested, and if it's a true emergency,[109] say so both in writing—in an obvious location,[110] please!—and through a phone call to the clerk's office.

The court can sua sponte grant without notice "any just relief pending the court's action on the petition," Tex. R. App. P. 52.10(b), but it's best not to rely on the court's magnanimous nature. If you want something, you should ask for it. The court may require that a bond be posted as a condition of granting temporary relief to protect the parties who will be affected by it. *Id.*

2. Other relief

If the court is of the tentative opinion that the relator is entitled to the relief sought or that a serious question concerning the relief requires further consideration, the court must request a response if one has not already been filed and may set the case for oral argument. Tex. R. App. P. 52.8(b)(1), (4). However, the court may grant relief without hearing oral argument. Tex. R. App. P. 52.8(c).

E. Ethics

Disregarding the rules is a bad idea under any circumstances, but filing a groundless petition, making a misleading statement, filing a misleading record, or bringing a mandamus petition solely to delay the underlying proceeding is sanctionable conduct. Tex. R. App. P. 52.11. The court can impose "just sanctions" upon the individual who is not acting in good faith—a party *or* an attorney—either on the court's own motion or on the motion of another party after notice and a reasonable opportunity to respond. *Id.* The gross misstatement or the omission of an "obviously important and material fact" in the petition or response, Tex. R. App. P. 52.11(c), or the filing of an appendix or record that is "clearly misleading because of the omission of obviously important and material evidence or documents," Tex. R. App. P. 52.11(d), are hallmarks of an original proceeding that is not brought in good faith.

[109]For example, if the trial court issued an order on a motion to compel on the same day that it will go into effect, that's an emergency. But if the trial court issued the order four months earlier, with the deadline on the day relator files the mandamus petition, while this may have *become* an emergency, it is only an emergency because of the relator's delay in filing, and the court may not be sympathetic unless the relator provides a suitable explanation for the delay.

[110]Please do not bury your request for temporary emergency relief halfway through the petition. Like most things in life, if you really want something, it's best to be upfront about it. Put it on the front cover in big, bold letters. Sprinkle it liberally throughout your brief so a keyword search for "emergency relief" will reveal it. Make sure to put it in your prayer too. Filing a separate motion for temporary emergency relief is a good idea. When it comes to original proceedings, overkill is preferable to subtlety if there's truly an emergency.

TEXAS EVIDENCE HANDBOOK

[Winner: Joseph W. McKnight Best Family Law CLE Article, 2017]

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INNOVATIVE EVIDENCE

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  - Regional Championship, National Mock Trial Competition
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- The Real Estate Council
- Texas Bar College
- Texas Bar Foundation, Fellow
- DAYL Foundation, Fellow
- Judicial Intern Committee, Past Chair
- William "Mac" Taylor American Inn of Court
- State Bar of Texas
- American Bar Association
- Dallas Bar Association
- Continuing Legal Education Committee, Past Chair
- Law in the Schools & Community Committee, Past Chair
- Bench Bar Committee
- Dallas Human Resource Management Association
- Homeowner's Association, Past President
- Lawyers in the Classroom program for Dallas ISD secondary social studies classes and the legal community volunteer

AWARDS & RECOGNITION

- Best Lawyers in Dallas, *D Magazine*, 2019-2023
- Texas Super Lawyers, Thomson Reuters, 2020-2023
- Texas Rising Star, Thomson Reuters, 2013-2019
- Up-and-Coming 100: Texas Rising Star, Thomson Reuters, 2017-2019
- 40 & Under Hot List, *Benchmark Litigation*, 2018

REPRESENTATIVE EXPERIENCE

Trial Litigation

- Obtained a $12.5 million verdict in a week-long trial in a breach of contract and breach of implied duty of good faith and fair dealing case against the world's second largest wind turbine manufacturer
- Obtained a $1 million verdict in a two-week federal jury trial against a school district for the abuse and mistreatment of a disabled, non-verbal student
- Jury trial verdict on behalf of a celebrity accused of breaching a multi-million-dollar contract
- Trial verdict for a large cell phone recycling company against a former employee who breached her contract
- Resolution of bet-the-company-litigation for one of the world's largest wind turbine suppliers

- Permanent injunction and judgment on behalf of one of the largest direct selling companies in the world in a case involving trademark infringement and unfair competition
- Resolution of multi-million-dollar litigation involving the largest energy provider in Texas
- Judgment for a local healthcare facility and its principals accused of breach of fiduciary duty, fraud, and breach of contract
- Resolution for one of the largest privately held companies in the United States in a multi-million-dollar dispute involving breach of fiduciary duty and tortious interference
- Dismissal from a multi-million-dollar arbitration in a matter pertaining to the securing of
- Department of Defense contracts and which involved allegations of breach of contract, conspiracy, and fraud
- Summary judgment for a popular pizza franchise in a multi-million-dollar fraud and breach of contract case
- Dismissal of a lawsuit filed by the City of Dallas against a fifth-generation Dallas business in a highly publicized and politically-charged case involving allegations of environmental abuse
- Dismissal in a multi-million-dollar lawsuit for large local dental group in breach of contract and breach of fiduciary duty matter
- Dismissal of a multi-million-dollar lawsuit for a family business in complex business lawsuit involving allegations of fraudulent transfers and fraud
- Dismissal of a lawsuit for large, worldwide cosmetics company in a breach of contract and employment discrimination case
- Secured a finding of contempt in federal court for a large, worldwide cosmetics company against a company who violated settlement agreement and who infringed on trademarks
- Secured a finding of contempt in state court for a large, national executive employee search firm against a company who violated a confidentiality agreement and covenant not to compete
- Defense of an injunction suit on behalf of an historic Dallas business whose certificate of occupancy was unlawfully revoked; the restoration of the certificate of occupancy resulted in the creation of hundreds of local jobs
- Secured a temporary injunction on behalf of a large multi-state development company
- Secured a temporary injunction on behalf of a national healthcare company against former business partners
- Dismissal of a lawsuit for a multinational box and recycled paper manufacturing company in case involving allegations of fraud and tortious interference
- Dismissal of a lawsuit for large company who owns, operates and manages apartment complexes in case involving allegations of negligence
- Summary judgment on behalf of a law firm accused of conspiracy and malicious prosecution
- Resolution of an employment discrimination matter for local teacher
- Resolution of a case involving a popular reality television show and allegations of fraud
- Resolution of a matter involving a Dallas regulatory compliance company in a case involving allegations of breach of contract and covenant not to compete and for violation of trade

Appellate Litigation

- *Qualizeal, Inc., et al., v. Cigniti Technologies, Inc.*, No. 05-22-00923-CV (Tex. App.—Dallas Feb. 28, 2024)
- *Encore Int'l Inv. Funds, LLC v. 2608 Inwood, Ltd.*, No. 05-19-00070-CV, 2020 WL 1685420 (Tex. App.—Dallas Apr. 7, 2020, no pet.)
- *Stanton v. Gloersen*, No. 05-16-00214-CV, 2016 WL 7166550 (Tex. App.—Dallas Nov. 30, 2016, no pet.)
- *Transfirst Holdings, Inc., et al. v. Magliarditi and DII Investments, Inc.*, No. 13-10436 (5th Cir. 2013)
- *In re Family Dollar Stores of Texas, LLC*, No. 09-11-00432-CV (Tex. App.—Beaumont Nov. 3, 2011, orig. proceeding) (mand. conditionally granted)
- *Lewis v. Family Dollar, Inc.*, No. 01-10-00472-CV, 2011 WL 346290 (Tex. App.—Houston [1st Dist.] Feb. 3, 2011) (affirmed)

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PROFESSIONAL ACTIVITIES

- Director, Officer & President, Tarrant County Family Law Bar Association 1998-2003
- Director, Officer & President, Tarrant County Bar Association 2003-2010
- Director/Officer & President, Texas Academy of Family Law Specialists, 2003 to 2012
- Council Member, Officer & Chair, Family Law Council, State Bar of Texas, 2004 to 2017
- Fellow, American Academy of Matrimonial Lawyers, 2005 to Present
- Fellow, College of the State Bar of Texas, 1999 to Present
- Member, Tarrant County Young Lawyers Association, 1996 to 2002
- Director/Fellow, Tarrant County Bar Foundation, 2017 to Present
- Member, Barrister, Master, President & Emeritus, Eldon B. Mahon Inn of Court, 1997-98, 2001-2005, 2007-2008, 2010 to 2011, 2017-Present
- Senior Counsel, American College of Barristers, 2001 to Present
- Fellow, Lifetime Fellow, Board Member, Officer Texas Bar Foundation 2002 to Present
- Lawyers of Distinction, 2018- Present

AWARDS/RECOGNITION

Friend of the Inn for outstanding contributions to Eldon B. Mahon Inn of Court, 2002
President's Certification of Outstanding Achievement from Tarrant Co. Bar Assoc., 2003
Texas Super Lawyer, *Texas Monthly Magazine* 2003 to Present
Who's Who in Executives and Professionals 2003
Top Attorneys featured in *Fort Worth, Texas Magazine* 2003 to Present
Top Fifty Female Attorneys in Texas, Texas Monthly Magazine 2004 to Present
Top Fifty Female Super Lawyers, *Texas Monthly Magazine* 2006 to Present
Top 100 Lawyers in Dallas Fort Worth, Texas Monthly Magazine 2006 to Present
Top 100 Lawyers in Texas, Texas Monthly Magazine 2014 to Present
The Best Lawyers in America 2007 to Present
Top Women Lawyers, *D Magazine*, 2010
Fort Worth Business Press Power Attorney 2014
Fort Worth Magazine Top Attorneys 2014 to Present
Top Attorney, 360 West Magazine, 2018- Present
State Bar of Texas Ovation Award 2017
Joseph W. McKnight Best Family Law CLE Article, 2017
Dan Price Award Recipient, 2017
TexasBarCLE Standing Ovation Award Recipient, 2017-2018
Texas Academy of Family Law Specialists- Sam Emison Award, 2018
Lawyer of The Year in Family Law in Dallas/Fort Worth in 2022 by Best Lawyers
Gene Cavin Award Recipient 2023

LAW RELATED SEMINAR PUBLICATIONS & PARTICIPATION

Author, *An Attorney Ad Litem Is Really A Lawyer*, Attorney Ad Litem Training Seminar 1997.
Author, *Trial Preparation & Planning*, "Nuts & Bolts" Protective Order Seminar 1997.
Author, *Challenging Characterization Issues: Characterizing Trusts, Employee Stock Options, Workman's Compensation Claims, And Intellectual Property*, Advanced Family Law Course 1997.
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Author/Player, *Associate Judge Do's & Don't's*, Tarrant County Family Law Bar Association 2003.
Author/Speaker, *Evaluating A Custody Case*, 26th Annual Marriage Dissolution Institute 2003.
Co-Director, Family Law Boot Camp, 29th Annual Advanced Family Law Seminar 2003.
Author, *Discovery in Hard Places*, 29th Annual Advanced Family Law Seminar 2003.
Speaker, *Practicing Law For Fun & Profit*, 29th Annual Advanced Family Law Seminar 2003.
Author/Speaker, *Internet Searches for Financial & Personal Information Useful in Family Law Litigation*, Texas Academy of Family Law Specialists Annual Trial Institute 2004.
Moderator, Effective Courtroom Advocacy, Tarrant County Bench Bar Seminar 2004
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Author/Speaker, *Investigation of Personal Information & Assets*, State Bar College "Summer School" 2004.
Author, *The Life of a Grievance & The New Disciplinary Rules, What You Don't Know Can Hurt You*, 30th Annual

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Author/Speaker, *Marital Property 101*, State Bar of Texas Spring Training, Fort Worth 2005
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Author/Speaker, *Internet Investigation of Personal Information and Assets*, Tarrant County Bar Association September 2005 Luncheon.
Director, Texas Academy of Family Law Specialists Trial Institute 2006, Reno, Nevada
Author/Speaker, *Avoiding Divorce Disasters*, Representing Small Businesses, Dallas March 23-24, 2006
Panelist/Author, 29th Annual Marriage Dissolution Institute Bootcamp – Practical Aspects of Enhancing Your Practice, *How To Lose A Paralegal In 10 Days, or Keep One for 10 Years*, April 19, 2006, Austin.
Moderator, 29th Annual Marriage Dissolution Institute, *Electronic Evidence*, April 20-21, 2006, Austin.
Speaker, *Being A Family Law Attorney*, Tarrant County Bench-Bar, April 27, 2006, The Woodlands.
Speaker, *Ethics: Evidence, Discovery and Witnesses*, Tarrant County Bar Association Brown Bag Luncheon, June 23, 2006, Fort Worth.
Author/Speaker, *21st Century Issues Dealing with Nontraditional Relationships*, 31st Annual Advanced Family Law Seminar, August 14-17, 2006, San Antonio.
Speaker, UTCLE Parenting Plan Conference, *Effective Strategies For Reaching Parenting Plan Agreements*, October 13, 2006.
Speaker, LexisNexis CLE, Learning to Make the Texas Family Code Work for You, *Navigating the Family Code*, October 20, 2006.
Speaker, LexisNexis CLE, Learning to Make the Texas Family Code Work for You, *Helpful Appellate References*, October 20, 2006.
Moderator, Texas Academy of Family Law Specialists Trial Institute 2007, Sante Fe, New Mexico, Electronic Evidence Panel.
Moderator, 30th Annual Marriage Dissolution Institute, *Electronic Evidence*, May 10-11, 2007, El Paso.
Co-Speaker, *Interesting Appellate Cases*, Tarrant County Family Law Bar Luncheon, May 22, 2007.
Speaker/Author, UTCLE Family Law on the Front Lines, *Appellate Tips for Family Law Attorneys*, Galveston, Texas June 28-29, 2007.
Speaker/Author, *Evidence, Keeping in In and Keeping it Out,* 32nd Annual Advanced Family Law Seminar, San Antonio.
Speaker, *Appellate Considerations*, Texas Academy of Family Law Specialists Trial Institute 2008, Sante Fe, New Mexico.
Speaker, UTCLE 8th Annual Family Law on the Front Lines, *Justice Behind Closed Doors: Protecting the Record, Your Client and Yourself In Chambers*, Galveston, Texas June 19-20, 2008.
Speaker/Author, SBOT Advanced Family Law Drafting, *Discovery*, Austin, Texas, December 3-4, 2008.
Speaker/Author, UTCLE Parent-Child Relationships: *Critical Thinking for Critical Issues, Discovery and Evidence, A Primer for Family Law Attorneys*, Austin, Texas, January 29-30, 2009.
Speaker/Author, SBOT Representing Small Business, *Protecting Business Before Divorce: What Every Business Lawyer Must Know About Family Law*, Dallas, Texas, March 26-27, 2009.
Speaker, UTCLE, 9th Annual Family Law on the Front Lines, *Electronic Evidence and Discovery*, San Antonio, June 18-19, 2009.
Director, 35th Annual Advanced Family Law Seminar, Dallas, Texas, August 3-7, 2009.
Speaker/Author, SBOT The Ultimate Trial Notebook: Family Law, *Effective Use of Prior Testimony*, San Antonio, December 3-4, 2009.
Speaker/Author, UTCLE 2010 Parent-Child Relationships: Critical Thinking for Critical Issues, *Discovery and Evidentiary Issues in Substance Abuse Scenarios*, Austin, Texas January 28-29, 2010.
Speaker/Author, SBOT Essentials of Business Law, *Business Succession Planning: Protecting Business In Divorce*,

Dallas, Texas, April 29-30, 2010.
Presiding Officer, UTCLE 10th Annual Family Law on the Front Lines, San Antonio, Texas, July 1-2, 2010.
Speaker/Author, 36th Annual Advanced Family Law Seminar, *Evidence: In or Out?* San Antonio, August 9-12, 2010.
Speaker/Panelist, New Frontiers in Marital Property Law, *Fiduciary Litigation and Other Financial Causes of Action*, Scottsdale, AZ, October 28-29.
Speaker/Panelist, American Bar Association Family Law Section Fall Meeting, *Tech Torts and Related Difficult Evidentiary Issues,* October 23, 2010, Fort Worth.
Speaker/Panelist, NBI Handling Divorce Cases from Start to Finish, *Exploring Custody, Visitation and Support Issues*, and *Ethical Perils In Divorce Practice*, November 7, 2010, Fort Worth.
Speaker, Tarrant County Court Coordinator's CLE, *Electronic Evidence and Social Networking*, February 23, 2011, Fort Worth.
Speaker, Tarrant County Bench Bar, *Family Law In A Nutshell*, April 2, 2011, Possum Kingdom.
Author/Speaker, *What Every Business Attorney Needs to Know About Family Law*, Essentials of Business Law, April 14-15, 2011, Houston.
Author/Speaker, *Modern Evidence,* 34th Annual Marriage Dissolution Institute, Austin, April 28-29, 2011.
Presiding Officer, Family Law on the Frontlines, June 16-17, 2011, Austin, Texas.
Author/Speaker, *Electronic Evidence Issues*, 2011 Family Law Seminar, Legal Aid of Northwest Texas Equal Justice Volunteer Program, July 21-22, 2011, Fort Worth.
Author/Speaker, 37th Annual Advanced Family Law Seminar, *Evidence*, San Antonio August 1-4, 2011.
Author/Speaker, Texas Advanced Paralegal Institute, *Social Networking*, Fort Worth, October 6-7, 2011.
Speaker, Tarrant County Court Coordinator's Luncheon, *Evidence and Social Networking*, Fort Worth, October 11, 2011.
Moderator/Panelist, New Frontiers in Marital Property Law, *Remedies in Property Cases*, San Diego, October 13-14, 2011.
Author/Speaker, *Drafting Family Law Discovery: Basic and Electronic*, Advanced Family Law Drafting 2011, December 8-9, 2011, Dallas, Texas.
Panelist, Introductory Notes, Lawyer Practice Notes and Panelist, *More than Sex, Drugs and Rock & Roll: Evaluating Your Custody Case from a Psychiatric, Psychological and Legal Perspective*, UTCLE, AAML, 2012 Innovations – Breaking Boundaries in Custody Litigation, January 19-20, 2012, Houston, Texas.
Author/Speaker, Attacking and Enforcing Mediated Settlement Agreements, 35th Annual Marriage Dissolution Institute, Dallas, April 26-27.
Faculty Member, Houston Family Law Trial Institute, South Texas College of Law, May 2012 to Present
Speaker, *Social Networking in Family Law and Electronic Evidence*, Legal Aid of Northwest Texas EJV Program 2012 Family Law Seminar, Fort Worth, July 12-13, 2012.
Speaker, A Sampling of Interesting Appellate Cases, Tarrant County Family Law Bar Luncheon, Fort Worth, July 21, 2012
Author/Panelist, *Discovery, Keeping It In, Keeping it Out; Facebook; Social Networking*, 38th Annual Advanced Family Law Seminar, Bootcamp, August 5, 2012.
Author/Speaker, *Evolving Evidentiary Issues in the 21st Century*, 38th Annual Advanced Family Law Seminar, August 6-9, 2012.
Speaker, *Social Networking in Family Law and Electronic Evidence*, Texas Advanced Paralegal Seminar, State Bar of Texas, Addision, October 3-5, 2012.
Moderator, *Identifying, Valuing and Characterizing Natural Resources*, 17th Annual New Frontiers in Marital Property Law, New Orleans, October 4-5, 2012.
Speaker, *Social Networking*, Texas Association of Court Administrators Annual Meeting, Fort Worth, Texas October 25, 2012.
Speaker/Co-Author, *Electronic Evidence Cases Every Family Lawyer Should Know*, SBOT Family Law Technology Course, Austin, Texas December 12-13, 2012.
Speaker/Author, *Evidence Cases Every Family Law Attorney Should Know*, Dallas Family Law Bench Bar, Dallas, Texas, February 8, 2013
Participant/Attorney, Texas Academy of Family Law Specialists Annual Trial Institute, Colorado Springs, Colorado, February 15-16, 2013.
Speaker, Tarrant County Bar Association Court Coordinators Continuing Education, *Searching The Internet*, Fort Worth, Texas, April 4, 2013.
Author/Speaker, Tarrant County Bar Association Bench Bar, *Evidence Cases Every Attorney Should Know*, Possum Kingdom, Texas, April 12-13, 2013.

Author/Speaker, 35th Annual Marriage Dissolution Institute, Bootcamp, *Preparing the Client*, April 17-19, 2013, Galveston, Texas.
Author/Speaker, 39th Annual Advanced Family Law Seminar, Important Evidence Cases, as a part of the Discovery/Evidence Presentation, San Antonio, August 5-8, 2013.
Panelist, Unanswered and Unique Receivership/Bankruptcy Questions, 18th Annual New Frontiers in Marital Property Law, Napa Valley, October 4-5, 2013.
Author/Speaker, 36th Annual Marriage Dissolution Institute, *Settlement Agreements, MSA's, Etc...*, April 22-23, 2014, Austin, Texas.
Panelist, Innovations – Breaking Bounds in Custody Litigation, *You Don't Own Me- Alienation and Reunification*, Dallas, June 12, 2014.
Author/Speaker, State Bar Annual Meeting, *Evidence Cases Every Attorney Should Know*, Austin, June 26, 2014.
Author//Speaker, Legal Aid of Northwest, Texas, Texas A&M School of Law Family Law Seminar, Evidence: Authentication and Admissibility, Fort Worth, Texas, July 24, 2014.
Author/Speaker, Family Law 101 Course, *Evidence*, San Antonio, August 3, 2014.
Author/Speaker, 40th Annual Advanced Family Law Course, *Evidence-Update and Current Issues*, San Antonio August 5, 2014.
Co-Director, New Frontiers in Family Law, Lake Tahoe October 23-24, 2014.
Author/Speaker, *Texas Association of Domestic Relations Offices Annual Meeting*, Social Networking and Evidence, San Antonio October 29, 2014
Author/Speaker, TCFLBA 4th Annual CLE Family Law In Review, *Evidence*, Fort Worth, November 7, 2014.
Author/Speaker TCFLBA Monthly Luncheon, *Social Networking*, November 18, 2014.
Author/Speaker SBOT 9th Annual Fiduciary Litigation Course, Electronic Discovery and Electronic Evidence, Horseshoe Bay, December 4-5, 2014.
Author/Speaker, SBOT Family Law Technology 360, *Proving It Up, Email and Social Media Evidence/Predicates*, Austin, December 4-5, 2015
Witness, Texas Academy of Family Law Specialists Trial Institute, January 15-16, 2015.
Co-Speaker, *Finding and Proving Up Email & Social Media Evidence*, Extreme Family Law Makeover XIII, San Antonio, February 27, 2015.
Moderator/Co-Speaker/Co-Author, *Cradle to the Grave – The Impact of Family on the Business*, Essentials of Business Law Course 2015, Dallas, March 12-13, 2015.
Speaker/Author, *Pleading, Discovering and Arguing Marital Fraud, Waste & Reconstituted Estate*, 38th Annual Marriage Dissolution Institute, Dallas, April 9-10, 2015.
Speaker, *Oops, I Spoliated Again!*, Tarrant County Bench Bar, April 24-25, 2015.
Speaker/Author, *SAPCR Update*, Advanced Family Law 2015, San Antonio, August 3-6, 2015.
Speaker/Author, *Hearsay*, Advanced Family Law 2015 Judge's Track, San Antonio, August 3-6, 2015.
Speaker/Author, *Spoiliation of Evidence*, Texas Advanced Paralegal Seminar, Fort Worth, October 1, 2015
Panelist/Co-Speaker, *The Role of Experts in Characterizing and Tracing Property*, New Frontiers in Marital Property Law, Denver, October 15-16, 2015
Speaker/Author, *Everything a Business Lawyer Needs to Know About Characterization*, Advanced Business Law, Houston, November 20, 2015
Speaker/Author, *Waste Fraud and the Reconstituted Estate*, Advanced Family Law Drafting, Dallas, December 10-11, 2015
Participant/Attorney, 32nd Annual Texas Academy of Family Law Specialists Trial Institute, Charleston, South Carolina, January 14-17, 2016
Speaker/Author, *Technical Issues in Property Cases*, 2016 Family Justice Conference, Cedar Creek, Texas January 25, 2016
Speaker/Author, Ethical Considerations in Family Law, 22nd Annual Ethics Symposium, South Texas College of Law, February 5, 2016
Speaker/Author, *Spoliation, Creation of Fraudulent Evidence*, 39th Annual Marriage Dissolution Institute, Galveston, April 7-8, 2016.
Speaker/Author, *Evidence*, State Bar of Texas Annual Meeting 2016, Fort Worth, Texas.
Speaker/Participant, Estate Planning for the Family Business Owner, Webinar, November 3, 2016
Speaker/Author, *Evidence Updates*, Tarrant County Family Bar Association "Advanced on a Shoestring" Seminar, Ft.

Worth, Texas, November 10-11, 2016
Course Director/Speaker/Author, *HIPPA,* Family Law Technology Course, Austin, Texas, December 8-9, 2016
Speaker/Author, *Evidence- Knowing When to Hold Em' and When to Fold Em' in the Courtroom,* Extreme Family Law Makeover XV Seminar, San Antonio, Texas, February 24, 2017
Moderator, *Courtroom Evidence & Demonstration*, Marriage Dissolution, Austin, Texas, April 21, 2017
Participant/Attorney, 33rd Annual Texas Academy of Family Law Specialists Trial Institute, Houston, TX, May 22nd-26th, 2017
Speaker/Author, Evidence Update and Issues, Advanced Family Law Course, San Antonio, Texas, August 6, 2017
Speaker/Author, *Drafting with Litigation in Mind*, Advanced Family Law Drafting, Dallas, Texas, December 7, 2017
Speaker/Author, *Pending*, 34th Annual Texas Academy of Family Law Specialists Trial Institute, February 15-16, 2018
Speaker/Author, *Effective Evidence*, Nevada Family Law Conference, Bishop, CA, March 1-2, 2018
Speaker/Author, *Evidence Update and Issues*, Advanced Family Law Course, San Antonio, Texas, August 8, 2018
Speaker/Author, *Spoliation and Fraudulent Documents*, NTEC Bar, Colleyville, Texas, August 21, 2018
Speaker/Author, *Evidence Trial Skills: Getting It In & Keeping it Out*, Trial Skills for Family Lawyers, New Orleans, LA, December 13-14, 2018
Speaker/Author, *Preparing for Direct on your Way to the Courthouse and Preparing for Cross During Direct,* Galveston, TX, April 25-26, 2019
Speaker/Faculty, 35th Annual Texas Academy of Family Law Specialists Trial Institute, May 18-25, 2019 Speaker/Author, *Courtroom Examination in Family Law Cases*, Advanced Family Law Course, San Antonio, Texas, August 13, 2019
Speaker/Author, *Evidence Trial Skills- Getting It In and Keeping It Out,* Advanced Family Law Course, San Antonio, Texas, August 13, 2019
Speaker/Author, *Evidence in Family Court,* Annual Judicial Education Conference, San Antonio, Texas, September 3-6, 2019
Speaker, Oral Arguments Presentation, Texas A&M University School of Law, Fort Worth Texas, October 10, 2019
Speaker/Author, *Evidence*, Tarrant County Family Law Bar Association, Fort Worth, Texas, November 12,2019
Speaker/Author, *Defense Against the Dark Arts: Evidence*, South Carolina Bar Convention, Columbia, South Carolina, January 23, 2020
Speaker/Author, *I Know There's and Answer: Getting the Information You Need to Win*, Advanced Family Law, Webcast, Texas, August 4, 2020
Speaker/Author, *Evidence: Get it In, Keep it Out*, Dallas Minority Attorney Program, Webcast, Texas, September 18, 2020
Speaker/Author, *Evidence: Getting it In, Keeping it Out*, Tarrant County Family Law Bar Association CLE, Webcast October 2020
Speaker/Author, Effective Evidence, Indiana Family Law Bar Annual Meeting, Webcast October 2020
Speaker/Author, *Cutting Edge Evidence Issues*, American Academy of Matrimonial Lawyers Annual Meeting, Chicago, Webcast November 2020
Speaker/Author, *Top Ten Discovery Mistakes*, Fiduciary Duty Seminar, State Bar of Texas, Webcast December 2020
Speaker, *Spousal Privacy: Where it Begins and Where it Ends*, Webcast December 2020
Speaker/Author, *Evidence, I think I love you*, Back to Basics: Looks Like We Made It, Family Law Bar Association of San Antonio, Webcast February 2021.
Speaker/Author, *Basic Evidence in Family Law, Getting It In, Keeping It Out, And Dealing with Electronic Evidence*, Handling Your First (Or Next) Divorce Case, State Bar of Texas, Webcast February 23, 2021.
Speaker/Author, *Cutting Edge Evidence*, New Developments And Advanced Strategies In The Family Law Practice, The Oregon Chapter of the American Academy of Matrimonial Lawyers 9th Bi-Annual Continuing Legal Education Program, Webcast, April 16, 2021.
Speaker, *Preparing Your Uncooperative Client For Discovery*, 44th Annual Marriage Dissolution Institute, April 29-30, 2021.
Panelist/Speaker, *Direct and Cross Examination of a Child Custody Evaluator*, Innovations, Breaking Boundaries In Custody Litigation, State Bar of Texas/Texas Chapter American Academy of Matrimonial Lawyers, May 27-28, 2021.
Author/Speaker, *Evidence, Thirty Tips in Thirty Minutes*, State Bar of Texas Annual Meeting, June 17, 2021.
Author/Speaker, *Cutting Edge Evidence*, State Bar of Texas, Advanced Family Law Seminar, August 2-5, 2021, San Antonio.
Author/Speaker, *Courtroom Examination in Family Law Cases: Effective and Efficient Presentation*, ABA Family Law Section Fall Meeting, October 2021, Orlando, Florida.
Moderator/Panelist*, Exiting the Case: Creative Property Division And Other Remedies At Final Trial*, 26th Annual New

Frontiers in Marital Property Law, October 14-15, 2021, Austin, Texas.
Author/Speaker, *Drafting For Yourself: Preparing Your Notes for Litigation, Depositions & Mediation*, Advanced Family Law Drafting, December 9-10, 2021, San Antonio.
Author/Speaker, *Drafting For Yourself: Preparing Your Notes for Litigation, Depositions & Mediation*, Houston Bar Association, Family Law Section, December 9-10, 2021, San Antonio.
Author/Speaker*, Cutting Edge Evidence*, Family Law Bar Association – San Antonio 3rd Annual Seminar: You're Still Muted!, February 25, 2022, Virtual.
Author/Speaker, *Cutting Edge Evidence*, State Bar of Texas, Advanced Trial Strategies, March 3-4, 2022, New Orleans.
Author/Speaker, *Cutting Edge Evidence*, AAML Webinar, recorded June 10, 2022.
Author/Speaker, *Innovative Evidence, Getting it In, Keeping it Out*, 48th Annual Advanced Family Law Seminar, August 8-11, 2022, San Antonio.
Author/Speaker, *Cutting Edge Evidence*, Ohio Chapter AAML, October 10, 2022
Author/Panelist, *Out of this World (Or At Least Outside of Texas): Out of State and Foreign Marital Property Considerations*, New Frontiers in Marital Property Law, October 27-28, 2022, Truckee, California.
Author/Speaker, *Cutting Edge Electronic Evidence Issues in Divorce: Wordless Communications*, 45th Annual Marriage Dissolution Institute, April 27-28, 2023, Austin.
Author/Speaker, *Cutting Edge Evidence Wordless Communicatio*n, Galveston County Bar Association monthly luncheon, June 15, 2023, Galveston.
[pending] *Hearsay and Other Evidentiary Issues, A Primer*, 46th Annual Advanced Civil Trial Course, July 19-21, 2023, Frisco (live).
[pending] Author/Speaker, *Innovative Evidence*, 49th Annual Advanced Family Law Seminar, August 7-10, 2023, San Antonio.
[pending] Author/Speaker, *Complex Issues in High Profile Family Law Cases*, Texas Center for the Judiciary 2023 Annual Judicial Education Conference, September 7, 2023.
[pending] Author/Speaker, *Hearsay and Other Evidentiary Issues, A Primer*, 46th Annual Advanced Civil Trial Course, October 4-6, 2023, Houston (live).
[pending] Author/Speaker, *Drafting the Perfect Petition* (working title), Advanced Family Law Drafting, December 14-15, 2023, Fort Worth.

LAW RELATED PERIODICAL/MAGAZINE PUBLICATIONS

Author, "Beating Out The Big Firms", *Texas Lawyer*, Vol. 18, No. 21, July 29, 2002.
Interviewed/Quoted "Divorce 101", *Fort Worth Magazine*, July 2003 edition.
Author, "Basic Internet Searches for Persons and Assets", *The College Bulletin, News for Members of the College of the State Bar of Texas*, Summer 2006
Author, "New Marital Estate in Divorce: Zombie Money", *Texas Lawye*r 2013
Author, "Killing the Messenger", *Texas Bar Journal*, September 2014, Vol. 77, No. 8, P712
Author, "How Courts and Litigators Are Dealing With Interpretation of Digital Wordless Communications", *ABA Law Practice Magazine*, January/February 2022.
Author, "Cutting Edge Evidence Issues", *ABA Law Practice Magazine Tech Show Issue*, Lead Article, Vol 49 No. 1 Jan/Feb 2023.

JESSICA H. JANICEK

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EDUCATION

B.B.A., Marketing, Baylor University, 2006
J.D., *Cum Laude*, Texas Wesleyan University School of Law, 2009

LEGAL EXPERIENCE/CERTIFICATIONS

KOONSFULLER, PC.
Attorney, January 2010 – Present

- Practice limited to family law.
- Litigation and appellate experience handling complex property disputes and child custody proceedings.
- Board Certified – Family Law, Texas Board of Legal Specialization, January 2015

Texas A&M School of Law
Adjunct Professor—Family Law Drafting, August 2014 – Present

PROFESSIONAL ASSOCIATIONS

Member, Baylor University Alumni Association, 2006 – Present
Member, Kappa Delta Alumni Association, 2006 – Present
Member, State Bar of Texas, 2009 – Present
Alumni, Houston Family Law Trial Institute, 2010
Member, Tarrant County Bar Association, 2010 – Present
Member, Tarrant County Family Law Bar Association, 2010 – Present
Member, Dallas County Bar Association, 2010 – Present
Member, Tarrant County Young Lawyer's Association, 2010 – Present
Member, Tarrant County Appellate Section, 2011 – Present
Member, Appellate Section—State Bar of Texas, 2011 – Present
Member, Eldon B. Mahon Inn of Court, 2011 – Present
Appellate Committee State Bar of Texas, Assistant to the Chair, 2013—Present

AWARDS/RECOGNITIONS

Fort Worth, Texas Magazine Top Attorney, 2012- Present
Texas Lawyer's Legal Leaders On The Rise (Only 25 Selected in Texas), 2013
Best Attorney in Northeast Tarrant County, Living Magazine, 2013
Texas Rising Star (SuperLawyers), 2014- Present
76092 Magazine's Local Luminary, 2014
Up- and- Coming 50: Women Texas Rising Stars, 2018-2019
Up- and- Coming 50: Texas Rising Stars, 2018-2019
The Best Lawyers in America, in family law as recognized by, Best Lawyers LLC, 2015-Present
Joseph W. McKnight Best Family Law CLE Article, 2017
Elite Lawyer by Elite Lawyers, 2018
Top Attorney, 360 West Magazine, 2018- Present

LEGAL PUBLICATIONS/PARTICIPATION

Interviewed/Quoted, *Fact vs. Fiction: First-Year Associates Dish About "The Deep End"*, Texas Lawyer Magazine, February 1, 2010.
Co-Editor, Texas Annotated Family Code, Published by LexisNexis, 2010 – 2013.
Author, *Exploring Custody, Visitation and Support Issues*, "Handling Divorce Cases from Start to Finish", National Business Institute, November 7, 2010, Fort Worth, Texas.
Author, *Drafting Family Law Discovery: Basic and Electronic*, Advanced Family Law Drafting, December 8-9, 2011, Dallas, Texas.
Author (Introductory Notes and Lawyer Practice Notes), *More than Sex, Drugs and Rock & Roll: Evaluating Your Custody Case from a Psychiatric, Psychological and Legal Perspective*, "Innovations—Breaking Boundaries in Custody Litigation", UTCLE, AAML, January 19-20, 2012, Houston, Texas.
Author, *Attacking and Enforcing Mediated Settlement Agreements*, 35th Annual Marriage Dissolution Institute, April 26-27, 2012, Dallas, Texas.
Author, *Discovery (Getting It In and Keeping It Out), Facebook and Social Networking*, 38th Annual Advanced Family Law Seminar: Bootcamp, August 5, 2012, Houston, Texas.
Author, *Discovery in Divorce*, "Family Law from A to Z", National Business Institute, October 2, 2012, Houston, Texas.
Author, *Electronic Evidence Cases Every Family Lawyer Should Know*, Family Law Technology Course, December 13-14, 2012, Austin, Texas.
Speaker, *Divorce Cases & E-Discovery*, Strafford Publishing Webinar, February 27, 2013, Fort Worth, Texas.
Author, *What You Tweet Can And Will Be Used Against You*, North Texas Magazine, March 1, 2013, Fort Worth, Texas.
Author, *Client Preparation*, 36th Annual Marriage Dissolution Institute, April 18-19, 2013, Galveston, Texas.
Speaker, *Evidentiary Issues*, Trying a Case in the New Age, May 10, 2013, Fort Worth, Texas.
Author, *Evidence Cases Every Family Law Attorney Should Know,* 39th Annual Advanced Family Law Course, August 5-8, 2013, San Antonio, Texas.
Author, *Unanswered and Unique Bankruptcy Questions*, 18th Annual New Frontiers in Marital Property Law, October 3-4, 2013, Napa, California.
Author/Speaker, *Really Good Ways to Ask, Answer and Object to Discovery,* Advanced Family Law Drafting, December 5-6, 2013, Dallas, Texas.
Author/Speaker, *Social Media Do's and Don'ts*, 37th Annual Marriage Dissolution Institute, April 24-25, 2014, Austin, Texas.
Author/Speaker, *Onshore Shale—Where Oil & Gas Law and Family Law Meet*, Institute for Energy Law, July 10, 2014, Southlake, Texas.
Author/Speaker, 40th Annual Advanced Family Law Course, *Modern Discovery*, San Antonio August 5, 2014.
Author, 40th Annual Advanced Family Law Course, *Evidence*, San Antonio August 5, 2014.
Author, New Frontiers in Family Law, *Evidence—A Master Class,* Lake Tahoe October 23-24, 2014.
Author/Speaker TCFLBA Monthly Luncheon, *Social Networking*, November 18, 2014.
Author/Speaker SBOT 9th Annual Fiduciary Litigation Course, Electronic Discovery and Electronic Evidence, Horseshoe Bay, December 4-5, 2014.
Author/Speaker, *Finding and Proving Up Email & Social Media Evidence*, Extreme Family Law Makeover XIII, San Antonio, February 27, 2015
Author/Speaker, *Defending Enforcements: Title I and Title V*, Marriage Dissolution Institute, Galveston, April 7-8, 2016
Author/Speaker, *Discovery and Spoliation and The Weekly Homes Demonstration*, Family Law Technology, Austin, December 8-9, 2016
Co- Author, *The New Normal- Modern Family Issues in a Changing Landscape*, Innovations, February 17, 2017
Author/Speaker, *Discovery- Uses and Abuses*, Marriage Dissolution Institute, Galveston, April 21, 2017
Author/Speaker, *Evidence Handbook*, Advanced Family Law 2017, San Antonio, August 7-10, 2017
Author/Speaker, *Innovative Discovery*, Advanced Family Law Drafting, Fort Worth, December 7-8, 2017
Author/Speaker, *Waste, Marital Fraud & The Reconstituted Estate (Zombie Money),* South Texas Litigation Course, May 17, 2018
Speaker/Author, *Spoliation and Fraudulent Documents*, NTEC Bar, Colleyville, Texas, August 21, 2018

Paul M. Leopold

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Southlake, Texas 76092
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paul@koonsfuller.com

EDUCATION

J.D., Texas A&M University School of Law, 2014
B.S., Marriage, Family, and Human Development, Brigham Young University, 2010

EMPLOYMENT

Associate Attorney, KoonsFuller, P.C., 2015–Present
Briefing Attorney, Eastland Court of Appeals, 2014–2015

HONORS/AWARDS

Board Certified, Civil Appellate Law, Texas Board of Legal Specialization, 2022–present
Texas Rising Star (SuperLawyers), Appellate, 2020–2023
360 West Magazine Top Attorney in Appellate Law, 2019–2022
Fort Worth Magazine Top Attorney in Family Law, 2019–2020
Top 40 Under 40, The National Advocates, 2018
10 Best Attorney for Client Satisfaction, American Institute of Family Law Attorneys, 2017
The Joseph W. McKnight Best Family Law CLE Article 2017

PROFESSIONAL ASSOCIATIONS

Admitted, State Bar of Texas; Member, Appellate and Family Law Sections
Admitted, Supreme Court of the United States
Admitted, United States Court of Appeals for the Fifth and Ninth Circuits
Admitted, United States District Court for the Northern District of Texas
Member, Texas Bar College
Member, Texas Family Law Foundation
Member, Texas Young Lawyers Association
Member, Tarrant County Bar Association
Secretary, Appellate Section, Tarrant County Bar Association
Member, Tarrant County Family Law Bar Association
Associate Member, Eldon B. Mahon Inn of Court
Alumnus, National Family Law Trial Institute

CLE ACTIVITIES

-Speaker, *Appellate Tips for Trial Lawyers*, May 2023 Tarrant County Family Law Bar Association Monthly Luncheon.
-Author, *Cutting Edge Electronic Evidence Issues in Divorce: Wordless Communication*, 2023 Marriage Dissolution Institute, Austin, Texas.
-Speaker, *Discovery: How to Get What You Need*, March 2023 Denton County Paralegal Association, Online CLE Webinar.
-Author, *The Weight of the World: Posturing the Property Case for Appeal*, 2022 State Bar of Texas Annual New Frontiers in Marital Property Law, Truckee, California.
-Speaker, *Discovery: How to Get What You Need*, September 2022 Fort Worth Paralegal Association, Online CLE Webinar.
-Author, *Cutting Edge Evidence*, 2022 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Author, *Cutting Edge Evidence*, 2022 State Bar of Texas Annual Texas Bar College Summer School, Galveston, Texas.
-Author, *Cutting Edge Evidence*, 2022 State Bar of Texas Annual Advanced Trial Strategies, New Orleans, Louisiana.
-Speaker, *Family Law Case Law Update*, 2022 Wise, Jack & Montague Counties Women's Bar Association.
-Speaker, *Top 20 Family Law Cases of 2021*, January 2022 Tarrant County Family Law Bar Association Monthly Luncheon.
-Author/Speaker, *Cutting Edge Evidence*, 2021 Advanced on a Shoestring, Tarrant County Family Law Bar Association, Fort Worth, Texas.

-Author, *Exiting the Case: Creative Property Division and Other Remedies at Final Trial*, 2021 State Bar of Texas Annual New Frontiers in Marital Property Law, Austin, Texas.
-Author, *Texas Evidence Handbook*, 2021 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Speaker, *Access, Disclosure, and Use of Mental Health Records in Family Law*, 2021 Association of Family and Conciliation Courts Virtual 58th Annual Meeting.
-Speaker, *2021 Changes to the TRCP*, January 2021 Tarrant County Family Law Bar Association Monthly Luncheon.
-Author, *Spousal Privacy: Where It Begins and Where It Ends*, 2020 State Bar of Texas Advanced Trial Skills for Family Lawyers, Online CLE Webinar.
-Author, *Preparing Direct and Cross Examination of the Financial Expert*, 2020 State Bar of Texas Advanced Trial Skills for Family Lawyers, Online CLE Webinar.
-Speaker, *SAPCR Case Law Update*, 2020 Advanced on a Shoestring, Tarrant County Family Law Bar Association, Online CLE Webinar.
-Author, *Cutting Edge Evidence Issues*, 2020 American Academy of Matrimonial Lawyers Virtual Annual Meeting.
-Author, *Courtroom Evidence*, 2020 Indiana Continuing Legal Education Forum Virtual Family Law Institute.
-Author, *What to Bring to Court for the Expected and Unexpected*, 2020 State Bar of Texas Annual Advanced Family Law, Online CLE Webinar.
-Author/Speaker, *Discovery Hacks*, 2020 State Bar of Texas Paralegal Division, Online CLE Webinar.
-Author, *Discovery Hacks*, 2019 State Bar of Texas Advanced Family Law Drafting, Dallas, Texas.
-Author/Speaker, *Evidence Trial Skills*, 2019 Advanced on a Shoestring, Tarrant County Family Law Bar Association, Fort Worth, Texas.
-Author/Speaker, *Gimme that "Fake Smile" While Putting on Your Fake Evidence*, 2019 Legal Aid of Northwest Texas Family Law Seminar, Fort Worth, Texas.
-Author, *Courtroom Examination in Family Law Cases: Effective and Efficient Presentation*, 2019 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Author, *Evidence Trial Skills: Getting It In and Keeping It Out*, 2019 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Author, *Gray Divorce: Strategies for Over 65, Dementia, and Durable POAs*, 2019 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Speaker, *Roughin' It Through Family Law - 2018-2019 Case Law Update*, 2019 Collin County Bench Bar, Glen Rose, Texas.
-Author, *Evidence Trial Skills: Getting It In & Keeping It Out*, 2018 Advanced Trial Skills for Family Lawyers, New Orleans, Louisiana.
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Table of Contents

TEXAS EVIDENCE HANDBOOK

This paper is meant to be more of a reference tool than a story to read from beginning to end. Each article of the Texas Rules of Evidence is examined with citations to current case law and other rules and statutes as applicable. This paper will also review other subjects related to evidence, such as preservation of error and ethical concerns. The scope of the paper is on family law and evidence that can arise in family law cases. Family law has been referred to as the cross-roads of all other litigation, and as such, many of the cases cited herein are from other fields, including criminal, business, personal injury, government, military, and several federal cases as well.

The first section focuses on the most recent, cutting-edge evidence topics that are still in development and provides guidelines on how these pieces of evidence fit into the existing structure currently found in the Texas Rules of Evidence.

I. Cutting-Edge Evidence

A. Communicating through pictures

1. Emojis and emoticons

An "emoticon" is "a combination of typed keyboard characters used . . . to represent a stylized face meant to convey the writer's tone." *Ukwuachu v. State*, No. PD-0366-17, 2018 WL 2711167, at *6 n.12 (Tex. Crim. App. June 6, 2018) (Yeary, J., concurring) (quoting Garner's Modern English Usage 476 (4th ed. 2014)). An "emoji" is "an emoticon or other image in [a standardized] set." *Id.* Similar to these are the "likes," "loves," and other emotions available to show how one feels about a post on social media. Emoticons and emojis are now mainstream in society and are becoming more prevalent in the law, and cases are citing to them more often. *See, e.g.*, *United States v. Schweitzer*, No. ACM 39212, 2018 WL 3326645, at *2, *6 (A.F. Ct. Crim. App. May 18, 2018); *Ukwuachu*, 2018 WL 2711167, at *6. But be careful; emojis are not the same across all platforms. For some examples of how they can differ, see https://www.parallels.com/blogs/emojis-revisited/ (last visited June 13, 2022). Because of this, be sure to obtain both the sending and the receiving messages from the same devices that sent and received them through discovery to show whether any discrepancies exist. This could possibly raise an authentication problem because what was sent may not be the same as what was received, so the distinctive characteristics of the emoji/emoticon would not be the same. *See* Tex. R. Evid. 901(b)(4).

Some U.S. cases have directly held that emojis or emoticons themselves are statements such that they could fall under the hearsay rules. *See, e.g.*, *In re Shawe & Elting LLC*, C.A. Nos. 9661-CB, 9686-CB, 9700-CB, 10449-CB, 2015 WL 4874733, at *23 (Del. Ch. Aug. 13, 2015) (mem. op.) (finding that "smiley-face emoticon at the end of his text message suggests he was amused by yet another opportunity to harass Elting"); *Commonwealth v. Castano*, 82 N.E.3d 974, 982 (Mass. 2017) (holding that text message with "an emoji face with X's for eyes alongside the victim's nickname," along with other communications, "was irreconcilable with an accidental shooting"); *Ghanam v. Does*, 845 N.W.2d 128, 144–46 (Mich. App. 2014) (holding that tongue-sticking-out emoji ":P" meant sarcasm, so defendant's responses in online forum thread that public official was performing nefarious acts "cannot be taken as asserting fact," so they were not defamatory); *People v. Johnson*, 28 N.Y.S.3d 783, 795 (County Ct. N.Y. 2015) (holding that "likes" by victim of sexually suggestive posts were hearsay).

They have also been argued in some cases without being directly ruled on. *See* Brief for the Petitioner at 7–10, 18, 50, *Elonis v. United States*, 575 U.S. 723 (2015) (No. 13-983), 2014 WL 4101234, at *7–10, 18, 50 (arguing that tongue-sticking-out-emoticon indicated "jest"); Complaint, *Malek Media Grp. LLC v. Pfeiffer, et al.*, No. SC128419, 2017 WL 11319286, at ¶51 (Cal. Super. Nov. 17, 2017) (arguing that emojis showed consent); *Kinsey v. State*, No. 11-12-00102-CR, 2014 WL 2459690, at *4 (Tex. App.—Eastland May 22, 2014, no pet.) (defendant argued that "winkie face" emoticon in text message showed consent to sex) (mem. op.); Kristen Lambertsen, *Pair arrested after 'threatening' emojis sent on Facebook, deputies say*, https://www.wfla.com/news/pair-arrested-after-threatening-emojis-sent-on-facebook-deputies-say/ (last visited June 13, 2022) (two men arrested for sending emojis of a fist, hand pointing, and ambulance over Facebook, which was interpreted to be threat of assault).

Courts outside of the U.S. have also relied on emojis and emoticons as statements. *See, e.g.*, Chris Ceasar, *Frenchman sent to jail, fined after sending ex a gun emoji*, https://www.metro.us/frenchman-sent-to-jail-fined-after-sending-ex-a-gun-emoji/ (last visited June 13, 2022) (gun emoji was threat); *High Court: Sally Bercow's Lord McAlpine tweet was libel*, https://www.bbc.com/news/world-22652083 (last visited June 13, 2022) (the phrase "*innocent face*," although not an emoji or emoticon itself, was read on Twitter as such and made the text it was written with libel); Ephrat Livni, *Emojis prove intent, a judge in Israel ruled*,

https://qz.com/987032/emojis-prove-intent-a-judge-in-israel-ruled/ (last visited June 13, 2022) (a smiley, a bottle of champagne, dancing figures, and more, although not a binding contract, led to plaintiff's reliance on defendant's desire to rent apartment).

Under the definition of hearsay, a written verbal expression or nonverbal conduct is a statement. Tex. R. Evid. 801(a). Furthermore, drawings have been held to be admissible under hearsay exceptions. *See Mims v. State*, No. 03-13-00266-CR, 2015 WL 7166026, at *6 (Tex. App.—Austin Nov. 10, 2015, pet. ref'd) (mem. op., not designated for publication) (drawings by a child of the child frowning or smiling represent the child's then-existing emotion and are admissible under 803(3)). Therefore, there is no reason why emoticons or emojis, computer images used to convey the writer's tone, the actual thing the emoji depicts, or a symbol representing something else, should not fall under the hearsay rules. When seeking to admit or object to evidence that contains emoticons, emojis, or similar graphics, make your argument specific and reference the emoticons or emojis accordingly.

Of course, emojis can mean different things to different people. *See* Hannah Miller, Jacob Thebault-Spieker, Shuo Chang, Isaac Johnson, Loren Terveen, and Brent Hecht. 2016. "Blissfully happy" or "ready to fight": Varying Interpretations of Emoji, *ICWSM'16*, Retrieved July 6, 2016 from http://www-users.cs.umn.edu/~bhecht/publications/ICWSM2016_emoji.pdf. Below is just a short sampling of some emojis and some of their alternative meanings:

- Avocado = "basic" or trendy;
- Beer mugs = testicles;
- Cherries = breasts or testicles;
- Clapping hands = emphasis;
- Dash = smoking or vaping;
- Eggplant = penis;
- Eyes = request for pictures;
- Goat = greatest of all time;
- Mailbox = sex;
- Maple leaf = marijuana or drugs, generally;
- Octopus = hug;
- Peach = butt;
- Pizza = I love you;
- Silent face = threat to not say anything;
- Snowflake = cocaine;
- Syringe = tattoo.

These and other emojis can stand alone or be combined to further mean other things. *See* Diana Bruk, *25 Secret Meanings of These Popular Emojis*, accessible at https://bestlifeonline.com/emoji-meanings/ (last visited June 13, 2022); Marissa Gainsburg, *The Ultimate Glossary Of Sexting Emojis*, accessible at https://www.womenshealthmag.com/sex-and-love/g28008142/sexting-emoji/ (last visited June 13, 2022); George Harrison, *SMILEY LIKE YOU MEAN IT: From the Love Hotel to the Splash… the hidden meanings behind the emojis your children are using*, accessible at https://www.thesun.co.uk/fabulous/4026934/sex-drug-symbols-hidden-meanings-emojis/ (last visited June 13, 2022); Katie Notopolous, *The Complete Guide To Emojis That Mean Dirty Words*, accessible at https://www.buzzfeednews.com/article/katienotopoulos/complete-dictionary-of-dirty-emojis (last visited June 13, 2022).

So, because attorneys are required to stay up to date on current technology, as discussed below in the section on ethics, be sure you know the latest trends and meanings of the emojis that are out there.

2. GIFs

"If, as it is often said, a picture is worth a thousand words, then a video is worth exponentially more." *Diamond Offshore Servs. Ltd. v. Williams*, 542 S.W.3d 539, 542 (Tex. 2018) (footnote omitted).

Graphics Interchange Format, or GIF (pronounced like the peanut butter brand, JIF, according to its creator), is an image file. *See* Doug Gross, *It's settled! Creator tells us how to pronounce 'GIF,'* May 2013, accessible at https://www.cnn.com/2013/05/22/tech/web/pronounce-gif/index.html (last visited June 13, 2022). It can be either a still image or, as discussed herein, animated images. "We say 'animated images' because GIFs aren't really videos. If anything, they're more like flipbooks. For one, they don't have sound (you probably noticed that). Also, the GIF format wasn't created for animations; that's just how things worked out. See, GIF files can hold multiple pictures at once, and people realized that these pictures could load sequentially (again, like a flipbook) if they're decoded a certain way.

"CompuServe published the GIF format in 1987, and it was last updated in 1989. In other words, GIF is older than about 35% of the US population, and it predates the World Wide Web by two years. It helped to define early GeoCities websites, MySpace pages, and email chains (remember the dancing baby?), and it's still a large part of internet culture. In fact, the GIF format may be more popular now than ever before." Andrew Heinzman, *What is a GIF, and How Do You Use Them?*, September 2019, accessible at https://www.howtogeek.com/441185/what-

is-a-gif-and-how-do-you-use-them/ (last visited, June 13, 2022).

Because GIFs are essentially just videos without sound, they can be authenticated the same as pictures, as discussed in more depth in the section on authentication below. A problem arises, however, because these pictures likely depict a scene or person that the proponent (or anyone else in the courtroom for that matter) has never before seen outside of that GIF or the source video from which the GIF is derived.

So, how do you authenticate a GIF? By virtue of what it is, the GIF must appear in an email, text message, website, etc., so you authenticate it the same way you authenticate the email, text message, website, etc. in which the GIF appears, which is all discussed in depth in the section on authentication below. You authenticate the communication, not each individual word used in it. Predicates for different kinds of communications can be found in the brand-new Predicates Manual 5.0, and one simply adds in the GIF where appropriate, also demonstrated in the Predicates Manual 5.0.

If that GIF is detrimental to your case, however, you can try objecting on technical grounds. Who created the GIF? How was it created? How does the Graphic Interchange Format decode these several images to portray this video-like depiction? But chances are that, because GIFs have been around for decades, although their popularity has recently resurfaced, the technical background will not be required to be proved up by an expert, just like photographs do not require an expert to prove how the film was developed or how the imaging sensor on a digital camera captured the light reflected onto it.

Moreover, the very reason GIFs are used underscores why they do not require a technical prove up—they simply convey a message or statement. For example, if someone is feeling surprised or excited about something that has happened, they may use a GIF of Andy Dwyer, portrayed by actor Chris Pratt, from NBC's Parks and Recreation looking into the camera with an excited face while the camera zooms in on his face. *See* "Andy Dwyer Shocked," accessible at https://imgur.com/gallery/Yixr3jv (last visited June 13, 2022); *see also* Parks and Recreation (NBC 2009–2015). No other explanation is needed because his look of surprise says it all. Is that look of surprise making a statement, though, such that it would be subject to the hearsay rules? Even if it were, would that not be an excited utterance?

GIFs may also have writing in them, which should more clearly fall under the hearsay rules. For example, if Party A asks Party B for permission to do something, Party B may send a GIF of Chancelor Palpatine, played by actor Ian McDiarmid, from Stars Wars: Episode III - Revenge of the Sith telling Anakin Skywalker, played by actor Hayden Christensen, to kill Count Dooku, played by actor Christopher Lee, with Palpatine's words superimposed over the images: "Do it!" *See* "Palpatine Star Wars GIF," accessible at https://tenor.com/view/palpatine-star-wars-emperor-do-it-go-for-it-gif-17446081 (last visited June 13, 2022); *see also* Star Wars: Episode III - Revenge of the Sith (20th Century Fox 2005). The words "do it" would be hearsay, unless it is excepted from the hearsay rule because Party B is a party opponent and the permission to "do it" is being used against Party B. *See* Tex. R. Evid. 801(e)(2). One could also argue that this was an agreement and the words "do it" were simply an operative fact, but that is discussed in more depth below in the section on hearsay.

Whether your GIFs have words or not, you can use the same evidentiary rules to admit them as any other statements. You have to authenticate the communication and show that the statements, including any GIFs, are either not hearsay or are excepted from the hearsay rule. Depending on what the GIF shows, you may also need to show that it is relevant and that its probative value outweighs any unfair prejudice. *See* Tex. R. Evid. 401, 403.

Practice Note: GIFs are moving images, like videos. So, two things to remember. One, when requesting discovery, be sure to request the native format because a printout of an animated GIF will not be animated. Second, if the communication you want to show to the factfinder contains an animated GIF, be sure to have the proper technology to show the animation contained in the GIF. *See, e.g.*, *Siebenaler v. State*, 124 N.E.3d 61, 70 (Ind. CVt. App. 2019) (holding, in child pornography case, that GIFs of boys being depantsed were mere nudity while GIFs of boys being depantsed and skinny dipping were not mere nudity); *Robillard v. Opal Labs, Inc.*, 428 F.Supp.3d 412, 437 (D. Or. 2019) (holding that GIF of an older Steve Buscemi dressed as a high school student was not "direct evidence" of discriminatory animus in ageism case). Although one image from the GIF may be important enough to have a screenshot, just like a screenshot of a video, the entire GIF will require showing the sequence images. And if the other side uses only a screenshot, Rules 106 and 107 can help get the rest of the GIF admitted under the rule of option completeness, as discussed further below in that section.

3. Internet memes

A meme is a "unit of cultural information spread by imitation. The term *meme* (from the Greek *mimema*, meaning 'imitated') was introduced in 1976 by British evolutionary biologist Richard Dawkins in his work *The Selfish Gene*. Dawkins conceived of memes as the cultural parallel to biological genes and considered them, in a manner similar to 'selfish' genes, as being in control of their own reproduction and thus serving their own ends. Understood in those terms, memes carry information, are replicated, and are transmitted from one person to another, and they have the ability to evolve, mutating at random and undergoing natural selection, with or without impacts on human fitness (reproduction and survival). . . .

"Within a culture, memes can take a variety of forms, such as an idea, a skill, a behaviour, a phrase, or a particular fashion. The replication and transmission of a meme occurs when one person copies a unit of cultural information comprising a meme from another person. The process of transmission is carried out primarily by means of verbal, visual, or electronic communication, ranging from books and conversation to television, e-mail, or the Internet. Those memes that are most successful in being copied and transmitted become the most prevalent within a culture. . . .

"In the early 21st century, Internet memes, or memes that emerge within the culture of the Internet, gained popularity, bringing renewed interest to the meme concept. Internet memes spread from person to person through imitation, typically by e-mail, social media, and various types of Web sites. They often take the form of pictures, videos, or other media containing cultural information that, rather than mutating randomly, have been deliberately altered by individuals. Their deliberate alteration, however, violates Dawkins's original conception of memes, and, for that reason, despite their fundamental similarity to other types of memes, Internet memes are considered by Dawkins and certain other scholars to be a different representation of the meme concept." Kara Rogers, "Meme," Encyclopedia Brittanica, Mar. 18, 2021, https://www.britannica.com/topic/meme (last visited June 13, 2022).

"Most common internet memes are image macros – photos with a bold caption written in Impact font. The text will usually be humorous or sarcastic. Aside from this familiar form, memes can also be a video, GIF, saying, an event or pretty much anything that can be copied or slightly changed and go viral across the web. . . .

"There are [a] few more reasons why memes are one of the go-to moves of the average social media user:

- They are eye-catching.
- They enable you to express complex ideas through a simple concept by relying on the meme context, origin and common use.
- They have a viral potential.
- They push you to paint your creative thoughts in more humorous colors.
- They are easy to create and are just too much fun! . . .

"The most vital part of using memes is to understand the context of the content you're sharing and to know how to leverage its full meaning." Chen Attias, *Memes 101: What They Are & How to Use Them*, accessible at https://www.wix.com/blog/2017/07/what-are-memes/ (last visited June 13, 2022).

Although internet memes are not quite the same as the original meme concept, understanding the original concept helps one to understand how to use internet memes. First, you have to know the culture, idea, etc. of the content used in the meme. That is part of what makes the meme more impactful to the viewers.

For instance, when something intense and suspenseful is being discussed in a text message, Facebook post, etc., someone may send or post a picture or GIF of the Mexican standoff scene from The Good, the Bad, and the Ugly where the three men are staring back and forth at each other. *See* The Good, the Bad, and the Ugly (United Artists 1966). Aside from looking intense, if the viewer does not understand the reference to that scene in the movie (or what a Mexican standoff is), the meme does not make much sense, aside from people staring at each other with guns ready to be drawn. That scene has now been edited to include other viral images of children or animals partaking in the staring. *See, e.g.*, "The Good The Bad The Ugly Clint GIF," accessible at https://tenor.com/view/the-good-the-bad-and-the-ugly-clint-east-wood-stare-down-cat-gif-5206183 (last visited June 13, 2022); "The Good The Bad And The Ugly Clint Eastwood GIF," accessible at https://tenor.com/view/the-good-the-bad-and-the-ugly-clint-eastwood-meme-gif-14888762 (last visited June 13, 2022).

Or in response to the winter storm in Texas in February of this year, someone may post a picture of Jack Torrance, played by actor Jack Nicholson, frozen in the snow at the end of The Shining with the words "Move to Texas, They Said. You'll Enjoy the Weather, They Said." *See* The Shining (Warner Bros. 1980). The viewer would need to know about both the horrible winter storm that Texas had

received and the contents of the movie to fully understand the meme. In fact, Jack Torrance's declaration, "Here's Johnny!" when he breaks through the door with an axe is a meme itself because he copied it from Ed McMahon's line on The Tonight Show Starring Johnny Carson. *See id.*; The Tonight Show Starring Johnny Carson (NBC 1962–1992).

Several examples of macro memes can be found at https://www.wix.com/blog/2017/07/what-are-memes/. Additional memes, their origins, and further examples can be found at https://knowyourmeme.com/.

You may be wondering, what is the difference between memes and GIFs? Ultimately, it does not matter. But: "The main difference between an animated gif and a meme is that memes tend to be static images that make a topical or pop culture reference and animated gifs are, more simply, moving images.

"You can find all the animated gif memes that your heart desires at website[s] such as Giphy and Awesome Gifs.

"As with most things, gifs and memes work better together. Grab an animated gif and stick some topical words on it et voilà, you have an animated meme." Edward Hyatt, *What is a GIF, who invented the image format, how is it pronounced and what's an animated meme?*, accessible at https://www.thesun.co.uk/tech/3800248/what-is-gif-how-pronounced-animated-memes/ (last visited June 13, 2022).

So, are memes evidence? Can you authenticate them like emojis and GIFs? Do they fall under the hearsay rules? Even if they do, are they ever relevant or have probative value? The answer, of course, is it depends. A meme should fall under the same authentication and hearsay rules as GIFs and emojis because they are used in websites, text messages, etc., and they convey a message, either through the image itself or the image with words on it. And if used in a conversation, it would hopefully be relevant to the conversation and not just a funny picture one party is sharing with the other. If the meme is a standalone post on Facebook or something similar, it could still be authenticated by authenticating the website or other medium it was posted on. It would still fall under the same hearsay rules. But its relevance or probative value may be in question. *See, e.g.*, *United States v. Alfred*, 982 F.3d 1273, 1282 (10th Cir. 2020) ("The maximum probative value of the memes was significant. As discussed, a jury could conclude from the memes that Mr. Alfred was branding himself as a pimp. . . . And while the fact they were posted years earlier might slightly diminish their probative value, the memes were available in real time to a visitor to Mr. Alfred's profile page with the click of a mouse."). This is where understanding the origin of the meme comes into play. And if not the true origin, then knowing why the poster posted it. What did it mean to them? What did it mean to those who viewed it? Had the poster ever posted something like this before, talked about this subject before? Does the message that the meme conveys relate to anything going on in the case, e.g., the intense stare down from The Good, the Bad, and the Ugly or chopping down a door to attack someone? These questions are all ripe for discovery requests or for questioning in a deposition.

Because memes can at the same time seem so innocent but have a deeper meaning to them based on the cultural piece from which they are copied, lawyers must stay on top of popular culture to best understand how to use memes when they show up in cases.

B. Disappearing messages

Certain types of evidence may no longer exist, or at least exist in a readily accessible format, which is discussed in more depth in the electronically-stored-information section below. If the evidence is truly gone, then perhaps a spoliation instruction is in order, as discussed in the section on presumptions and ethics below. But, just because evidence no longer exists does not mean you should just ignore it; it just means it will take some more digging to get to it, know what it was, and use it to your advantage or keep it out.

There are several different companies that offer "disappearing" messages. Just search in the App Store or Google Play for disappearing messages apps, and several results appear. Below are just a few:

1. Dust: "Dust automatically deletes all messages after 24 hours." *See* "Dust:," accessible at https://support.usedust.com/article/29-why-are-my-messages-gone (last visited June 13, 2022).

2. Wickr: "Auto-Destruct settings govern the time at which messages and/or attachments are securely destroyed. . . . So, for example, if 'Expiration' is set for 48-hours and 'Burn-on-read' is set for 5-minutes, the recipient of your message will have a full two days to receive the message but the content will no longer exist on their device 5-minutes after it is read." *See* "Auto-Destruction: Expiration and Burn-on-read (BOR)," accessible at https://support.wickr.com/hc/en-us/articles/115007397548-Auto-Destruction-Expiration-and-Burn-on-read-BOR- (last visited June 13, 2022).

3. Silent Circle: "Stored data is a security risk. Many providers keep as much data as possible 'just in case.' We keep as little data as possible. We don't track IP addresses or keep logs of calls and messages between users." *See* "Silent Phone," accessible at https://www.silentcircle.com/products-and-solutions/silent-phone/ (last visited June 13, 2022).

4. Snapchat: "If you leave the Friends screen before replaying a Snap, you won't be able to replay it again." *See* "View a Snap," accessible at https://support.snapchat.com/en-US/a/view-snaps (last visited June 13, 2022). "When you delete a Snap, we'll attempt to remove it from our servers and your friends' devices. This might not always work if someone has a bad internet connection, or is running an old version of Snapchat. In this case, the deleted Snap may still appear for a brief moment!" *See* "Send a Snap," accessible at https://support.snapchat.com/en-US/article/send-snap (last visited June 13, 2022).

5. Confide: "With encrypted, self-destructing, and screenshot-proof messages, Confide gives you the comfort of knowing that your private communication will now truly stay that way." *See* "Confide," accessible at https://getconfide.com/ (last visited June 13, 2022).

6. Signal: "Accidentally send a message to the wrong chat? Take backs are permitted. When deleting a recently sent message, you now have the option to **delete for everyone** in the chat." *See* "Delete for everyone," accessible at https://support.signal.org/hc/en-us/articles/360050426432-Delete-for-everyone (last visited June 13, 2022).

These types of apps come and go on a frequent basis. Be sure when requesting discovery or questioning a witness in a deposition or through interrogatories to include a catchall request, e.g. "or anything similar," that could include these types of apps in case you do not mention the specific one the witness has used.

The messages that are in these apps are just like the text messages, emails, and Facebook messages that have been authenticated for years. But these messages most likely no longer exist, so you do not need to worry about authenticating the message. Rather, you will need to worry about proving the message did exist at one time, that it has been deleted (either intentionally or by virtue of the app being used, which app could have been used intentionally so the message would disappear), and what the contents of the message are. The best evidence rule, discussed further below, will allow this type of evidence to still come in because no other evidence of the message exists. *See* Tex. R. Evid. 1002. When discussing the contents of the deleted messages, you will still need to use the hearsay rules to show how it is not hearsay or is excepted from the hearsay rule, as discussed further below.

C. Gaming/forum messages

Almost gone are the days of pulling out a deck of cards to play solitaire at home alone. Several games today are played online with other people either through phones, computers, or video game consoles (Nintendo Switch, Xbox, PS4, etc.). Many of these games allow for the players to communicate with each other while playing. Sometimes it is by speaking to each other through the use of microphones/headsets, e.g., Call of Duty and Fortnite, and sometimes it is through text and a chat log, e.g. League of Legends and Words With Friends.

Any live voice chats would not be retrievable unless the particular game was recorded. And even chat logs may be difficult to retrieve. Some games carry chat logs forward from previous games. You may need to first ask the witness whether they play any online or multiplayer games, find out what they play, and then request any recorded games (for the voice chats) or the chat logs. If the witness is unable to save the chat log, you may have to request screenshots of the chat logs. You could try to subpoena the owner/host of the online game, but chances are that the Stored Communications Act or similar laws, discussed further in the ethics section below, will prevent you from getting very far.

Another way to get to the content is to ask a witness to bring his or her phone (or computer/gaming device) to the deposition once you know what multiplayer games they are playing. Then, in the deposition, ask the witness to open up the game to access the content. That shows the evidence exists and should be produced in discovery for compel purposes later, but you can go ahead and read it all into the deposition record if it is not a significant amount.

If you are able to get your hands on any live chat recordings, those will need to be proved up like any other voice recording, discussed below in the authentication section. Chat logs can be proved up like any other chat room content, also discussed below. Both will require you to get around any hearsay.

For any chats, voice or text, that are not available, you would have to go through that evidence the same as the disappearing messages above. Find out whether the

evidence ever existed and then get into its contents.

Similar to games are online forums. This could be anything from a technical support forum where other users have the same issue and they share ideas on how to fix it, e.g. if you need to get your printer to connect to your computer, to Reddit. Other file sharing sites, like Tumblr, allow for comments where users can interact that way. Tumblr and similar sites have been described as a cross between social media and blogging, so be sure to tailor your discovery requests accordingly. *See* "Explainer: What is Tumblr?," accessible at https://www.webwise.ie/parents/explainer-what-is-tumblr-2/ (last visited June 13, 2022). The "chats" through these types of forums can be admitted the same as similar chat logs or social media messages, all described below.

D. Geolocation

Geolocation "refers to the geographical (latitudinal and longitudinal) location of an Internet-connected device. Not your location, mind you, but the location of whatever electronic medium is being used to access the Internet." *See* "What is Geolocation?," accessible at https://www.gravitatedesign.com/blog/what-is-geolocation/ (last visited June 13, 2022).

Your geolocation can be collected through your cell phone. "As long as location-based services are enabled and you have a GPS chip and a cell network signal, you can access (and be accessed by) these services for finding your *general* location through GPS-tower-device triangulation. Obviously, Internet services having access to this raises privacy issues. Therefore, for device-based data collection:

1. Users have to allow location detection on each device (and for each application).

2. Websites have to ask for a visitor's location.

3. As of Chrome 50, the HTML Geolocation API will work only over secure website connections (as denoted by *https*:// in the URL, instead of *http*://). . . .

"The other geolocation method uses server-based data collection tied to your device's IP address through a Wi-Fi or Ethernet connection. IP addresses are stored in databases where physical locations are associated with those IPs, mapped by years of data mining. This data is sold by third-party servicers, which means accuracy is only as good as the servicer's data. Whenever the value of the data is based on accuracy but the source of the data is based on availability, the integrity of the data becomes suspect. . . .

"What does that mean? If enough incorrect information is entered, or not enough information is available, the databases *guess*. So, that's it: IP geolocation accuracy is based on the amount of data (and supporting data) relating to a specific location, as well as the timeliness of that data acquisition through third-party servicer databases. This is why, when trying to determine the geolocation of Gravitate's office (based on my laptop's IP address over Wi-Fi), the results were different: Some servicers indicated Portland; others Vancouver.

"IP geolocation, for all intents and purposes, is more accurate the further out the data pointing goes. In the United States, IP geolocation is 90-something percent accurate (that number varies, depending on the source database) at the country level. At the city level, the accuracy drops to between 50 and 70 percent. Given this, IP geolocation is best used for broader location detection categories, like a website visitor's country. Naturally, if accuracy (and even data access) is less than 50 percent, privacy isn't a huge concern, which is why websites don't have to request permission for your location when using it.

"There are caveats to using either type of geolocation, of course. Naturally, you need visitors to give their permission if you are using device-based detection, which is the most accurate and the best suited for city-specific location information. Server-based detection, which is the least invasive and best suited for country-specific information, can return bypassed data if the visitor's IP address is routed through a proxy server (e.g., VPN). In this instance, the IP address is actually mapped to a location that's relative to the server's location, not the visitor's. Therefore, because either type of data collection can fail, a website will sometimes incorporate both types as a fallback, considering *some* data better than none for providing the best user experience." *Id.*

So, when requesting discovery, tailor your requests to include this geolocation information. On phones, it can be embedded in iOS software or through Google on Androids. In iOS, go to Settings>Privacy>Location Services>System Services>Significant Locations and make sure it is turned on. On an Android, open Google>Settings>Google activity controls>Google Location History and select the device to turn it on. In iOS, this is where you can view the information, everywhere that iPhone has ever been since the Significant Locations feature was turned on. This may need to be screenshotted for production purposes. On

Android, open Google Maps, go to the side navigation menu, and select "Your timeline." This information through Google is accessible from a computer also at google.com/maps/timeline and can be downloaded in its native format. Of course, if this feature is not turned on, then no data will be available, so you may need to first find out if this feature is on (maybe by surprise in a deposition) and then request the information. This information can be deleted also, so be sure to include this with your letter regarding evidence preservation.

Using this information as evidence may require some expert testimony, although that time may be fading because of how prevalent GPS is in our society today. The witness may not know how the technology works, but he knows that when the map pops up on his phone, the little blue, blinking dot is where he is, so it is accurate, which is half the battle. In *Gordon*, the children took the mother's phone to the father's house and took a picture of alleged drugs; the mother testified that it was her phone, that the children had it when they went to visit the father, and that she found the photo on her phone when the children returned the phone; the photo also showed the timestamp as the time the children were with the father and a geolocation of the father's house. *Gordon v. Martin*, No. 03-19-00241-CV, 2020 WL 1908316, at *3 (Tex. App.—Austin Apr. 17, 2020, no pet.) (mem. op.). The trial judge said that he would confer with the children in chambers to ask whether they took the photo. *Id.* The court held that the photo was cumulative of other evidence of drug use, "so any error in the admission of [the photo] would have been harmless and not reversable on appeal." *Id.*

In *Billingsley*, the defendant was convicted of multiple counts of sexual assault of a child. *Billingsley v. State*, Nos. 09-18-00282-CR, 09-18-00283-CR, & 09-18-00284-CR, 2019 WL 2111840, at *1 (Tex. App.—Beaumont May 15, 2019, no pet.) (mem. op.). Billingsley tried to admit GPS data from his phone to show where he was at certain times and on certain dates, but the trial court excluded the evidence because, on voir dire, Billingsley admitted that he obtained the information from the Google Maps app on his phone, that the information was from Google rather than Billingsley's personal knowledge, and Billingsley did not know how Google records the information. *Id.* at *2. Although Billingsley testified that the application was accurate, he agreed that he could turn off the GPS on his phone. *Id.* The State objected to hearsay and that it could not be authenticated through Billingsley. *Id.* The court of appeals only stated that, "[v]iewing the record as a whole," the trial court did not err. *Id.* at *3.

So, to be safe, obtain a business records affidavit from Google or Apple or whatever third party is tracking the information, and if that is not possible, then bring in an expert to explain how GPS and geolocation works by sending signals to and from the device, cellular towers, and triangulating the location or by using the devices IP address. If you cannot do that, be sure to go through how the witness knows that the information is accurate, e.g., establish the date and time and location and that the witness viewed the GPS on their phone and that it was accurate, and the more occurrences of that the better to prove accuracy (does anyone use maps on their phone to find directions and how long it will take and where to go when you get lost, etc.?). This should also show the personal knowledge of the witness. That person knows whether he or she was in that place at that time. Further, you can try authenticating it using the "silent witness" theory explained further below in the authentication section. Essentially, this is a process that produces an accurate result, so it can be authenticated that way.

As for the hearsay objection like in *Billingsley*, the business records affidavit would solve that, if it were actually a statement by a person. Geolocation, however, is simply a computer spitting out a date and time and geographical location. Like the timestamp from a fax machine, it is not a statement because a person is not making it. If, however, your judge or opposing counsel insist that it is hearsay, you could argue a few different things depending on the circumstances. You could argue that the party who produced the information (if you are using it against that party) has adopted that information by virtue of that party producing it as that party's geolocation information, so it is excepted from the hearsay rule. *See* Tex. R. Evid. 801(e)(2)(B). You could also argue that it is present sense impression because it records the event at the time it is happening under 803(1), a then-existing physical condition (the condition of being in a certain place at a certain time) under 803(3), a recorded recollection under 803(5), or a statement in an ancient document (if the information is at least twenty years old, so maybe someday) under 803(16). All of these, and more, are discussed further below. Be sure to establish, however, that the device and the witness were in the same place at the same time. To try to keep it out, or impeach the witness or make the weight of the evidence less, bring out facts that show the witness and the device were not together.

E. Fake evidence

Because of the prevalence of photoshop, picture filters, fake text message creators, etc., some evidence that is presented may not be real. And aside from the nefarious,

there are perfectly legitimate tools like Quicken that can spit out documents regularly used in family law cases.

One way to help know what is real is to request the native format of whatever electronic evidence you are asking for in discovery. The metadata of that evidence can help show where it originated and when. Metadata is explained in further detail below under the authentication section.

In *Bosyk*, an IP address associated with the defendant's house accessed a link in an online message board that described taking the person who clicked on it to a site with child pornography. *United States v. Bosyk*, 933 F.3d 319, 322 (4th Cir. 2019). Based on that fact, the government obtained a search warrant to search the defendant's home for evidence of child pornography. *Id.* The defendant argued that the government did not have reasonable probability to obtain the warrant, but the majority opinion concluded that it did because it was reasonably probable that the defendant accessed the link after seeing it on the online message board, which would mean that the defendant saw the description of where the link would lead to, i.e. child pornography. *Id.* at 325. The dissenting opinion criticized the majority's conclusion because its opinion "glosses over the myriad alternative paths of accessing the URL." *Id.* at 349 (Wynn, J., dissenting). Judge Wynn compared this to "rickrolling," a "humorous form of URL spoofing," "in which individuals click on a link 'expecting one thing' but are instead led to 'a video of Rick Astley singing 'Never Gonna Give You Up.'"" *Id.* at 345 (quoting Abby Ohlheiser, *I Can't Believe This Is Why People Are Tweeting Fake Celebrity News*, Wash. Post (Oct. 18, 2018), https://www.washingtonpost.com/technology/2018/10/18/i-cant-believe-this-is-whypeople-are-tweeting-fake-celebrity-news/?utm_term=.e9c493b7234d, now available at https://www.washingtonpost.com/technology/2018/10/18/i-cant-believe-this-is-why-people-are-tweeting-fake-celebrity-news/).

In rickrolling, the link is the "fake" evidence. But looking at the metadata—the HTML coding for the link—would show that the URL is going somewhere other than where it says.

Other ways to expose fake evidence is to look at the details, i.e. the distinctive characteristics. *See* Tex. R. Evid. 901(b)(4). Compare previous bills, texts, emails, paystubs, etc. to see whether they are the same or not. In family law, paystubs are often important (and now required in certain family law cases under the recently updated Texas Rules of Civil Procedure). Subpoena the company for the paystubs instead of relying on the opposing party to produce them. Then you have a better assurance that they are real. As new paystubs continue to come out during the case, compare the ones you received directly from the company with any new ones the opposing party may produce. This can be done with most any documents that are not originally created by the parties.

The burden of authentication is very low, as discussed below. So, if the evidence comes in when you believe it is fake, then your job is to convince the factfinder to give little to no weight to it. First and foremost, object. The only way to preserve evidentiary error is to object, so let the judge know your concerns. Then, show how it is unreliable, how it does not match other documents portraying similar information. Ultimately, the factfinder can choose what to believe and is presumed to resolve all conflicts in the evidence, so do what you can to lead the factfinder to your desired conclusion.

II. TRE Article I. General Provisions

A. Scope and Applicability of the Rules

The Texas Rules of Evidence apply to Texas courts. Tex. R. Evid. 101(b). However, "[w]here the Federal Rules of Evidence are similar, we may look to federal case law for guidance in interpreting the Texas evidentiary rules." *Reid Road Mun. Utility Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 856 n.6 (Tex. 2011); *accord In re Silver*, 540 S.W.3d 530, 537 (Tex. 2018) ("In the past we have looked to federal case law for guidance in interpreting a Texas evidentiary rule when a similar federal rule exists. On at least one occasion, we have even looked to the Advisory Committee's Notes to the Federal Rules to aid in interpreting our own similar rule, as Tabletop suggests we do here. When persuasive, these federal sources are very helpful. But the federal commentary here is not helpful because the federal rule was never adopted and the sentence from the commentary on which Tabletop relies is taken out of context."). The rules of evidence guide in the admission or exclusion of evidence, but the United States and Texas Constitutions, federal or Texas statutes, or another rule proscribed by the Supreme Court of the United States or of Texas or the Court of Criminal Appeals of Texas supersede the rules. Tex. R. Evid. 101(d). Additionally, the rules, except for those on privilege, do not apply to the trial court's determination on preliminary questions of fact governing admissibility; grand jury proceedings; applications for habeas corpus in extradition, rendition, or interstate detainer proceedings; competency hearings under the Code of Criminal Procedure; bail proceedings other than

hearings to deny, revoke, or increase bail; hearings on justification for pretrial detention not involving bail; proceedings to issue a search or arrest warrant; or direct contempt determination proceedings. Tex. R. Evid. 101(e). The rules also do not apply to justice court, aside from certain exceptions, and as determined by Rule 500.3 of the Texas Rules of Civil Procedure. Tex. R. Evid. 101(f). Military justice hearings also use their own rules of evidence as found in Sections 432.001 through 432.195 of the Texas Government Code. Tex. R. Evid. 101(g).

B. Purpose

The purpose of the rules is to have fair proceedings, eliminate unjustifiable expense and delay, and promote the development of evidence law to ascertain the truth and secure just determinations. Tex. R. Evid. 102; *see Ex parte Trevino*, 648 S.W.3d 435, 441 n.4 (Tex. App.—San Antonio 2021, no pet.) ("[C]ourts should not interpret Rule 102 as a plenary grant of discretion to the trial judge to forego the specific mandates of the Rules . . . .") (quoting *Englund v. State*, 946 S.W.2d 64, 70 (Tex. Crim. App. 1997)). As such, the trial court judge "must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." Tex. R. Evid. 103(d).

C. Rulings on Evidence

Rule 103 sets forth similar requirements as Rule 33.1 of the Texas Rules of Appellate Procedure. *Compare* Tex. R. Evid. 103, *with* Tex. R. App. P. 33.1. Any claim of error in a ruling to admit or exclude evidence is only justified if that error affected a substantial right of the party. Tex. R. Evid. 103(a). Similarly, that claim of error, if the ruling admitted evidence, must be timely made on the record and state the specific ground, unless apparent from the context. Tex. R. Evid. 103(a)(1). If the ruling excluded evidence, an offer of proof must be made, unless the substance was apparent from the context. Tex. R. Evid. 103(a)(2). Rule 103 states that "[w]hen the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal." Tex. R. Evid. 103(b). This will be discussed more below in the section on objections and preservation of error. When a party makes an offer of proof, it must be outside the presence of the jury at the earliest practicable time. Tex. R. Evid. 103(c). Additionally, the party may request the offer of proof be made in a question-and-answer format, which the trial court must then allow. *Id.* In criminal cases, the court may take notice of fundamental error affecting a substantial right, even if that error was not preserved. Tex. R. Evid. 103(e).

D. Preliminary Questions

The court is the gatekeeper for the admission of evidence. It must decide any preliminary questions concerning whether a witness is qualified to testify, privileges exist, or evidence is admissible, and is not bound by the rules of evidence in its decision, except for those applying to privileges. Tex. R. Evid. 104(a); *see, e.g.*, *Richter v. State*, 482 S.W.3d 288, 295 (Tex. App.—Texarkana 2015, no pet.) (explaining that preliminary hearing under Rule 104(a) is used to determine whether expert is qualified under Rule 702) (quoting *Vela v. State*, 209 S.W.3d 128, 130–31 (Tex. Crim. App. 2006)). This preliminary step does not require that the trial court be persuaded that the proffered evidence is actually authentic, however; it only requires the proponent to produce sufficient evidence to support a finding that the evidence is authentic. *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). Authenticity will be discussed more in that section below.

If the relevance of a piece of evidence hinges on whether a fact exists, the proponent must provide sufficient evidence to support a finding that the fact does exist. Tex. R. Evid. 104(b). The court has discretion to admit the proposed evidence on condition that the proof be introduced later. *Id.* This is known as the doctrine of conditional relevance. *Fischer v. State*, 268 S.W.3d 552, 563 (Tex. Crim. App. 2008) (Price, J., concurring and dissenting). "Simply put, a trial judge cannot err in most cases by overruling a relevancy objection so long as the challenged evidence might be connected up before the end of trial. And it is not the judge's duty to notice whether the evidence is eventually connected up in fact. Instead, the objecting party must reurge his relevancy complaint after all the proof is in, ask that the offending evidence be stricken, and request that the jury be instructed to disregard it. Otherwise, his objection will be deemed forfeited on appeal." *Id.* at 563 n.8 (quoting *Fuller v. State*, 829 S.W.2d 191, 198–99 (Tex. Crim. App. 1992) (internal quotations omitted)). A search of the case law shows that this doctrine is discussed far more often in criminal cases than in civil ones.

All hearings on preliminary questions must be conducted outside the presence of the jury if it would involve: (1) the admissibility of a confession in a criminal case; (2) a defendant in a criminal case is a witness and requests it; or (3) justice so requires. Tex. R. Evid. 104(c). The defendant in a criminal case who testifies outside the jury's hearing on a preliminary question is not subject to cross-examination on other issues in the case. Tex. R. Evid. 104(d).

Preliminary questions do not limit a party's right to

introduce evidence that is relevant to the weight or credibility of other evidence. Tex. R. Evid. 104(e). But the proponent of the evidence must still show how that evidence is relevant to the weight or credibility of the other evidence. *See, e.g.*, *Izaguire v. Cox*, No. 10-07-00318-CV, 2008 WL 4427272, at *7 (Tex. App.—Waco Oct. 1, 2008, no pet.) (mem. op.) (holding no abuse of discretion by excluding new evidence that attacked the weight and credibility of other evidence because party introducing new evidence did not show how it was relevant).

E. Evidence that is not Admissible Against Other Parties or for Other Purposes

Evidence that is only admissible for certain purposes or against certain parties must, on request, be restricted to its proper scope with an instruction given to the jury accordingly. Tex. R. Evid. 105(a). Error is preserved only if the party claiming error: (1) requested that the evidence be limited if the evidence was, in fact, admitted without limitation; or (2) limited the evidence to its proper scope when offering it, but the evidence was excluded altogether. Tex. R. Evid. 105(b); *see, e.g.*, *Estes v. State*, 487 S.W.3d 737, 761–62 (Tex. App.—Fort Worth 2016) (holding that appellant failed to preserve error because he did not renew request for a limiting instruction after testimony he had objected to in preliminary hearing was offered), *rev'd on other grounds*, No. PD-0429-16, 2018 WL 2126740 (Tex. Crim. App. May 9, 2018).

F. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a statement, written or recorded, any adverse party may introduce, at that time, any other part or statement that should be considered at the same time. Tex. R. Evid. 106. The principles discussed in Rules 106 and 107 "comprise the rule of optional completeness, which was designed to guard against the possibility of confusion, distortion, or false impression that could rise from [the] use . . . of an act, writing, conversation, declaration, or transaction out of proper context." *Elmore v. State*, 116 S.W.3d 801, 807 (Tex. App.—Fort Worth 2003, pet. ref'd) (internal quotations omitted) (quoting *Livingston v. State*, 739 S.W.2d 311, 339 (Tex. Crim. App. 1987)).

G. Rule of Optional Completeness

If a party introduces part of an act, declaration, conversation, writing, or recorded statement, any adverse party may inquire into any other part on the same subject. Tex. R. Evid. 107. The adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement *necessary* to explain or help the factfinder fully understand that part offered by the opponent. *Id.* The rule of optional completeness is an exception to the hearsay rule, as explained more in the hearsay section below. But Rule 107 is limited by Rule 403 if the additional evidence's probative value is substantially outweighed by its unfair prejudicial effect. Tex. R. Evid. 403; *Walters v. State*, 247 S.W.3d 204, 218 (Tex. Crim. App. 2007). Rule 403 is discussed in more detail below in the section on relevance.

III. TRE Article II. Judicial Notice

The Texas Rules of Evidence provide a court with the ability to take judicial notice in four areas: (1) adjudicative facts; (2) the law of other states; (3) the laws of foreign countries; and (4) Texas municipal and county ordinances, Texas Register contents, and agency regulations. Tex. R. Evid. 201–204.

Practice Note: A court may not take judicial notice of testimony from a previous trial or even testimony from a prior temporary orders hearing in the same case. *Guyton v. Monteau*, 332 S.W.3d 687, 693 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("In order for testimony from a prior hearing or trial to be considered in a subsequent proceeding, the transcript of that testimony must be properly authenticated and entered into evidence."); *May v. May*, 829 S.W.2d 373, 376 (Tex. App.—Corpus Christi 1992, writ denied); *Traweek v. Larkin*, 708 S.W.2d 942, 946–947 (Tex. App.—Tyler 1986, writ ref'd n.r.e.). Similarly, that testimony will not be considered on appeal unless properly entered into evidence. *See, e.g.*, *In re M.C.G.*, 329 S.W.3d 674, 675 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). Note, however, that in subsequent termination proceedings involving the same child, the trial court may consider evidence from previous hearings. Tex. Fam. Code Ann. § 161.004(b). The statutory language and case law are not clear whether the evidence from the previous hearing must be readmitted for either the trial or appellate courts to consider it, though. *See id.*; *In re K.G.*, 350 S.W.3d 338, 352 (Tex. App.—Fort Worth 2011, pet. denied).

Practice Note: A trial court may take judicial notice of what is in its file, but it may not necessarily take judicial notice of the truth of those documents. *Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied) ("A court may take judicial notice of its own file and the fact that a pleading has been filed in a case . . . . 'A court may not, however, take judicial notice of the truth of allegations in its records.' . . . Thus, unless a party's inventory and appraisal has been admitted into

evidence, it may not be considered as evidence of a property's characterization of value."); *but cf. Vannerson v. Vannerson*, 857 S.W.2d 659, 671 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (holding that, because inventory was sworn to and filed with the trial court, even though inventory was not introduced into evidence, trial court could rely on inventory in its judgment; additionally, no harm occurred because properly offered trial exhibit contained same information as was in inventory).

Practice Note: A court may not take judicial notice of scientific literature. *Glockzin v. State*, 220 S.W.3d 140, 145–46 (Tex. App.—Waco 2007, pet. ref'd). If the evidence is an expert treatise or market report, it should be offered under the appropriate hearsay exception, as explained below.

A. Adjudicative Facts

An adjudicative fact is any well settled fact, "one which is so well known by all reasonably intelligent people in the community or its existence is so easily determinable with certainty from sources considered reliable, that it would not be good sense to require formal proof." Ray, Law of Evidence, Judicial Notice, § 151 (1980); *accord Harper v. Killion*, 348 S.W.2d 521, 522 (Tex. 1961). A fact is not subject to reasonable dispute when: (1) it is generally known within the territorial jurisdiction of the trial court; or (2) it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Tex. R. Evid. 201(b).

When the above requirements are established, and a party requests it, the court must take judicial notice. Tex. R. Evid. 201(c)(2); *see Hernandez v. Hous. Lighting & Power Co*., 795 S.W.2d 775, 776–77 (Tex. App.—Houston [14th Dist.] 1990, no writ). Even if the mandatory requirements are not asserted, a court has the discretion to take judicial notice, whether requested or not, at any stage of the proceeding. Tex. R. Evid. 201(c)(1), (d). Even the court of appeals may take judicial notice for the first time on appeal. *Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 878 S.W.2d 598, 600 (Tex. 1994).

The trial court has a duty to notify the parties that it has taken or will take judicial notice of something. *Cobb v. State*, 835 S.W.2d 771, 773 (Tex. App.—Texarkana 1992), *rev'd on other grounds*, 851 S.W.2d 871 (Tex. Crim. App. 1993). A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. Tex. R. Evid. 201(e). In the absence of prior notification, the request may be made after judicial notice has been taken. *Id.* The party opposing the trial court's action must be given an opportunity to be heard on the issue of propriety of the court's action and make a proper objection to preserve error. *See In re M.W.*, 959 S.W.2d 661, 664 (Tex. App.—Tyler 1997, writ denied). The court must, in a civil case, instruct the jury as to the conclusiveness of a judicially noticed fact. Tex. R. Evid. 201(f).

B. Law of Other States

A court may, on its own, or must, upon request, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every jurisdiction of the United States. Tex. R. Evid. 202(a), (b). Judicial notice may be taken at any stage of the proceeding. Tex. R. Evid. 202(d). The court's determination shall be subject to review as a ruling on a question of law. Tex. R. Evid. 202(e). A party requesting that judicial notice be taken must furnish the court sufficient information. Tex. R. Evid. 202(b)(2). A photocopy is sufficient—no certified copy is required. *Cal Growers, Inc. v. Palmer Warehouse & Transfer Co.*, 687 S.W.2d 384, 386 (Tex. App.—Houston [14th Dist.] 1985, no writ). The requesting party must give all parties any notice the court deems necessary to enable all parties fairly to prepare to meet the request. Tex. R. Evid. 202(c)(1). A party is entitled, upon timely request, to an opportunity to be heard on the taking of judicial notice. Tex. R. Evid. 202(c)(2). In the absence of prior notification, the request may be made after judicial notice has been taken. *Id.*

Practice Note: When another state's law is offered for the purpose of determining the legal rights of the parties, Rule 202 applies. However, when the other state's law is considered only as persuasive to the court's legal reasoning, Rule 202 need not be followed. *See Ewing v. Ewing*, 739 S.W.2d 470, 472 (Tex. App.—Corpus Christi 1987, no writ).

Practice Note: If the proponent does not provide any specificities on what the law of the other state is and properly request the court to take judicial notice of those differing laws, a presumption exists that the laws of the other state are the same as the laws of Texas. *Id.*; *Cal Growers*, 687 S.W.2d at 386.

C. Law of Foreign Countries

1. Notice

A party who intends to request the court to take judicial

notice of the law(s) of a foreign country shall give at least 30 days' notice prior to trial. Tex. R. Evid. 203(a). The notice can be set forth in the pleadings or other reasonable written notice (e.g., certified registered letter or motion). Tex. R. Evid. 203(a)(1). The proponent shall furnish copies of materials and sources to be relied upon (e.g., xerox copies of cases, statutes, etc., or place where they may be found). Tex. R. Evid. 203(a)(2).

Practice Note: Rule 308b of the Texas Rules of Civil Procedure became effective January 1, 2018. This Rule applies to the recognition or enforcement of a judgment or arbitration award based on foreign law in a suit involving a marriage relationship or a parent-child relationship. Tex. R. Civ. P. 308b(b)(1). In those situations, the notice requirement of Rule 203(a) does not apply, as Rule 308b alters the requirements, as discussed below.

2. Translation of Foreign Material

If the materials or sources were originally written in a language other than English, the proponent must furnish to any adverse party both a copy of the foreign language text and the English translation at least 30 days before trial. Tex. R. Evid. 203(b).

Practice Note: Rule 308b of the Texas Rules of Civil Procedure became effective January 1, 2018. This Rule applies to the recognition or enforcement of a judgment or arbitration award based on foreign law in a suit involving a marriage relationship or a parent-child relationship. Tex. R. Civ. P. 308b(b)(1). In those situations, the timeline for translating foreign language documents in Rule 203(b) does not apply, as Rule 308b alters the requirements, as discussed below.

3. Other Sources to be Considered by the Court

The trial court may consider any other material or source, whether admissible or not, including but not limited to, affidavits, testimony, briefs, and treatises. Tex. R. Evid. 203(c); *Ossorio v. Leon*, 705 S.W.2d 219, 222 (Tex. App.—San Antonio 1985, no writ). If the court considers materials not submitted by a party, it must notify all parties and allow each a reasonable opportunity to comment and submit additional materials. Tex. R. Evid. 203(c).

4. Determination and Review

The court shall determine the law of the foreign country, and that determination is subject to de novo review as a question of law. Tex. R. Evid. 203(d).

Practice Note: Texas courts will assume that foreign law is the same as Texas law unless a party shows otherwise. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848 (Tex. 2000) ("Because neither party introduced evidence of [foreign] law, . . . the trial court submitted the damages issue under Texas law. . . . [T]he trial court did not err in applying Texas law."); *Schacht v. Schacht*, 435 S.W.2d 197, 202 (Tex. App.—Dallas 1968, no writ) ("No effort was made to prove the provisions of the law of Mexico relative to divorce action. Absent such, the presumption arises that the laws of the other jurisdiction are the same as those of Texas.").

D. Texas City and County Ordinances, Texas Register, and Administrative Regulations

The procedure for taking judicial notice of Texas municipal and county ordinances, contents of the Texas Register, and administrative agency regulations is the same as for the Law of Other States as stated above. Tex. R. Evid. 204.

E. Texas Rule of Civil Procedure 308b

In response to House Bill 45 from the 2017 Regular Session of the Texas Legislature, the Supreme Court of Texas adopted Rule 308b. 308b applies to the recognition or enforcement of a judgment or arbitration award based on foreign law in a suit involving a marriage relationship or a parent-child relationship. Tex. R. Civ. P. 308b(b)(1). This Rule was meant to ensure that a party cannot obtain a judgment or arbitration award in a foreign country, where constitutional rights may not be observed, and subsequently enforce that judgment or award in Texas. Act of May 6, 2017, 85th Leg., R.S., ch. 771, § 1(1), 2017 Tex. Sess. Law Serv. Ch. 771 (West), eff. Sept. 1, 2017; *see* Tex. Att'y Gen. Op. No. KP-0094 (2016); *see also Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S.Ct. 1865 (2018) (discussing principle of comity).

This Rule alters Rule 203 of the Texas Rules of Evidence in determining foreign law by making 203(a) and (b) not applicable. Tex. R. Civ. P. 308b(c). A party asking the court to recognize or enforce a judgment or arbitration award based on foreign law has sixty days from the original pleading to give written notice of that intent. Tex. R. Civ. P. 308b(d)(1). The responding party then has 30 days to file an explanation of that party's opposition and whether that party asserts that the judgment or award violates constitutional rights or public policy. Tex. R. Civ. P. 308b(d)(2). The court must then hold a pretrial conference within 75 days of the original notice under

(d)(1) to set the timelines for submitting materials to the court to consider and determine foreign law, the translation of foreign-language documents, and the designation of expert witnesses (those who would translate the foreign-language documents). Tex. R. Civ. P. 308b(e). At least thirty days before trial, the court must conduct a hearing on the record to determine whether to enforce the judgment or award. Tex. R. Civ. P. 308b(f)(1). The court must file a written order on the determination that includes findings of fact and conclusions of law. Tex. R. Civ. P. 308b(f)(2). The hearing must occur, even if there is no opposition, meaning that there can be no default and that the court may be required to perform an independent review to determine whether the judgment or award violates the constitution or public policy. Tex. R. Civ. P. 308(f)(4). The court may issue orders necessary to preserve the principles of comity or the freedom to contract. Tex. R. Civ. P. 308b(f)(3). And the court may alter these deadlines to accommodate temporary orders. Tex. R. Civ. P. 308b(g).

IV. TRE Article III. Presumptions

"A presumption is a rule which draws a particular inference as to the existence of one fact, not actually known, arising from its usual connection with other particular facts which are known or proved." *Beck v. Sheppard*, 566 S.W.2d 569, 570–571 (Tex. 1978) (internal quotations omitted). Texas has not adopted any rules of evidence explicitly dealing with presumptions.

A. Presumptions vs. Inferences

A presumption affects the duty of a party offering further testimony. *Strain v. Martin*, 183 S.W.2d 246, 247 (Tex. App.—Eastland 1944, no writ). An inference involves the weighing of evidence already produced. *Id.* Thus, inferences are based upon facts that are proved. Unrebutted presumptions may establish a fact in issue, but only as an "artificial legal equivalent of the evidence otherwise necessary to do so." *Id.* Presumptions can be based upon inferences, but an inference based upon another inference is conjecture and does not prove anything. *Id.* at 247–48; *see also Roberts v. U.S. Home Corp*., 694 S.W.2d 129, 135 (Tex. App.—San Antonio 1985, no writ) (citing *Rounsaville v. Bullard*, 276 S.W.2d 791, 794 (Tex. 1955)).

B. Rebuttable Presumptions

A presumption establishes a fact as proved when the fact from which it may be inferred is proved. *Lobley v. Gilbert*, 236 S.W.2d 121, 123–24 (Tex. 1951). The burden of proof remains on the party offering the fact that gives rise to the presumption, but in effect, it assumes that it has established the fact, prima facie. *Page v. Lockley*, 176 S.W.2d 991, 998 (Tex. App.—Eastland 1943), *rev'd on other grounds*, 180 S.W.2d 616 (Tex. 1944). When the adversely affected party introduces evidence contrary to the existence of the presumed fact, the presumption stops, leaving it to the trier of fact to weigh the bare inference against the evidence to the contrary. *Southland Life Ins. Co. v. Greenwade*, 159 S.W.2d 854, 858 (Tex. 1942).

The parental presumption is a rebuttable presumption. Tex. Fam. Code Ann. § 153.131. And it applies in both original suits and modifications, although in modifications it is embedded only within the best interest analysis. *In re C.J.C.*, 603 S.W.3d 804, 812 (Tex. 2020) (orig. proceeding). In modifications, another hurdle is also placed before litigants, res judicata. *Knowles v. Grimes*, 437 S.W.2d 816, 817 (Tex. 1969). This means that, if the order being modified was in the child's best interest based on the circumstances at the time of that order, then the petitioner must prove a material and substantial change has occurred, such that the order may no longer be in the child's best interest under the current circumstances. Tex. Fam. Code Ann. § 156.101(a)(1); *In re S.N.Z.*, 421 S.W.3d 899, 912 (Tex. App.—Dallas 2014, pet. denied).

Practice Note: A material and substantial may not exist if that change was anticipated at the time of the order being modified. *See Smith v. Karanja*, 546 S.W.3d 734, 740–41 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *compare Guion v. Guion*, 597 S.W.3d 899, 910 (Tex. App.—Houston [1st Dist.] 2020, no pet.) ("We conclude that '[t]he fact that the divorce decree did not prohibit [Laura] from moving is not evidence that she anticipated moving at the time of the decree' such that her relocation to Houston could not constitute a change in circumstances."), *with In re T.L.S.*, No. 2-08-238-CV, 2009 WL 976007, at *4 (Tex. App.—Fort Worth Apr. 9, 2009, no pet.) (mem. op.) ("The possibility that Barbara would move to the outer boundary of the thirty-mile restriction was contemplated at the time of the original agreement.").

C. Irrebuttable or Conclusive Presumptions

There are very few presumptions that are legally conclusive as to the fact(s) stated or proved. Most presumptions, whether based on statute or case law, are rebuttable. The rules of procedure create certain conclusive presumptions if proper pleading requirements are not followed. Rules 93 and 185 of the Texas Rules of

Civil Procedure illustrate this point. The failure to file certain verified pleas pursuant to Rule 93 will result in a conclusive presumption that certain defensive matters do not exist. Pursuant to Rule 185 (suit on sworn account), unless the defendant files a verified answer contesting the validity of the claim, it will be conclusively presumed that the claim stated is true. Irrebuttable presumptions also exist when an attorney is at a firm that is representing one party and that attorney moves to a firm that is representing the other party, which results in "mandatory disqualification of the second firm." *In re Guaranty Ins. Servs., Inc.*, 343 S.W.3d 130, 133–34 (Tex. 2011) (orig. proceeding) (per curiam).

During a marriage, absent very unusual circumstances, there is an irrebuttable presumption that a fiduciary relationship exists between a husband and wife. *Miller v. Miller*, 700 S.W.2d 941, 946–47 (Tex. App.—Dallas 1985, writ ref'd n.r.e.). Note, however, that most Texas courts of appeals have held that, in a contested divorce where each spouse is independently represented by counsel, the fiduciary relationship terminates. *See, e.g.*, *Solares v. Solares*, 232 S.W.3d 873, 881 (Tex. App.—Dallas 2007, no pet.) (holding that spouses in divorce have no fiduciary relationship to one another); *Boaz v. Boaz*, 221 S.W.3d 126, 133(Tex. App.—Houston [1st Dist.] 2006, no pet.) (same); *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 701 n.21 (Tex. App.—Austin 2005, pet. denied); *Boyd v. Boyd*, 67 S.W.3d 398, 405 (Tex. App.—Fort Worth 2002, no pet.) (same). The only other conclusive presumption exclusively in family law is that of dealing with support. It is presumed that both spouses have the duty to financially support each other, as well as any of their minor children. Tex. Fam. Code Ann. §§ 2.501, 151.001. If no community funds are available for spousal support, separate property of one or both spouses shall be expended. *Trevino v. Trevino*, 555 S.W.2d 792, 802–03 (Tex. App.—Corpus Christi 1977, no writ). With respect to child support, character of property is irrelevant. *Cameron v. Cameron*, 641 S.W.2d 210, 218 n.8 (Tex. 1982).

D. Purpose of Presumptions

The reasons for and purposes of presumptions are numerous. They include the following:

"1. To permit instruction to the jury on the relationship between certain facts;

2. To promote convenience or to bring out the real issues in dispute;

3. To save the court's time by favoring a finding consonant with the balance of probability;

4. To correct an imbalance resulting from one party's greater access to proof concerning the presumed fact;

5. To avoid an impasse and its consequent unfairness;

6. To serve a social or economic policy that favors a contention by giving such contention the benefit of the presumptions; and

7. To provide a shorthand description of the initial assignment of the burdens of persuasion and of going forward with the evidence on an issue." Murl A. Larkin & Cathleen C. Herasimchuk, *Article III: Presumptions*, 30 Hous. L. Rev. 241, 243–44 (1993) (internal citations omitted).

E. Presumptions - To Instruct or not to Instruct

1. Directed Verdicts

The genuine importance of presumptions is realized only after the party bearing the burden has rested. A true presumption operates to invoke a rule of law that compels the jury to reach a conclusion in absence of evidence to the contrary. *Farley v. M M Cattle Co*., 529 S.W.2d 751, 756–57 (Tex. 1975), *abrogated on other grounds*, *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978). If the party with the burden of producing evidence of a particular fact fails to meet that burden, it is proper for the court to direct a verdict against that party on the issue not proved. The reverse is also true. If the burden has been satisfied and no controverting evidence has been admitted, the producing party can be favored with a directed verdict because there is no decision for the jury on that issue. *Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex. App.—Amarillo 1979, writ ref'd. n.r.e.).

2. Jury Instructions

There is some question as to how the court should instruct the jury regarding presumptions. An instruction, which recites verbatim a presumption, risks reversal on appeal. The complaints range from a comment on the evidence to a misplaced burden of persuasion. *See, e.g.*, *Tex. A & M Univ. v. Chambers*, 31 S.W.3d 780, 785 (Tex. App.—Austin 2000, pet. denied) ("Including a presumption in the jury charge which has been rebutted by controverting facts is an improper comment on the weight of the evidence."); *Hailes v. Gentry*, 520 S.W.2d 555, 558–59 (Tex. App.—El Paso 1975, no writ) ("[Presumptions] are not evidence of something to be weighed along with the evidence."). Generally, Texas does not favor the

inclusion of presumptions in the court's charge. 2 McCormick on Evidence § 344 (7th ed. 2013). This policy obviously does not prohibit the court from properly instructing the jury as to the law, but it does discourage the preface to an instruction with words such as "the law presumes." *Id.* To permit the latter would likely lead the jury to infer that the presumption was conclusive. *Id.* If viewed as conclusive, the instruction has actually shifted the burden of persuasion to the wrong party. The point is aptly illustrated in *Sanders v. Davila*. In that case, the instruction stated in part that the plaintiff was "presumed to have exercised ordinary care." *Sanders*, 593 S.W.2d at 129. Although the burden was still on the plaintiff to prove his case, the improper instruction effectively shifted the burden of persuasion to the defendant, who had no such burden. At best, it places upon the defendant a greater burden than that required by law. *Id.*

3. Spoliation Presumption

One area where a jury instruction regarding a presumption can be appropriate is in cases of spoliation of evidence. One of the most severe penalties for spoliation is a rebuttable presumption that the evidence was damaging to the spoliating party, combined with a shift in the burden of proof so that the spoliating party must prove the evidence was not damaging. The court in *Trevino* discusses the proper procedure: deciding whether to submit a spoliation instruction is a legal determination. *Trevino v. Ortega*, 969 SW2d 950, 960 (Tex. 1998). The trial court should first determine whether there was a duty to preserve evidence; second, whether the spoliating party breached that duty; and third, whether the spoliation prejudiced the non-spoliating party. *Id.* at 954–55, 960. "The trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires." *Id.* at 960 (internal citations omitted).

F. Burden of Proof

The common meaning of this term among litigators is the amount of evidence required to establish the facts pleaded, as well as a sufficient amount of evidence necessary to convince the trier of fact to find in the offering party's favor. While simplistic in usage, an academic examination reveals that there are two separate and distinct burdens that are interdependent for a valid judgment.

1. Burden of Producing Evidence

This burden is based on the premise that the proponent must produce satisfactory evidence to the judge of a particular fact to be proved. 1 Roy R. Ray, Texas Practice, Law of Evidence § 336 (1972). Absent a presumption of the facts to be proved, if the party with that responsibility does not produce the requisite evidence, the results will be an adverse ruling, i.e., a directed verdict. This burden of producing evidence rests initially on the party who pleads the existence of a particular fact. When the initial burden to produce evidence has been met, the burden shifts to the opposing party.

2. Burden of Persuasion

The burden of persuasion comes only after the proponent has met its burden of producing evidence sufficient to prove the contested issue. Simply stated, it is the task of convincing the trier of fact, after producing satisfactory evidence, that the alleged facts are true. If the advocate is successful in meeting the burden of evidence and in persuading the factfinder, the ultimate outcome is a favorable verdict. Unlike the burden of producing evidence, the burden of persuasion seldom shifts from one party to the other. It remains with the party who seeks any affirmative relief.

G. Standard of Proof (Burden of Persuasion)

Though referred to as the burden of proof in practice, a more accurate term would be the standard of proof required in persuading the judge or jury. The standard of proof represents the persuasive boundaries set by the court. In jury cases, the boundaries are affixed in the court's charge.

1. Persuading by a Preponderance of the Evidence

With few exceptions, this is the most common standard utilized in family law cases. The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced and admitted in this case.

2. Persuading by Clear and Convincing Evidence

The exception to the usual preponderance standard in most family law cases is the burden to persuade by clear and convincing evidence. Less than beyond a reasonable doubt and more than a preponderance, this burden is the measure or degree of proof that will produce in the minds of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Tex. Fam. Code Ann. § 101.007.

Practice Note: The above burdens represent the only applicable standards in family law litigation. The unwritten standard of "clear and compelling" is virtually non-existent in family law. Although previously utilized by some courts in "sibling-splitting" cases, this author is unable to find where this standard was ever defined. Upon reading some of the opinions which imposed this standard of proof, it appears that the burden fell somewhere between a preponderance of the evidence and clear and convincing. *See, e.g.*, *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980); *In re De La Pena*, 999 S.W.2d 521, 535 (Tex. App.—El Paso 1999, no pet.); *Pizzitola v. Pizzitola*, 748 S.W.2d 568, 569 (Tex. App.—Houston [1st Dist.] 1988, no writ).

Practice Note: Topics related to family law that must meet the higher burden of clear and convincing are as follows:

1. Separate property. Tex. Fam. Code Ann. § 3.003.

2. Reimbursement to separate estate. Tex. Fam. Code Ann. §§ 3.003, 3.402.

3. Termination of parental rights. Tex. Fam. Code Ann. §§ 161.001, 161.003, 161.004, 161.005, 161.007.

4. Guardianship of an adult. Tex. Estates Code Ann. § 1101.101.

5. Involuntary commitment. Tex. Health & Safety Code Ann. §§ 462.062, 462.068, 462.069, 574.034.

6. Rebutting presumption of parent's gift to child. *Bogart v. Somer*, 762 S.W.2d 577, 577 (Tex. 1988).

V. TRE Article IV. Relevance and Its Limits

A. Relevant Evidence

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Tex. R. Evid. 401; *PPC Transp. v. Metcalf*, 254 S.W.3d 636, 642 (Tex. App.—Tyler 2008, no pet.).

If there is some logical connection, either directly or by inference, between the evidence and a fact to be proved, the evidence is relevant. *PPC Transp.*, 254 S.W.3d at 642. In practice, this is a test of logic and common sense. There are no degrees of relevancy—a piece of evidence either is or is not relevant. All relevant evidence is admissible unless it is shown that the evidence should be excluded for some other reason. Tex. R. Evid. 402.

B. Exclusion of Relevant Evidence

In deciding whether to exclude relevant evidence, a court must weigh the probative value of the evidence against its potential for unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence, and must examine the necessity and probative effect of the evidence. Tex. R. Evid. 403; *Goodson v. Castellanos*, 214 S.W.3d 741, 754 (Tex. App.—Austin 2007, pet. denied). "Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *In re K.Y.*, 273 S.W.3d 703, 710 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Because the guiding principle in a suit affecting the parent-child relationship is the best interest of the child, Rule 403 provides for an extraordinary remedy and should be used "sparingly." *Goodson*, 214 S.W.3d at 754.

1. Unfair Prejudice

Prejudice as applied under this section refers to emotional, irrational, or other similarly improper grounds on which to base a decision. *Roberts v. Dallas Ry. & Terminal*, 276 S.W.2d 575, 577–78 (Tex. App.—El Paso 1953, writ ref'd n.r.e.). For example, "relevant photographic evidence is admissible unless it is merely calculated to arouse sympathy, prejudice or passion of the jury where the photographs do not serve to illustrate disputed issues or aid in understanding the case." *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 389 (Tex. 1998) (internal quotations omitted).

If an attorney trying to keep a piece of evidence out has failed to block the evidence based on relevance, authenticity, hearsay, or the original writing rule, the final step is the requirement to balance the evidence's probative value against the potential for unfair prejudice, or other harm, under Rule 403. Although Rule 403 may be used in combination with any other rule of evidence to assess the admissibility of electronic evidence, courts are particularly likely to consider whether the admission of electronic evidence would be unduly prejudicial in the

following circumstances: offensive language, computer animations, summaries, and reliability or accuracy. *See Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994) (language); *Friend v. Time Mfg. Co.*, No. 03-343-TUC-CKJ, 2006 WL 2135807, at *7 (D. Ariz. July 28, 2006) (animations); *Pugh v. State*, 639 S.W.3d 72, 84 n.14 (Tex. Crim. App. 2021) (animations, serving as demonstrative exhibits, must satisfy traditional evidentiary standards); *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 774–75 (S.D. Tex. 1999) (reliability); 5 McLaughlin, Weinstein, & Berger, Weinstein's Federal Evidence § 1006.08[3] (2d ed. 1998) (summaries).

2. Confusing the Issues

Confusing the issues refers to situations where evidence confuses or distracts the jury from the main issues of the case. *Casey v. State*, 215 S.W.3d 870, 880 (Tex. Crim. App. 2007). This includes evidence that may take an inordinate amount of time to present. *Id.*

3. Misleading the Jury

Misleading the Jury, on the other hand, refers to situations where the jury will give undue weight to evidence "on other than emotional grounds." *Id.*

4. Undue Delay

If the admission of evidence creates undue delay, outweighing the probative value of the evidence, the court may exclude it. *Mo., K. & T. Ry. v. Bailey*, 115 S.W. 601, 607–08 (Tex. App.—Dallas 1908, writ ref'd).

5. Needlessly Presenting Cumulative Evidence

If the evidence offered is merely cumulative of other evidence already admitted, the court may exclude it. *R.R. Comm'n v. Shell*, 369 S.W.2d 363, 373 (Tex. App.—Austin 1963), *aff'd*, 380 S.W.2d 556 (Tex. 1964). However, visual evidence is generally not cumulative of testimony on the same subject because it has significant probative value apart from testimonial evidence. *In re K.Y.*, 273 S.W.3d at 710.

C. Character Evidence

While the use of character evidence in civil cases is limited by the rules of evidence, in family law, several important exceptions make the use of character evidence relevant and commonly used.

Evidence about prior instances of conduct used to show that a person acted in conformity on a particular occasion is generally inadmissible. Tex. R. Evid. 404(a); *but see* Tex. R. Evid 405(b) (specific instances of conduct to prove character or trait admissible if character is an essential element of a charge, claim, or defense). However, under Rule 404(b), such evidence may be admissible for other purposes, such as showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Tex. R. Evid. 404(b)(2). Further, evidence of a person's habit or routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person on a particular occasion was in conformity with the habit or routine practice. Tex. R. Evid. 406. Although evidence of specific acts is limited, character evidence through testimony of a person's reputation or by testimony in the form of an opinion is admissible. Tex. R. Evid. 405(a)(1). If reputation or opinion testimony is admitted, evidence of specific instances of conduct is permitted on cross-examination. *Id.*

Similarly, offers or acceptances of consideration, along with conduct or statements made during compromise negotiations, is inadmissible, unless it is used to prove a person's bias, prejudice, or interest. Tex. R. Evid. 408. And any offer or promise to pay for anything related to an injury is inadmissible to prove liability. Tex. R. Evid. 409.

Family law often overlaps with criminal law, as family violence or sexual abuse can instigate both types of cases. But a guilty plea that is later withdrawn, a nolo contendere plea, or a statement made during proceedings for either of those pleas or made during plea discussions with the prosecuting authority, if those discussions did not result in a guilty plea or resulted in a later-withdrawn guilty plea, are not admissible against the defendant who made the plea or participated in those discussions. Tex. R. Evid. 410(a). The only exception to this falls under Rules 106 and 107, when part of the discussion is introduced and the rest of the discussion should be introduced for fairness. Tex. R. Evid. 410(c); *see also* Tex. R. Evid. 106, 107.

Practice Note: In custody cases, evidence of the prior conduct of a parent is regularly presented to show that future behavior is likely to be in conformity. One termination case has drawn a relevant distinction: "The evidence regarding [father's] prior criminal behavior, convictions, and imprisonment was not offered to prove conduct in conformity or to impeach his credibility as a witness. Instead, it was relevant and probative to whether he engaged in a course of conduct that endangered [the child]." *In re J.T.G.*, 121 S.W.3d 117, 133 (Tex. App.—

Fort Worth 2003, no pet.) (internal citations omitted). A modification case held that, "[w]hile evidence of past misconduct or neglect may not of itself be sufficient to show present unfitness in a suit affecting the parent-child relationship, such evidence is permissible as an inference that a person's future conduct may be measured by her past conduct as related to the same or similar situation." *Kirby v. Chapman*, 917 S.W.2d 902, 911 (Tex. App.—Fort Worth 1996, no writ). Another modification case held that a parent's prior conduct can give rise to a material and substantial change in circumstances of the child. *In re A.L.E.*, 279 S.W.3d 424, 429–30 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

VI. TRE Article V. Privileges

Our rules of privilege stem from the common law notion that certain relationships are so important that they ought to be afforded a degree of protection. Article V of the Texas Rules of Evidence provides a nonexclusive list of privileges recognized in Texas, including lawyer-client, husband-wife, clergy, political vote, trade secrets, identity of informer, physician-patient, and mental health privileges. Unless protected under a privilege, or other constitutional or statutory authority, no person has a privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another from doing any of those. Tex. R. Evid. 501, 502 (required reports privileged by statute). If the law governing a report does not require the report be made, any reports that are made in accordance with that law are not privileged. *Star-Telegram, Inc. v. Schattman*, 784 S.W.2d 109, 111 (Tex. App.—Fort Worth 1990, no writ).

A. Lawyer-Client Privilege

The recognition of the lawyer-client privilege dates back to common law and is designed to protect confidential communications between attorney and client, which are made to facilitate the rendition of legal services. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995) (orig. proceeding), *superseded on other grounds by* Tex. R. Civ. P. 192.3(g). The purpose of the lawyer-client privilege is to promote unrestrained communication between attorney and client by eliminating the fear that the attorney will disclose confidential information in any legal proceeding. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding). Although not all communications between attorney and client are privileged, those communications which fall within the lawyer-client privilege are protected from disclosure. *Sanford v. State*, 21 S.W.3d 337, 342 (Tex. App.—El Paso 2000, no pet.), *abrogated on other grounds by Motilla v. State*, 78 S.W.3d 352 (Tex. Crim. App. 2002). The court in *Sanford* noted: "Underlying this privilege is an attorney's need to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* (quoting *Strong v. State*, 773 S.W.2d 543, 547 (Tex. Crim. App. 1989)). Thus, the aspirational purpose of the privilege is the promotion of communication between attorney and client unrestrained by fear that these confidences may later be revealed. *Strong*, 773 S.W.2d at 547; *Sanford*, 21 S.W.3d at 342.

1. Three-Part Test

A three-part test must be met before the lawyer-client privilege may attach to protect information. First, the communication must be between those individuals included in Rule 503(b) of the Texas Rules of Evidence. *See* Tex. R. Evid. 503(b). Second, the communication sought to be protected must be "confidential." Tex. R. Evid. 503(a)(5). Third, the communication sought to be protected must have been made to facilitate the rendition of legal services to the client. Tex. R. Evid. 503(b)(1).

a) Individuals Included

Rule 503(b)(1) of the Texas Rules of Evidence provides protection for communications between the following individuals:

(1) Lawyer and Client

To determine the applicability of the lawyer-client privilege under Rule 503 of the Texas Rules of Evidence, an individual is considered a "client" of the attorney if he "is rendered professional legal services by a lawyer" or "consults a lawyer with a view to obtaining professional legal services from that lawyer." Tex. R. Evid. 503 (a)(1). A client may be a person, public officer, or corporation, association, or other organization or entity, and may be either public or private. *Id.* If a professional relationship exists between the attorney and client wherein the attorney provides professional legal services to the client, communications made for the purpose of rendering legal services are protected from disclosure by the lawyer-client privilege. *In re Ford Motor Co*., 988 S.W.2d 714, 719 (Tex. 1998) (orig. proceeding). As long as a professional relationship exists in which professional legal services are provided by the lawyer to the client, litigation need not be pending in order for the lawyer-client privilege to apply. *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996) (orig. proceeding). Actual employment of the attorney is not required for the applicability of the lawyer-client privilege. Communications between the lawyer and the client during an initial consultation are privileged if the

communication takes place in the attorney's capacity of rendering professional legal services and if the communication is related to the client's legal problems. Tex. R. Evid. 503 (a)(1); *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 332 (Tex. App.—Austin 2000, pet. denied). The fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention. *Braun v. Valley Ear, Nose, and Throat Specialists*, 611 S.W.2d 470, 472–73 (Tex. App.—Corpus Christi 1980, no writ). All that is required under Texas law is that the parties, either explicitly or by their conduct, manifest an intention to create the lawyer-client relationship. *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). Furthermore, payment of a fee to the attorney is not required to give rise to the lawyer-client relationship. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

(2) Representatives of the Lawyer

The protection afforded to communications between the lawyer and client is extended to protect communications with "representatives" of the attorney. Tex. R. Evid. 503(b)(1)(A)–(B). A lawyer's representatives include those employed by the lawyer to assist in the rendition of professional legal services to the client and specifically include accountants who provide services that are reasonably necessary to the lawyer's rendition of professional legal services. Tex. R. Evid. 503(a)(4)(A)–(B). Communications with legal assistants, secretaries, and investigators also fall within the protection provided by the lawyer-client privilege. Tex. R. Evid. 503(a)(4)(A); *Bearden v. Boone*, 693 S.W.2d 25, 27–28 (Tex. App.—Amarillo 1985, orig. proceeding). One caveat, however, is that images of underlying facts (e.g., a private investigator's photos) are excepted from work product protection. Tex. R. Civ. P. 192.5(c)(4). It is also important to note that the attorney's "representative" must be hired by, or at the direction or request of, the attorney. Once the lawyer-client relationship exists and the "representative" is hired by or at the direction of the attorney, the client's direct payment to the representative is immaterial. *See, e.g.*, *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197–98 (Tex. 1993) (orig. proceeding).

(3) Representatives of the Client

Communications with a client's representative also fall within the protections provided by the lawyer-client privilege. Tex. R. Evid. 503(b)(1). An individual is a client's representative for purposes of the lawyer-client privilege if that person is authorized to obtain or act upon professional legal services on behalf of the client, or if that person, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client. Tex. R. Evid. 503(a)(2).

b) Confidential Communications Protected

Only confidential communications are protected from disclosure by the lawyer-client privilege. Tex. R. Evid. 503(b); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding). Whether a communication is confidential is largely determined by the client's intent. A communication is confidential if the client communicates it to the attorney or his representative and the client does not intend that the information be disclosed to third persons, other than to those in furtherance of the rendition of legal services to the client or to those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5); *Ates v. State*, 21 S.W.3d 384, 394 (Tex. App.—Tyler 2000, no pet.). A communication between attorney and client in the presence of a third party who is not the attorney's representative is not confidential and, therefore, is unprotected by the lawyer-client privilege. *Ledisco Fin. Servs., Inc. v. Viracola*, 533 S.W.2d 951, 959 (Tex. App.—Texarkana 1976, no writ).

Practice Note: When a client wishes to discuss issues relevant to the representation of the client while a third party is present, the attorney should advise the client that the presence of the third party waives the lawyer-client privilege and that the third party's testimony regarding the contents of the discussion may be required or compelled.

(1) Lawyer-client Privilege Protects Entire Contents of Confidential Communication

If the requirements for the lawyer-client privilege are met, the lawyer-client privilege will protect the contents of the complete communication. *In re Seigel*, 198 S.W.3d 21, 27 (Tex. App.—El Paso 2006, orig. proceeding). For example, once the lawyer-client privilege protects the disclosure of a particular statement within a document, the entire document is protected from disclosure. *In re Valero Energy Corp*., 973 S.W.2d 453, 457–58 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding).

(2) Confidential Information Protected from Eavesdroppers

Because the lawyer-client privilege is defined by the

intent of the client, the privilege is not destroyed by an eavesdropper who overhears the confidential communications between attorney and client. Tex. R. Evid. 503(a)(5); *Ates*, 21 S.W.3d at 393–94; *but see Clark v. State*, 261 S.W.2d 339, 342–43 (Tex. Crim. App. 1953) (holding that, because client did not take precautions to avoid eavesdroppers, communication was properly admitted). Therefore, if a communication that was overheard by a third party was not intended to be heard by or disclosed to a third party, the lawyer-client privilege may remain intact. *See In re Small*, 346 S.W.3d 657, 662–63 (Tex. App.—El Paso 2009, orig. proceeding).

Practice Note: If documents or other evidence is intended to be confidential, those communications should be preserved and maintained as confidential; otherwise, any privilege that may have existed could be forfeited. *See Burnett v. State*, 642 S.W.2d 765, 777 (Tex. Crim. App. 1982) (en banc) (Dally, J., dissenting).

(3) Contracts for Representation and Attorney's Fees

Evidence relating to the retention or employment of an attorney and the attorney's fees paid is not protected by the lawyer-client privilege. *Duval Cty. Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634–35 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.). One exception exists, however: evidence showing the retention or employment of an attorney is protected from disclosure if disclosure of the lawyer-client relationship would tend to implicate the client in the commission of a crime. *Jim Walter Homes, Inc. v. Foster*, 593 S.W.2d 749, 752 (Tex. App.—Eastland 1979, no writ).

c) Communications Made for the Purpose of Providing Legal Assistance

The third requirement for protection of a communication by the lawyer-client privilege is that it must have been in the context of providing legal services to the client. Specifically, Rule 503 provides protection for confidential communications made to facilitate "the rendition of professional legal services to the client." Tex. R. Evid. 503(a)(5), (b)(1). Although the scope of the lawyer-client privilege is broad, a material fact may not be concealed under the lawyer-client privilege merely because it is disclosed to an attorney. *Huie*, 922 S.W.2d at 923. The lawyer-client privilege will not apply to protect communications made if the attorney is not acting in his capacity as attorney. *In re Tex. Farmers Ins.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding). For example, if an attorney acts as an accountant, the communications between the attorney and client in relation to the accounting services provided are not protected under the lawyer-client privilege. *Harlandale Indep. Sch. Dist.*, 25 S.W.3d at 332.

2. Asserting the Lawyer-client Privilege

a) Who May Assert the Lawyer-client Privilege?

The lawyer-client privilege belongs to the client. *In re XL Specialty Ins. Co.*, 373 S.W.3d at 49; *Chance v. Chance*, 911 S.W.2d 40, 63 (Tex. App.—Beaumont 1995, writ denied). The lawyer-client privilege may be claimed or invoked only by the client or the client's representative. Tex. R. Evid. 503(c). Specifically, Rule 503(c) allows "the client; the client's guardian or conservator; a deceased client's personal representative; or the successor, trustee, or similar representative of a corporation, association, or other organization" to assert the lawyer-client privilege on behalf of the client. *Id.* The client's attorney is presumed under Rule 503(c) to have the authority to invoke the attorney client privilege; however, the attorney may only do so on behalf of the client. *Id.* The attorney may not invoke the lawyer-client privilege on his own behalf. *Turner v. Montgomery*, 836 S.W.2d 848, 850 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). The lawyer's representative also has the authority to claim the lawyer-client privilege on behalf of the client. *Bearden*, 693 S.W.2d at 28. In *Bearden*, the court of appeals held that a private investigator, as a representative of the attorney, had the authority to claim the lawyer-client privilege on behalf of the client and that the information he acquired through his investigation was protected from disclosure under the lawyer-client privilege. *Id.*

b) When Must the Privilege Be Asserted?

The lawyer-client privilege must be asserted at the time the response to the question requesting the privileged information is due.

c) Evidence Presented to Support the Assertion of Privilege

Evidence to support the assertion of the lawyer-client privilege may be required. For example, documents are not afforded the protections of the lawyer-client privilege without some evidence supporting the assertion of privilege. *Eckermann v. Williams*, 740 S.W.2d 23, 25 (Tex. App.—Austin 1987, orig. proceeding). The test for determining whether a communication is confidential looks to the nature of the communication, not the subject matter. *Keene Corp. v. Caldwell*, 840 S.W.2d 715, 720 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding). A party makes a prima facie claim of

privilege by pleading that a communication is confidential, supported by attorney affidavits and detailed privilege logs, and possibly submitting the documents for in camera review. *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 591 (Tex. App.—Dallas 1994, orig. proceeding). The burden of proof then shifts to the opposing party to refute the claim. *Id.*

Practice Note: When the privileged documents themselves are the only evidence that the privilege exists, you must request that the court perform an in camera review and produce the documents to the court for the court to make its determination. *See Tilton v. Moye*, 869 S.W.2d 955, 957 (Tex. 1994) (orig. proceeding); *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proceeding). The court of appeals, in an original proceeding, may perform an in camera review of these documents to make that determination as well. *See, e.g.*, *In re Fairway Methanol LLC*, 515 S.W.3d 480, 494 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).

d) Duration of the Lawyer-client Privilege

The lawyer-client privilege continues even after the conclusion of the lawsuit or the employment of the attorney and will protect disclosure of confidential information for as long as the client asserts the privilege. *Bearden*, 693 S.W.2d at 28. The lawyer-client privilege even continues after the death of the client. Tex. R. Evid. 503(c)(3). The privilege may be claimed or waived by "the client; the client's guardian or conservator; a deceased client's personal representative; or the successor, trustee, or similar representative of a corporation, association, or other organization or entity--whether or not in existence." *Id.*

3. Exceptions to the Lawyer-client Privilege

Rule 503(d) of the Texas Rules of Evidence provides the exclusive list of exceptions to the lawyer-client privilege. This rule provides that no lawyer-client privilege exists in the following circumstances:

1. When the attorney's services were sought or obtained in order to enable crime or fraud.

2. When the communication is relevant to an issue between parties who assert claims through the same deceased client.

3. When a client sues a lawyer for breach of duty by the lawyer to the client.

4. When a lawyer acts as attesting witness to a document, no lawyer-client privilege exists as to communications relevant to an issue concerning the attested document.

5. In litigation where one attorney represents two or more clients, no lawyer-client privilege exists as to matters that are of mutual interest between or among the clients.

4. Lawyer-client Privilege Distinguished from Attorney Work-Product

Although the lawyer-client privilege and the attorney work-product privilege may, many times, protect the same material, it is important for the practitioner to distinguish one from the other so that each may be properly asserted. The lawyer-client privilege protects confidential client communications from disclosure. Tex. R. Evid. 503. The attorney-work-product privilege protects the material prepared and mental impressions developed in anticipation of litigation. Tex. R. Civ. P. 192.5.

While the lawyer-client privilege belongs to and protects the client, the work-product protection belongs to and protects the attorney. *Pope v. State*, 207 S.W.3d 352, 257–58 (Tex. Crim. App. 2006). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). "The privilege continues indefinitely, beyond the litigation for which the materials were originally prepared." *In re Bexar Cty. Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 186 (Tex. 2007) (orig. proceeding).

The attorney work-product privilege acts as a limitation to the scope of discovery. Work product is defined in Rule 192.5(a) of the Texas Rules of Civil Procedure as "material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents." Tex. R. Civ. P. 192.5(a). "Core" work product, which consists of work product of an attorney or an attorney's representative containing the mental impressions, opinions, conclusions, or legal theories of the attorney or attorney's representative, is not discoverable. Tex. R. Civ. P. 192.5(b)(1). Other work product not qualifying as "core" work product is protected from discovery unless the party requesting the discovery shows substantial need

for the discovery in the preparations of the case. Tex. R. Civ. P. 192.5(b)(2).

In *In re National Lloyds Insurance Company*, the Supreme Court of Texas held that redacting privileged information in an attorney's billing records would be insufficient as a matter of law to mask the attorney's thought processes and strategies, i.e., work product. 532 S.W.3d 794, 804–07 (Tex. 2017) (orig. proceeding). A request for all billing invoices, payment logs, payment ledgers, payment summaries, documents showing flat rates, and audits invades the zone of work-product protection, but a more narrowly tailored request may be proper. *Id.* at 806. Work-product privilege, however, does not apply to experts, so an attorney's billing records who is designated as an expert could come in that way. *Id.* at 813–14. Further, this privilege may be waived when trying to prove up attorney's fees. *Id.* at 807.

5. Ethical Duty of Attorneys not to Disclose Client Confidences

The ethical duty of the lawyer not to disclose confidences of the client should be distinguished from the lawyer-client privilege not to disclose confidential information. An attorney owes the client a professional duty not to disclose client "confidences" and "secrets." Tex. Disciplinary Rules of Prof'l Conduct R. 1.05(b). The ethical duty of the attorney under the Rules of Professional Conduct is much broader and prohibits the attorney from disclosing any information gained about the client without the client's consent, except under the specific circumstances provided in the rules.

B. Husband-Wife Privileges

Two privileges arising out of the marital relationship exist. *See* Tex. R. Evid. 504. First, a husband and wife have the privilege of refusing to disclose, and to prevent the disclosure of, confidential communications. Tex. R. Evid. 504(a). Second, spouses have the right to refuse to testify against each other in a criminal case. Tex. R. Evid. 504(b)

1. Confidential-Communications Privilege

Communications made privately between spouses during the marriage, which were not intended for disclosure to any third party, are protected from disclosure. Tex. R. Evid. 504(a). This spousal privilege belongs to the communicating spouse and may be asserted by that spouse or by the non-communicating spouse on behalf of the communicating spouse. Tex. R. Evid. 504(a)(3). The protection from disclosure of communications made during the marriage survives the divorce of the spouses or the death of the communicating spouse. Tex. R. Evid. 504(a)(2).

a) Communications Protected

The marital-communications privilege protects verbal and written communications. *Freeman v. State*, 786 S.W.2d 56, 59 (Tex. App.—Houston [1st Dist.] 1990, no writ). A spouse has no privilege to refuse to disclose the actions or conduct of the other spouse. *Id.* (citing *Pereira v. United States*, 347 U.S. 1, 6 (1954)). Communications between spouses in front of third parties are not protected. *Bear v. State*, 612 S.W.2d 931, 932 (Tex. Crim. App. 1981). It should be noted that, in civil cases, the confidential-communications privilege permits a spouse to refuse to testify regarding the contents of a confidential communication made between husband and wife during the marriage; however, it may not be asserted by a spouse to avoid being called by the opposing party as a witness. Tex. R. Evid. 504; *see also Marshall v. Ryder Sys., Inc.*, 928 S.W.2d 190, 195 (Tex. App.—Houston [14th Dist.] 1996, writ denied) ("Only in criminal cases is there a broad, general privilege protecting a person from being a witness against his or her spouse.").

b) Exceptions to the Husband Wife Confidential Communications Privilege.

The exceptions to the husband-wife communications privilege are located in Rule 504(a)(4). Of particular relevance to the family law practitioner are the exceptions permitting disclosure of confidential marital communications in proceedings between spouses in civil cases and in proceedings in which a spouse is accused of committing a crime against the other spouse, any minor child, or a member of either spouse's household. Tex. R. Evid. 504(a)(4)(B), (C). Certainly, such exceptions substantially eliminate the husband-wife confidential communications privilege in family law matters, and in fact, noted practitioners have commented that the confidential communications privilege has no application in the area of family law. *See* Warren Cole, Sally H. Emerson, and Linda B. Thomas, "Evidence: Predicates, Presumptions, and Privileges" p. S-33, Advanced Family Law Course 1996. Statements between spouses relating to the present dispute between them are an additional exception to the husband-wife confidential communications privilege. In *Earthman's Inc. v. Earthman*, the Houston First Court of Appeals held that the admission of evidence as to communications between spouses, made prior to the parties' divorce, was permissible to the extent that the communications related to the controversy that gave rise to the lawsuit between

them. 526 S.W.2d 192, 206 (Tex. App.—Houston [1st Dist.] 1975, no writ).

2. Privilege not to Testify in Criminal Proceedings against Spouse

The spouse of the accused in a criminal proceeding has a right to refuse to testify as a witness for the state. Tex. R. Evid. 504(b)(1). The privilege belongs to the spouse of the accused only and may not be asserted by the accused to prevent the other spouse from acting as a witness. Tex. R. Evid. 504(b)(3). One should note that when the Texas Rules of Civil Evidence and Texas Rules of Criminal Evidence were merged and renamed the Texas Rules of Evidence, the former rule of criminal evidence permitting the accused to prevent his spouse from testifying was eliminated. *Compare* former Tex. R. Crim. Evid. 504, *with* Tex. R. Evid. 504(b). The spouse of the accused may not refuse to testify in proceedings in which the accused is charged with a crime against that spouse, against any minor, or against a member of either spouse's household. Tex. R. Evid. 504(b)(4)(A); *Huddleston v. State*, 997 S.W.2d 319, 320–21 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding that the husband-wife privilege did not apply to prevent defendant's spouse from testifying in prosecution for sexual assault and kidnapping of a minor who was unrelated to the husband and the wife).

C. Communications to Members of the Clergy

1. Clergy Privilege is Broad in Scope

The clergy privilege in Texas is quite broad in scope. Rule 505 provides no exceptions to the clergy privilege. Tex. R. Evid. 505. The privilege protects confidential communications made to a member of the clergy who is acting in his capacity as a "spiritual advisor." *Id.* Communications made to a member of the clergy acting in a capacity other than spiritual advisor, such as administrator, are not privileged. *Kos v. State*, 15 S.W.3d 633, 639 n.4 (Tex. App.—Dallas 2000, pet. ref'd). The privilege is not limited only to penitent communications, however. *Easley v. State*, 837 S.W.2d 854, 856 (Tex. App.—Austin 1992, no writ). If communications to a member of the clergy are made with a reasonable expectation of confidentiality, the privilege will apply, even if the statements were made in the presence of third parties. *Nicholson v. Wiitig*, 832 S.W.2d 681, 685 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). Even the identity of one who has communicated with a member of the clergy is privileged. *Simpson v. Tennant*, 871 S.W.2d 301, 308–09 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). The clergy privilege may be claimed by the person who communicated to the clergy, the communicant's guardian or conservator, or the clergy member on behalf of the communicant. Tex. R. Evid. 505(c).

2. Exception in Cases of Neglect or Abuse of Child

The Rules of Evidence provide no exceptions to the clergy privilege, but Section 261.202 of the Family Code states that privileged communications, except those between attorney and client, "may not be excluded" in a proceeding involving the abuse or neglect of a child. Tex. Fam. Code Ann. § 261.202; *Gonzalez v. State*, 45 S.W.3d 101, 107 (Tex. Crim. App. 2001). Additionally, as required by Section 261.101 of the Family Code, members of the clergy have an affirmative duty to report any cause to believe that a child's welfare has been adversely affected by abuse or neglect. Tex. Fam. Code Ann. § 261.101; *Gonzalez*, 45 S.W.3d at 107 n.12.

3. Waiver of Privilege in Custody Cases

In a suit for conservatorship, where the character of the conservators is necessarily at issue, a spouse who communicated confidential information to a member of the clergy waives the privilege by calling the clergy member as a character witness. Tex. R. Evid. 511(a)(2). Therefore, on cross-examination of the clergy member by the other spouse, confidential communications to the clergy member will not be protected from disclosure by the privilege. *Gonzalez*, 45 S.W.3d at 107.

D. Physician-Patient Privilege

In civil proceedings, unless an exception applies, confidential communications between a patient and physician, which are not intended to be disclosed to third persons who were not present or participating in the diagnosis and treatment, are privileged from disclosure. Tex. R. Evid. 509(a). The privilege serves to encourage full disclosure to facilitate the rendition of professional services by the physician and to prevent unnecessary disclosure of highly personal information. *Ex Parte Abell*, 613 S.W.2d 255, 262–63 (Tex. 1981). The physician-patient privilege is found in the Texas Rules of Evidence and in Texas case law interpreting these rules. Texas courts have held that medical records also fall within the zone of privacy protected by the United States Constitution. *See, e.g.*, *In re Columbia Valley Reg'l Med. Ctr.*, 41 S.W.3d 797, 802–03 (Tex. App.—Corpus Christi 2001, orig. proceeding); *In re Xeller*, 6 S.W.3d 618, 625 (Tex. App.—Houston 1999, orig. proceeding). The physician-patient privilege does not exist under the Federal Rules of Evidence. *Perkins v. United States*, 877

F.Supp. 330, 332 (E.D. Tex. 1995); *see, generally*, Fed. R. Evid. 501. The physician-patient privilege is similar to the lawyer-client privilege to the extent that the determination of whether the communication is confidential is largely determined by the communicator's intent. Tex. R. Evid. 509(a)(3). The physician-patient privilege may be invoked by the patient, the patient's representative, or the patient's physician on behalf of the patient. Tex. R. Evid. 509(d). However, there are a number of exceptions to the physician-patient privilege, which are contained in Rule 509(e).

Practice Note: Read this privilege together with the hearsay exception of statements for the purpose of medical diagnosis or treatment. It is interesting to consider that the hearsay exception includes statements made to third parties in the hopes that they would assist with diagnosis or treatment, while the privilege does not.

1. Releases

One of the exceptions to the privilege, often relevant in family law proceedings, is the waiver or release of confidential information by the written consent of the patient or representative of the patient. Tex. R. Evid. 509(f).

The consent must be in writing and signed by the patient, or representative of the patient, and must be drafted to specify the information or records to be covered by the release, the purpose for the release, and the person to whom the information is to be released. Tex. R. Evid. 509(f)(1)–(2). There is no requirement that the release cover all the information or records in the physician's file. *See, generally*, Tex. R. Evid. 509. The release should be narrowly drawn to permit release of only the relevant information. The exceptions to the medical and mental health privileges apply when the pleadings sufficiently show (1) the records sought to be discovered are relevant to the condition in issue and (2) the condition is relied upon as part of a party's claim or defense. Tex. R. Evid. 509(e)(4), 510(d)(5); *R.K. v. Ramirez*, 887 S.W.2d 836, 842–43 (Tex. 1994) (orig. proceeding).

2. Patient-Litigant Exception

The court in *R.K.* discusses the exception to the physician-patient privilege when the condition is part of a claim or defense: "The patient-litigant exception to the privileges applies when a party's condition relates in a significant way to a party's claim or defense." *R.K.*, 887 S.W.2d at 842–43 (citing Tex. R. Evid. 509(d)(4)). Patient-litigant communications and patient records should not be subject to discovery if the patient's condition is simply an evidentiary, intermediary, or tangential issue of fact, rather than an "ultimate" or "central" issue for a claim or defense. *Id.* at 842. "The scope of the exception should be tied in a meaningful way to the legal consequences of the claim or defense. This is accomplished . . . by requiring that the patient's condition, to be a 'part' of a claim or defense, must itself be a fact to which the substantive law assigns significance." *Id.* The court provided the example of alleging a testator to be incompetent, which would be an allegation of a mental "condition," and incompetence, if found, is a factual determination to which legal consequences attach, i.e. the testator's will is no longer valid. *Id.* at 842–43. "This approach is consistent with the language of the patient-litigant exception because a party cannot truly be said to 'rely' upon a patient's condition, as a legal matter, unless some consequence flows from the existence or non-existence of the condition." *Id.* at 843.

If the trial court, after reviewing documents submitted in camera, finds that this first step is satisfied, it must ensure that the production of documents, if any, is no broader than necessary by considering the competing interests at stake. *Id.* The exception only allows for the discovery of records "relevant to an issue of the . . . condition of a patient." *Id.* Therefore, even though a condition may be part of a claim or defense, patient records should only be disclosed to the extent necessary for relevant evidence relating to the condition alleged. *Id.* Thus, courts that review claims of privilege and inspect records in camera should confirm that both the request for records and the records themselves are closely related in time and scope to the claims made to avoid unnecessary intrusions into private matters. *Id.* "Even when a document includes some information meeting this standard, any information not meeting this standard remains privileged and must be redacted or otherwise protected." *Id.*

This approach has several advantages: most importantly, some protection of a patient's privacy interest will remain intact. *Id.* Access to the medical and mental health information will be disclosed only if the patient's condition itself is a fact issue with legal significance and only to the extent necessary to satisfy the discovery needs of the requesting party. *Id.*

"To summarize, the exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance. Both parts of the test must be met before the exception will apply. Even then, when requested, the trial court must perform an in camera

inspection of the documents produced to assure that the proper balancing of interests . . . occurs before production is ordered." *Id.*

3. HIPAA

The court in *Collins* discusses the impact of federal HIPAA legislation on the use of medical records at trial: "Congress enacted HIPAA to increase the portability of health insurance and to reduce health care costs by simplifying administrative procedures. The development of national standards for electronic medical records management was central to the goal of simplification. Envisioning increasing privacy concerns associated with the move toward electronic record-keeping, Congress simultaneously authorized the secretary of the United States Department of Health and Human Services to promulgate rules governing the disclosure of confidential medical records. The privacy rules HHS enacted strike a balance that permits important uses of information, while protecting the privacy of people who seek care and healing. The privacy rules prohibit the disclosure of protected health information except in specified circumstances. A person who discloses protected health information in violation of the privacy rule is subject to a fine of up to $50,000, and imprisonment of no more than a year, or both. Health information means any information, whether oral or recorded in any form or medium. With limited exceptions, HIPAA's privacy rules preempt any contrary requirement of state law unless the state law is more stringent than the federal rules. A requirement is contrary if it would be impossible for a covered entity to comply with both the state law requirement and the HIPAA privacy rules, or if the requirement would undermine HIPAA's purposes.

"While the rules strongly favor the protection of individual health information, they permit disclosure of health information in a number of circumstances. In a judicial proceeding, protected information may be disclosed in response to a court order. It may also be disclosed without a court order in response to a subpoena or discovery request if the health care provider receives satisfactory assurances that the requestor has made reasonable efforts to ensure that the subject of the information has been given notice of the request. A health care provider receives satisfactory assurances when the requestor provides a written statement and documentation demonstrating that the requestor has made a good faith attempt to notify the subject of the request, and the subject has been given an opportunity to object. Alternatively, the requestor may provide satisfactory assurances that reasonable efforts have been made to obtain a qualified protective order limiting the use of the information to the legal proceeding and providing for its return or destruction. Finally, health care information may be disclosed if the patient has executed a valid written authorization. Any disclosure the health care provider makes in reliance on a written authorization must be consistent with its terms." *In re Collins*, 286 S.W.3d 911, 917–18 (Tex. 2009) (orig. proceeding) (internal citations and quotations omitted).

HIPAA does not provide for a private right of action. Any violations may be reported to HHS, which is the only party authorized to investigate and penalize violations.

E. Privilege Relating to Mental-Health Information

Any communication or records between a patient and a professional relating to the identity, diagnosis, evaluation, or treatment of a patient's mental and emotional condition or disorder is privileged and exempt from disclosure in civil proceedings. Tex. R. Evid. 510(a)–(b). The purpose behind such a rule is to encourage "the full communication necessary for effective treatment." *R.K.*, 887 S.W.2d at 840. The Supreme Court of the United States held that the mental health privilege is necessary in order to ensure effective psychotherapy, which "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996).

1. SAPCR

The comment to the current Rule 510 of the Rules of Evidence points out that the omission of the specific exception to the mental-health privilege from the rule does not eliminate the application of the mental-health privilege in a SAPCR case. Tex. R. Evid. 510 cmt. to 1998 change. Rather, the comment notes that the applicability of the mental-health privilege is determined under Rule 510(d)(5), which provides an exception to the privilege when a party relies upon the condition of the patient's mental health as part of the party's claim or defense, and under the requirements set forth by the Texas Supreme Court in *R.K. v. Ramirez*. *Id.*; *see R.K.*, 887 S.W.2d at 842–43. In *R.K.*, the Supreme Court of Texas held that mental-health information of a party to a suit affecting the parent-child relationship is not protected by privilege if the fact finder must make a factual determination concerning the condition itself. *R.K.*, 887 S.W.2d at 843. The court explained, however, that the exception to the mental-health privilege is not without limits and held that, in applying the exception, the court must balance the need for the information with the privacy interests protected by the privilege. *Id.* A more recent

case, *Garza*, has applied *R.K.* as follows: "Generally, the diagnosis of a patient by a physician and the communications between a patient and physician are privileged. Likewise, with regard to a person's mental health, the diagnosis of the patient and communications between the patient and a mental-health professional are privileged. However, these privileges are not absolute. An exception to both privileges applies to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense." *Garza v. Garza*, 217 S.W.3d 538, 554–55 (Tex. App.—San Antonio 2006, no pet.); *accord JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 837–38 (Tex. 2018). In *Garza*, the mother's medical condition relating to her personality and bipolar disorders was relevant to the issue of whether appointing her as sole managing conservator was in her children's best interests. *Garza*, 217 S.W.3d at 555. Both parties' medical and mental conditions were relevant to the determination of which party should be named as the conservator. *Id.* No abuse of discretion occurred when the trial court allowed that information into evidence, especially where the trial court did not allow all of mother's medical and mental-health records in evidence, but instead took care to exclude references that predated the marriage. *Id.*

2. Court-Ordered Evaluations

Under Rule 510(d)(4), communications regarding a patient's mental or emotional health to a mental-health professional appointed by the court to perform an examination are not privileged as long as the patient had been previously informed that the communications would not be privileged. *Subia v. Tex. Dep't of Human Servs.*, 750 S.W.2d 827, 830 (Tex. App.—El Paso 1988, no writ), *disapproved of on other grounds by In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), (trial court erred in admitting testimony of court-appointed psychologist when neither the court nor the psychologist informed the mother that the communications between the mother and the psychologist would not be privileged).

3. Disclosure of Child's Mental-Health Records to Parent

Although the Supreme Court of Texas did not directly address the issue of the assertion of the mental-health privilege in *Abrams v. Jones*, that case deserves discussion due to its support for protecting the mental-health records of a minor from disclosure. 35 S.W.3d 620 (Tex. 2000). In *Abrams*, when the father-joint-managing conservator was denied access to the notes taken by the daughter's psychologist during therapy sessions, he filed suit against the psychologist seeking to compel the release of the psychologist's notes. *Id.* at 623. The father, who had been granted a right of access to the psychological records under the parties divorce decree in accordance with Section 153.073 of the Family Code, alleged that such a right granted him a greater right of access to mental health records than parents generally have under Chapter 611 of the Health and Safety Code. *Id.* at 624. Specifically, the father argued that the right of access to mental health records under Section 153.073(a)(3), granted to him in the parties' divorce decree, permitted him access to all the child's psychological records at all times. *Id.* The Supreme Court of Texas held that the right of access to psychological records of the child under Section 153.073(a)(3) provides no greater right of access than is granted to parents who are not divorced and that Section 153.073 merely ensures that the right of access of divorced parents appointed as managing conservators is the same as that of non-divorced parents. *Id.* Accordingly, the court held that the determination of whether the records should be ordered to be released is governed by Chapter 611 of the Health and Safety Code. *Id.* The court held that the applicable sections of Chapter 611 of the Health and Safety Code do not provide parents unrestricted access to mental health records of their children. *Id.* at 626. The court recognized that the purpose behind Chapter 611 is to "closely guard a patient's communications with a mental-health professional." *Id.* (quoting *Thapar v. Zezulka*, 994 S.W.2d 635, 638 (Tex. 1999)). Furthermore, although many times it is necessary for a parent to have access to the child's records, unrestrained access to all the child's mental-health records would act as an obstacle to full disclosure by the patient, thereby preventing the goals of therapy from being met. *Id.* In its analysis, the court discussed the protections afforded to both the child and the parent under Chapter 611 and specifically addressed the fact that the rights of the parent are protected by Chapter 611 of the Health and Safety Code by providing recourse to a parent who is denied access to his child's mental health records. *Id.*; Tex. Health & Safety Code Ann. §§ 611.0045(e), 611.005(a). Obviously, this holding may have a significant impact upon the family law practitioner's ability to obtain access to the psychological records of children the subject of a lawsuit.

4. Alcohol and Drug Rehabilitation Records

Federal regulations provide that records of alcohol and drug rehabilitation treatment are confidential. *See* 42 C.F.R. Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records; *see also In re K.C.P.*, 142 S.W.3d 574, 582 (Tex. App.—Texarkana 2004, no pet.). However, the

regulations apply to information held by a treatment center, so discovery directed at a patient may still be effective. Further, upon good cause, a court can order the records released, pursuant to specific procedures.

F. Privilege against Self Incrimination in Civil Cases

The *Speer* case gives an excellent summary of the application of the privilege against self-incrimination in civil cases. *In re Speer*, 965 S.W.2d 41, 45–47 (Tex. App.—Fort Worth 1998, orig. proceeding).

1. The Rule

"Both the United States Constitution and the Texas Constitution guarantee an accused the right not to be compelled to testify or give evidence against himself. A party does not lose this fundamental constitutional right in a civil suit. Thus, the privilege against self-incrimination may be asserted in civil cases wherever the answer might tend to subject to criminal responsibility him who gives it." *Id.* at 45 (internal citations and quotations omitted). Because both the United States and Texas Constitutions protect a witness, the witness should answer each question accordingly: "On the advice of counsel, I decline to answer the question pursuant to Article I, Section 10 of the Texas Constitution and pursuant to the Fifth Amendment of the United States Constitution." A party or witness retains his privilege against self-incrimination and has the right to assert the privilege to avoid civil discovery if he reasonably fears the answers would tend to incriminate him. *Tex. Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995); *Ex parte Butler*, 522 S.W.2d 196, 197–98 (Tex. 1975). However, the privilege covers only statements or information that may lead to criminal prosecution; information which may lead to civil liability is not protected. *Butler*, 522 S.W.2d at 198. Non-compelled testimonial communications are not protected by the privilege. *Wielgosz v. Millard*, 679 S.W.2d 163, 166–67 (Tex. App.—Houston [14th Dist.] 1984, no writ). One invoking the privilege need not show that the disclosure of the information sought to be protected alone will support conviction. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Rather, if the potentially-incriminating information or documents would provide a link to the incrimination of the one claiming the privilege, the Fifth Amendment privilege will protect the information from disclosure. *Id.* Further, there is no requirement that any criminal charges be pending if the threat or hazard of criminal prosecution is "real and appreciable" if the potentially incriminating evidence were disclosed. *State v. Boyd*, 2 S.W.3d 752, 755 (Tex. App.—Houston [14th Dist.] 1999), *rev'd on other grounds*, 38 S.W.3d 155 (Tex. Crim. App. 2001); *accord United States v. Doe*, 465 U.S. 605, 614 n.13 (1984); *Hoffman*, 341 U.S. at 486. If the individual asserting the privilege has been granted immunity from, acquitted of, or pardoned of the criminal conduct at issue, the state may compel testimony in a civil proceeding. *In re Verbois*, 10 S.W.3d 825, 829 (Tex. App.—Waco 2000, orig. proceeding). If the party continues to assert the privilege, however, that silence does not preclude an adverse inference, and ruling based on that inference, in a civil proceeding. *Id.* But it is important to note that if the acquittal, immunity, or pardon granted is not complete, or if possible liability exists for a related crime, the privilege will still apply. *Kastigar v. United States*, 406 U.S. 441, 448–49 (1972). The privilege against self-incrimination provides the right of testimonial silence. U.S. Const. amend. V. In a civil case, however, it does not allow a witness to refuse to be called as a witness. *Butler*, 522 S.W.2d at 197–98.

2. The Test

In a civil suit, the witness's decision to invoke the privilege against self-incrimination is not absolute. Instead, the trial court is entitled to determine whether assertion of the privilege appears to be based upon the good faith of the witness and is justifiable under all of the circumstances. *Id.* at 198. The court's inquiry is necessarily limited, though, because the witness need only show that a response is likely to be hazardous to him. *Id.* The witness cannot be required to disclose the very information that the privilege protects. *Id.* Before the trial court may compel the witness to answer, it must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency to incriminate." *Id.* (quoting *Hoffman*, 341 U.S. at 487).

Thus, the court must study each question for which the privilege is claimed and forecast whether an answer to the question could tend to incriminate the witness in a crime. *Warford v. Beard*, 653 S.W.2d 908, 911 (Tex. App.—Amarillo 1983, no writ). Some cases have apparent ramifications from answering; others, though, are not so apparent. *Id.* The latter situation presents a difficult problem because the witness must reveal enough to demonstrate danger without revealing the very information he or she seeks to conceal. *Id.* After the witness has given the reasons for refusing to answer, the judge must then evaluate those reasons by the high standard of review stated previously. *Id.* It is the trial court's duty to consider the witness's evidence and argument on each individual question and determine whether the privilege against self-incrimination is

meritorious. *Burton v. West*, 749 S.W.2d 505, 508 (Tex. App.—Houston [1st Dist.] 1988, no writ).

3. Assertion and Waiver

The privilege is applied differently in civil and criminal cases. When a criminal defendant voluntarily testifies on his own behalf, he is subject to the same rules of cross-examination as any other witness. In that situation, if a criminal defendant voluntarily states a part of the testimony, he waives his right against self-incrimination and cannot afterwards assert the privilege to suppress other testimony even if that testimony would incriminate him.

The same reasoning does not apply in civil cases. Because of the difference between the civil and criminal context, the Supreme Court of the United States allows juries in civil cases to make negative inferences based upon the assertion of the privilege. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). And as previously discussed, the civil witness, unlike the defendant in a criminal case, is not the exclusive arbiter of his right to exercise the privilege. *Warford*, 653 S.W.2d at 911. Furthermore, the assertion of the privilege against self-incrimination must be raised in response to each specific inquiry or it is waived. *Tex. Dep't of Pub. Safety v. Sanchez*, 82 S.W.3d 506, 513 (Tex. App.—San Antonio 2002, no pet.). Each assertion of the privilege rests on its own circumstances and blanket assertions of the privilege are not allowed. *Id.* Thus, a civil defendant can be forced to choose between asserting his privilege against self-incrimination or losing his civil suit. *See Gebhardt v. Gallardo*, 891 S.W.2d 327, 330 (Tex. App.—San Antonio 1995, orig. proceeding).

4. Pretrial Privilege

Because the privilege against self-incrimination must be asserted selectively in civil litigation, it follows that selective assertion of the privilege does not result in waiver. *Id.* For example, filing a verified denial does not constitute waiver of a civil defendant's right to subsequently assert the privilege against self-incrimination in response to interrogatories. *Burton*, 749 S.W.2d at 508. Answering all deposition questions but one does not constitute waiver of a civil defendant's right to assert the privilege. *Butler*, 522 S.W.2d at 198–99. Likewise, answering some interrogatories does not result in waiver of the right to assert the privilege against self-incrimination in response to other interrogatories. *Speer*, 965 S.W.2d at 46. The privilege must be asserted prior to or at the time the response is due. Tex. R. Civ. P. 193.3, 196.2, 197.2. Denying requests for admissions also does not result in waiver of the privilege against self-incrimination. Tex. R. Civ. P. 198.2. But a party may not assert the privilege against self-incrimination as a reason for refusing to answer requests for admission. *Katin v. City of Lubbock*, 655 S.W.2d 360, 363 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) (citing to previous version of current TRCP 198.3).

5. Document Production

The privilege against self-incrimination also applies to documentary evidence: "The seizure of a man's private books and papers to be used in evidence against him is not substantially different from compelling him to be a witness against himself." *Warford*, 653 S.W.2d at 908 (quoting *Boyd v. United States*, 116 U.S. 616 (1886)) (internal quotations omitted). However, in order to be privileged, the incriminating documents must have a strong personal connection to the witness, i.e., documents "which he himself wrote or which were written under his immediate supervision." *Id.* at 912. It follows then that documents that belong to or were prepared by others are not protected, even if they contain incriminating matters. *Id.* The court may order the disputed documents to be produced in camera for an inspection. *Speer*, 965 S.W.2d at 47.

G. Trade Secret Privilege

The court in *Cooper Tire* discusses the trade-secret privilege in depth: "A trade secret is any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it. Rule 507 of the Texas Rules of Evidence provides for the protection of trade secrets: A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

"The trade secret privilege seeks to accommodate two competing interests. First, it recognizes that trade secrets are an important property interest, worthy of protection. Second, it recognizes the importance placed on fair adjudication of lawsuits. Rule 507 accommodates both interests by requiring a party to disclose a trade secret only if necessary to prevent fraud or injustice. Disclosure is required only if necessary for a fair adjudication of the requesting party's claims or defenses.

"The party asserting the trade secret privilege has the burden of proving that the discovery information sought qualifies as a trade secret. If the resisting party meets its burden, the burden shifts to the party seeking the trade secret discovery to establish that the information is necessary for a fair adjudication of its claim. It is an abuse of discretion for the trial court to order production once trade secret status is proven if the party seeking production has not shown necessity for the requested materials.

"To determine whether a trade secret exists, the following six factors are weighed in the context of the surrounding circumstances: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

"The party claiming a trade secret is not required to satisfy all six factors because trade secrets do not fit neatly into each factor every time.

"The Texas Supreme Court has not stated conclusively what would or would not be considered necessary for a fair adjudication; instead, the application depends on the circumstances presented. The degree to which information is necessary depends on the nature of the information and the context of the case. However, . . . the test cannot be satisfied merely by general assertions of unfairness. Just as a party who claims the trade secret privilege cannot do so generally but must provide detailed information in support of the claim, so a party seeking such information cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 914–15 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (internal citations and quotations omitted).

H. Waiver of Privileges

Once a privilege is waived, it is waived "for all times and all purposes." *Lucas v. Wright*, 370 S.W.2d 924, 927 (Tex. App.—Beaumont 1963, no writ). If confidential information is disclosed inadvertently, the party asserting the privilege has the burden of proving that no waiver occurred. *Giffin v. Smith*, 688 S.W.2d 112, 114 (Tex. 1985) (orig. proceeding).

1. Disclosure to Third Parties

An individual seeking to avoid disclosure based upon the assertion of a privilege waives such privilege if he or she voluntarily discloses or consents to the disclosure of the privileged information. Tex. R. Evid. 511(a)(1).

2. Waiver by Calling Witness for Character Testimony

When a party to a suit calls as a character witness a person to whom privileged communications have been made, any privileges arising from the communications relevant to the character of the party are waived. Tex. R. Evid. 511(a)(2). For example, the communications to clergy privilege is waived if the party who made confidential communications to a member of the clergy calls the clergy-member as a character witness at trial. *Gonzalez*, 45 S.W.3d at 107.

3. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege

One does not waive his or her claim of privilege by providing disclosure of information or documents under order of the court compelling such disclosure. Tex. R. Evid. 512(a). Additionally, a privilege is not waived by disclosure if the disclosure was made without opportunity to claim the privilege. Tex. R. Evid. 512(b).

4. Offensive Use of Privilege Waives Privilege

A party seeking affirmative relief from the court cannot use a privilege to conceal information that forms the basis of that party's request for relief. *Denton*, 897 S.W.2d at 761; *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107–08 (Tex. 1985) (orig. proceeding). In *Ginsberg*, the Texas Supreme Court held that an offensive use of privilege is impermissible and explained that when a party asserts a claim for affirmative relief, that party cannot restrict access, by the assertion of privilege, to information that would otherwise be pertinent and relevant to that party's ability to maintain the cause of action. *Ginsberg*, 686 S.W.2d at 108. The Court further reasoned that although a party may have an absolute right to assert a privilege, that party may be forced to choose between maintaining the assertion of privilege or maintaining his cause of action. *Id.* at 107.

VII. TRE Article VI. Witnesses

A. Competency

As long as the witness was sane at the time of the event that is the subject of the testimony and is sane at the time of his or her testimony, he is competent to testify, unless the Rules provide otherwise. Tex. R. Evid. 601(a). This includes children that possess sufficient intellect to relate transactions with respect to which they are questioned. *Id.*

Practice Note: Rule 601 creates a presumption of competence, so if a child or other person who may not have sufficient intellect testifies, it is the burden of the party opposing that witness to show the court that the witness is incompetent, and a finding that a person has sufficient intellect is reviewed for an abuse of discretion. *Hollinger v. State*, 911 S.W.2d 35, 38–39 (Tex. App.—Tyler 1995, pet. ref'd).

B. Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Tex. R. Evid. 602. If the witness is not testifying as an expert, discussed further below in the section on experts, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Tex. R. Evid. 701.

C. Mode and Order of Interrogation/Presentation

The court has wide discretion in controlling the ebb and flow of questioning and is charged with exercising reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. Tex. R. Evid. 611(a).

D. Leading Questions

Leading questions are ordinarily permissible on cross and, to the extent necessary to develop the witness's testimony, also on direct examination. Tex. R. Evid. 611(c). When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. *Id.*

E. Writing Used to Refresh Memory

If a witness's memory fails, a writing may be used to refresh the witness's memory. Tex. R. Evid. 612. There is often confusion about the difference between a recorded recollection under the hearsay exception of Rule 803(5) and a writing used to refresh memory under Rule 612. The court in *Welch* discusses the distinction: "A witness testifies from present recollection what he remembers presently about the facts in the case. When that present recollection fails, the witness may refresh his memory by reviewing a memorandum made when his memory was fresh. After reviewing the memorandum, the witness must testify either his memory is refreshed or his memory is not refreshed. If his memory is refreshed, the witness continues to testify and the memorandum is not received as evidence. However, if the witness states that his memory is not refreshed, but has identified the memorandum and guarantees the correctness, then the memorandum is admitted as past recollection recorded." *Welch v. State*, 576 S.W.2d 638, 641 (Tex. Crim. App. 1979); *accord Aquamarine Assocs. v. Burton Shipyard, Inc.*, 659 S.W.2d 820, 822 (Tex. 1983) (Robertson, J., dissenting). "Where the memorandum, statement or writing is used to refresh the present recollection of the witness and it does, then the memorandum does not become part of the evidence, for *it is not the paper that is evidence*, but the recollection of the witness." *Wood v. State*, 511 S.W.2d 37, 43 (Tex. Crim. App. 1974); *accord Aquamarine Assocs.*, 659 S.W.2d at 822.

However, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions that relate to the testimony of the witness. Tex. R. Evid. 612(b).

Practice Note: Use of an otherwise privileged writing to refresh a party's memory, while testifying, will constitute a waiver of that privilege. *City of Denison v. Grisham*, 716 S.W.2d 121, 123 (Tex. App.—Dallas 1986, orig. proceeding). Note, however, that in a civil case, when a witness reviews material before testifying, the trial court has the discretion to decide whether to grant the adverse party the "certain options" stated in subsection (b) "if . . . justice requires" it. Tex. R. Evid. 612.

F. The Rule - Exclusion of Witnesses from the Courtroom

"The Rule" refers to Rule of Evidence 614 and Rule of Civil Procedure 267(a). The *Drilex* case provides a discussion of the Rule: "Sequestration minimizes witnesses' tailoring their testimony in response to that of other witnesses and prevents collusion among witnesses testifying for the same side. The expediency of

sequestration as a mechanism for preventing and detecting fabrication has been recognized for centuries. English courts incorporated sequestration long ago, and the practice came to the United States as part of our inheritance of the common law. Today, most jurisdictions have expressly provided for witness sequestration by statute or rule.

"In Texas, sequestration in civil litigation is governed by Texas Rule of Evidence 614 and Texas Rule of Civil Procedure 267. These rules provide that, at the request of any party, the witnesses on both sides shall be removed from the courtroom to some place where they cannot hear the testimony delivered by any other witness in the cause. Certain classes of prospective witnesses, however, are exempt from exclusion from the courtroom, including: (1) a party who is a natural person or his or her spouse; (2) an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney; or (3) a person whose presence is shown by a party to be essential to the presentation of the cause.

"When the Rule is invoked, all parties should request the court to exempt any prospective witnesses whose presence is essential to the presentation of the cause. The burden rests with the party seeking to exempt an expert witness from the Rule's exclusion requirement to establish that the witness's presence is essential. Witnesses found to be exempt by the trial court are not placed under the Rule.

"Once the Rule is invoked, all nonexempt witnesses must be placed under the Rule and excluded from the courtroom. Before being excluded, these witnesses must be sworn and admonished that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Thus, witnesses under the Rule generally may not discuss the case with anyone other than the attorneys in the case.

"Witnesses exempt from exclusion under [the Rule] need not be sworn or admonished. . . . A violation of the Rule occurs when a nonexempt prospective witness remains in the courtroom during the testimony of another witness, or when a nonexempt prospective witness learns about another's trial testimony through discussions with persons other than the attorneys in the case or by reading reports or comments about the testimony. When the Rule is violated, the trial court may, taking into consideration all of the circumstances, allow the testimony of the potential witness, exclude the testimony, or hold the violator in contempt." *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 116–17 (Tex. 1999) (internal citations, quotations, and footnotes omitted).

G. Impeachment

Rule 607 permits the impeachment of any witness, including by the party calling the witness. Tex. R. Evid. 607. Prior inconsistent statements can impeach a witness, but that evidence may not be considered for probative or substantive value. *Fultz v. First Nat'l Bank in Graham*, 388 S.W.2d 405, 408 (Tex. 1965); *Willover v. State*, 70 S.W.3d 841, 846 n.8 (Tex. Crim. App. 2002). Prior inconsistent statements offered to impeach the witness's credibility do not constitute hearsay because they are not offered for the truth of the matter asserted. *Del Carmen Hernandez v. State*, 273 S.W.3d 685, 688 (Tex. Crim. App. 2008). If the impeachment evidence meets a hearsay exception or exemption, however, it may be admitted as probative evidence.

The court in *Michael* gives an excellent summary of the means of impeachment: "There are five major forms of impeachment: two are specific, and three are nonspecific. The two specific forms of impeachment are impeachment by prior inconsistent statements . . . and impeachment by another witness. The three non-specific forms of impeachment are impeachment through bias or motive or interest, impeachment by highlighting testimonial defects, and impeachment by general credibility or lack of truthfulness. Specific impeachment is an attack on the accuracy of the specific testimony (i.e., the witness may normally be a truthteller, but she is wrong about X), while non-specific impeachment is an attack on the witness generally (the witness is a liar, therefore she is wrong about X)." *Michael v. State*, 235 S.W.3d 723, 725–26 (Tex. Crim. App. 2007).

1. Character for Truthfulness

Character evidence is raised under Rules 404–406, as explained above in the section on relevance. Similar rules also exist under Article VI that deal with impeachment.

a) Rehabilitation by Character Evidence

The court in *Michael* discusses when impeachment by a prior inconsistent statement permits rehabilitative evidence of character for truthfulness: "Impeaching a witness with a prior inconsistent statement is not necessarily an attack on credibility that would allow rehabilitative evidence of character for truthfulness under Rule of Evidence 608(a). Although rehabilitation may be permitted under 608(a), it is not automatic. . . .

"At the outset, every witness is assumed to have a truthful character. If that character is attacked, Rule 608(a) allows the presentation of evidence of that witness's good character. . . . When a witness's credibility has been attacked . . ., the sponsoring party may rehabilitate the witness only in direct response to the attack. The wall attacked at one point may not be fortified at another and distinct point. Generally, a witness's character for truthfulness may be rehabilitated with good character witnesses only when the witness's general character for truthfulness has been attacked.

"Impeachment by a prior inconsistent statement . . . is normally just an attack on the witness's accuracy, not his character for truthfulness. As Wigmore explained: The exposure of an error of a witness on one material point by his own self-contradictory statements is a recognized mode of impeachment. It serves as a basis for further inference that he is capable of having made errors on other points. This possibility of other errors, however, is not attributable to any specific defect; it may be supposed to arise from a defect of knowledge, of memory, of bias, or of interest, or, by possibility only, of moral character. Thus, though the error may conceivably be due to dishonest character, it is not necessarily, and not even probably, due to that cause.

"There are circumstances, however, where the cross-examiner's intent and method clearly demonstrate that he is not merely attacking the conflict in the witness's testimony between one or more specific facts, but mounting a wholesale attack on the general credibility of the witness. If the inconsistent statement is used to show that the witness is of dishonest character, then it follows that the opposing party should be allowed to rehabilitate this witness through testimony explaining that witness's character for truthfulness. Alternatively, if this testimony is used to show some other defect, then such evidence should not be allowed. . . .

"Prior to the adoption of the Texas Rules of Evidence, case law held that impeachment with prior inconsistent statements was an attack on credibility, allowing character evidence to rehabilitate a witness. In *O'Bryan v. State*, the defendant impeached a State's witness's testimony with his prior sworn testimony concerning dates, times, and descriptions of the defendant's clothing. In rebuttal the State presented evidence of the witness's reputation for truth and veracity. The Court likened impeachment by self-contradiction to an attack on a witness's veracity character, and held that the testimony was permissible. The Court did not explain, however, why this form of impeachment necessarily impugned a witness's character for truthfulness.

"The Federal Rules of Evidence modified the common-law position held by some states, including Texas, that allowed rehabilitation evidence of truthful character when the witness was impeached by self-contradiction. Although the text of Federal Rule 608(a) does not make an explicit delineation between impeachment by self-contradiction and other forms of impeachment, the advisory committee notes state: Whether evidence in the form of contradiction is an attack upon the character of a witness must depend in part upon the circumstances. Texas Rule 608(a) is identical to Federal Rule 608(a). . . .

"Some courts had held that rehabilitation should be permitted when the witness is subject to a slashing cross-examination. [However,] the question should not be whether the cross-examination is slashing but whether the overall tone and tenor of the cross-examination implied that the witness is a liar.

"It may be quite obvious that a witness's character for truthfulness has been attacked directly, as by a question such as, Were you lying then or are you lying now? or another witness's testimony that the witness is a liar or is untruthful. When a party uses prior inconsistent statements to impeach someone, the cross-examiner's intent may not be as clear. . . . [T]here are several reasons why one's statements may be inconsistent, and most of them do not imply dishonest character.

"[T]he question . . . is whether a reasonable juror would believe that a witness's character for truthfulness has been attacked by cross-examination, evidence from other witnesses, or statements of counsel (e.g., during voir dire or opening statements)." *Michael*, 235 S.W.3d at 725, 726–28.

b) Impeachment by Evidence of a Criminal Conviction

A witness's character for truthfulness may also be attacked by introducing evidence of a conviction of a felony or crime of moral turpitude, if the probative value outweighs the prejudicial effect to a party, and it is elicited from the witness or established by a public record. Tex. R. Evid. 609(a); *see Smith v. State*, 439 S.W.3d 451, 457–58 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Crimes of moral turpitude involve a grave infringement of the moral sentiment of the community or show a moral indifference to the opinion of the good and respectable members of the community.") (internal citations and quotations omitted), *abrogated on other grounds*, *Meadows v. State*, 455 S.W.3d 166 (Tex. Crim. App.

2015). If the conviction or release from confinement for it is more than ten years old, the conviction is admissible for impeachment only if its probative value substantially outweighs its prejudicial effect. Tex. R. Evid. 609(b). No evidence of a conviction is admissible if that conviction has been pardoned, annulled, certified rehabilitated, or the equivalent, or if probation has been satisfactorily completed with no further convictions for a felony or crime of moral turpitude. Tex. R. Evid. 609(c). Nor is a conviction currently under appeal admissible. Tex. R. Evid. 609(e). Notice must be given of the intent to use the conviction. Tex. R. Evid. 609(f).

c) Religious Beliefs

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of their nature, the witness's credibility is impaired or enhanced. Tex. R. Evid. 610. This may not preclude, however, the questioning of the witness regarding church affiliation for purpose of establishing bias or prejudice. *Id.*

2. Prior Inconsistent Statement

In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and *before* further cross-examination concerning, or extrinsic evidence of such statement, may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. Tex. R. Evid. 613(a)(1), (3), (4), and cmt. to 2015 Restyling. If written, the writing need not be shown to the witness at that time, but on request, the same shall be shown to opposing counsel. Tex. R. Evid. 613(a)(2). If the witness unequivocally admits having made such statement, extrinsic evidence of the same shall not be admitted. Tex. R. Evid. 613(a)(4). This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2). Tex. R. Evid. 613(a)(5); *see* Tex. R. Evid. 801(e)(2). If a proper predicate is not laid, the inconsistent statement may be excluded and further cross-examination on the subject blocked. *Alvarez-Mason v. State*, 801 S.W.2d 592, 595 (Tex. App.—Corpus Christi 1990, no pet.).

H. In-Chambers Interviews of Children

Judge Dean Rucker and Sally Pretorius have considered this issue in depth in their paper: Kids Say the Darndest Things—An Academic and Demonstrative Look at the In Chambers Conference. Hon. Dean Rucker & Sally Pretorius, *Kids Say the Darndest Things—An Academic and Demonstrative Look at the In Chambers Conference*, State B. Tex., 41st Annual Advanced Family Law ch. 15 (2015). Several portions of their paper have been used herein and updated. The authors express their thanks for permission to use Judge Rucker's and Sally's paper.

1. Initial Determination

Section 153.009 of the Texas Family Code sets forth the procedure of requesting and conducting in-chambers interviews of children in SAPCR cases. Tex. Fam. Code Ann. § 153.009.

Before requesting an in-chambers interview, the practitioner must first consider what information the child will discuss with the judge and whether a jury will decide that issue. The court may request an in-chambers interview for any of the purposes identified in Section 153.009, discussed below. Tex. Fam. Code Ann. § 153.009(a). The interview may even occur after a child has testified in open court. *Fettig v. Fettig*, 619 S.W.2d 262, 268 (Tex. App.—Tyler 1981, no writ).

2. What Can Be Discussed?

In nonjury trials or hearings, a party, amicus, or attorney ad litem can request an in-chambers interview regarding the child's choice of who will have the exclusive right to determine the child's primary residence. *Id.* If the child is twelve years or older, the judge ***shall*** interview the child. *Id.* If the child is under twelve years, the judge ***may*** interview the child. *Id.* If the purpose is for the child to tell the judge his or her wishes regarding possession, access, or any other issue in the SAPCR, then the judge ***may*** interview the child, regardless of the child's age. *Id.* § 153.009(b). This interview does not diminish the judge's discretion in determining any of these issues based on the best interest of the child. *Id.* § 153.009(c).

In a jury trial, the judge may not interview the child in chambers regarding any issue that the jury will decide. *Id.* § 153.009(d). A party is entitled to a jury verdict in a SAPCR on:

1. the appointment of a sole managing conservator;

2. the appointment of joint managing conservators;

3. the appointment of a possessory conservator;

4. the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child;

5. the determination of whether to impose a geographic restriction for the child's primary residence; and

6. if a geographic restriction is imposed, the determination of the geographic area within which the child's primary residence must be. *Id.* § 105.002(c)(1).

Accordingly, issues other than those listed above can be discussed in an in-chambers interview. *Id.* § 153.009(d). One court has held that asking the child what happens in each parents' home is allowable. *Turner v. Turner*, 47 S.W.3d 761, 764 (Tex. App.—Houston [1st Dist.] 2001, no pet.). At least one court, however, has held that the interview should not be used to determine whether it is in the best interest of a child to testify. *Callicott v. Callicott*, 364 S.W.2d 455, 458 (Tex. App.—Houston 1963, writ ref'd n.r.e.) (relying on *Cline v. May*, 287 S.W.2d 226, (Tex. App.—Amarillo 1956, no writ) (holding that trial court has no discretion to refuse to allow competent child to testify)).

A party is not entitled to a jury verdict on child support, terms or conditions of possession and access, or rights and duties other than determining the child's primary residence. *Id.* § 105.002(c)(2). Moreover, a party cannot even demand a jury trial regarding adoption or parental adjudication. *Id.* § 105.002(b).

3. Who Can Attend?

The trial court has discretion to allow an attorney for a party, the amicus attorney, the guardian ad litem for the child, or the attorney ad litem for the child to be present at the interview. *Id.* § 153.009(e). The court has discretion to refuse to interview a child (1) under the age of twelve regarding primary residence, or (2) of any age regarding any other issue. *In re Marriage of Stockett*, 570 S.W.2d 151, 153 (Tex. App.—Amarillo 1978, no writ).

4. Making a Record

If a child is twelve years or older, and a party, the amicus attorney, the attorney ad litem for the child, or the court requests that a record be made of the interview, the court shall cause that a record is made. *Id.* § 153.009(f). The record of the interview shall be part of the record in the case. *Id.* A trial court abuses its discretion by sealing the record and not allowing the parties access to it, contrary to statute. *Glud v. Glud*, 641 S.W.2d 688, 689–90 (Tex. App.—Waco 1982, no writ). The party's lack of access to the record denies that party the ability to present his case on appeal. *Id.*; *see* Tex. R. App. P. 44.1(a)(2). But any error is harmless if the party fails to request the record initially. *Wilkinson v. Evans*, 515 S.W.2d 734, 737 (Tex. App.—Dallas 1974, writ ref'd n.r.e.).

5. Waiving Error

If no one requests that a record be made or that anyone in particular attend the interview, any error for failing to make a record or that a particular person did not attend is waived. *In re S.E.K.*, 294 S.W.3d 926, 929 (Tex. App.—Dallas 2009, pet. denied); *Voros v. Turnage*, 856 S.W.2d 759, 763 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Fettig*, 619 S.W.2d at 268; *Kimery v. Blackstock*, 538 S.W.2d 503, 504 (Tex. App.—Waco 1976, no writ). Furthermore, the trial court has no duty to announce what portions of the interview it deemed relevant or important, such that counsel has the opportunity to rebut the child's testimony. *Fettig*, 619 S.W.2d at 268. These provisions do not relate to a fundamental right, so they are waivable. *Wilkinson*, 515 S.W.2d at 737.

Although the court may interview children after the close of evidence, *Fettig*, 619 S.W.2d at 268, a motion for new trial is too late to request such interview for the first time, *Hamilton v. Hamilton*, 592 S.W.2d 87, 87–88 (Tex. App.—Fort Worth 1979, no writ). Moreover, an oral suggestion that the court may want to interview the children does not qualify as an application under the statute, such that the interview is mandatory for children 12 and older regarding primary residence. *Hamilton*, 592 S.W.2d at 88.

6. Using the Interview as Evidence

What the child tells the judge is evidence that the judge may consider and that can support the judgment. *Long v. Long*, 144 S.W.3d 64, 69 (Tex. App.—El Paso 2004, no pet.); *Voros*, 856 S.W.2d at 763. Accordingly, if a judge refuses to interview a child under 12 regarding primary residence, or any child regarding any other matter, an offer of proof or bill of exception is required to show that the child is competent to testify and what the child would have told the judge. *O. v. P.*, 560 S.W.2d 122, 125 (Tex. App.—Fort Worth 1977, no writ).

If no record exists when an interview occurs, the reviewing court on appeal must presume facts existed that support the trial court's judgment. *Ohendalski v. Ohendalski*, 203 S.W.3d 910, 916 (Tex. App.—Beaumont 2006, no pet.); *Long*, 144 S.W.3d at 69. The Supreme Court of Texas, however, has clarified this presumption and explained that it only applies when the interview is required—i.e., when the child is twelve or older and tells the judge his or her wishes regarding primary residence. *Forbes v. Wettman*, 598 S.W.2d 231, 232 (Tex. 1980) (orig. proceeding). In *Forbes*, an order gave father

possession of the children, but mother refused to return the children to father. *Id.* Father filed a petition for writ of habeas corpus, wherein the trial court interviewed the children, who were under twelve, but did not make a record. *Id.* The trial court refused the habeas corpus, and mother argued that the record was incomplete, so the court had to presume the facts from the missing portion supported the trial court's judgment. *Id.* The supreme court disagreed and held that, because the interview was not mandatory, the record was not incomplete, such that the presumption exists. *Id.*

7. Effect on the Child

The attorney, and probably more-so the parent, needs to consider the effect that an in-chambers interview will have on the child. Experts have posited both the positive and negative effects an interview may have.

a) The Positive

One positive effect is the ability to empower the child by giving the child a voice in their future. In her article, *The Child's Voice*, Justice Debra H. Lehrmann cites to research by Judith Wallerstein in *The Unexpected Legacy of Divorce*, wherein she sets forth:

"[C]hildren feel distress over visitation schedules that keep them from having input as to how they spend their free time. . . . Involving the child in the process of developing an access schedule and parenting plan may give the child a sense of empowerment over his or her life. Although involving the children in this way will not give them more control over their schedules on a day-to-day basis, it may make adherence to the schedule more palatable, since it gives them input in the decision making process." Justice Debra Lehrmann, *The Child's Voice--An Analysis of the Methodology Used to Involve Children in Custody Litigation* at 885 (Texas Bar Journal, November 2002) (citations omitted).

Although an interview can empower a child, Justice Lehrmann cautions "not to take psychological research indicating that children should be involved in the process of reorganizing the family to mean that children should be brought into the lawsuit without forethought. Attention must remain focused on reliable data that indicates that children must not become embroiled in their parent's conflict." *Id.*

b) Alienation

Alienation is always a concern with the in-chambers interview, although it does not exist in every case. This can most likely occur by a parent trying to coach a child prior to the interview to try to make the other parent look bad or to tell the judge what the coaching parent wants the child to say. This may even occur without specific coaching for the interview itself. If a child has been living with a parent who regularly talks bad about the other parent, that can stay with the child long-term.

If alienation is an issue, an expert may be necessary to determine whether the child has been alienated and to what degree. If alienation has occurred, the judge should be made aware of it because the child's statements may be biased, rather than showing what the child actually desires. The interview may allow the judge a better glimpse into the degree of alienation as well.

c) Manipulation

Alienation is related to manipulation. Jonathan Gould, Ph.D, ABPP states:

"A corollary is a parent who manipulates a child to express a preference to live with him or her when that parent may not have presented the child with all the available and necessary information to make a responsible decision. There are two alternative concerns that may come from a parent's manipulation through providing limited and biased information that the child uses as the basis for his or her decision. One outcome is that the child learns later in life that s/he has been manipulated by the parent and focused his/her anger at being manipulated toward that parent. The second outcome is that the child feels a sense of guilt and remorse over rejecting the other parent based upon biased or incomplete information provided by the custodial parent. A third outcome is that the child learns not to trust the previously trusted parent and reaches out to the other parent to find that the other parent is unwilling or unable to repair the damage done by the earlier decision." Jonathan Gould & David Martindale, *Including Children in Decision Making About Custodial Placement*, 22 J. Am. Acad. Matrim. Law. 303, 310 (2009).

d) The "Fun" Parent

A child will also often be influenced by who the child sees as the "fun" parent, as opposed to the parent who has rules and guidelines for the child. Those rules may make the child see that parent as mean or restrictive and express a desire to the judge that the child does not want to live with that parent. This factor must be understood and addressed if necessary, and judge should be sensitive to it. Thoughtful questions by the judge can help to reveal this factor if it exists.

e) Clash of Personalities

If a child and parent have an extreme difference in personalities, it should be considered whether the child being with that parent, and for how much time, is best for the child. For instance, if a child and a parent constantly yell and argue in front of other children, if violence erupts during the periods of possession, or if the child constantly runs away from home while in the possession of the parent, what is truly in the child's best interest? While this behavior should not be rewarded, it may be attributable to puberty or events that have occurred during the child's life and is something that must be considered when conducting an in-chambers conference because the child may be the only credible source of this information.

f) Maturity of the Child

Although Texas sets the limit for mandatory interviews at 12 regarding primary residence, the parties, attorneys, and judge should still consider the maturity of the child. The court may want to start the in-chambers interview with some questions to determine the child's maturity level and ability to tell and understand the truth. Basically, the competency and reliability of the child. Parties know their children and should discuss with their attorneys how the child might come off in the interview with the judge. Similarly, the judge needs to be cautious that a child's maturity may be best ascertained over an extensive period of time and not in brief time that is set aside for the in-chambers interview.

"Another reason for not including children's participation in the decision making about their custodial placement is that children's decisions are . . . how do we say this delicately . . . often unreliable, spur of the moment, emotion-driven, short sighted, and generally misinformed. That is, children are not often rational or objective in their decision making. Perhaps a fairer way to frame the concern is that on any given day a pre-adolescent child may be rational, objective and consider the long term effects of his or her decision making, and the next day may be impulsive, emotion-drive and short sighted." *Id.* at 310–311.

g) First Impressions

An in-chambers interview is often a child's first interaction with the judicial system. There is likely an impact associated with talking to a judge about life decisions that should be considered before requesting an in-chambers interview. If this experience is a negative one, this may impact how children view judges and lawyers for the rest of their lives. We often hear stories from clients about how their parents' divorce affected them and their future relationships. Attorneys, the parties, and the courts should be cognizant that the children's experience from the moment that they walk into the courthouse, going through security, waiting in the halls of the courthouse, talking to the attorneys, missing school, and talking to the judge may have a significant impact on them for the rest of their lives.

h) Lost in Translation

Co-existent with being cognizant of the maturity of the child is accurately interpreting what the child is really saying—not just listening to the words that come out of the child's mouth. For instance, if the child is saying that he or she "just wants to spend more time with Mom/Dad," but can cite to no specific reason, one should consider whether the child is really saying that he or she is going through issues that are gender specific or is hiding some underlying issue such as mental, physical, or sexual abuse at the other parent's house. It is imperative when there is a question about the child's motives that other resources be marshalled to ascertain what the child is truly saying. For instance, a mental health professional may be recommended and/or ordered to counsel with the child and ascertain any motives or reasons for the child's preferences. Another option may be obtaining a social study or the appointment of an amicus attorney to probe into the child's home life and provide the court with a clearer view of the situation at hand.

In an older article in the Louisiana Law Review entitled *Child Custody: The Judicial Interview of the Child* by Lisa Carol Rogers, Rogers identifies the more common strategies and possible interpretations of the child's behavior:

"1. Reunion strategy: The child will praise both parents, and the parent "at fault," hoping they will respond to the praise by the reuniting. The judge should be alert to descriptions of the parents that sound too good to be true.

2. Pain reduction strategy: The parents may both claim that the child refuses to leave one to visit the other. The child is probably just trying to reduce the pain he feels each time he leaves one parent by refusing to leave, which does not indicate a preference for one parent over the other.

3. Tension detonation strategy: The child may seem very hostile toward one or both parents. It is possible that he is trying to get them to direct their anger toward him instead of each other, and to detonate the tension between

them by having them strike out at him.

4. Loyalty proving strategy: The child may pick the parent that seems the most likely to keep him around and sacrifice the other parent to show his loyalty.

5. Fairness strategy: The child will repress his own needs in order to make sure each parent gets equal treatment. He will probably refuse to state a preference, and will exhaust himself trying to divide his time and affection equally between his parents.

6. Permissive living strategy: The child will give up trying to reunite his parents and will repress his pain. He may appear to his own best advantage. Older adolescents are more likely to use this strategy consciously. Younger children are more likely to use it innocently, as when they express a natural preference for the parent who buys nicer presents or who has had custody during vacations." Lisa Carol Rogers, *Child Custody: The Judicial Interview of the Child*, 47 La. L. Rev. 559, 580 (1987).

i) Putting the Child in the Middle

The child should never be put in the middle of litigation. If a child is forced to speak with a judge and talk about the child's preferences for possession and access or with whom the child primarily resides, it will likely have an adverse impact on the child, manifested in several ways. First, if a record is made, there is forever a writing that memorializes what was said to the judge and a parent will be able to read it and have first-hand knowledge of what the child said. This is very likely to impact the relationship of the parent with the child. It may lead to alienation or feelings of being slighted. These feelings will then impact both the child and the parent for a very long time—maybe even a lifetime. If a record is not made, and the judge makes a ruling that takes away rights or possession and access time of one parent, the slighted parent may assume that it is because of what the child told the judge and lead to the same repercussions as if a record was made.

In short, we are all human, and feeling slighted or "un-preferred" by someone we love and would do anything for is going to lead to feelings that are not easily concealed, and these feelings may have a long-term impact on the child.

Practice note: When you are not having a jury determine a specific issue, the child has expressed desires regarding that issue, and you want the judge to interview the child, be sure to file a motion requesting the interview prior to the close of evidence and to include in your request who you want to be present and whether you want to make a record of the interview. For appellate purposes, a record is needed, but you should weigh the psychological effect that the interview will have on the child and whether that effect may be prolonged by having a written record of it. And if the court denies any of it, object to the interview if you do not want it to happen, object to the interview not happening if you want it to happen, and make an offer of proof or bill of exception to preserve the error regarding what the child would have testified.

8. Interview Framework

"Among the most relevant factors to examine when talking with children about their experiences in a divorced family are:

"1. Physical space refers to the practical issues of getting from one place to another. Physical space includes examining concerns that the child has about organizing clothes, toys, and schoolwork. It entails letting children's friends know where they are and letting children voice concerns that they have about remembering where to be at certain times.

"2. Emotional space refers to different emotional climates that exist at each parent's home. Children are moving not only from one physical home to another but also from one emotional landscape to another. Children may react to changes in emotional climate between mother's and father's home. Children also may feel differently at different homes. Smart found that the geographic distance between parental homes can create an emotional distance between child and parent. Interestingly, Smart noted that even children who are equally happy to be with either parent or equally happy to be in either parent's home experienced transitions between homes as an emotional journey requiring regular emotional adjustment.

"3. Psychological space refers to differences in household structure, organization, and functions. There may be changes between homes in routines, codes of behavior, expectations, standards of living, and other functional differences. Children may find it difficult to adjust to a home that does not fit the psychological narrative in their heads about who they are and where they are supposed to live.

"4. Equal time refers to parents', judges', and attorneys' tendency to think about parenting time in exact amounts of time. Whether children spend one week with one parent and another week with the other parent or whether children are on a '4 day with one parent and 3 day with

the other parent' schedule, the inflexibility of time share schedules often affect children's need for elasticity in the scheduling of their transitions between homes. For example, Smart found that if a child was scheduled with her father but needed to spend time with her mother on a particular day, the rigidity of the access schedule became a more important decision-making element than the child's needs. If it was Tuesday, the child had to be at dad's house. Smart reported that children felt frustrated with the rigidness of their access schedules and they were reluctant to talk about these frustrations with their parents. Children were aware of their parent's competing needs for the children's time and, as a result, they did not want to disappoint either parent nor did they want to cause tension because of their discontent. The result was that children did not talk about their feelings and often experienced the unbending nature of the parenting schedule as oppressive.

"5. Time apart refers to children's time away from one parent. Some children did not like time away from a particular parent and, other children did not like feeling that they were forced to spend time with a parent. Still other children liked the time away from the residential parent because it provided them with opportunities to gain some perspective on the non-residential parent. Smart referred to this time away from the residential parent as a 'sabbatical.'

"Some children worried about one parent when they were with the other parent. Children worried when their parents remained single and had no romantic partner. These children felt that time away from a single parent meant that the parent was lonely. Some children reported that time passed more slowly at one parent's home than at the other's, usually because one parent was less available, less involved, or had a home with fewer creature comforts.

"6. Time to oneself refers to children's lack of private time. Children of divorce felt that their time was always scheduled. They felt that they had less time for themselves and that they had less time to spend with their friends.

"7. Time and hurting refers to an experience of a subgroup of children who had to deal with waiting for the nonresidential parent to come to visit them or wait for the nonresidential parent to take them out. These children often felt powerless and they often viewed time spent waiting for the parent to show up as a measure of how much that parent cared.

"8. Time and sharing refers to those situations where both parents enjoyed plenty of time with their children and where each parent was on good terms with the other parent. Sharing parenting time became a way of continuing family life. Children felt happy with time-sharing arrangements because of the quality of their relationship with each parent. Children felt that the most important issues were sustaining and managing their relationships with parents." Gould & Martindale, *Including Children in Decision Making About Custodial Placement*, 22 J. Am. Acad. Matrim. Law. at 312–13.

9. Requirement to Interview

The Supreme Court of Texas has recently held that, when a party foregoes a jury trial to request an in-chambers interview, the failure to hold such interview is harmful error that requires reversal. *In re J.N.*, --- S.W.3d ---, No. 22-0419, 2023 WL 3910042 (Tex. June 9, 2023). This resolved several courts of appeals' opinions where the failure to interview a child was held to be harmless error because of the ultimate discretion of the trial court. *See, e.g.*, *In re Marriage of Comstock*, 639 S.W.3d 118, 135 (Tex. App.—Houston [1st Dist.] 2021, no pet.); *see also* Tex. Fam. Code Ann. § 153.009(c). But the supreme court held that, where the record is clear that a party waives its right to a jury trial so that the trial court interviews the child, harmful error exists and requires reversal. *In re J.N.*, 2023 WL 3910042, at *4–5. Of course, a court still maintains discretion to not interview children when it is not mandatory by statute. Tex. Fam. Code Ann. § 153.009(a), (b). It is only mandatory when the child is twelve or older and conservatorship or primary residence is at issue. *Id.* It is discretionary if the child is under twelve and conservatorship and primary residence are not at issue. *Id.* Further, interviews are allowed in a "nonjury trial or hearing," which would include temporary orders hearings, even if a jury is requested for final trial. *Id.* Similarly, a fact issue must exist that would be presented to the jury had a jury not been waived. *In re J.N.*, 2023 WL 3910042, at *5.

Practice Note: Be sure that the record reflects that your client is waiving her right to a jury trial so that the trial court can interview the child. *Id.* at *4–5. The supreme court stated that it is not necessary to have requested a jury and paid the fee and then waived it for the interview like the mother in *J.N.*, but include a statement in your interview request that states that the party is foregoing or waiving a jury trial to make this request. It may be best practice to have that statement verified or sworn to by the party or testified to in open court on the record to avoid any waiver or harmless error arguments.

VIII. TRE Article VII. Opinions and Expert Testimony

A. Lay Witness Opinion

Rule 701 states that any person who is not testifying as an expert may state that person's opinion if the opinion is rationally based on the witness's perception and helps the factfinder understand the witness's testimony or determine a fact in issue. Tex. R. Evid. 701. The first requirement is a two-part test: "First, the witness must establish personal knowledge of the events from which his opinion is drawn and, second, the opinion drawn must be rationally based on that knowledge." *Hartwell v. State*, 476 S.W.3d 523, 536 (Tex. App.—Corpus Christi 2016, pet. ref'd) (quoting *Fairow v. State*, 943 S.W.2d 895, 898 (Tex. Crim. App. 1997)). Lay opinions are elicited and given in almost every family law case, and as is often the case in family law, facts and opinions are often intertwined and impossible to separate. There are no Texas civil cases that have resulted in reversal because of the admission or exclusion of a lay opinion. *But see Patterson v. State*, 508 S.W.3d 432, 452–53 (Tex. App.—Fort Worth 2015, no pet.) (reversing for improper lay witness testimony admitted during punishment phase, which caused harm); *Lape v. State*, 893 S.W.2d 949, 962 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (reversing for excluding lay witness testimony, which caused harm).

Practice Note: Unless the proffered lay opinion testimony is damaging the case, it is probably not worth the objection. The practitioner will find that, many times, such lay opinions present the cross examiner with fodder to neutralize any potential harm.

B. Admission of Expert Testimony

Rule 702 of the Texas Rules of Evidence predicates the admission of expert testimony on three basic factors:

1. The witness must be qualified in the area of expertise for which the evidence is proffered;

2. The expert's testimony must be grounded in the scientific, technical, or other specialized knowledge in that particular area of expertise; and

3. The testimony must assist the trier of fact.

Predicate:

You were requested to provide expert witness services by ___ in this case?
Does the person who has asked you to perform those services affect your professional opinions in this matter?
What was your assignment in this matter?
Did you do work to complete that assignment?
Did you use your training and experience to complete your work in this matter?
Please tell the court what education you have received that you believe qualified you to perform this assignment? (if objected to: Please tell the court your education, including specialized professional college education, after high school.)
Have you attended any professional educational programs within the last five years (to emphasize recent knowledge)?
Please tell the court what those professional educational programs were and when you attended them. (compound; break down if objected to)
Were there other professional education programs you have attended?
Are those other professional educational programs you have attended set forth on your CV?
Have you taught any professional educational programs with the last five years?
Please tell the court the professional educational programs you have taught and when you taught them.
Were there other professional educational programs you have taught?
Are those other professional educational programs you have taught set forth on your CV?
Have you written any professional books, articles, or other similar materials within the last five years?
Please tell the court about those professional books, articles, or other materials.
Were there other professional books, articles, or materials you have written?
Are those other professional books, articles, or materials you have written set forth on your CV?
I am handing you what has been marked as Exhibit 1 for identification purposes; do you recognize that document? What is it? (My CV)
Does it set forth most of your educational information to which you have not specifically testified?
If I asked you about each item set forth on Exhibit 1 for identification, would you testify as set forth on Exhibit 1 for identification?
I offer Exhibit 1 into evidence.
I request the Court to declare/recognize the witness as a qualified expert.

C. Qualification of the Expert is Discretionary

Whether the expert is qualified to testify and render an opinion lies within the discretion of the trial court. *Benge v. Williams*, 548 S.W.3d 466, 472 (Tex. 2018) (citing *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996)). A reviewing court will review the trial court's determination

to admit expert testimony for abuse of discretion. *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002).

D. Bases of Expert Testimony and Opinions

The proponent of the proffered testimony bears the burden of demonstrating the admissibility of the expert testimony if the other side objects to it. *Id.*

1. Hard Science

To overcome the objection, the proponent must demonstrate that: (1) the expert is qualified, and (2) the expert's testimony is relevant and reliable. *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 422 (Tex. 2020) (citing *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 348 (Tex. 2015)). The non-exclusive factors that can be considered in the reliability of scientific evidence are:

1. The extent to which the theory has been or can be tested;

2. The extent to which the technique relies upon the subjective interpretation of the expert;

3. Whether the theory has been subjected to peer review and/or publication;

4. The technique's potential rate of error;

5. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

6. The non-judicial uses which have been made of the theory or technique. *Gharda USA, Inc.*, 464 S.W.3d at 348 n.8.

2. Soft Science

While prior cases dealt primarily with the "hard" sciences, "soft" sciences need to be addressed as well. In *Nenno*, a framework was enunciated by which to test the reliability of the fields of science, such as social science or other fields (soft sciences), based upon experience and training as opposed to scientific method. It suggests that the court look at whether:

1. The field of expertise is a legitimate one;

2. The subject matter of the expert's testimony is within the scope of that field; and

3. The expert's testimony properly relies upon and/or utilizes the principles involved in that field. *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998), *overruled on other grounds*, *State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).

The Supreme Court of Texas has not adopted the approach in *Nenno*, but the one time that it cites to *Nenno*, it distinguished it because the expert's testimony included the "hard science" factors. *See In re M.P.A.*, 364 S.W.3d 277, 288 (Tex. 2012). Some courts of appeals, however, have followed the *Nenno* approach. *See, e.g.*, *Taylor v. Tex. Dep't of Protective & Regulatory Servs.*, 160 S.W.3d 641, 650–51 (Tex. App.—Austin 2005, pet. denied); *In re A.J.L.*, 136 S.W.3d 293, 298 (Tex. App.—Fort Worth 2004, no pet.); *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591, 604–05 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

3. Factors Relied Upon

The general rule is that, once properly qualified, an expert can base his or her opinion on just about anything remotely relevant to the issue he or she is called to testify about. Rule 703 permits an expert to rely on the following to base his opinion:

1. Personal Knowledge. This would include such observations as statements made by the parties, testing results, etc.

2. Facts/Data Made Known to the Expert at or Before the Hearing. Many mental health professionals rely and may rely on evidence presented by others, deposition testimony, and reports of other experts.

3. Inadmissible Evidence, if Relied on by Others. The reliance on tests, trade journals, other medical reports, etc., has not created much controversy concerning expert opinions. *Gharda USA*, 464 S.W.3d at 352. However, a problem may arise when the expert begins to recount a hearsay conversation he has had with another. Rule 703 implies that this type of testimony is permissible, but the case law indicates that there are limits. A trial court may permit the expert to state that his or her opinion was based, in part, on what another had related but should not permit the expert to disclose what was actually said. *Beavers ex rel. Beavers v. Northrop Worldwide Aircraft Servs., Inc.*, 821 S.W.2d 669, 674 (Tex. App.—Amarillo 1991, writ denied); *First Sw. Lloyds Ins. Co. v. MacDowell*, 769 S.W.2d 954, 958 (Tex. App.—Texarkana 1989, writ denied). The Supreme Court of Texas, in the pre-rules case of *Moore*, held that an

expert's opinion could not be based solely on hearsay. *Moore v. Grantham*, 599 S.W.2d 287, 289 (Tex. 1980), *superseded by* Texas Rule of Evidence 703. In *Birchfield*, the court held that "[o]rdinarily an expert witness should not be permitted to recount a hearsay conversation with a third party, even if that conversation forms part of the basis of his opinion." *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987). However, the *Birchfield* court permitted the testimony to stand based on the theory of invited error on the part of defendant's counsel. *Id.*

4. Experts and Custody Cases

The testimony of mental health experts is often critical to the outcome of a conservatorship proceeding. Courts have placed limits on expert testimony in jury cases. For example, in *Ochs*, the court held that a psychologist in a child abuse case was not permitted to testify before a jury as to the propensity of the child complainant to tell the truth regarding the alleged abuse. *Ochs v. Martinez*, 789 S.W.2d 949, 957 (Tex. App.—San Antonio 1990, writ denied). The court reasoned that such testimony invaded the province of the jury concerning judging the credibility of the witness. *Id.* While social workers assigned to custody cases are almost always permitted to testify, the extent of their testimony should also be closely monitored. If the testimony is admitted over objection, a limiting instruction should be requested at the time the objection is made and in the charge to preserve error and avoid the invited error trap. *See In re Commitment of Polk*, 187 S.W.3d 550, 554–55 (Tex. App.—Beaumont 2006, no pet.).

However, in paternity suits under Chapter 160 of the Family Code, where no presumed, acknowledged, or adjudicated father exists, a report of a genetic testing expert is admissible as evidence of the truth of the facts asserted in the report. Tex. Fam. Code Ann. § 160.621(a). Admissibility is only affected if a presumed, acknowledged, or adjudicated father exists, unless the testing was performed with consent of both the mother and presumed/acknowledged/adjudicated father, or by court order. *Id.* § 160.621(c).

Predicate:

(This predicate may be used with an expert in almost any field)

Please tell the court what your assignment was in this case.
Were you able to formulate an opinion in regards to ___?
In connection with your work in this matter, did you apply/use any tests/procedures in reaching your opinion?
Please tell the court what the tests/procedures are that you used in reaching your opinions and conclusions in this matter.
*As to each test/procedure, one at a time:
Please describe what that test/procedure is.
Why did you use that test/procedure?
As a result of using that test/procedure, did you obtain information that you used in your work in this case?
What information did you obtain that you used in your work in this case?
Why did you think that information was important?
How did you use that information in formulating your opinions or conclusions in this case?
(Then go to the next test/procedure and repeat*)
What opinion or conclusion did you reach as a result of the work you did in this case?

E. Use of Treatises

1. Only through Expert Testimony

As discussed below, under a hearsay exception, treatises may be used only through expert testimony. Tex. R. Evid. 803(18). A proponent cannot have his expert read from the treatise on direct but can have the treatise qualified as a reliable authority. If the witness is asked to read from it on cross, then clarifying excerpts can subsequently be read on redirect. If admitted, the statements may be read into evidence, but the treatise may not be received as an exhibit. Tex. R. Evid. 803(18).

2. Using a Treatise on Cross-Examination

The questioning attorney can have the opposing expert acknowledge that the treatise in question is authoritative and relied upon in that particular field. Even if the witness does not commit to such a position, the attorney has established that the treatise is a published work and that the opposing expert is aware of it. The proponent's expert can then qualify the writing as authoritative at a later time. *King v. Bauer*, 767 S.W.2d 197, 199–200 (Tex. App.—Corpus Christi 1989, writ denied).

Predicate:

You have heard of Fishman and Pratt's book: Guide to Business Valuations?
Fishman and Pratt are respected in the business valuation community?
Their book is respected in the business valuation community?
Their book has guidelines on how to perform business valuations?

Were you aware that their book states that a cap rate should be between 11% and 20%?
You set the cap rate for your valuation at 4%?

F. Disclosure of Underlying Facts/Data

Per Rule 705, an expert may disclose all data he has relied on in arriving at his opinion, thus abolishing the need to ask hypothetical questions. Tex. R. Evid. 705; *cf. Jordan v. State*, 928 S.W.2d 550, 556 n.8 (Tex. Crim. App. 1996).

G. Opinion of Law and Fact

Rule 704 allows an expert to give an opinion that embraces an ultimate issue. Tex. R. Evid. 704. As such, an expert may state an opinion on a mixed question of law and fact, so long as the opinion is confined to the relevant issues and is based on proper legal concepts. *Birchfield*, 747 S.W.2d at 365.

H. Opinion as to Understanding of the Law

Even though an expert may not be permitted to testify as to his or her understanding of the law, the expert is entitled to apply legal terms in his testimony as to the factual issues. *In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d 119, 149 n.7 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding); *Welder v. Welder*, 794 S.W.2d 420, 423 (Tex. App.—Corpus Christi 1990, no writ); *see, e.g.*, *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 95 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that former Supreme Court of Texas justice could not testify to his understanding of the law). For example, in a divorce case involving tracing of separate funds, summaries of checking account records were held to be admissible even though the testifying CPA made characterizations as to the separate and community nature of the money. *Welder*, 794 S.W.2d at 428–29.

I. Opinion Evidence does not Establish Fact

The effect of opinion evidence does not establish material facts as a matter of law. *McGuffin v. Terrell*, 732 S.W.2d 425, 428 (Tex. App.—Fort Worth 1987, no writ).

J. Jury Trials

Courts have also placed limits on expert testimony in jury cases. For example, the *Ochs* case, discussed above, where the expert could not opine on the truthfulness of a witness. *Ochs*, 789 S.W.2d at 957. Also, social studies are generally inadmissible hearsay before a jury, although the expert who put the study together is competent to testify as a witness. *Taylor*, 160 S.W.3d at 649 n.9. Former Section 107.113 of the Family Code required the evaluation report be made a part of the record, but Section 107.114 required that the disclosure to the jury of the contents of the report is subject to the rules of evidence. Former Tex. Fam. Code Ann. §§ 107.113(b), 107.114(a). Note that Section 107.113 was amended effective September 1, 2017, to no longer require the report be made a part of the record, but it will still be subject to the Rules of Evidence. A court should not exclude the testimony of a social worker merely because that witness was not court-appointed. *Davis v. Davis*, 801 S.W.2d 22, 23 (Tex. App.—Corpus Christi 1990, no writ).

IX. TRE Article VIII. Hearsay

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tex. R. Evid. 801(d); *see* "Non-assertive Statement," below, for a discussion of whether testimony is even a "statement" at all. Hearsay is normally excluded because it is evidence that cannot be tested; thus, it is more susceptible to being unreliable or untrustworthy. *See* 2 McCormick on Evid. §§ 244–45. A "statement" includes any spoken or written words or any nonverbal conduct intended as a substitute for such words. Tex. R. Evid. 801(a). The statement offered at trial need not be a direct quote to violate the hearsay rules. *Head v. State*, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999). The "matter asserted" includes any matter explicitly asserted and any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter. Tex. R. Evid. 801(c). Hearsay is inadmissible unless otherwise permitted by the rules or by statute. Tex. R. Evid. 802. Put more simply, any out-of-court statement, except a statement listed in Rule 801(e), whether by the witness or another person, is inadmissible to support the truth of the statement, unless permitted by another rule or statute. However, otherwise inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay. Tex. R. Evid. 802. If it can be shown that a statement is non-hearsay or that it falls within a hearsay exception, the statement is admissible as probative evidence. *See Routier v. State*, 112 S.W.3d 554, 591 (Tex. Crim. App. 2003).

A. Statements that are not Hearsay

Evidence constitutes hearsay only if it is (1) an assertive statement (2) by an out-of-court declarant (3) offered to prove the truth of the assertion. Tex. R. Evid. 801(d). A non-statement or a statement *not* offered to prove the truth of the matter asserted is not hearsay. Further, certain types of statements are defined as non-hearsay by statute

or by the rules of evidence.

1. Non-assertive Statement

A "statement" includes verbal or non-verbal assertions, for example pointing, nodding, or a headshake. Tex. R. Evid. 801(a); *see, e.g.*, *Clabon v. State*, 111 S.W.3d 805, 808 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (holding that hand gesture was hearsay). However, a purely contextual out-of-court statement that is nothing more than a question is not hearsay. *See, e.g.*, *McNeil v. State*, 452 S.W.3d 408, 418–19 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). "Imperative sentences giving orders, exclamatory sentences, and interrogatory sentences posing questions usually fall outside the hearsay definition; if these sentences are relevant at all, it is usually relevant simply that the sentences were uttered." Edward J. Imwinkelried, Evidentiary Foundations 423 (8th ed. 2012). The predicate for offering non-assertive statements as non-hearsay usually includes the following evidence:

1. Where and when the statement was made;

2. Who was present;

3. The tenor of the statement;

4. In an offer of proof outside the presence of the jury, that the tenor of the statement is non-assertive; and

5. In the same offer of proof, that the non-assertive statement is logically relevant to the material facts of consequence in the case. *Id.*

2. Statement not Offered by a Person

In family law cases, this usually comes up in the context of electronic evidence, which is discussed below, but could also come up with animals or other non-humans. For example, a dog trained to detect drugs can indicate whether it has detected drugs. The indication made by the dog, however, is not a "statement" because it was not made by a person and is, therefore, not hearsay.

3. Statement not offered for its Truth

"Even if the statement is assertive, the statement is not hearsay unless the proponent offers the statement to prove the truth of the assertion." *Id.* at 428–29. When arguing that a statement is not being offered for its truth, an attorney is arguing that the fact *of* the statement is relevant and that the truth of the facts *in* the statement is irrelevant. *Id.* at 429. Evidence is hearsay when its probative value depends in whole or in part on the credibility or competency of a person other than the person by whom it is sought to be produced. *Chandler v. Chandler*, 842 S.W.2d 829, 831 (Tex. App.—El Paso 1992, writ denied). For example, a declarant's credibility is an issue with statements offered for their truth, and an opponent needs to cross-examine the out-of-court declarant to test the evidence. Imwinkelried, *Evidentiary Foundations* at 421. In contrast, if a proponent is not offering a statement for its truth, the opponent does not need to have the declarant available for cross-examination. *Id.*

a) State of Mind

Rule 803(3) provides an exception to the hearsay rule for statements regarding one's then-existing state of mind, emotion, sensation, or physical condition. Tex. R. Evid. 803(3). "Normally, statements admitted under this exception are spontaneous remarks about pain or some other sensation, made by the declarant while the sensation, not readily observable by a third party, is being experienced." *Chandler*, 842 S.W.2d at 831. When this exception does not apply, offering the statement, not for the truth of the statement, but rather, to show the knowledge or belief of the person who communicated or received the statement, will provide an exemption and bring the evidence out of being hearsay altogether. *Id.* (citing *Thrailkill v. Montgomery Ward & Co.*, 670 S.W.2d 382, 386 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)). Moreover, where the question is whether a party has acted prudently, wisely, or in good faith, information on which the party acted is original and material evidence, which is not hearsay. *Id.* For example, when a party testified that a Mexican judge told her that she was divorced, the statement was not offered to prove that she was in fact divorced. *Id.* "Rather, it was offered to show that she believed she was divorced. Moreover, the probative force of the statement does not depend on the competency or credibility of the Mexican judge. Therefore, it is not hearsay." *Id.*

b) Impeachment by Prior Inconsistent Statement

Any witness may be impeached by showing that on a prior occasion he made a material statement inconsistent with his trial testimony. Such a statement can be taken from many sources, including prior testimony, affidavits, discovery responses, or pleadings. The purpose of impeachment evidence is to attack the credibility of a witness, not to show the truth of the matter asserted. Impeachment evidence cannot provide probative value to support a judgment. *Labonte v. State*, 99 S.W.3d 801, 807 (Tex. App.—Beaumont 2003, pet. ref'd). As such, any impeaching evidence warrants a limiting instruction. *Id.*

c) Operative Facts

Operative facts are facts leading to the ultimate issue. If the making of an out-of-court statement has legal significance, regardless of its truthfulness, then evidence that the statement was made is not hearsay because it is not offered to prove the truth of the matter asserted. *Lozano v. State*, 359 S.W.3d 790, 820 (Tex. App.—Fort Worth 2012, pet. ref'd); *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 782 (Tex. App.—Dallas 2005, pet. denied). This is most obvious when the statement constitutes a necessary part of the cause of action or defense, the ultimate issue. *Case Corp.*, 184 S.W.3d at 782. Operative facts are admissible as evidence to prove that an utterance was made and not to establish the truth of the contents of such a statement. *Id.* For example, a statement would be an operative fact if the mere making of the statement were the basis of a fraud claim. Another example is words or writings that constitute offer, acceptance, or terms of a contract. *See, e.g.*, *Bobbie Brooks, Inc. v. Goldstein*, 567 S.W.2d 902, 906 (Tex. App.—Eastland 1978, writ ref'd n.r.e.).

4. Extrajudicial Admissions

Extrajudicial admissions are exceptions to the hearsay rule generally based on the notion of estoppel as it applies to prior and often contradictory statements. The court in *Regal* discussed extrajudicial admissions as follows: A statement in an affidavit may not amount to a judicial admission if it is not deliberate, clear, and unequivocal. *Regal Constr. Co. v. Hansel*, 596 S.W.2d 150, 154 (Tex. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.). In such cases, the statement may be considered an extra-judicial admission. Such an admission "is not conclusive but is merely evidence to be given such weight as the trier of facts may see fit to accord it." *Id.*

5. Prior Statement

Certain prior statements by witnesses are defined by the rules as non-hearsay. In order for a prior statement by the witness to be admissible as probative evidence, the declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement. Tex. R. Evid. 801(e)(1). The three types of prior statements defined as non-hearsay are:

a) Prior Inconsistent Statement

A statement that is inconsistent with the declarant's testimony and, in a civil case, was given under penalty of perjury at a trial, hearing, other proceeding, or in a deposition. Tex. R. Evid. 801(e)(1)(A)(i). Because the rule refers to "a deposition" and is not limited to depositions in the same proceeding, any prior deposition testimony by the witness may be used. *Compare* "Depositions" below.

Practice Note: Although any prior deposition testimony is non-hearsay, prior testimony at a trial or hearing *not* in the same proceeding is governed by Rule 804(b)(1) and is admissible only if the declarant is unavailable. *See* "Former Testimony" below.

b) Prior Consistent Statement to Rebut

A statement that is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. Tex. R. Evid. 801(e)(1)(B). Bolstering a witness's credibility by attempting to introduce prior consistent statements, solely for the purpose of bolstering and not in connection with Rule 801(e)(1)(B), is not permitted. Tex. R. Evid. 613(c). However, while a witness's prior consistent statements would normally be inadmissible hearsay, Rule 801 defines prior consistent statements offered to rebut charges of fabrication or improper influence or motive as non-hearsay. Tex. R. Evid. 801(e)(1)(B). If even an implied charge is made against a witness, then prior consistent statements by the testifying witness are not hearsay and are, therefore, admissible as substantive evidence to rebut the charges. However, a prior consistent statement would only be admissible to rebut a charge of fabrication if the statement was made before the motive to fabricate arose. *Hammons v. State*, 239 S.W.3d 798, 804–05 (Tex. Crim. App. 2007).

c) Statement of Identification

A prior statement of identification of a person made after perceiving the person. Tex. R. Evid. 801(e)(1)(C); *see, e.g.*, *Hill v. State*, 392 S.W.3d 850, 858 (Tex. App.—Amarillo 2013, pet. ref'd).

6. Admissions by a Party-Opponent

The statement is offered against the opposing party and is: (A) that party's own statement in either an individual or representative capacity; (B) a statement that the party manifested an adoption or belief in its truth; (C) a statement by a person authorized by the party to make a statement concerning the subject; (D) a statement by the party's agent or employee concerning a matter within the scope of that relationship and while it existed; *or* (E) a statement by a co-conspirator of a party during the course

and in furtherance of the conspiracy. Tex. R. Evid. 801(e)(2).

Statements in discovery responses or pleadings from the present or other proceedings may be used to impeach a witness's credibility. If they are admissions by a party, they may also be admissible as substantive evidence. Allegations and statements made by a party's attorney in such responses or pleadings are that party's statements. *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Props., L.C.*, 323 S.W.3d 322, 337 (Tex. App.—Beaumont 2010, pet. denied). Even pleadings of a party in other cases that contain statements that are inconsistent with that party's present position may be receivable and admissible as admissions. *Westchester Fire Ins. Co. v. Lowe*, 888 S.W.2d 243, 252 (Tex. App.—Beaumont 1994, no writ). Superseded pleadings, even if they are not verified or file-marked, are no longer conclusive as judicial admissions, but they can be introduced into evidence as other admissions. *Quick v. Plastic Sols. of Tex., Inc.*, 270 S.W.3d 173, 185 (Tex. App.—El Paso 2008, no pet.); *Huff v. Harrell*, 941 S.W.2d 230, 239 (Tex. App.—Corpus Christi 1996, writ denied).

One line of cases even extends the theory of adoptive admissions to documents produced by a party in discovery. *See, e.g.*, *Hernandez v. Zapata*, No. 04-19-00507-CV, 2020 WL 3815932, at *6 (Tex. App.—San Antonio July 8, 2020, no pet.) (mem. op.) (holding that party's production of bank statements in discovery was that party's adoption of those statements, exempting documents from hearsay rule); *Fetter v. Brown*, No. 10-13-00392-CV, 2014 WL 5094080, at *4–5 (Tex. App.—Waco, Oct. 9, 2014, pet. denied) (mem. op.) (same); *In re A.J.J.*, No. 2-04-265-CV, 2005 WL 914493, at *5 (Tex. App.—Fort Worth Apr. 21, 2005, no pet.) (mem. op.) (same), *disapproved on other grounds by Iliff v. Iliff*, 339 S.W.3d 74 (Tex. 2011); *see also Reid Road Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 855–58 (Tex. 2011) (holding that opposing party adopted expert's report when it used expert's report to support expert's opinion; thus, expert's report was excepted from rule against hearsay).

7. Depositions

A deposition taken in the same proceeding. Tex. R. Evid. 801(e)(3). Unavailability of the deponent is not a requirement for admissibility. *Id.* Because the rule defines all depositions taken in the same proceeding as non-hearsay, the testimony used to impeach a witness does not have to come from that witness's deposition.

Practice Note: Any deposition testimony from the same proceeding is non-hearsay, whether or not it is from that witness. Compare "Prior Inconsistent Statement" above.

Practice Note: This rule means only that deposition testimony is *non-hearsay*. The deposition testimony may still be objectionable under other rules of evidence, such as relevance, etc. Remember, during a deposition, a majority of objections and evidentiary issues are deferred to final trial.

8. Judicial Admissions

A judicial admission is an assertion of fact, not pleaded in the alternative, in the live pleadings of a party. *Holy Cross Church of Christ in God v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001). "A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact." *Id.* The most common examples of judicial admissions are factual statements made in live pleadings, confession of judgment, and evidence of a guilty plea in a criminal case. An unanswered request for admission is automatically deemed admitted unless the court, on motion, permits its withdrawal or amendment. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989). An admitted admission, deemed or otherwise, is a judicial admission, and that party may not subsequently introduce testimony to controvert it. *Id.* Similarly, a sworn inventory filed in a divorce case constitutes a judicial admission. *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App.—El Paso 1985, writ dism'd); *but see Rivera v. Hernandez*, 441 S.W.3d 413, 420–21 (Tex. App.—El Paso 2014, pet. denied) (considering *Roosevelt* and holding that H's inventory did not constitute admission because (1) that argument was not raised at trial, (2) trial court did not find inventory constituted admission, (3) trial court did not take judicial notice of inventory that was not filed or admitted into evidence, (4) trial court allowed H to amend inventory). A party alleging a material and substantial change in order to support a motion to modify cannot then deny that a material and substantial change has occurred for the purposes of the opposing party's motion to modify because the moving party judicially admitted the change in the original motion. *In re A.E.A.*, 406 S.W.3d 404, 410 (Tex. App.—Fort Worth 2013, no pet.).

Practice Note: While abandoned or superseded pleadings may be admissible as a party admission or declaration against interest, they do not qualify as a judicial admission. *Quick*, 270 S.W.3d at 185.

Practice Note: In light of *Rivera*, trial counsel should seek to notify the trial court of statements that are admissions, have the trial court find the statements are

admissions, admit them as admissions, and object to any amendments or withdrawals of the admissions. *See Rivera*, 441 S.W.3d at 420–21.

Practice Note: Be sure that the judicial admission concerns the same subject matter you are using it for. In a recent case out of Dallas, mother petitioned to modify conservatorship, while father petitioned to modify child support; father argued that mother's pleadings contained judicial admissions that circumstances had changed; the Dallas Court of Appeals held that, even though mother pleaded that a change in circumstances had occurred, mother's petition was to modify conservatorship, so she made no judicial admission as to a change in circumstances concerning child support. *In re J.C.J.*, No. 05-14-01449-CV, 2016 WL 345942 (Tex. App.—Dallas Jan. 28, 2016, no pet.) (mem. op.); *cf. In re R.M.*, No. 02-18-00367-CV, 2019 WL 2635566, at *3 (Tex. App.—Fort Worth June 27, 2019, no pet.) (mem. op.) (holding that mother's counterpetition in suit to modify child support was judicial admission of material and substantial change in finances of parties or child).

B. Exceptions to the Hearsay Rule - Availability of Declarant Immaterial

The twenty-four hearsay exceptions listed in Rule 803 may be roughly categorized into (i) unreflective statements, (ii) reliable documents, and (iii) reputation evidence. *Fischer v. State*, 252 S.W.3d 375, 379 (Tex. Crim. App. 2008). "The rationale for all of the exceptions is that, over time, experience has shown that these types of statements are generally reliable and trustworthy." *Id.* However, all hearsay exceptions require a showing of trustworthiness. *Robinson v. Harkins & Co.*, 711 S.W.2d 619, 621 (Tex. 1986); *see, generally*, Tex. R. Evid. 803.

1. Present Sense Impression

A statement describing or explaining an event or condition made *while* the declarant was perceiving the event or *immediately* thereafter. Tex. R. Evid. 803(1). Unlike the excited-utterance exception, the rationale for this exception stems from the statement's contemporaneity, not its spontaneity. *Fischer*, 252 S.W.3d at 380. The present sense impression exception to the hearsay rule is based upon the premise that the contemporaneity of the event and the declaration ensures reliability of the statement. The rationale underlying the present sense impression is that: (1) the statement is safe from any error of the defect of memory of the declarant because of its contemporaneous nature, (2) there is little or no time for a calculated misstatement, and (3) the statement will usually be made to another (the witness who reports it) who would have an equal opportunity to observe and therefore check a misstatement. *Id.* (quoting *Rabbani v. State*, 847 S.W.2d 555, 560 (Tex. Crim. App. 2008)). The court in *Fischer* states the following: "The rule is predicated on the notion that the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes. It is instinctive, rather than deliberate. If the declarant has had time to reflect upon the event and the conditions he observed, this lack of contemporaneity diminishes the reliability of the statements and renders them inadmissible under the rule.

"Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious thinking-it-through statements enter the picture, the present sense impression exception no longer allows their admission. Thinking about it destroys the unreflective nature required of a present sense impression." *Id.* at 381 (internal quotations and citations omitted).

2. Excited Utterance

A statement relating to a startling event or condition made while the declarant was under stress or excitement caused by the event or condition. Tex. R. Evid. 803(2). The excited-utterance exception is broader than the present-sense-impression exception. *McCarty v. State*, 257 S.W.3d 238, 240 (Tex. Crim. App. 2008). While a present-sense-impression statement must be made while the declarant was perceiving the event or condition, or immediately thereafter, under the excited-utterance exception, the startling event may trigger a spontaneous statement that relates to a much earlier incident. *Id.* No independent evidence of that earlier incident need exist; the trial court decides whether sufficient evidence exists of the event and may consider the excited utterance itself to make that determination. *Coble v. State*, 330 S.W.3d 253, 294–95 (Tex. Crim. App. 2010).

The court in *Goodman* stated the following: "For the excited-utterance exception to apply, three conditions must be met: (1) the statement must be a product of a startling occurrence that produces a state of nervous excitement in the declarant and renders the utterance spontaneous and unreflecting, (2) the state of excitement must still so dominate the declarant's mind that there is no time or opportunity to contrive or misrepresent, and (3) the statement must relate to the circumstances of the occurrence preceding it. The critical factor in determining when a statement is an excited utterance under Rule 803(2) is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. The time elapsed between the occurrence of the event and the utterance is only one factor considered in determining the

admissibility of the hearsay statement. That the declaration was a response to questions is likewise only one factor to be considered and does not alone render the statement inadmissible. *Goodman v. State*, 302 S.W.3d 462, 471–72 (Tex. App.—Texarkana 2009, pet. ref'd) (internal quotations and citations omitted).

Practice Note: "The critical determination is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event or condition at the time of the statement. . . . [But] we are constrained to hold that the long pauses in S.D.'s responses . . . preclude a determination that her statements resulted from impulse rather than reason and reflection." *Tienda v. State*, 479 S.W.3d 863, 877–878 (Tex. App.—Eastland 2015, no pet.) (internal quotations and citations omitted) (quoting *Zuliani v. State*, 97 S.W.3d 589, 596 (Tex. Crim. App. 2003)).

3. Then-Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, mental feeling, pain, or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. Tex. R. Evid. 803(3). Statements that go beyond the declarant's emotional state to describe past acts do not fit within this exception to the hearsay rule. *Menefee v. State*, 211 S.W.3d 893, 905 (Tex. App.—Texarkana 2006, pet. ref'd). The type of statement anticipated by this rule includes a statement that, on its face, expresses or exemplifies the declarant's state of mind—such as fear, hate, love, and pain. *Garcia v. State*, 246 S.W.3d 121, 132 (Tex. App.—San Antonio 2007, pet. ref'd). For example, a person's statement regarding her emotional response to a particular person qualifies as a statement of then-existing state of emotion. *Id.* However, a statement is inadmissible if it is a statement of memory or belief offered to prove the fact remembered or believed. Tex. R. Evid. 803(3). "Case law makes it clear that a witness may testify to a declarant saying 'I am scared,' but not 'I am scared because the defendant threatened me.' The first statement indicates an actual state of mind or condition, while the second statement expresses belief about why the declarant is frightened. The phrase 'because the defendant threatened me' is expressly outside the state-of-mind exception because the explanation for the fear expresses a belief different from the state of mind of being afraid." *Delapaz v. State*, 228 S.W.3d 183, 207 (Tex. App.—Dallas 2007, pet. ref'd) (quoting *United States v. Ledford*, 443 F.3d 702, 709 (10th Cir. 2005), *abrogation on other grounds recognized by United States v. Little*, 829 F.3d 1177, 1181–82 (10th Cir. 2016)).

Practice Note: Drawings by a child of the child frowning or smiling represent the child's then-existing emotion and are admissible under 803(3). *Mims v. State*, No. 03-13-00266-CR, 2015 WL 7166026, at *6 (Tex. App.—Austin Nov. 10, 2015, pet. ref'd) (mem. op., not designated for publication).

4. Statements Made for Medical Diagnosis or Treatment

Statements made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, sensations, or the inception or general cause thereof insofar as reasonably pertinent to diagnosis or treatment. Tex. R. Evid. 803(4). The *Taylor* case provides a thorough discussion of this exception, and key points are as follows:

The rationale behind this exception "focuses upon the patient and relies upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says." *Taylor v. State*, 268 S.W.3d 571, 580 (Tex. Crim. App. 2008) (quoting *United States v. Iron Shell*, 633 F.2d 77, 83–84 (8th Cir. 1980)). Further, it is reasonable that "a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription." *Id.* "A two-part test flows naturally from this dual rationale: first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the witness to rely on the information for purposes of diagnosis or treatment." *Id.*

It is not required that the witness be a physician or have medical qualifications. *Id.* at 587. Out-of-court statements to psychologists, therapists, licensed professional counselors, social workers, hospital attendants, ambulance drivers, or even members of the family might be included under Rule 803(4). *Id.* "The essential qualification expressed in the rule is that the declarant believe that the information he conveys will ultimately be utilized in diagnosis or treatment of a condition from which the declarant is suffering, so that his selfish motive for truthfulness can be trusted. That the witness may be a medical professional, or somehow associated with a medical professional, is no more than a circumstance tending to demonstrate that the declarant's purpose was in fact to obtain medical help for himself. A declarant's statement made to a non-medical professional under circumstances that show he expects or hopes it will be relayed to a medical professional as pertinent to the

declarant's diagnosis or treatment would be admissible under the rule, even though the direct recipient of the statement is not a medical professional." *Id.*

Breaking the two-part test down, the first part involves a second two-part test to determine reliability of the statement. The proponent of the evidence must first show that the declarant was aware that the statements were made for the purpose of a medical diagnosis or treatment. *Id.* at 588–89. Second, the proponent must show that a proper diagnosis or treatment depends upon the truthfulness of the statements. *Id.* That a diagnosis has been given or treatment has begun does not preclude the declarant's self-interested motive to tell the truth. *Id.* at 589. And for purposes of appellate review, especially in cases involving a child-declarant, the proponent of the hearsay must "make the record reflect both 1) that truth-telling was a vital component of the particular course of therapy or treatment involved, and 2) that it is readily apparent that the child-declarant was aware that this was the case." *Id.* at 590. The second part of the original two-part test boils down to whether the particular statements proffered are pertinent to treatment. *Id.* at 591.

Practice Note: The Austin Court of Appeals held in *Mata* that, even though the proponent of the hearsay did not explicitly state that the child-declarant knew she had to be truthful when talking to the doctor, the record was absent of any evidence that would negate such a finding, and the evidence was such that the court could infer the finding. *Mata v. State*, No. 03-15-00220-CR, 2016 WL 859037, at *5 (Tex. App.—Austin Mar. 4, 2016, no pet.) (mem. op., not designated for publication).

Practice Note: Medical doctors and mental-health doctors are treated differently in this context. Courts will look "for any evidence that would *negate*" an awareness that the patient must tell the truth to a medical doctor, but the record must reflect that that awareness is present when the patient seeks mental-health treatment. *Taylor*, 268 S.W.3d at 589.

Practice Note: The declarant does not have to be the patient, so long as it is reasonable for the treating professional to rely on the statements and the statements are pertinent to treatment. *Rangel v. State*, No. 05-15-00609-CR, 2016 WL 3031378 (Tex. App.—Dallas May 19, 2016, pet. ref'd) (mem. op., not designated for publication). Therefore, a parent's statements, or someone else that takes a child to the doctor, are excepted from the hearsay rule.

5. Recorded Recollection

A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. Tex. R. Evid. 803(5). If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. *Id.* For a statement to be admissible under Rule 803(5): (1) the witness must have had firsthand knowledge of the event, (2) the statement must be an original memorandum made at or near the time of the event while the witness had a clear and accurate memory of it, (3) the witness must lack a present recollection of the event, and (4) the witness must vouch for the accuracy of the written memorandum. *Johnson v. State*, 967 S.W.2d 410, 416 (Tex. Crim. App. 1998); *Priester v. State*, 478 S.W.3d 826, 836 (Tex. App.—El Paso 2015, no pet.). To meet the fourth element, "the witness may testify that she presently remembers recording the fact correctly or remembers recognizing the writing as accurate when she read it at an earlier time. But if her present memory is less effective, it is sufficient if the witness testifies that she knows the memorandum is correct because of a habit or practice to record matters accurately or to check them for accuracy. At the extreme, it is even sufficient if the individual testifies to recognizing her signature on the statement and believes the statement is correct because she would not have signed it if she had not believed it true at the time." *Johnson*, 967 S.W.2d at 416.

6. Records of Regularly Conducted Activity

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. Tex. R. Evid. 803(6). "'Business' as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not." Tex. R. Evid. 803(6)(e). For example, if a spouse keeps financial records as part of a regularly organized activity, the records can be admitted under this exception with the

spouse as the sponsoring witness, without a business records affidavit. Courts have admitted check registers, medical bills and receipts, and cancelled checks in this way. *See, e.g.*, *Sabatino v. Curtiss Nat'l Bank of Miami Springs*, 415 F.2d 632, 634 (5th Cir. 1969); *In re M.M.S.*, 256 S.W.3d 470, 477 (Tex. App.—Dallas 2008, no pet.). The predicate for admissibility under the business records exception is satisfied if the party offering the evidence establishes that the records were generated pursuant to a course of regularly conducted business activity and that the records were created by or from information transmitted by a person with knowledge, at or near the time of the event. Business records that have been created by one entity but have become another entity's primary record of the underlying transaction may be admissible under this rule. *Nat'l Health Res. Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 130 (Tex. App.—Dallas 2014, no pet.). Although the sponsoring witness need not be the record's creator or have personal knowledge of the content of the record, the witness must have personal knowledge of the manner in which the records were prepared. *Barnhart v. Morales*, 459 S.W.3d 733, 744 (Tex. App.—Houston [14th Dist.] 2015, no pet.). A party need only object to one of those prongs to preserve error as to both. *Bahena v. State*, 634 S.W.3d 923, 926–27 (Tex. Crim. App. 2021). In order for a compilation of records to be admitted, there must be a showing that the authenticating witness or another person compiling the records had personal knowledge of the accuracy of the statements in the documents. *In re E.A.K.*, 192 S.W.3d 133, 143 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). However, documents written in preparation of litigation indicate a lack of trustworthiness and do not qualify as business records under the above rule. *Campos v. State*, 317 S.W.3d 768, 778 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

7. Absence of a Record of a Regularly Conducted Activity

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of 803(6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. Tex. R. Evid. 803(7). For example, testimony about what is not documented in medical records is admissible under Rule 803(7). *Azle Manor, Inc. v. Vaden*, No. 2-08-115-CV, 2008 WL 4831408, at *6–7 (Tex. App.—Fort Worth 2008, no pet.) (mem. op.), *disapproved of on other grounds*, *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013). It is first necessary to show that records were kept in accordance with Rule 803(6) before introducing testimony under 803(7) that records are missing. *Coleman v. United Sav. Ass'n of Tex.*, 846 S.W.2d 128, 131 (Tex. App.—Fort Worth 1993, no writ).

8. Public Records

Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth: (A) the activities of the office or agency; (B) matters observed while under a legal duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or (C) in civil cases as to any party, factual findings resulting from a legally authorized investigation; unless the sources of information or other circumstances indicate lack of trustworthiness. Tex. R. Evid. 803(8). The court in *Cole* stated: "A number of courts have drawn a distinction for purposes of Rule 803(8)(B) between law enforcement reports prepared in a routine, non-adversarial setting, and those resulting from the arguably more subjective endeavor of investigating a crime and evaluating the results of the investigation." *Cole v. State*, 839 S.W.2d 798, 803 (Tex. Crim. App. 1990) (internal citations omitted) (quoting *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985)). "Rule 803(8) is designed to permit the admission into evidence of public records prepared for purposes independent of specific litigation. In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter, . . . such records are, like other public documents, inherently reliable." *Id.* at 804.

In contrast, adversarial, investigative, or third-party statements do not fall under this exception. Classic examples would be witness statements in police reports or statements by third parties in CPS caseworker narratives. Such statements, even if contained within a public report, would be hearsay-within-hearsay and only admissible if another hearsay exception was applicable. However, records prepared solely for litigation may be admitted so long as they are the result of an investigation made pursuant to authority granted by law and as long as they are properly authenticated. *See, e.g.*, *F-Star Socorro, L.P. v. City of El Paso*, 281 S.W.3d 103, 106 (Tex. App.—El Paso 2008, no pet.) (holding that delinquent-tax records, made for the sole purpose of litigation, were prepared as

a result of a tax assessor-collector's lawful investigation, and were admissible because self-authenticating).

Practice Note: It is the burden of the party opposing the document to point out what statements within it are untrustworthy and, thus, excluded from the exception. *Corrales v. Dep't of Family & Protective Servs.*, 155 S.W.3d 478, 486–87 (Tex. App.—El Paso 2004, no pet.) (holding that, although police report contained witness statements that did not fall within 803(8) exception, opposing party only objected on grounds that those witnesses were not at trial and did not specifically indicate which statements were untrustworthy, so entire report was admitted).

9. Public Records of Vital Statistics

Records of births, deaths, or marriages, if reported to a public office in accordance with a legal duty. Tex. R. Evid. 803(9). Very few Texas cases have dealt with this exception. *See In re Baggett*, No. 11-14-00213-CV, 2014 WL 4952812, at *1 (Tex. App.—Eastland Sep. 30, 2014, orig. proceeding) (mem. op.) (mentioning that proponent of acknowledgment of paternity did not provide certified copy of acknowledgment per 803(9)); *Tex. Workers' Comp. Comm'n v. Wausau Underwriters Ins.*, 127 S.W.3d 50, 61 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (explaining that, while death certificate itself was automatically admissible under 803(9), contents of death certificate constitute hearsay within hearsay and must be examined separately); *Martinez v. State*, No. 05-92-02176-CR, 1996 WL 179370, at *1 (Tex. App.—Dallas April 16, 1996, no writ) (not designated for publication) (holding that death certificate, including assumed name and also true name offered by third party, was admissible under 803(9)). The contents of a record of vital statistics are not automatically admissible pursuant to Rule 803(9) if it is alleged that the record contains hearsay statements. *See Tex. Workers' Comp. Comm'n*, 127 S.W.3d at 61; *but see Martinez*, 1996 WL 179370, at *1. Except for birth and death records, further allegations of hearsay within a record must be examined separately. *See* Tex. Health & Safety Code Ann. § 191.052 ("A copy of a birth, death, or fetal death record registered under this title that is certified by the *state* registrar is prima facie evidence of the facts stated in the record.") (emphasis added); *Tex. Workers' Comp. Comm'n*, 127 S.W.3d at 61.

10. Absence of a Public Record

To prove the absence of a public record or statement or the nonoccurrence or nonexistence of a matter of which a public record or statement was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that a diligent search failed to disclose the public record or statement. Tex. R. Evid. 803(10). The best evidence rule cannot be an objection to testimony about the absence of a record because it does not apply to testimony that written records have been examined and found not to contain a certain matter. *Mega Child Care, Inc. v. Tex. Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 311–12 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Further, "a nonexistent document or document entry, by definition, cannot be authenticated; it does not exist, and no authentication is required." *Id.*

11. Records of Religious Organizations Concerning Personal or Family History

Statements of births, legitimacy, ancestry, marriages, divorces, deaths, relationships by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. Tex. R. Evid. 803(11). These types of records do not require the same foundation as business records if they are not offered under that exception. *Jessop v. State*, 368 S.W.3d 653, 683 (Tex. App.—Austin 2012, no pet.). Nor does this rule depend upon the personal views or religious beliefs of the person making the records or the popularity or acceptance of the religious organization in question. *Id.* at 684.

12. Certificates of Marriage, Baptism, or Similar Ceremonies

Statements of fact, contained in a certificate that is made by a person who is authorized by a religious organization or by law to perform the act certified, that attest that the person performed a marriage or similar ceremony or administered a sacrament and that purports to have been issued at the time of the act or within a reasonable time after it. Tex. R. Evid. 803(12).

13. Family Records

Statements of fact concerning personal or family history contained in a family record, such as Bibles, genealogies, charts, engravings on rings, inscriptions on portraits, or engravings on urns or other burial markers. Tex. R. Evid. 803(13). While parties have attempted to use this exception, no Texas case to date has relied upon this exception to allow evidence in. *See, e.g.*, *Cruz-Garcia v. State*, No. AP-77,025, 2015 WL 6528727, at *24 (Tex. Crim. App. Oct. 28, 2015) (not designated for publication) (holding that Bible study certificates did not qualify as family records because they did not concern personal or family history nor were they contained in any

of the documents listed in 803(13)); *Holmes v. State*, No. 05-03-00915-CR, 2004 WL 2804800, at *8 (Tex. App.—Dallas Nov. 30, 2004, no pet.) (not designated for publication) (holding that audiotaped recording of anonymous caller to CPS did not fall under category of family history).

14. Records of Documents Affecting an Interest in Property

The record of a document purporting to establish or affect an interest in property as proof of the content of the originally recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is kept in a public office and an applicable statute authorizes the recording of documents of that kind in that office. Tex. R. Evid. 803(14). This hearsay exception should be construed to relate to recitals or statements made in deeds, leases, mortgages, and other such documents affecting an interest in property and not to affidavits of heirship which more properly fall within the hearsay exception stated under Rule 804(b)(3). *Compton v. WWV Enters.*, 679 S.W.2d 668, 671 (Tex. App.—Eastland 1984, no writ). 804(14) could include a power of attorney as well. *Champion v. Robinson*, 392 S.W.3d 118, 128 n.17 (Tex. App.—Texarkana 2012, pet. denied). And translated documents. *Kerlin v. Arias*, 274 S.W.3d 666, 667 (Tex. 2008).

15. Statements in Documents Affecting an Interest in Property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. Tex. R. Evid. 803(15). This rule is similar to 803(14) but relates to statements in unrecorded documents affecting an interest in property. Although attorneys tend to think of real property when applying this exception, it can apply to personal property as well. *See, e.g.*, *Guidry v. State*, 9 S.W.3d 133, 146–47 (Tex. Crim. App. 1999) (holding that wife's inventory from divorce proceeding stating she had an interest in a Jeep, which was to be the appellant's remuneration for killing her, fell under 803(15) exception); *Madden v. State*, 799 S.W.2d 683, 698 (Tex. Crim. App. 1990) (holding that handwritten list of victim's weapons with corresponding serial numbers found among victim's personal papers after death fell under 803(15) exception). Be aware, however, that some courts require the document to have some sort of official or formal nature, even though it is not recorded. *See, e.g.*, *Tri-Steel Structures, Inc. v. Baptist Found. of Tex.*, 166 S.W.3d 443, 451 (Tex. App.—Fort Worth 2005, pet. denied) (noting that Court of Criminal Appeals has been more liberal but holding that unsigned letters do not fall under 803(15) exception).

16. Statements in Ancient Documents

Statements in a document that is at least twenty years old and whose authenticity is established. Tex. R. Evid. 803(16). Although all hearsay exceptions require a showing of trustworthiness, the justification for the exception is, in part, circumstantial indicia of trustworthiness. *Walton v. Watchtower*, No. 10-05-00190-CV, 2007 WL 64442, at *3 (Tex. App.—Waco Jan. 10, 2007, no pet.) (mem. op.). "Fraud and forgery are unlikely to be perpetrated so patiently, to bear fruit so many years after a document's creation. Fair appearance and proper location, therefore, are sufficient additional circumstances to justify admissibility of an ancient document." *Id.* Grounds for excluding evidence include that the document was: (1) not produced in an admissible form, (2) unreliable, (3) found and produced under suspicious circumstances, or (4) not found where it should have been found. *Aguillera v. John G. & Marie Stella Kennedy Mem. Found.*, 162 S.W.3d 689, 695 (Tex. App.—Corpus Christi 2005, pet. denied); *see also* Tex. R. Evid. 901(b)(8) (authenticating ancient documents).

17. Market Reports and Similar Commercial Publications

Market quotations, lists, directories, or other compilations generally relied upon by the public or by persons in particular occupations. Tex. R. Evid. 803(17). "Where it is proven that publications of market prices or statistical compilations are generally recognized as reliable and regularly used in a trade or specialized activity by persons so engaged, such publications are admissible for the truth of the matter published." *Patel v. Kuciemba*, 82 S.W.3d 589, 594 (Tex. App.—Corpus Christi 2002, pet. denied). This exception also applies to drug labels if there is sufficient reliability that the drugs had not been changed since the date of packaging. *Shaffer v. State*, 184 S.W.3d 353, 362 (Tex. App.—Fort Worth 2006, pet. ref'd). For a discussion of the difference between this exception and the learned treatise exception, see below.

18. Statements in Learned Treatises, Periodicals, or Pamphlets

To the extent called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, statements contained in published treatises,

periodicals, or pamphlets established as reliable authority by the testimony or admission of the expert or by another expert or by judicial notice. Tex. R. Evid. 803(18). If admitted, the statements may be read into evidence but may not be received as exhibits. *Id.* The market report exception is different from the learned treatise exception in significant ways, as discussed in the *Kahanek* case: "A market report or commercial publication is received for the truth of the matter asserted, which permits the jury to take the document into the jury room. A learned treatise, on the other hand, is admissible only in conjunction with an expert's testimony and may not be taken into the jury room." *Kahanek v. Rogers*, 12 S.W.3d 501, 504 (Tex. App.—San Antonio 1999, pet. denied). The market report exception is for information that is readily ascertainable and about which there can be no real dispute. *Id.* The exception relates to objective facts furnished under a business duty to transmit. *Id.* Texas's acceptance of these criteria can be seen in several examples in case law—growth charts of turkeys, daily stock price quote sheets, newspaper publications of the market prices of chickens, a baseball guide admitted to show the beginning and ending dates of the baseball season, and a travel guide admitted to show railroad timetables. *Id.* On the other hand, the compilation of drug information embodied by the Physicians' Desk Reference (PDR) goes beyond objective information to items on which learned professionals could disagree in good faith. *Id.* Therefore, the PDR is better classified as a learned treatise rather than a compilation of market material. *Id.* The predicate for cross-examining an expert on a learned treatise is found above in the section on experts. From that predicate, simply read into the record what you want the judge or jury to hear from the treatise.

19. Reputation Concerning Personal or Family History

Reputation among members of a person's family by blood or adoption or marriage, among a person's associates, or in the community, concerning a person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood or adoption or marriage, or other similar facts of personal or family history. Tex. R. Evid. 803(19). Hearsay exceptions 803(19) and (20) arise from necessity and are founded on the general reliability of statements by family members about family affairs when the statements by deceased persons regarding family history were made at a time when no pecuniary interest or other biased reason for the statements were present. *Akers v. Stevenson*, 54 S.W.3d 880, 885 (Tex. App.—Beaumont 2001, pet. denied). For example, "certain witnesses may provide hearsay evidence regarding a person's age. In order to give such evidence, the witness must be a close family associate who is familiar with the family history." *Jones v. State*, 950 S.W.2d 386, 388 (Tex. App.—Fort Worth 1997, pet. ref'd, untimely filed).

20. Reputation Concerning Boundaries or General History

Reputation in a community, arising before the controversy, concerning boundaries of or customs affecting lands in the community or concerning general historical events important to the community, state, or nation in which they are located. Tex. R. Evid. 803(20). However, proposed testimony related to an individual's family assertion of an easement without any indication of the community's interest in or knowledge of the family's claim to access the property or any indication of a general reputation within the community of his right of access is not admissible. *Roberts v. Allison*, 836 S.W.2d 185, 191 (Tex. App.—Tyler 1992, writ denied).

21. Reputation Concerning Character

Reputation of a person's character among that person's associates or in the community. Tex. R. Evid. 803(21). "Reputation testimony is necessarily based on hearsay, but is admitted as an exception to the hearsay rule." *Moore v. State*, 663 S.W.2d 497, 500 (Tex. App.—Dallas 1983, no pet.). A character witness is not required to reside or work in the same "community" as the one about whom the testimony is related. *Siverand v. State*, 89 S.W.3d 216, 221 (Tex. App.—Corpus Christi 2002, no pet.). For example, the testimony of a witness who knew defendant's reputation in Dallas, where the defendant worked, was admissible even though the witness did not know the defendant's reputation in Richardson, where the defendant lived. *Jordan v. State*, 290 S.W.2d 666, 667 (Tex. Crim. App. 1956).

22. Judgment of Previous Conviction

In civil cases, evidence of a final judgment of conviction, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction, while no appeal of the conviction is pending. Tex. R. Evid. 803(22)(A). In criminal cases, evidence of a final judgment of conviction, entered after a trial or upon a plea of guilty or nolo contendere, adjudging a person guilty of a criminal offense, to prove any fact essential to sustain the judgment of conviction, but not including, when offered by the state for purposes other than impeachment, judgments against persons other than the accused, while no appeal of the conviction is pending. Tex. R. Evid. 803(22)(B). According to the

McCormick case, a person may even be prevented from explaining the circumstances of his previous conviction: "Where (i) the issue at stake was identical to that in the criminal case, (ii) the issue had been actually litigated, and (iii) determination of the issue was a critical and necessary part of the prior judgment, the judgment is established by offensive collateral estoppel and is within the hearsay exception of [803(22)]. When the requirements are satisfied, a party is estopped from attacking the judgment or any issue necessarily decided by the guilty verdict." *McCormick v. Tex. Commerce Bank Nat'l Ass'n*, 751 S.W.2d 887, 890 (Tex. App.—Houston [14th Dist.] 1988, writ denied). A trial court does not err in refusing to permit a party to explain the circumstances of his criminal conviction under these circumstances. *Id.* To allow a party to present evidence of inadequate representation by counsel, for example, would impugn the validity of the judgment and be impermissible under the doctrine of collateral estoppel. *Id.*

23. Judgments Involving Personal, Family, or General History, or a Boundary

Judgments as proof of matters of personal, family or general history, or boundaries that were essential to the judgment, if the same could be proved by evidence of reputation. Tex. R. Evid. 803(23).

24. Statement against Interest

A statement that was, at the time of its making, so contrary to the declarant's pecuniary or proprietary interest, or had so great a tendency to invalidate the declarant's claim against someone else or expose the declarant to civil or criminal liability or make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. Tex. R. Evid. 803(24)(A). In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Tex. R. Evid. 803(24)(B). However, only those specific statements that were actually against penal interest are admissible, not the entire conversation. *Walter v. State*, 267 S.W.3d 883, 886 (Tex. Crim. App. 2008). Self-inculpatory statements and "blame-sharing" or neutral collateral statements are admissible, but self-exculpatory statements that shift blame to another must be excluded. *Id.* at 886, 894. And remember that the statement must involve the *declarant's* interest or liability and not the interest or liability of another. *See, e.g.*, *Garza v. Alcala*, No. 04-04-00855-CV, 2006 WL 1080241, at *9 (Tex. App.—San Antonio April 26, 2006, no pet.) (mem. op.) (holding that because statements by voters to campaign workers implicated campaign workers' liability, statements did not fall under 803(24)); *cf. Ruiz v. State*, 631 S.W.3d 841, 859 (Tex. App.—Eastland 2021, pet. ref'd) (explaining that "[s]tatements against a declarant's penal interest fall into three general categories: (1) self-inculpating statements, (2) statements that equally inculpate the declarant and a third party, and (3) statements that inculpate both the declarant and a third party but shift blame to another by minimizing the speaker's culpability").

C. Exceptions to the Hearsay Rule - Declarant Unavailable

1. "Unavailable" Defined

A declarant is considered unavailable if the declarant: (1) is exempted, by ruling of the court on the ground of privilege, from testifying concerning the subject matter of the declarant's statement; (2) refuses to testify concerning the subject matter despite a court order to do so; (3) testifies to not remembering the subject matter; (4) is unable to be present or to testify at the hearing because of death or a then-existing infirmity or physical or mental illness; or (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means. Tex. R. Evid. 804(a). These do not apply if the proponent of the statement wrongfully caused the declarant's unavailability. *Id.* In other words, unavailability of a witness means that the witness is dead, has become insane, is physically unable to testify, is beyond the jurisdiction of the court, is unable to be found after a diligent search, or has been kept away from the trial by the adverse party. *Hall v. White*, 525 S.W.2d 860, 862 (Tex. 1975). The party offering a statement under a hearsay exception must prove the unavailability of the declarant. *Id.*

The court in *Fuller* discussed situations that do not satisfy the unavailability requirement. *Fuller-Austin Insulation Co. v. Bilder*, 960 S.W.2d 914 (Tex. App.—Beaumont 1998, pet. dism'd, judgment set aside Sep. 16, 1999). Although the *Fuller* opinion has been set aside, it raises concerns that lawyers must be diligent in procuring an available declarant. The court in *Fuller* stated that, although the declarant, who was 92, uncooperative, too ill to attend the original trial, and lived in California, was unavailable at the date of trial, that did not mean that he was not or would not be available at another point or in another way, such as a deposition in his home state. *Id.* at 921.

2. Former Testimony

Former testimony is not excluded if the declarant is unavailable as a witness if, in civil cases, the testimony was given by the declarant as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Tex. R. Evid. 801(b)(1)(A). Basically, if the opposing party, or one with a similar interest and motive, had the opportunity to examine the declarant at another point in time about the same testimony, the declarant need not be available for examination by that party at the present hearing. Former testimony from a previous hearing or trial, whether or not it is in the same proceeding, must be properly admitted into evidence at the current hearing before the factfinder, or the reviewing court may not consider it. *Bos v. Smith*, 492 S.W.3d 361, 378 (Tex. App.—Corpus Christi 2016), *rev'd in part on other grounds*, 556 S.W.3d 293 (Tex. 2018); *Moreno v. Perez*, 363 S.W.3d 725, 735–36 (Tex. App.—Houston [1st Dist.] 2011, no pet.). While a trial court may take judicial notice of its own file, it may not "take judicial notice of the truth of [the] allegations in its records." *Barnard*, 133 S.W.3d at 789. To properly admit previously admitted testimony, a party must authenticate the evidence and lay the proper predicate as though offering it for the first time. *See Guyton*, 332 S.W.3d at 693. Evidence not properly before the factfinder amounts to no evidence. *Id.*

Practice Note: Do not confuse Rule 804(b)(1) with 801(e)(3). Rule 801(e)(3) states that all depositions taken in the same proceeding are non-hearsay, whether the declarant is available or not. The court in *Hall* explained the distinction: "It may seem incongruous that Texas would allow the admission of deposition testimony without regard to the availability of the witness and exclude former testimony where the witness is available. Distinguished writers have said that there is no distinction between the two. There is, indeed, no distinction so far as the lack of personal observation of the witness by the trier of fact. There is a difference to the adversary in his preparation for trial and in his meeting the adverse testimony. The contesting attorney is not so likely to have ready reference to transcribed testimony given at a former trial as he is to have available a copy of a deposition. There may be no written transcription of the former testimony; the rule has not required its proof to be by a method of that reliability. Furthermore, the deposition rules now require that the witness supplement his testimony if, after the giving of the deposition, he discovers that he has testified incorrectly or that the facts have changed. In the taking of a deposition the attention of a witness may be called to this duty to supplement, and further obligation of this nature may be placed upon the witness by agreement of the parties. No such duty may be imposed with respect to testimony at a former trial." *Hall*, 525 S.W.2d at 862 (internal citations omitted).

Practice Note: Section 161.004(b) of the Texas Family Code allows the trial court, in a hearing to terminate parental rights after the denial of a prior petition to terminate, to consider testimony from a previous hearing in a suit to terminate parental rights involving the same parent and child. Tex. Fam. Code Ann. § 161.004(b). No cases currently discuss this section in terms of a hearsay objection.

3. Dying Declaration

A statement made by a declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of the death. Tex. R. Evid. 804(b)(2). The court in *Gardner* discusses this exception: "Under Texas common law, the proponent of a dying declaration was required to establish that it was made (1) when the declarant was conscious of approaching death and had no hope of recovery, (2) voluntarily, (3) without persuasion or influence from leading questions, and (4) when the declarant was of sound mind. This predicate could be established by either direct or circumstantial evidence, and it was not essential that the declarant actually say that he was conscious of impending death or without hope of recovery. Each case depends upon its particular circumstances, but sometimes the declarant's conduct and the nature of his wounds would suffice. Under the modern-day Rule 804(b)(2), the common-law requirement that there was no hope of recovery was abrogated, and the focus turned more to the severity of the injuries than the declarant's explicit words indicating knowledge of imminent death. All that the rule requires is sufficient evidence, direct or circumstantial, that demonstrates that the declarant must have realized that he was at death's door at the time that he spoke. It is both (1) the solemnity of the occasion—the speaker peering over the abyss into the eternal—which substitutes for the witness oath, and (2) the necessity principle—since the witness had died, there was a necessity for taking his only available trustworthy statements—that provide the underpinning for the doctrine. As with the admission of all evidence, the trial judge has great discretion in deciding whether a statement qualifies as a dying declaration." *Gardner v. State*, 306 S.W.3d 274, 289–91 (Tex. Crim. App. 2009).

4. Statement of Personal or Family History

A statement concerning the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or adoption or marriage, or other similar facts of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or a statement concerning the foregoing matters, including death, of another person, if the declarant was related to the person by blood or adoption or marriage, or was so intimately associated with the person's family as to be likely to have accurate information concerning the matter stated. Tex. R. Evid. 804(b)(3). This rule is similar to 803(19), which allows *reputation* testimony regarding personal or family history. *See* Tex. R. Evid. 803(19). This rule rests on the assumption that the type of declarant specified by the rule will not a make a statement, such as a date of a marriage or the existence of a ceremony, unless it is trustworthy. *Henderson v. State*, 77 S.W.3d 321, 326 (Tex. App.—Fort Worth 2002, no pet.). Rule 804(b)(3) does not apply when the matter asserted by the declarant involves non-trustworthy facts, such as state of mind. *Id.*

D. Hearsay within Hearsay

Hearsay within hearsay is admissible only if each offered portion fits a rule or exception. Tex. R. Evid. 805. Trial advocates commonly face this problem regarding statements contained within business and medical records. Like all hearsay, however, if an opponent does not object to hearsay-within-hearsay, the testimony is probative evidence. *Gen. Motors Corp. v. Harper*, 61 S.W.3d 118, 126 (Tex. App.—Eastland 2001, pet. denied). Similarly, if evidence contains both inadmissible hearsay and other admissible evidence, the objection must be specific enough to point out the inadmissible evidence, or else it may all come in. *Sunl Grp., Inc. v. Zhejiang Top Imp. & Exp. Co., Ltd.*, 394 S.W.3d 812, 816 (Tex. App.—Dallas 2013, no pet.).

Practice Note: A recent case out of California held that, although an expert may rely on hearsay to form an opinion, the expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." *People v. Sanchez*, 374 P.3d 320, 334 (Cal. 2016). The court adopted the following rule: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." *Id.* This would then extend to an expert's report, like a custody evaluation. If the evaluator relied on collaterals in forming an opinion, and the evaluator's report contains those collateral's statements, the opponent should object on the grounds of hearsay (for the report) and hearsay within hearsay (for each statement made by a collateral). The proponent of the report should call each of those collaterals to testify so that the collateral can be cross-examined. But note that the Confrontation Clause, generally, does not apply to civil cases, should the court deny your request that each collateral be called to testify before admitting the report. *In re S.P.*, 168 S.W.3d 197, 206 (Tex. 2005). One possible way around this, however, is that cross-examination is fundamental to due process. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) ("We have recognized that our due course of law provision at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. . . . This right [to be heard] also includes an opportunity to cross-examine witnesses, to produce witnesses, and to be heard on questions of law."); *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987) ("Due process requires an opportunity to confront and cross-examine adverse witnesses.").

E. Impeaching Hearsay Statements

Rule 806 provides that when a hearsay statement, or a non-hearsay statement defined by Rule 801(e), has been admitted in evidence, the credibility of the out-of-court declarant may be attacked. Tex. R. Evid. 806. Evidence of a statement or conduct by the declarant at any time may be offered to impeach the out-of-court declarant. *Id.* There is no requirement that the declarant be afforded an opportunity to deny or explain. *Id.* If the credibility of the out-of-court declarant is attacked, it may be supported by any evidence that would be admissible if the declarant had testified as a witness. *Id.* If the party against whom a hearsay statement has been admitted subsequently calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if on cross-examination. *Id.*

F. Hearsay Issues in SAPCR Cases Involving Abuse

SAPCR cases may involve abuse, and the only evidence of abuse may be the words of the victim. When this occurs, Section 104.006 of the Family Code allows for any statements made by a child twelve years of age or younger describing the abuse to be admitted, even if they are inadmissible hearsay statements, if the court finds that the time, content, and circumstances of the statements

provide sufficient indications of reliability and either the child testifies at the proceeding or the court finds that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child. Tex. Fam. Code Ann. § 104.006. The Fort Worth Court of Appeals has compared Section 104.006 to article 38.072 of the Code of Criminal Procedure to determine the reliability of these types of statements. *In re M.R.*, 243 S.W.3d 807, 813 (Tex. App.—Fort Worth 2007, no pet.). Indicia of reliability include whether (1) the child victim testifies at trial and admits to making the out-of-court statement; (2) the child understands the need to tell the truth and has the ability to observe, recollect, and narrate; (3) other evidence corroborates the statements; (4) the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults; (5) the child's statement is clear an unambiguous and rises to the needed level of certainty; (6) the statement is consistent with other evidence; (7) the statement describes an event that the child of the victim's age could not be expected to fabricate; (8) the child behaves abnormally after the contact; (9) the child has a motive to fabricate the statements; (10) the child expects punishment because of reporting the conduct; and (11) the accused had the opportunity to commit the offense. *Id.* These indicia correlate with the two-part test established in *Taylor* with regards to statements made for a medical diagnosis or treatment. *See Taylor*, 268 S.W.3d at 587–91. Remember, hearsay is excluded because it is unreliable and untested, but under these circumstances, it may be reliable. *See, generally*, *id.*; *In re M.R.*, 243 S.W.3d at 813; 2 McCormick on Evid. §§ 244–45.

In criminal cases, these statements alone can be sufficient to support a conviction of the perpetrator. *See* Tex. Code Crim. P. art. 38.07. They can be just as useful in family law cases to protect children. *See, e.g.*, Tex. Fam. Code Ann. §§ 153.004 (affects conservatorship; prevents access to child), 156.1045 (is a material and substantial change to justify modification), 161.001(b) (termination of parental rights). The court in *Taylor* clarified its two-part test when it comes to the identity of the perpetrator: In addition to making the record clear that the patient believed that truth-telling was necessary to obtain proper treatment and that proper treatment depended upon the truthfulness of the statements, the record must also reflect that the witness's knowledge of the identity of the perpetrator was important to the efficacy of the treatment. *Taylor*, 268 S.W.3d at 591.

G. Hearsay Issues with Electronic Evidence

Electronic evidence and non-electronic evidence follow the same underlying rules: they both must (1) be relevant, (2) be authentic, (3) fall within a hearsay exception or not be hearsay, (4) be an original or duplicate, and (5) have probative value that is not outweighed by its unfair prejudice. The predicates may be lengthier or more complicated for electronic evidence to prove each of those things, but do not forget, it is still just evidence. As such, this sub-section will only discuss issues directly related to electronic evidence and hearsay, relying on the discussions above of each individual hearsay rule. Electronic evidence, generally, will be discussed in more depth in the next section on authentication.

1. Unreflective Statements

Evidence obtained from email, text messaging, or social networking sites, such as Facebook, MySpace, or Twitter, is often relevant in family law cases. The evidence may be non-hearsay to the extent that it is an admission by a party-opponent, but there may be times where statements by others are relevant. Of the hearsay exceptions, 803(1)-(3) can be especially useful in admitting these types of statements. Those are the exceptions for present sense impression, excited utterance, and then-existing condition, as discussed above. Electronic communication is particularly prone to candid statements of the declarant's state of mind, feelings, emotions, and motives. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 570 (D.Md. 2007) (mem. op.). Further, such messages are often sent while events are unfolding, thus providing an additional argument for lack of reflection. The logic of the existing exceptions can be applied to admit even new forms of communication. *See* Tex. R. Evid. 803(1)–(3).

2. Reliable Documents

The second category of hearsay exceptions, reliable documents, can also include a variety of computer- or internet-stored data. Anything from online flight schedules, to personal financial records, to emails could potentially be admitted under these existing hearsay exceptions. *See* Tex. R. Evid. 803(5)–(18).

3. Statements that are not Hearsay

a) Computer-Generated "Statements"

"Cases involving electronic evidence often raise the issue of whether electronic writings constitute statements under Rule 801(a). Where the writings are non-assertive, or not made by a 'person,' courts have held that they do not constitute hearsay, as they are not 'statements.'" *Lorraine*, 241 F.R.D. at 564. This refers to computer-generated statements made by an internal operation of the computer, such as the date and time that a hotel-room card

reader reads a card key or the self-generated print out from an intoxilyzer instrument, rather than data that was entered by a person and subsequently printed out. *Stevenson v. State*, 920 S.W.2d 342, 343–44 (Tex. App.—Dallas 1996, no pet.) (intoxilyzer); *Murray v. State*, 804 S.W.2d 279, 283–84 (Tex. App.—Fort Worth 1991, pet. ref'd) (hotel-room card reader). Even though these statements may be computer-generated, evidence must still support that the computer process is accurate and reliable. *See Miller v. State*, 208 S.W.3d 554, 562–64 (Tex. App.—Austin 2006, pet. ref'd) (holding that because no evidence was admitted that self-generated phone bill or process to create such bill was accurate, trial court erred by admitting phone bill over hearsay objection).

b) Metadata

Metadata is the computer-generated data about a file, including date, time, past saves, edit information, etc. It would likely be considered a non-statement under the above logic, and therefore non-hearsay. It remains important to properly satisfy authentication requirements. A higher authentication standard may apply because it is computer-processed data, rather than merely computer-stored data.

However, because metadata is normally hidden and usually not intended to be reviewed, ten states have issued ethics opinions concluding that it is unethical to mine inadvertently-produced metadata. *See, e.g.*, Miss. Bar Ethics Comm., Op. 259 (2012); N.C. State Bar Ethics Comm., 2009 Formal Ethics Op. 1 (2010); Me. Bd. of Overseers, Op. 196 (2008). Seven states, including the American Bar Association, have issued opinions stating that mining metadata is not unethical, some including the caveat "as long as special software is not used." *See, e.g.*, Or. State Bar Legal Ethics Comm., Op. 2011-187 (2015); Co. Bar Ass'n Ethics Comm., Op. 119 (2008); Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Op. 06-442 (2006). Minnesota and Pennsylvania have each issued opinions that state it must be determined on a case-by-case basis. *See* Minn. Lawyers Prof'l Responsibility Board, Op. 22 (2010); Penn. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Op. 2009-100 (2009).

Texas recently issued an ethics opinion at the end of 2016 about metadata. Prof'l Ethics Comm. for the State Bar of Tex., Op. 665 (2016). While it does not directly address mining for metadata, it does instruct that attorneys have a duty to be competent when dealing with electronic documents and to scrub metadata so that a client's confidential information will not be inadvertently disseminated to opposing counsel. *Id.* It also states that, while lawyers have no duty to tell the sending lawyer that metadata containing confidential information was received, lawyers must continue to follow other ethical rules by not misleading the court. *Id.* Thus, if a lawyer makes a proposition to the court that would not be misleading without the knowledge of the confidential information, but would be misleading with the knowledge of the confidential information, the lawyer cannot make that proposition if the lawyer knew the confidential information, whether the lawyer inadvertently saw it or mined for it. *Id.*

c) Admissions by a Party-Opponent

The exemption for admissions by a party-opponent is extremely useful in overcoming a hearsay objection to texts, emails, Facebook wall posts, etc. Electronic evidence will meet this hearsay exemption if it is properly authenticated to have been written/posted/created/etc. by the party against whom it is used. *See, e.g.*, *Cook v. State*, 460 S.W.3d 703, 713 (Tex. App.—Eastland 2015, no pet.) (text messages); *Massimo v. State*, 144 S.W.3d 210, 215–17 (Tex. App.—Fort Worth 2004, no pet.) (emails).

H. Rule of Optional Completeness

Rule 107 allows for the admission of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter opened up by the adverse party. Tex. R. Evid. 107; *Bezerra v. State*, 485 S.W.3d 133, 142–43 (Tex. App.—Amarillo 2016, pet. ref'd) (holding no abuse of discretion in admitting videotaped interviews, over hearsay exception, that more fully and fairly explained the matters about which police officer testified per Rule 107) (citing *Walters*, 247 S.W.3d at 214–18). The omitted portion or other evidence that the proponent attempts to admit must be on the same subject and must be necessary to make it fully understood. *Id.* (quoting *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004)).

X. TRE Article IX. Authentication and Identification

The requirement of authentication or identification is one of the first conditions precedent to admissibility. This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Tex. R. Evid. 901(a). If the evidence is not what the proponent claims it is, then it cannot be relevant. *Tienda*, 358 S.W.3d at 638. A party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be. Unless the evidence sought to be admitted is self-authenticating under Rule 902,

extrinsic evidence must be adduced prior to its admission. Tex. R. Evid. 902. Rule 901(b) contains a non-exclusive list of illustrations of authentication that comply with the rule. Tex. R. Evid. 901(b).

The authentication requirements of Rule 901 are designed to set up a threshold preliminary standard to test the reliability of evidence, subject to later review by an opponent's cross-examination. Determining what degree of foundation is appropriate in any given case is in the judgment of the court. The required foundation will vary not only with the particular circumstances but also with the individual judge. Obviously, there is no "one size fits all" approach that can be taken when authenticating electronic evidence, partly because technology changes so rapidly that it is often new to many judges.

Before you step into the courtroom, you should already know what evidence you have that you want the factfinder to consider. You can then find the predicates and law necessary to authenticate and admit that evidence. Whether the evidence is electronic or not, the same rules of evidence apply, and the same unreliability must be overcome. *See In re F.P.*, 878 A.2d 91, 95 (Penn. 2005) (explaining that same rules of evidence apply to new technology and that same problem of unreliability can exist in traditional forms of evidence). While attorneys are right to be skeptical of electronic evidence, attorneys may forget that the same concerns are present with any type of evidence.

A. Non-electronic evidence

Non-electronic, physical evidence still exists, e.g. drawings, letters or writings, public records, tickets (sporting or other events, travel, etc.), deeds, judgments or convictions, bills, tax records, and wills. Except for those items that fall under 902, these items must be authenticated by laying the proper predicate to show that they are what the proponent claims they are.

Physical evidence has two basic methods of identification, which can authenticate the physical evidence and make it admissible: ready identifiability and chain of custody. Imwinkelried, Evidentiary Foundations at 138. Ready identifiability usually consists of distinctive characteristics or other attributes that a witness has experienced with the senses, thereby having personal knowledge, and can then identify again at trial, for example: a letter with an identifiable signature, a photograph, a voice, or an email. *See, e.g.*, *Angleton v. State*, 971 S.W.2d 65, 68 (Tex. Crim. App. 1998) (voice); *Manuel v. State*, 357 S.W.3d 66, 75 (Tex. App.—Tyler 2011, pet. ref'd) (email); *Garza v. Guerrero*, 993 S.W.2d 137, 142 (Tex. App.—San Antonio 1999, no pet.) (letter); *Kessler v. Fanning*, 953 S.W.2d 515, 522 (Tex. App.—Fort Worth 1997, no pet.) (photograph). The same identifiable characteristics can apply to both physical evidence and electronic evidence.

Predicate:

When have you seen/heard/experienced/etc. _____?
What characteristics did you see/hear/experience/etc.?
I am handing you what has been marked as Exhibit 1 for identification purposes; can you identify Exhibit 1?
What is it? (The same _____ I saw/heard/experienced/etc. before)
How can you identify Exhibit 1? *[distinctive characteristics test]*
Are those the same characteristics you saw/heard/experienced/etc. previously?
Are you basing your identification on your previous experience?
Is Exhibit 1 in the same condition as you previously experienced it?

Chain of custody is necessary when an object has no readily identifiable characteristics, yet the proponent wants to prove that the object is the same object that is connected to the case. Imwinkelried, Evidentiary Foundations at 138. This is most apparent in criminal cases involving drugs that are collected at the crime scene, sent for testing, and sent back and presented at the trial. But beware, with the ever increasing amount of "fake" evidence that can be produced today, some evidence in family law cases may require the chain of custody to be established. To do so, the proponent must call each link (person who handled the evidence) to the stand and show that link's receipt of the object, ultimate disposition of the object, and safekeeping of the object. *Id.* at 139. Note, however, that the chain-of-custody requirements in civil cases are less stringent than in criminal cases in Texas. *In re K.C.P.*, 142 S.W.3d at 579–80.

Predicate:

When did you receive _____?
Where did you receive _____?
What condition was _____ in when you received it at that time and place?
What did you do with _____ when you received it?
Did you safeguard _____?
What did you do to prevent any tampering?
What did you do when your work with _____ was complete? (retain, destroy, or transfer)
Explain the process of retain/destroy/transfer.
If not destroyed:

I am handing you what has been marked as Exhibit 1 for identification purposes; can you identify Exhibit 1?
What is it?
Aside from anything you did to _____, is Exhibit 1 in the same condition as _____ when you initially received it?
Do you believe _____ and Exhibit 1 are the same object?

B. Electronically Stored Information (ESI)

Remember, evidence is evidence. Whether electronic or not, the proponent must adduce sufficient evidence to show that it is what its proponent claims.

1. What is ESI?

Family law cases typically involve four different categories of electronic data: (1) voice transmissions such as audio recordings, cell phone transmissions, and voice mail; (2) computer-generated data such as spreadsheets, computer simulations, information downloaded from a GPS device, emails, and website information (such as social networking sites); (3) information from personal data devices and cell phones including calendars, text messages (SMS/MMS), notes, digital photos, and address books; and (4) video transmissions.

Each of those four categories can be stored as data in different ways. The court, in the landmark case of *Zubulake*, listed five different types of storage:

1. Active/Online Data. This includes data files that are currently-in-use and works-in-progress such as word processing documents, spreadsheets, electronic calendars, address books, and all of the items contained on the computer's hard drive. This is considered the most accessible data;

2. Near-line Data. This includes the data contained on robotic storage devices. Although retrieval time can range between a few milliseconds to two minutes, this data is still considered very accessible;

3. Archival or Offline Data. This includes the information copied to removable media and stored in a location other than on the computer. The accessibility time of this data can range from minutes to days, depending on where the data is stored;

4. Backup Tapes. This is the imaging of the computer's system to a tape drive for archival reasons. Restoration of backup tapes is more time-consuming and usually very costly. The court in *Zubulake* considered this type of data inaccessible;

5. Erased or Damaged Data. This includes deleted files and fragments of files that are randomly placed throughout the disk. This is the least accessible form of ESI, and the court in *Zubulake* considered this type of data inaccessible. *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 318–19 (S.D.N.Y. 2003).

Each of these types of storage can be found in a variety of forms, such as desktop and laptop computers, hard drives, removable media drives (i.e. floppy disks, tapes, CDs, DVDs), handheld devices and cell phones, optical disks, network hard disks, remote internet storage or the "cloud," and iPods/iPads and other MP3 players. Many newer forms of media/apps, such as Snapchat, purportedly send a message that is erased after a set amount of time. But some of these apps actually store those messages on the phone, which can be retrieved.

2. Stored versus Processed Data

"Given the widespread use of computers, there is an almost limitless variety of records that are stored in or generated by computers." *Lorraine*, 241 F.R.D. at 556. The least complex admissibility issues are associated with electronically stored records. "In general, electronic documents or records that are merely *stored* in a computer raise no computer-specific authentication issues. If a computer *processes* data rather than merely storing it, authentication issues may arise. The need for authentication and an explanation of the computer's processing will depend on the complexity and novelty of the computer processing. There are many stages in the development of computer data where error can be introduced, which can adversely affect the accuracy and reliability of the output. Inaccurate results occur most often because of bad or incomplete data inputting, but can also happen when defective software programs are used or stored-data media become corrupted or damaged." *Lorraine*, 241 F.R.D. at 543 (quoting Weinstein's Federal Evidence § 900.06[3]); *see, e.g.*, *Burleson v. State*, 802 S.W.2d 429, 440 (Tex. App.—Fort Worth 1991, pet. ref'd) (holding that computer-generated display, and system that produced display, was properly authenticated).

That said, although computer records are the easiest to authenticate, there is growing recognition that more care is required to authenticate these electronic records than traditional "hard copy" records. Two cases illustrate the contrast between the more lenient approach to admissibility of computer records and the more demanding one:

In *United States v. Meienberg*, the defendant challenged

on appeal the admission into evidence of printouts of computerized records of the Colorado Bureau of Investigation, arguing that they had not been authenticated because the government had failed to introduce any evidence to demonstrate the accuracy of the records. 263 F.3d 1177, 1180–81 (10th Cir. 2001). The Tenth Circuit disagreed, stating, "Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility." *Id.* at 1181 (quoting *United States v. Catabran*, 836 F.2d 453, 458 (9th Cir. 1988)).

In contrast, in the case of *In re Vee Vinhnee*, the bankruptcy appellate panel upheld the trial ruling of a bankruptcy judge excluding electronic business records of the credit card issuer of a Chapter 7 debtor for failing to authenticate them. 336 B.R. 437, 445 (9th Cir. BAP 2005). The court noted, "it is becoming recognized that early versions of computer foundations were too cursory, even though the basic elements covered the ground." *Id.* The court also observed, "The primary authenticity issue in the context of business records is on what has, or may have, happened to the record in the interval between when it was placed in the files and the time of trial. In other words, the record being proffered must be shown to continue to be an accurate representation of the record that originally was created. . . . Hence, the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created." *Id.* at 444. That is similar to chain of custody. The court reasoned that, for paperless electronic records, "The logical questions extend beyond the identification of the particular computer equipment and programs used. The entity's policies and procedures for the use of the equipment, database, and programs are important. How access to the pertinent database is controlled and, separately, how access to the specific program is controlled are important questions. How changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database, are pertinent to the question of whether records have been changed since their creation." *Id.* at 445. In order to meet the heightened demands for authenticating electronic business records, the court adopted, with some modification, an eleven-step foundation proposed by Professor Edward Imwinkelried, viewing electronic records as a form of scientific evidence:

1. The business uses a computer.

2. The computer is reliable.

3. The business has developed a procedure for inserting data into the computer.

4. The procedure has built-in safeguards to ensure accuracy and identify errors.

5. The business keeps the computer in a good state of repair.

6. The witness had the computer readout certain data.

7. The witness used the proper procedures to obtain the readout.

8. The computer was in working order at the time the witness obtained the readout.

9. The witness recognizes the exhibit as the readout.

10. The witness explains how he or she recognizes the readout.

11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact. *Id.* at 446.

As the foregoing cases illustrate, there is a wide disparity between the most lenient positions courts have taken in accepting electronic records as authentic and the most demanding requirements that have been imposed. Further, it would not be surprising to find that, to date, more courts have tended towards the lenient rather than the demanding approach. However, it also is plain that commentators and courts increasingly recognize the special characteristics of electronically stored records, and there appears to be a growing awareness, as expressed in the Manual for Complex Litigation, that courts should "consider the accuracy and reliability of computerized evidence" in ruling on its admissibility. Manual for Complex Litigation, Fourth, § 11.447. Lawyers can expect to encounter judges in both camps, and in the absence of controlling precedent in the court where an action is pending setting forth the foundational requirements for computer records, there is uncertainty about which approach will be required. Further, although "it may be better to be lucky than good," as the saying goes, counsel would be wise not to test their luck unnecessarily. If it is critical to the success of your case to admit into evidence computer stored records, it would

be prudent to plan to authenticate the record by the most rigorous standard that may be applied. If less is required, then luck was with you.

Practice Note: The Court of Criminal Appeals of Texas stated, in 2007, "in this modern era of computer-stored data, electronic files, and paperless court records, the day may come in which written judgments are largely obsolete. For this reason, Rule 902 of the Texas Rules of Evidence explicitly allows for the self-authentication of certified copies of public records, including data compilations in any form certified as correct by their custodian. A computer-generated compilation of information setting out the specifics of a criminal conviction that is certified as correct by the county or district clerk of the court in which the conviction was obtained is admissible under Rule 902." *Flowers v. State*, 220 S.W.3d 919, 922–23 (Tex. Crim. App. 2007) (internal quotations and citations omitted). In the past several years, the Texas Courts of Appeals have been adopting the CCA's view. *See, e.g.*, *Montiel v. State*, No. 03-19-00405-CR, 2021 WL 2021142, at *10 (Tex. App.—Austin May 21, 2021, no pet.) (mem. op.) (not designated for publication); *Haas v. State*, 494 S.W.3d 819, 823 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Gaddy v. State*, No. 02-09-00347-CR, 2011 WL 1901972, at *6 (Tex. App.—Fort Worth May, 19, 2011) (mem. op.) (not designated for publication), *vacated on other grounds*, No. PD-1118-11, 2012 WL 4448757 (Tex. Crim. App. Sept. 26, 2012).

3. *Tienda v. State*

The Texas Court of Criminal Appeals released a 2012 opinion that dealt extensively with authenticating social media evidence. *See Tienda*, 358 S.W.3d at 633. While this case is not the first Texas case to address internet evidence, it is the first from a court of last resort in Texas and goes into great depth on the subject. *Id.*; *see, e.g.*, *Burnett Ranches, Ltd. v. Cano Petroleum, Inc.*, 289 S.W.3d 862 (Tex. App.—Amarillo 2009, pet. denied) (discussing authentication of websites).

The court in *Tienda* explained that there is no specific procedure for authenticating each piece of electronic evidence; rather the means of authentication will depend on the facts of the case. *Tienda*, 358 S.W.3d at 638–39. The court reviewed the case law from other jurisdictions to list some methods by which electronic evidence had been authenticated. *Id.* at 639 n.23. The court also acknowledged that some courts have held electronic evidence to a higher standard of authentication than other forms of evidence. *Id.* at 641–42. The court acknowledged the possibility that someone could have forged the pages to frame the defendant but held that that issue was one for the factfinder, not for the court as an authentication prerequisite. *Id.* at 645–46.

Practice Note: While case law on authenticating and admitting electronic evidence is still developing, practitioners may need to rely on cases from other jurisdictions. However, a practitioner should always attempt to admit the evidence, even if case law from other jurisdictions appears to be against it. Texas law has sometimes followed, but sometimes distinguished, federal law and the law of other states, so there is nothing to lose by at least attempting to authenticate the evidence using as much circumstantial evidence as possible. Remember, the same rules of evidence apply to all evidence.

4. Reply-Letter Doctrine

"It is an accepted rule of evidence that a letter received in due course through the mails in response to a letter sent by the receiver is presumed to be the letter of the person whose name is signed to it and is thus self-authenticating." *United States v. Wolfson*, 322 F.Supp. 798, 812 (D. Del. 1971) (citing *Scofield v. Parlin & Orendorff Co.*, 61 F. 804, 806 (7th Cir. 1894)); *accord Black v. Callahan*, 876 F.Supp. 131, 132 (W.D. Tex. 1995) (citing *United States v. Weinstein*, 762 F.2d 1522 (11th Cir. 1985)). But the original letter must still be authenticated under traditional rules. *Wolfson*, 322 F.Supp. at 812.

In Texas, under the traditional doctrine, a letter received in the due course of mail purportedly in answer to another letter is prima facie genuine and ***admissible*** without further proof of authenticity. *Varkonyi v. State*, 276 S.W.3d 27, 35 (Tex. App.—El Paso 2008, pet. ref'd). "A reply letter needs no further authentication because it is unlikely that anyone other than the purported writer would know of and respond to the contents of the earlier letter addressed to him." *Id.* Texas cases have held that the reply-letter doctrine for authenticating letters applies to email and other messages. *See, e.g.*, *Butler v. State*, 459 S.W.3d 595, 602 n.6 (Tex. Crim. App. 2015), and cases cited therein.

5. Voice Transmissions

Rule 901(b)(5) provides that a voice recording may be identified by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. Tex. R. Evid. 901(b)(5). Voice transmissions may be authenticated by a witness with knowledge, opinion based upon hearing a voice under circumstances

that connect it with the alleged speaker, or self-identification coupled with the context, content, and timing of the call. *Goodrich v. State*, No. 09-10-00167-CR, 2011 WL 1417026, at *3 (Tex. App.—Beaumont Apr. 13, 2011, pet. ref'd) (mem. op., not designated for publication) (quoting Rule 901 and citing *Thornton v. State*, 994 S.W.2d 845, 855 (Tex. App.—Fort Worth 1999, pet. ref'd), and *Manemann v. State*, 878 S.W.2d 334, 338 (Tex. App.—Austin 1994, pet. ref'd)). One Texas court has held that a voicemail was not properly authenticated, even though a witness testified that she recognized the voice as the defendant's, because no evidence before the jury identified the recording or explained the circumstances in which it was made. *Miller*, 208 S.W.3d at 566. However, a recording can be properly authenticated even when the witness cannot identify every voice in the recording, so long as those unknown voices are not pertinent to the case. *See, e.g.*, *Escalona v. State*, No. 05-12-01418-CR, 2014 WL 1022330, at *10 (Tex. App.—Dallas Feb. 20, 2014, pet. ref'd) (mem. op., not designated for publication) (holding that "[i]t was not necessary to identify both voices on the phone call recordings in order for the State to prove that the recordings were what the State claimed them to be.") (citing *Banargent v. State*, 228 S.W.3d 393, 401 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), and *Jones v. State*, 80 S.W.3d 686 (Tex. App.—Houston [1st Dist.] 2002, no pet.)).

Practice Note: A video is typically authenticated by a witness who can testify either that the scene is accurately depicted or that the recording was made by a reliable method. However, if your witness merely recognizes the people in the video but cannot testify about the scene or how the video was made, you may try admitting solely the audio portion. Your witness can testify that she recognizes some or all of the voices, and the other requirements for authenticating a video would not apply.

6. Computer-generated Data

a) Email

There are many ways in which email evidence may be authenticated. The distinctive characteristics of email include the sender's email address, its contents, substance, and internal patterns. *Lorraine*, 241 F.R.D. at 554 (quoting Weinstein's Federal Evidence § 900.07[3][c]). "Because of the potential for unauthorized transmission of e-mail messages, authentication requires testimony from a person with personal knowledge of the transmission or receipt to ensure its trustworthiness." *Id.* The reply-letter doctrine applies to emails.

Practice Note: An email can be authenticated by testimony that the witness was familiar with the sender's email address and that the witness had received the emails in question from the sender. *Sennett v. State*, 406 S.W.3d 661, 669 (Tex. App.—Eastland 2013, no pet.). Other courts have enumerated several characteristics to consider when determining whether an e-mail has been properly authenticated, including:

1. Consistency with the email address on another email sent by the defendant;

2. The author's awareness through the email of the details of defendant's conduct;

3. The email's inclusion of similar requests that the defendant had made by phone during the time period; and

4. The email's reference to the author by the defendant's nickname. *See Manuel*, 357 S.W.3d at 75; *Shea v. State*, 167 S.W.3d 98, 105 (Tex. App.—Waco 2005, pet. ref'd); *Massimo*, 144 S.W.3d at 215.

b) Social Network Postings

When determining the admissibility of exhibits containing representations of the contents of website postings of a party, the issues that have concerned courts include the possibility that third persons other than the sponsor of the website were responsible for the content of the postings, leading many to require proof by the proponent that the organization hosting the website actually posted the statements or authorized their posting. *Lorraine*, 241 F.R.D. at 555–56.

"One commentator has observed in applying the authentication standard to website evidence, there are three questions that must be answered explicitly or implicitly. (1) What was actually on the website? (2) Does the exhibit or testimony accurately reflect it? (3) If so, is it attributable to the owner of the site? The same author suggests that the following factors will influence courts in ruling whether to admit evidence of internet postings:

"The length of time the data was posted on the site; whether others report having seen it; whether it remains on the website for the court to verify; whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g. financial information from corporations); whether the owner of the site has elsewhere published the same data, in whole or in part; whether others have published the same data, in whole or in part; whether the data has been republished by others who

identify the source of the data as the website in question? "Counsel attempting to authenticate exhibits containing information from internet websites need to address these concerns in deciding what method of authentication to use, and the facts to include in the foundation." *Id.* at 555–56 (quoting Gregory P. Joseph, *Internet and Email Evidence*, 13 Prac. Litigator (Mar. 2002), *reprinted in* 5 Stephen A. Saltzburg et el., Federal Rules of Evidence Manual, Part 4 at 22 (9th ed. 2006)).

7. Information from Personal Data Devices

a) Text Messages

Text messages can be authenticated by applying the same factors as emails. *Manuel*, 357 S.W.3d at 76–77.

b) Chat Room Content

"Many of the same foundational issues encountered when authenticating website evidence apply with equal force to internet chat room content; however, the fact that chat room messages are posted by third parties, often using 'screen names' means that it cannot be assumed that the content found in chat rooms was posted with the knowledge or authority of the website host." *Lorraine*, 241 F.R.D. at 556. "One commentator has suggested that the following foundational requirements must be met to authenticate chat room evidence:

"(1) evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question);

"(2) evidence that, when a meeting with the person using the screen name was arranged, the individual showed up;

"(3) evidence that the person using the screen name identified himself as the person in the chat room conversation;

"[(4)] evidence that the individual had in his possession information given to the person using the screen name; or

"(5) evidence from the hard drive of the individual's computer showing use of the same screen name." *Id.* (quoting 1 Saltzburg, Federal Rules of Evidence Manual, § 901.02[12]).

Courts also have recognized that exhibits of chat room conversations may be authenticated circumstantially.

c) Digital Photographs

"Photographs have been authenticated for decades under Rule 901(b)(1) by the testimony of a witness familiar with the scene depicted in the photograph who testifies that the photograph fairly and accurately represents the scene. Calling the photographer or offering [expert] testimony about how a camera works almost never has been required for traditional film photographs. Today, however, the vast majority of photographs taken, and offered as exhibits at trial, are digital photographs, which are not made from film, but rather from images captured by a digital camera and loaded into a computer. Digital photographs present unique authentication problems because they are a form of electronically produced evidence that may be manipulated and altered. Indeed, unlike photographs made from film, digital photographs may be enhanced. Digital image enhancement consists of removing, inserting, or highlighting an aspect of the photograph that the technician wants to change." *Lorraine*, 241 F.R.D. at 561 (quoting Edward J. Imwinkelried, *Can this Photo be Trusted?*, Trial, Oct. 2005, at 48).

"Some examples graphically illustrate the authentication issues associated with digital enhancement of photographs: Suppose that in a civil case, a shadow on a 35 mm photograph obscures the name of the manufacturer of an offending product. The plaintiff might offer an enhanced image, magically stripping the shadow to reveal the defendant's name. Or suppose that a critical issue is the visibility of a highway hazard. A civil defendant might offer an enhanced image of the stretch of highway to persuade the jury that the plaintiff should have perceived the danger ahead before reaching it. In many criminal trials, the prosecutor offers an improved, digitally enhanced image of fingerprints discovered at the crime scene. The digital image reveals incriminating points of similarity that the jury otherwise . . . never would have seen." *Id.* (quoting Imwinkelried, *Can this Photo be Trusted?* at 49).

Three distinct types of digital photographs should be considered with respect to authentication analysis: original digital images, digitally converted images, and digitally enhanced images. *Id.*

(1) Original Digital Photograph

"An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it. If a question is raised about the reliability of digital photography in general, the court likely could take judicial notice of it under Rule 201." *Id.*

Further, even if no witness can testify from personal knowledge that the photo accurately depicts the scene, the "silent witness" analysis allows a photo to be authenticated by showing a process or system that produces an accurate result. Tex. R. Evid. 901(b)(9); *Reavis v. State*, 84 S.W.3d 716, 719 (Tex. App.—Fort Worth 2002, no pet.) (citing *United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001)). Testimony that shows how the storage device was put in the camera, how the camera was activated, the removal of the storage device immediately after the offense, the chain of custody, and how the film was developed/photograph was printed, is sufficient to support a trial court's decision to admit evidence. *See Reavis*, 84 S.W.3d at 719 (citing *United States v. Taylor*, 530 F.2d 639, 641–42 (5th Cir. 1976)). The D.C. Circuit has held that photos taken by an ATM were properly authenticated on even less evidence—mere testimony of a bank employee familiar with the operation of the camera and the fact that the time and date were indicated on the evidence were sufficient to authenticate the photos. *Id.* at 719–20 (citing *United States v. Fadayini*, 28 F.3d 1236, 1241 (D.C. Cir. 1994)).

(2) Digitally Converted Images

"For digitally converted images, authentication requires an explanation of the process by which a film photograph was converted to digital format. This would require testimony about the process used to do the conversion, requiring a witness with personal knowledge that the conversion process produces accurate and reliable images, Rules 901(b)(1) and 901(b)(9)—the latter rule implicating expert testimony under Rule 702. Alternatively, if there is a witness familiar with the scene depicted who can testify to the photo produced from the film when it was digitally converted, no testimony would be needed regarding the process of digital conversion." *Lorraine*, 241 F.R.D. at 561. If further testimony is required to explain the process, then the predicate laid out above in the expert witness section would be used to show the procedures used to convert the film image to a digital format, along with the witness's personal knowledge that the process produces an accurate and reliable digital version of the photograph.

(3) Digitally Enhanced Images

"For digitally enhanced images, it is unlikely that there will be a witness who can testify how the original scene looked if, for example, a shadow was removed, or the colors were intensified. In such a case, there will need to be proof, permissible under Rule 901(b)(9), that the digital enhancement process produces reliable and accurate results, which delves into the realm of scientific or technical evidence under Rule 702. Recently, one state court has given particular scrutiny to how this should be done. In *State v. Swinton*, the defendant was convicted of murder in part based on evidence of computer enhanced images prepared using the Adobe Photoshop software. The images showed a superimposition of the [defendant's] teeth over digital photographs of bite marks taken from the victim's body. At trial, the state called the forensic odontologist (bite mark expert) to testify that the defendant was the source of the bite marks on the victim. However, the defendant testified that he was not familiar with how the Adobe Photoshop made the overlay photographs, which involved a multi-step process in which a wax mold of the defendant's teeth was digitally photographed and scanned into the computer to then be superimposed on the photo of the victim. The trial court admitted the exhibits over objection, but the state appellate court reversed, finding that the defendant had not been afforded a chance to challenge the scientific or technical process by which the exhibits had been prepared. The court stated that to authenticate the exhibits would require a sponsoring witness who could testify, adequately and truthfully, as to exactly what the jury was looking at, and the defendant had a right to cross-examine the witness concerning the evidence. Because the witness called by the state to authenticate the exhibits lacked the computer expertise to do so, the defendant was deprived of the right to cross examine him.

"Because the process of computer enhancement involves a scientific or technical process, one commentator has suggested the following foundation as a means to authenticate digitally enhanced photographs under Rule 901(b)(9): (1) The witness is an expert in digital photography; (2) the witness testifies as to image enhancement technology, including the creation of the digital image consisting of pixels and the process by which the computer manipulates them; (3) the witness testifies that the processes used are valid; (4) the witness testifies that there has been adequate research into the specific application of image enhancement technology involved in the case; (5) the witness testifies that the software used was developed from the research; (6) the witness received a film photograph; (7) the witness digitized the film photograph using the proper procedure, then used the proper procedure to enhance the film photograph in the computer; (8) the witness can identify the trial exhibit as the product of the enhancement process he or she performed. The author recognized that this is an extensive foundation, and whether it will be adopted by courts in the future remains to be seen. However, it is probable that courts will require authentication of digitally enhanced photographs by

adequate testimony that it is the product of a system or process that produces accurate and reliable results." *Id.* at 561–62.

The eight steps above can lay the predicate for digitally enhanced images. But because Photoshop is so widely used today, and image enhancements are easy to come by, the same predicate laid out in the section on expert witnesses concerning the tests and procedures they use could be used here. The witness must first be proved up as an expert on digital photo enhancements, though.

8. Video Transmissions

Videos can be authenticated the same way as photographs, and the same "silent witness" principle applies as well. *Reavis*, 84 S.W.3d at 719; *see, e.g.*, *Thierry v. State*, 288 S.W.3d 80, 88–89 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (holding that, even though sponsoring witness was not present when the video was made, sponsoring witness knew the intricacies of the recording and computer systems and detailed how he was able to link the encoding on the receipts to the time and date in question, to the transaction in question, to the cashier, to the terminal, and finally to the video camera that recorded the transaction; he also testified that he personally copied the relevant recording to the videotape, viewed it on the recording system and the videotape the same day he made the tape, and viewed it on the day prior to his testimony, and that it fairly and accurately represented what it purported to show and that no alterations or deletions had been made; thus, videotape was properly authenticated).

In *Fowler v. State*, the Texas Court of Criminal Appeals held that, "yes, it is possible" for the proponent of a video to sufficiently prove its authenticity without testimony of someone who either witnessed what the video depicts or is familiar with the functioning of the recording device. 544 S.W.3d 844, 848–49 (Tex. Crim. App. 2018). The court used the distinctive characteristics test to determine that the trial court was within the zone of reasonable disagreement when admitting a video from a store's surveillance camera that recorded the defendant's action of stealing an ATV. *Id.* An officer requested the video from a certain date and time, a time-stamp is on the video, the time-stamp corresponds with the date and time on a receipt found next to the ATV, and the video shows the defendant at the store on that date and at that time purchasing the items listed on the receipt. *Id.* at 849–50. Although the State could have done more, the "zone of reasonable disagreement is exactly that—a zone." *Id.* at 850.

C. Self-Authenticating Evidence

Rule 902 sets forth eleven different types of evidence that are self-authenticating, meaning that no extrinsic evidence of authenticity is required before they are admissible. Tex. R. Evid. 902. Each subsection of Rule 902 lays out the predicate necessary to self-authenticate each type of evidence.

1. Domestic Public Documents that are Sealed and Signed

Any document that bears a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; along with a signature purporting to be an execution or attestation. Tex. R. Evid. 902(1); *see, e.g.*, *Waworsky v. Fast Grp. Hous. Inc.*, No. 01-13-00466-CV, 2015 WL 730819, at *4 (Tex. App.—Houston [1st Dist.] Feb. 17, 2015, no pet.) (mem. op.) (holding that, because Texas Workforce Commission's "Appeal Tribunal Decision" contained seal of TWC and signature of hearing officer, decision was properly self-authenticated).

2. Domestic Public Documents that are not Sealed but are Signed and Certified

Any document that bears no seal but bears the signature of an officer or employee of an entity named in 902(1) and another public officer, who has a seal and official duties within that same entity, certifies under seal, or its equivalent, that the signer has the official capacity and that the signature is genuine. Tex. R. Evid. 902(2). These documents can often be authenticated under Rule 902(4) as well. *See, e.g.*, *Williams v. State*, No. 03-07-00398-CR, 2008 WL 820919, at *3 (Tex. App.—Austin Mar. 28, 2008, pet. ref'd) (mem. op., not designated for publication) (holding that pen packets had more ways to be authenticated than just 902(1) and 902(2)); *Hooker v. Tex. Dep't of Public Safety*, No. 09-07-125 CV, 2007 WL 4722931, at *1 (Tex. App.—Beaumont Jan. 17, 2008, pet. denied) (mem. op.) (holding that sworn reports of police officer were properly authenticated under 902(4), so appellant's issue of proper authentication under 902(2) was irrelevant).

3. Foreign Public Documents

Any document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. Tex. R. Evid. 902(3). The document must also have

a final certification as to the genuineness of the signature and the official position of the signer, and this must be signed by a secretary of the United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. Tex. R. Evid. 902(3)(A). If all of the parties have had a reasonable opportunity to investigate the authenticity of the document, the court may order that the document be treated as presumptively authentic without a final certification or allow it to be evidenced by an attested summary with or without a final certification. Tex. R. Evid. 902(3)(B). If the United States and the foreign country in question are parties to a treaty or convention that abolishes the final certification requirement, the record and attestation must be certified under the terms of the treaty or convention. Tex. R. Evid. 902(3)(C).

The Court of Criminal Appeals of Texas has recently examined this statute in depth. *Bruton v. State*, 428 S.W.3d 865, 873–81 (Tex. Crim. App. 2014). The appellant had been convicted in the district court of aggravated sexual assault of a child and indecency with a child by contact. *Id.* at 869 n.8. During the punishment phase, the State attempted to introduce exhibits containing several certificates of conviction from the United Kingdom. *Id.* at 868. The court looked first at the difference between obtaining originals or copies. *Id.* at 874–76. Rule 902(3) applies to originals, and originals that purport to be originals executed by someone with authority to execute them satisfy the execution/attestation requirement of Rule 902(3). *Id.* at 874–76. It then turned to the final certification that must accompany such documents, including who must make the certification. *Id.* at 877–79. A final certification must directly or indirectly vouch for the genuineness of the signature and official position of the signer. *Id.* at 877. Only those positions listed in 902(3)(A) may sign such certification. *Id.* at 877–78. And finally, it looked at the good cause determination when no final certification is available. *Id.* 879–81. Good cause is measured partly by whether the document is authentic despite the absence of a final certification. *Id.* at 880. But the weight goes toward whether good cause exists as to why the party did not obtain a final certification. *Id.* at 880–81.

4. Certified Copies of Public Records

Any copy of an official record if the copy is certified as correct by the custodian or another person authorized to make the certification or a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed under statutory authority. Tex. R. Evid. 902(4); *see also* Tex. Fam. Code Ann. §§ 88.005 (registration of protective order), 152.305 (registration of child custody determination), 159.602 (registration of enforcement order); *see, e.g.*, *In re Marriage of Dalton*, 348 S.W.3d 290, 295 (Tex. App.—Tyler 2011, no pet.) (holding that certified copy of Oklahoma order was properly filed in Texas and properly authenticated foreign judgment).

5. Official Publications

Any book, pamphlet, or other publication purporting to be issued by a public authority. Tex. R. Evid. 902(5). Because such documents are self-authenticating, it is proper to take judicial notice of documents on government websites. *Pak v. AD Vallarai, LLC*, No. 05-14-01312-CV, 2016 WL 637736, at *6 (Tex. App.—Dallas Feb. 16, 2016) (mem. op.) (Evans, J., dissenting) (citing *Williams Farms Produce Sales, Inc. v. R & G Produce Co.*, 443 S.W.3d 250, 259 (Tex. App.—Corpus Christi 2014, no pet.)), *rev'd on other grounds*, 519 S.W.3d 132 (Tex. 2017); *Avery v. LLP Mortgage, Ltd.*, No. 01-14-01007-CV, 2015 WL 6550774, at *3 (Tex. App.—Houston [1st Dist.] Oct. 29, 2015, no pet.) (mem. op.). Similarly, USPS receipts are self-authenticating if they bear the letterhead and signature of the USPS and address a subject matter within the purview of the USPS. *Fort Bend Central Appraisal Dist. v. Am. Furniture Warehouse Co.*, 630 S.W.3d 530, 538 (Tex. App.—Houston [1st Dist.] 2021).

6. Newspapers and Periodicals

Any printed materials purporting to be a newspaper or periodical. Tex. R. Evid. 902(6); *see, e.g.*, *Crofton v. Amoco Chemical Co.*, No. 14-98-01412-CV, 1999 WL 1122999, at *3 (Tex. App.—Houston [14th Dist.] Dec. 9, 1999, pet. denied) (not designated for publication) (holding that newspaper articles were self-authenticating).

7. Trade Inscriptions

Any inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control. Tex. R. Evid. 902(7); *see, e.g.*, *United States v. Burdulis*, 753 F.3d 255, 263 (1st Cir. 2014) (holding that thumb drive with "Made in China" stamped on it was self-authenticating evidence that showed that thumb drive had travelled in interstate commerce).

8. Acknowledged Documents

Any document accompanied by a certificate of

acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments. Tex. R. Evid. 902(8). Although affidavits may be authenticated under this Rule, they may still be inadmissible as hearsay. *Ortega v. Cach, LLC*, 396 S.W.3d 622, 630 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

9. Commercial Paper

Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law. Tex. R. Evid. 902(9); *Ethridge v. State*, No. 12-09-00190-CR, 2012 WL 1379648, at *19 (Tex. App.—Tyler April 18, 2012, no pet.) (mem. op., not designated for publication) (holding that photocopy of checks in forgery case were self-authenticating).

10. Business Records Accompanied by Affidavit

The original or a copy of a record that was made at or near the time of the act by a person with knowledge and was kept in the regular course of business, which is a regular practice of that business, if the record is accompanied by an affidavit and both record and affidavit are served at least fourteen days before trial. Tex. R. Evid. 902(10). The form of the affidavit must state that the affiant is the custodian of the record, that the affiant is familiar with the manner in which the records are maintained, how many pages of records are attached, that the records are originals or exact duplicates, that the records were made at or near the time of the act or that it is regular practice to make them at or near the time of the act, that the records were made by a person with knowledge of the matters set forth or that it is the regular practice for this type of record to be made by a person with knowledge, and that it is the regular practice of the business to make that type of record. Tex. R. Evid. 902(10)(B).

Business records that originate with one entity but subsequently become another entity's primary record of information about an underlying transaction are admissible as business records of that subsequent entity. *Riddle v. Unifund CCR Partners*, 298 S.W.3d 780, 782 (Tex. App.—El Paso 2009, no pet.). Furthermore, one business' documents may comprise the records of a second business if that second business determines the accuracy of the information generated by the first business. *Id.*

11. Presumptions Under a Statute or Rule

A signature, document, or anything else that a statute or rule prescribed under statutory authority declares to be presumptively or prima facie genuine or authentic. Tex. R. Evid. 902(11).

12. Self-authenticating Discovery

In addition to self-authenticating evidence under Rule 902, Rule 193.7 of the Texas Rules of Civil Procedure states that an opposing party's discovery responses are self-authenticating. Tex. R. Civ. P. 193.7; *Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 451 (Tex. App.—Dallas 2002, no pet.). No additional extrinsic evidence is required, but the party against whom the evidence will be used—the producing party—must have actual notice that the documents will be used. Tex. R. Civ. P. 193.7. The party who produced the documents must object, in good faith, to the documents' authenticity, either on the record or in writing, within ten days of that notice. *Id.* The court may alter the time to object. *Id.* If the party objects, the party attempting to use the document "should be given a reasonable opportunity to establish its authenticity." *Id.*

13. Genetic Testing Results

Under Chapter 160 of the Family Code, a report of the results of genetic testing is self-authenticating if it is: (1) in a record and signed under penalty of perjury; and (2) accompanied by documentation from the testing laboratory that includes (a) the name and photograph of each individual whose specimens have been taken; (b) the name of each individual who collected the specimens; (c) the places in which the specimens were collected and the date of each collection; (d) the name of each individual who received the specimens in the testing laboratory; and (e) the dates the specimens were received. Tex. Fam. Code Ann. § 160.504. These requirements provide a sufficiently reliable chain of custody. *Id.*

D. Drug Test Results

Drug tests and related issues often arise in family law cases. The family code requires either a preponderance of the evidence or clear and convincing evidence as explained above under "Burden of Proof." Where a higher standard of proof is required, the evidence to authenticate must be more fully developed to show that the evidence being offered truly is what its proponent claims, thus meeting that higher burden. Termination cases require that higher standard of proof, and drug issues are often more prevalent in such cases. *See* Tex. Fam. Code Ann. § 161.001(b).

1. Parental Termination Cases

The Texarkana Court of Appeals has held that "the test for admissibility of [drug test records] should comply with the rule as stated in criminal cases." *In re K.C.P.*, 142 S.W.3d at 580. This is because termination cases involve rights that "are more important than any property right." *Id.* (quoting *In re J.F.C.*, 96 S.W.3d at 273 (internal quotations omitted)). This higher standard may exclude evidence, even as a business record, if supporting evidence does not show the qualifications of the persons who tested the specimens, the types of tests administered, or whether such tests were standard for the particular substance. *Id.*; *but see In re A.D.H.-G.*, No. 12-16-00001-CV, 2016 WL 3182610, at *5–6 (Tex. App.—Tyler June 8, 2016, no pet.) (mem. op.) (holding that, even though evidence was not adduced to meet higher standard for admissibility per *K.C.P.*, admission of drug test results was harmless because testimony was sufficient that parent was "avid drug user"). The Texarkana court relied on its previous holding in *Strickland* to determine the predicate for drug test results: (1) the tests were standard for the particular substance, (2) they were made by a person who had personal knowledge of the test and test results, and (3) the results of the tests were recorded on records kept in the usual course of business of the laboratory. *In re K.C.P.*, 142 S.W.3d at 579 (quoting *Strickland v. State*, 784 S.W.2d 549, 553 (Tex. App.—Texarkana 1990, pet. ref'd)). The third element is the general business records predicate from Rule 902(10), while the first two elements establish the trustworthiness of the records per Rule 901. Therefore, in termination cases, business records alone may not be enough to admit drug test results over objection due to the lack of showing of trustworthiness. Furthermore, one must be careful that any tests administered are complete; otherwise, errors in conducting an otherwise valid test can render the results unreliable. *See, e.g.*, *In re J.A.C.*, No. 14-02-00806-CV, 2005 WL 1389759, at *4 9Tex. App.—Housto [14th Dist.] June 14, 2005, pet. denied) (mem. op.) (holding that, for negative test result, because sample was not tested for adulterants that could cause false negative, test was incomplete and unreliable) (citing *McRae v. State*, 152 S.W.3d 739, 743–44 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd)).

2. Non-termination Cases

In SAPCR cases not involving the termination of parental rights, the Fort Worth Court of Appeals has held that the following need not be shown in a business records affidavit: (1) a person with personal knowledge of the tests made the entries on the records, (2) the qualifications of the person conducting the test, (3) whether the tests were standard tests, or (4) the type of equipment that was used in the test. *In re A.T.*, No. 2-04-355-CV, 2006 WL 563565, at *3 (Tex. App.—Fort Worth Mar. 9, 2006, pet. denied) (mem. op.). The court relied on its opinion from *March* that business records containing lab reports do not need to explain the trustworthiness of the report, only facts that the court can use to determine trustworthiness. *Id.* at *4 (citing *March v. Victoria Lloyds Ins. Co.*, 773 S.W.2d 785, 788 (Tex. App.—Fort Worth 1989, writ denied)). The court in *March* stated that those types of business records are admissible and sufficiently trustworthy if they show: (1) who drew the sample, (2) when the sample was drawn, (3) that it was received by a laboratory, and (4) that a toxicologist analyzed the sample and reported the results. *March*, 773 S.W.2d at 788.

XI. TRE Article X. Contents of Writings, Recordings, and Photographs

Writings and recordings consist of letters, words, numbers, or their equivalent, set down in any form or recorded in any manner. Tex. R. Evid. 1001(a), (b). Originals of writings and recordings are the writings or recordings themselves or any counterpart intended to have the same effect by the person who executed or issued them. Tex. R. Evid. 1001(d). Photographs are photographic images or their equivalent stored in any form. Tex. R. Evid. 1001(c). Originals of photographs include their negatives. Tex. R. Evid. 1001(d).

Originals of electronically stored information include any printout or other output readable by sight if the printout or output accurately reflects the information. Tex. R. Evid. 1001(d). Duplicates are counterparts that are produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original. Tex. R. Evid. 1001(e).

Rule 1002 is commonly known as the best evidence rule. The best evidence rule states that, to prove the content of a writing, recording, or photograph, the *original* writing, recording, or photograph is required except as otherwise provided. Tex. R. Evid. 1002. "The purpose of the best evidence rule is to produce the best obtainable evidence, and if a document cannot as a practical matter be produced because of its loss or destruction, then the production of the original is excused." *Jurek v. Couch-Jurek*, 296 S.W.3d 864, 871 (Tex. App.—El Paso 2009, no pet.). In the predicate for introducing a computer printout, asking whether the exhibit reflects the data accurately may help to overcome an objection under the best evidence rule. The rule generally precludes admission of parol evidence to prove the contents of a document. *Id.*

A. When is Original Not Required?

The rule does not normally require the use of the singular, originally created source document. The only time a copy would not be admissible to the same extent as the original is if the party opposing the evidence raises a question as to the authenticity of the original or shows that it would be unfair to admit the duplicate in lieu of the original. Tex. R. Evid. 1003. The rules also list several potentially far-reaching exceptions to the rule. *See* Tex. R. Evid. 1004–1005. If any of the following exceptions apply, then other evidence, such as witness testimony, can be used to prove the contents of the document.

1. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

2. No original can be obtained by any available judicial process;

3. No original is located in Texas;

4. The party against whom the original would be offered had control of the original, was on notice at that time that the original would be a subject of proof at the trial, and failed to produce the original at the trial;

5. The writing, recording, or photograph is not closely related to a controlling issue; or

6. The proponent wants to prove the content of an official record or document that was recorded or filed in a public office as authorized by law, but no such copy can be obtained by reasonable diligence. Tex. R. Evid. 1004 (exceptions 1–5), 1005 (exception 6).

Practice Note: Even if an exception to the best evidence rule applies, the statute of frauds may still require a writing in some circumstances. *See In re Estate of Berger*, 174 S.W.3d 845, 847–48 (Tex. App.—Waco 2005, no pet.); *In re Estate of Bell*, No. 08-01-00475-CV, 2003 WL 22282997, at *3 (Tex. App.—El Paso Oct. 2, 2003, no pet.) (mem. op.).

B. Summaries

The contents of voluminous writings, recordings, or photographs can be presented in a summary, chart, or calculation if it is not convenient to examine the records in court. Tex. R. Evid. 1006. The rule requires that the originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place and that the court may order the proponent to produce them in court. *Id.* A proper predicate for introducing summaries includes demonstrating that the underlying records are voluminous, were made available to the opposing party for inspection and use in cross-examination, and are admissible. *Aquamarine Assocs.*, 659 S.W.2d at 821. In *Aquamarine*, the Supreme Court of Texas held a summary to be inadmissible hearsay because the underlying business records upon which it was based were never shown to be admissible. *Id.* at 822 (holding that records were hearsay, which under former rules of evidence, would not support a judgment, even though unobjected to).

C. Testimony or Statement of a Party to Prove Content

The proponent of the evidence may prove the content of the writing, recording, or photograph through testimony, deposition, or written statement of the party against whom the evidence is offered. Tex. R. Evid. 1007. Although no Texas cases have dealt with this rule, its basic concept is similar to the admissions by a party opponent exception to the hearsay rule, though it accepts all opposing party statements in the form of testimony, deposition, or written statement. *Lorrain*, 241 F.R.D. at 581–82.

D. Functions of the Court and Jury

The court normally determines whether a party has fulfilled the factual conditions to admit other evidence of the content of a writing, recording, or photograph under Rules 1004 or 1005. Tex. R. Evid. 1008. However, if a jury is acting as the factfinder, then the jury, pursuant to Rule 104(b), will decide issues concerning whether an asserted writing, recording, or photograph never existed; another one produced at the trial is the original; or other evidence of content accurately reflects the content. *Id.*

E. Translating a Foreign Language Document

A translation of a foreign language document is admissible if, at least fort-five days before trial, the proponent serves on all parties the translation and original foreign language document and a qualified translator's affidavit or unsworn declaration that sets forth the translator's qualifications and certifies that the translation is accurate. Tex. R. Evid. 1009(a). Objections to the translated document must be to specific inaccuracies, offer an accurate translation, and be served on all parties at least fifteen days before trial. Tex. R. Evid. 1009(b). At trial, if the underlying foreign language document is otherwise admissible, the court must admit the translation and disallow any objections on the accuracy of the translation unless the attacking party either submitted a conflicting translation pursuant to subdivision (a) or

properly objected pursuant to subdivision (b). Tex. R. Evid. 1009(c). If a conflicting translation is submitted pursuant to subdivision (a) or proper objection made pursuant to subdivision (b), the court must determine whether a genuine issue about the accuracy of a material part of the translation exists, and if so, the factfinder must resolve the issue. Tex. R. Evid. 1009(d). A qualified translator may testify at trial to translate a foreign language document. Tex. R. Evid. 1009(e); *Castrejon v. State*, 428 S.W.3d 179, 184 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Peralta v. State*, 338 S.W.3d 598, 606 (Tex. App.—El Paso 2010, no pet.). Live testimony translating the document may be given in lieu of filing. The court may, on a party's motion and for good cause, alter the time limits of this rule. Tex. R. Evid. 1009(f). The court may appoint a qualified translator, whose reasonable value of services will be taxed as court costs. Tex. R. Evid. 1009(g).

The translator need not be certified or licensed. *Castrejon*, 428 S.W.3d at 188. The translator, at least in criminal cases, need only have sufficient skill in translating and familiarity with the use of slang. *Id.*

XII. Demonstrative Evidence

Demonstrative evidence is used as an aid to the factfinder in presenting information, but unless it is properly admitted into evidence, the jury cannot take it back into the jury room with the admitted evidence. Common examples of demonstrative evidence include PowerPoint slide shows, lists or drawings on a tablet, or other visual aids. An attorney can use courtroom demonstratives without authenticating or admitting them into evidence. *See, e.g.*, *Hanson v. State*, 269 S.W.3d 130, 134 (Tex. App.—Amarillo 2008, no pet.) (demonstrative evidence used during voir dire of jury). However, while a court has the discretion to permit counsel the use of visual aids, including charts, to assist in summarizing the evidence, the court also has the power to exclude such visual aids. *See Markey v. State*, 996 S.W.2d 226, 231 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

If a demonstrative meets the requirements for admissibility, an attorney may offer it into evidence. *Id.* One court allowed the admission of a golf club into evidence that was alleged to be similar to one used in a crime. *Lynch v. State*, No. 07-06-0104-CR, 2007 WL 1501921, at *2–3 (Tex. App.—Amarillo Ma 23, 2007) (mem. op., not designated for publication). Demonstrative evidence that summarizes or even emphasizes the testimony is admissible if the underlying testimony has been admitted or is subsequently admitted into evidence. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 342 (Tex. 1998); *but see Markey*, 996 S.W.2d at 231–32 (holding that demonstrative evidence was mere summary of testimony and, therefore, constituted no proof of any fact issue, making it irrelevant and inadmissible). Admission of charts and diagrams that summarize a witness's testimony is within the discretion of the court. *Speier v. Webster College*, 616 S.W.2d 617, 618 (Tex. 1981). Even if exhibits contain excerpts from a witness's testimony, if they are admitted, the trial court must permit them to be taken into the jury room. *First Emps. Ins. Co. v. Skinner*, 646 S.W.2d 170, 172–73 (Tex. 1983).

XIII. Parol Evidence Rule

The parol evidence rule is not a rule of evidence in the proper sense but a rule of substantive law. "In the absence of fraud, accident or mistake, the parol evidence rule prohibits the contradiction of final written expressions by evidence of a prior or contemporaneous agreement." *Stavert Props., Inc. v. RepublicBank of N. Hills*, 696 S.W.2d 278, 280–81 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.). Put succinctly, any prior or contemporaneous agreement is not admissible if it is inconsistent with a written agreement. The ability to understand and apply the parol evidence rule is extremely important, especially in marital agreement and inter-spousal transaction cases.

A. Effects of the Parol Evidence Rule

1. Merger and Bar

Merger means that one contract, which is between the same parties and of the same subject as a second contract, is merged into that second contract by intent of the parties. *Burlington Res. Oil & Gas Co. v. Tex. Crude Energy, LLC*, 573 S.W.3d 198, 209 (Tex. 2019); *Fish v. Tandy Corp.*, 948 S.W.2d 886, 898 (Tex. App.—Fort Worth 1997, writ denied). This is an analogue of the parol evidence rule. *Fish*, 948 S.W.2d at 898. Absent pleading and proof of ambiguity, fraud, or accident, it is presumed that all previous written or oral agreements between the parties have merged into the last written instrument, and no parol evidence can dispute it. *West v. Quintanilla*, 573 S.W.3d 237, 244–45 (Tex. 2019); *ISG State Operations, Inc. v. Nat'l Heritage Ins. Co.*, 234 S.W.3d 711, 719–20 (Tex. App.—Eastland 2007, pet. denied).

2. Omitted Intentions Disregarded

When one intention of the parties is reflected in a writing but other expressions suggest that another agreement was intended, the court will disregard the unwritten intentions,

when in the court's opinion they would have normally been included in the writing. *Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 749 (Tex. 2020); *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 889 (Tex. 2019); *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 763–65 (Tex. 2018); *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011).

B. Applicability of Parol Evidence Rule

1. Generally

Absent fraud, mistake, or accident, the parol evidence rule only applies when parol evidence is offered to vary the terms of a complete, written document. Parol evidence is admissible to prove other agreements, when the written document is not intended as a complete, all-inclusive embodiment of the terms of the agreement, even absent a showing of fraud, accident, or mistake. *Bob Robertson, Inc. v. Webster*, 679 S.W.2d 683, 688 (Tex. App.—Houston [1st Dist.] 1984, no writ).

2. Judicial and Official Records

Judicial and official records are protected by the parol evidence rule. Evidence tending to add, subtract, or alter the terms of the official records will not be admissible. *Weynand v. Weynand*, 990 S.W.2d 843, 846 (Tex. App.—Dallas 1999, pet. denied).

3. Privies and Parties

The parol evidence rule will apply to the parties and only those third parties who are so closely affiliated with the transaction as to not be considered strangers. *Baroid Equip., Inc. v. Odeco Drilling, Inc.*, 184 S.W.3d 1, 13–15 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). The rule does not apply to true third-party strangers to the transaction, and thus, parol evidence can be admitted in such situations. *Id.* at 13.

C. When Parol Evidence is Admissible

1. Want or Failure of Consideration

Parol evidence is admissible to show want or failure of consideration. *Katy Intern, Inc. v. Jinchun Jiang*, 451 S.W.3d 74, 85 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Parol evidence may also be used to establish the actual consideration given for the instrument. *Dupree v. Boniuk Interests, Ltd.*, 472 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *McLernon v. Dynergy, Inc.*, 347 S.W.3d 315, 335 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

2. Collateral Agreement

Parol evidence is admissible to show collateral, contemporaneous agreements, so long as they are consistent with the underlying agreement being construed. *Dupree*, 472 S.W.3d at 366.

3. Incomplete Instrument

Extrinsic evidence is admissible to clarify the terms of a writing that is facially incomplete, even though no fraud, accident, or mistake is shown. *Gail v. Berry*, 343 S.W.3d 520, 523 (Tex. App.—Eastland 2011, pet. denied).

4. Fraud, Duress, and Misrepresentation

"Parol evidence is always admissible to show the nonexistence of a contract." *Abraham Inv. Co. v. Payne Ranch, Inc.*, 968 S.W.2d 518, 526 (Tex. App.—Amarillo 1998, pet. denied) (citing *Baker v. Baker*, 183 S.W.2d 724, 728 (Tex. 1944)). By the very nature of the action, parol evidence is always admissible, if properly pleaded, to set aside the writing because of fraud, duress, or misrepresentation. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 331 (Tex. 2011).

5. Ambiguity

"An unambiguous contract will be enforced as written." *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008); *accord TRO-X, L.P. v. Anadarko Petroleum Corp.*, 548 S.W.3d 458, 462 (Tex. 2018). As such, parol evidence is inadmissible to create an ambiguity or to give the contract a different meaning from what the language states. *David J. Sacks, P.C.*, 266 S.W.3d at 450. However, if a contract is ambiguous, the court may consider the parties' interpretation and admit extrinsic evidence to interpret the true meaning of the instrument. *Id.* at 450–51. "Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." *Id.* at 451.

D. Parol Evidence and Interpersonal Transactions

Relevant exceptions to the parol evidence rule have evolved, allowing parol evidence relating to certain husband-wife transactions and depository-depositor signature cards.

1. When Parol Evidence is Admissible to Establish

Character of Property

The admission of parol evidence can be critical in proving that property is separate property. When a conveyance of any property, evidenced by a writing, contains no significant or separate property recital, parol evidence is usually admissible. *See In re Marriage of Moncey*, 404 S.W.3d 701, 709–13 (Tex. App.—Texarkana 2013, no pet.), for discussion of parol evidence in marital property cases. A significant recital would be one that states in the writing that the conveyance is made to a spouse as that spouse's separate property or that the consideration was paid from the separate funds of a spouse. *See, e.g.*, *Stearns v. Martens*, 476 S.W.3d 541, 547–48 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

a) Third-Party Grantor.

Parol evidence is admissible to prove or rebut the character of property when the conveyance is from a third-party grantor to one or both spouses. *Bahr v. Kohr*, 980 S.W.2d 723, 726–27 (Tex. App.—San Antonio 1998, no pet.). If the normal community property presumption is rebutted, and it is shown separate funds were used as consideration of the transfer, a resulting trust arises in favor of the spouse whose separate funds were utilized. *Id.*

b) Spouse as Grantor.

A presumption exists that a conveyance from one spouse to another is intended as a gift to the grantee spouse. *In re Marriage of Moncey*, 404 S.W.3d at 709–10. However, the true intent of the grantor is always the controlling factor. *Id.* at 710. Parol evidence is admissible to rebut the gift presumption. *Roberts v. Roberts*, 999 S.W.2d 424, 432 (Tex. App.—El Paso 1999, no pet.), *superseded on other grounds by* Tex. Fam. Code Ann. § 6.711.

c) Spouse Furnishes Separate Property Consideration.

The same presumption of gift to grantee spouse arises when the grantor spouse uses his or her separate property to acquire assets and title is taken in grantee spouse's name or both names. *In re Marriage of Moncey*, 404 S.W.3d at 710. Parol evidence is admissible to rebut the gift presumption. *Id.*

2. When Parol Evidence is not Admissible to Establish Character of Property

When a written document conveying title contains a significant recital, parol evidence is customarily not admissible to vary the terms or intent of the writing. *Stearns*, 476 S.W.3d at 548.

a) Spouse as Grantor.

The presumption of gift becomes unambiguous, thus not allowing any parol evidence to be admitted, when the conveying instrument contains express recitals that the conveyance is the grantee spouse's separate property. *Raymond v. Raymond*, 190 S.W.3d 77, 81 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Only upon a showing of fraud, accident, mistake, or latent or patent ambiguity, may evidence of intent be admitted to contradict the written instrument. *Id.*

b) Spouse Joins in Conveyance.

If one spouse joins in a conveyance of property to another spouse, even though the conveying spouse owned no interest in the property, that contained a significant recital, the conveying spouse is estopped from introducing parol evidence absent a showing of fraud, duress or mistake. *Messer v. Johnson*, 422 S.W.2d 908, 912 (Tex. 1968).

c) Spouse Signs Executory Contract.

When a spouse signs a contract for property to be paid for out of her separate funds and title to be taken for her exclusive use and benefit, parol evidence is inadmissible to alter the nature of the property. *Lindsay v. Clayman*, 254 S.W.2d 777, 780 (Tex. 1952).

d) Spouse Signs Promissory Note or Deed of Trust.

Parol evidence is not admissible when a husband signs a note and deed of trust securing the purchase of real property taken by wife "as her separate property." *Hodge v. Ellis*, 277 S.W.2d 900, 905–06 (Tex. 1955).

e) Spouse Participates in Transaction.

If a spouse is not a party to a transaction, but participates in any manner, parol evidence will not be admitted to alter the character of property. *Little v. Linder*, 651 S.W.2d 895, 900 (Tex. App.—Tyler 1983, writ ref'd n.r.e.). A spouse's mere presence when the transaction takes place, which states the property is the other spouse's separate property, will preclude parol evidence, even if community funds are used to purchase the property. *Long v. Knox*, 291 S.W.2d 292, 587–88 (Tex. 1956).

XIV. Summary-Judgment Evidence

"The purpose of summary judgment is to provide a

method of summarily terminating a case when it clearly appears that only a question of law is involved and there is no genuine issue of fact." *G & H Towing Co. v. Maggee*, 347 S.W.3d 293, 296–97 (Tex. 2011) (internal quotations omitted) (quoting *Gaines v. Hamman*, 358 S.W.2d 557, 563 (Tex. 1962)). Summary-judgment evidence must be admissible under the rules of evidence, but the rules of civil procedure govern what can be used as summary-judgment evidence. *See* Tex. R. Civ. P. 166a; *Fort Brown Villas III Condominium Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 881–82 (Tex. 2009). This means that summary-judgment evidence may be excluded under the same rules of evidence. *Gillenwater*, 285 S.W.3d at 881–82. In summary-judgment proceedings, facts are proved by pleadings, affidavits, discovery responses, deposition transcripts, interrogatory answers, admissions, stipulations, and authenticated or certified public records, rather than by oral testimony. Tex. R. Civ. P. 166a(c).

A. Pleadings

A party's own pleadings cannot be used as summary-judgment evidence, even if they are verified. *Regency Field Servs., LLC v. Swift Energy Op., LLC*, 622 S.W.3d 807, at 818–19 (Tex. 2021); *Laidlaw Wast Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660–61 (Tex. 1995). However, a party's pleadings that admit facts or conclusions that directly contradict the party's own theory of recovery may be used against that party in summary-judgment proceedings. *H2O Sols., Ltd. v. PM Realty Grp., LP*, 438 S.W.3d 606, 616–17 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). This would be a judicial admission, as explained above in the section on hearsay. *See Wolf*, 44 S.W.3d at 568. As such, that party may "plead itself out of court" because it has admitted facts that affirmatively negate its cause of action or defense. *H2O Sols.*, 438 S.W.3d at 616–17.

B. Affidavits

Any witness may provide evidence for a summary judgment, but testimony of an interested witness, or of an expert witness if such testimony is required, must be clear, positive, direct, credible, free from contradiction, uncontroverted, and readily controvertible. Tex. R. Civ. P. 166a(c). Readily controvertible means that the evidence is of such a nature that the opposing party can effectively counter it with opposing evidence. *Trico Techs. Corp. v. Michael*, 949 S.W.2d 308, 310 (Tex. 1997). All affidavits must contain facts that would be admissible at a normal trial on the merits based on the rules of evidence. Tex. R. Civ. P. 166a(f). All necessary documents to support the affidavit must be attached to it. *Id.*

Practice Note: The Dallas Court of Appeals recently held that affidavits filed by ex-wife and her alleged informal husband were sufficient to summarily deny the existence of a common-law marriage. *Assoun v. Gustafson*, 493 S.W.3d 156 (Tex. App.—Dallas 2016, pet. denied). Ex-husband was required to pay spousal support in the amount of $132,000 per year until ex-wife remarried. The divorcing court subsequently upped the amount to $320,000 per year. Ex-husband claimed that ex-wife was now married. Ex-wife filed a counterclaim that no marriage existed. Ex-wife attached an affidavit stating that she has never had an agreement to be married to alleged informal husband; she had multiple marriage ceremonies with ex-husband but none with alleged informal husband; she would not agree to be married without a formal, religious ceremony, and her and alleged informal husband had none; she would never marry again without a premarital agreement, and her and alleged informal husband have no premarital agreement; alleged informal husband was characterized as ex-wife's "boyfriend" by the divorcing court; she has not changed her marital status with her insurance company, which is listed as divorced; she declared herself as divorced in a marital status affidavit in connection with the sale of a homestead property; she filed taxes as head of household; and she applied for an apartment as a single person. Alleged informal husband also attached an affidavit claiming that he had no agreement to be married and similar evidence that he was a single person. Ex-husband, in response to raise a fact issue, argued that the other parties are living together, ex-wife wears a ring on her ring finger, alleged informal husband's children call her stepmom, and the other parties occasionally register as husband and wife when travelling. The court of appeals held that ex-husband's summary judgment evidence failed to create a fact issue on the element of an agreement to be married because ex-husband's circumstantial evidence did not overcome the other parties' direct evidence.

C. Discovery

If a party wishes to use discovery evidence already on file with the court, it must specifically refer to that discovery in its pleadings. Tex. R. Civ. P. 166a(c). If a party wishes to use discovery evidence not on file with the court, it must file and serve, on all parties, copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments along with a statement of intent to use the specified discovery as summary judgment proof. Tex. R. Civ. P. 166a(d). The movant

must serve and file such at least twenty-one days before the hearing; the nonmovant must do so at least seven days before the hearing. *Id.* If a party is relying on its own discovery responses, it must authenticate them. *Blanche*, 74 S.W.3d at 451–52. If a party relies on the opposing party's discovery responses, and uses those responses against the party who produced them, the documents are self-authenticated under Rule 193.7 of the Texas Rules of Civil Procedure, as discussed above. Tex. R. Civ. P. 193.7; *Blanche*, 74 S.W.3d at 451.

XV. Objections and Preservation of Error

"To obtain a reversal based upon an erroneous ruling on the admissibility of evidence, a party must show that there was error, that a substantial right of the party's was affected, and that the error probably caused rendition of an improper judgment." *Conner v. Johnson*, No. 2-03-316-CV, 2004 WL 2416425, at *3 (Tex. App.—Fort Worth Oct. 28, 2004, pet. denied) (citing Tex. R. Evid. 103(a), Tex. R. App. P. 44.1(a), and *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998)). Accordingly, not only is it necessary to preserve error, but it is logically imperative that the objecting party make certain that a record of the ruling on the evidence, the objection to that ruling, the ruling on the objection, and the evidence that has been admitted or excluded is before the reviewing court. *See* Tex. R. Evid. 103(a); Tex. R. App. P. 33.1(a), 44.1(a).

A. Right to Object

At trial, a litigant has the right to object to the introduction of improper evidence, and an attorney has a duty to the client to ensure that only competent evidence is introduced against the client. *Tex. Emp'rs Ins. Ass'nv. Drayton*, 173 S.W.2d 782, 788 (Tex. App.—Amarillo 1943, writ ref'd w.o.m.) (quoting *McMahan v. City of Abilene*, 8 S.W.2d 554, 554–55 (Tex. App.—Eastland 1928, no writ)). Below are the requirements for objections to preserve error.

B. Time for Objection

The party opposing the admission of evidence must object at the time the evidence is offered and not after it has been received. *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 234 (Tex. 2011). When an objection is sustained as to testimony that has been heard by the jury, a motion to strike should be made to preserve error in a sufficiency review. *Parallax Corp. v. City of El Paso*, 910 S.W.2d 86, 90 (Tex. App.—El Paso 1995, writ denied); *see also Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728, 736 (Tex. App.—Texarkana 1996, no writ) (holding that when appellant's objection was sustained and instruction to disregard granted, nothing was preserved for appeal). But with testimony from an expert about underlying facts, under Rule 705, a motion to strike after cross-examination has ended is sufficient to preserve error. *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252 (Tex. 2004), *abrogated on other grounds*, *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008). Objections to summary-judgment evidence should be filed in a motion to strike before the trial court signs its judgment, and the objecting party should make certain that the trial court considered the motion. *Wolfe v. Devon Energy Prod. Co.*, 382 S.W.3d 434, 446–448 (Tex. App.—Waco 2012, pet. denied).

An objection must be made each time the evidence comes up, whether from the same witness or different witnesses or in different documents. *Reece v. State*, 474 S.W.3d 483, 487–88 (Tex. App.—Texarkana 2015, no pet.). Even if error is preserved for one instance, subsequent instances where the same or similar evidence is admitted without objection will usually render the complained of error harmless. *State v. Chana*, 464 S.W.3d 769, 786 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

C. Sufficiency of Objection

To properly preserve error, the objection must be specific and clear enough to allow the trial court and opposing party an opportunity to address it and, if necessary, correct it. *Degar v. State*, 482 S.W.3d 588, 590 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd). This is especially true when only part of a piece of evidence is inadmissible. *See, e.g.*, *Richter*, 482 S.W.3d at 298 (holding no abuse of discretion, over global hearsay objection, when trial court admitted entire audio/video recording because appellant did not specify which portions of recording were inadmissible hearsay). Furthermore, the complaint on appeal must comport with the complaint at trial, otherwise, the complaint on appeal is waived. *Reece*, 474 S.W.3d at 488.

Recent Case: The Eastland Court of Appeals recently ruled on the merits of a case after assuming that the appellant had preserved error. *Massingill v. State*, No. 11-14-00289-CR, 2016 WL 5853180 (Tex. App.—Eastland Sep. 30, 2016, no pet.) (mem. op., not designated for publication). The Court explained that the appellant had objected, in a motion in limine, to certain witnesses' testimony under Rule 404(b) but made no objections under Rule 403. They did, however, discuss the prejudicial nature of the testimony at the hearing on the motion in limine, which would go toward a 403 objection. At trial, the appellant renewed his 404(b) objection, and

the court concluded that the "practical effect" of that renewal "was to also renew his objection as to prejudice."

D. Exceptions to Contemporaneous Objection Rule

Two exceptions exist to the contemporaneous objection rule: (1) where the party requests and receives a running objection, and (2) where the party receives a ruling outside the presence of the jury that admits the evidence. Tex. R. Evid. 103(b); *Beheler v. State*, 3 S.W.3d 182, 187 (Tex. App.—Fort Worth 1999, pet. ref'd). Under the proper circumstances, a running objection may preserve error, but case law tells us that this is a highly risky proposition. The appellate court may consider the proximity of the objection to the subsequent testimony, the nature and similarity of the subsequent testimony as compared to the prior testimony and objection, whether the subsequent testimony was elicited from the same witness, whether a running objection was requested and granted, and any other circumstance which might suggest why the objection should not have been urged. *Smith v. State*, 316 S.W.3d 688, 698 (Tex. App.—Fort Worth 2010, pet. ref'd) (citing *Sattiewhite v. State*, 786 S.W.2d 271, 283 n.4 (Tex. Crim. App. 1989) (explaining pros and cons of running objections)); *see, e.g.*, *In re P.R.P.*, No. 10-03-00129-CV, 2004 WL 1574602, at *1 (Tex. App.—Waco July 7, 2004, no pet.) (mem. op.) (holding that appellant waived error, under running objection, by not re-urging objection when same evidence was offered through a different witness at a later time). A running objection, however, can satisfy Rule 33.1(a)'s requirement of a timely objection. *Smith*, 316 S.W.3d at 698 (holding that appellant properly preserved error when objection was re-urged before new witness testified on same subject). A running objection, similar to a one-time objection, must be specific and unambiguous. *Jurek*, 296 S.W.3d at 870. A running objection may be sufficient, under certain conditions, if opposing counsel brings up the previous testimony, subject to a running objection, on cross-examination of a later witness without a subsequent objection. *See, e.g.*, *Leaird's, Inc. v. Wrangler, Inc.*, 31 S.W.3d 688, 690–91 (Tex. App.—Waco 2000, pet. denied) (holding that appellant had preserved error when given running objection to one witness's testimony and opposing counsel raised previous witness's statements on cross-examination of later witness who acknowledged but did not endorse previous witness's opinion).

Rulings made outside of the hearing of the jury that admit evidence, even when that objection is not renewed when the evidence is actually introduced and offered, preserves error. Tex. R. Evid. 103(b); *Coleman v. State*, No. 06-16-00002-CR, 2017 WL 382419, at *2 (Tex. App.—Texarkana Jan. 27, 2017, pet. ref'd) (mem. op., not designated for publication). But when that same evidence is introduced and offered, and the opposing party states that he has "no objection" to the admission of that evidence, he has waived any error in its admission. *Mayfield v. State*, 152 S.W.3d 829, 831 (Tex. App.—Texarkana 2005, pet. ref'd). However, ancillary matters concerning the complained-of evidence are not necessarily waived when the admission of the evidence is waived. In *Mayfield*, the appellant had presented a pretrial motion to suppress a photo array, which was overruled. *Id.* at 831. He also complained that the photo array improperly affected the witness's in-court identification of the appellant. *Id.* He stated that he had no objection to the array when it was offered at trial, which was held to waive that error, but the court held that "the complaint about the taint arising from that array was not" waived because it had been properly presented during the suppression hearing and was not affirmatively waived during trial. *Id.*

E. Limited and Conditional Admissibility

Where evidence is admissible for one purpose and inadmissible for another, it may be admitted, under a limited scope, for the proper purpose, as explained above under the general provisions section. Tex. R. Evid. 105(a). The court must, upon motion of a party, limit the evidence to its proper purpose, and in the absence of such motion, the right to complain of the improper purpose is waived. Tex. R. Evid. 105; *Barnhart*, 459 S.W.3d at 743. Evidence may also be admitted, conditioned upon the representation of counsel that it will be "connected up" at a later time. *Fischer*, 268 S.W.3d at 557 (majority op.). This is the doctrine of conditional relevance discussed above under Rule 104. Tex. R. Evid. 104(b). If it is not connected up at a later time, the opposing party must request the prior testimony be stricken and request an instruction from the court to disregard the unconnected testimony. *Fischer*, 268 S.W.3d at 563 (Price, J., concurring and dissenting). To hold that "a trial court's ruling on an initial proffer is dispositive of the admissibility issue regardless of what evidence is presented afterwards during the trial . . . would render the 'subject to' language in rule 104(b) meaningless." *Id.* at 557 (majority op.).

F. Necessity of Obtaining Ruling on Objection

Rule 103 of the rules of evidence only discusses rulings *on the evidence* and objections made. Tex. R. Evid. 103. But the rules of appellate procedure require the objecting party to secure a ruling *on the objection* to preserve error on appeal. Tex. R. App. P. 33.1(a)(2). The objecting party is entitled to an immediate ruling admitting or

excluding the evidence. *Citizens of Tex. Sav. & Loan Ass'n v. Lewis*, 483 S.W.2d 359, 365 (Tex. App.—Austin 1972, writ ref'd n.r.e.); *Thomas v. Atlanta Lumber Co.*, 360 S.W.2d 445, 447 (Tex. App.—Texarkana 1962, no writ). But that initial ruling, as explained above, is not dispositive of admissibility if later evidence allows for its admission. *Fischer*, 268 S.W.3d at 557.

Rule 33.1 of the rules of appellate procedure allows for express or implied rulings on objections. Tex. R. App. P. 33.1(a)(2)(A). While the Supreme Court of Texas has allowed implied rulings, Texas courts are split on what constitutes an implied ruling, especially in summary-judgment proceedings. *In re Commitment of Hill*, 334 S.W.3d 226, 230 (Tex. 2011) (holding that prohibiting line of questions was implicit ruling, and thus proper to preserve error, and citing to *Babcock v. NW. Mem. Hosp.*, 767 S.W.2d 705, 708 (Tex. 1989)). If an implied ruling is made, it must be capable of being understood from the context around it. *See, e.g.*, *Mason v. Mason*, No. 07-12-00007-CV, 2014 WL 199649, at *6 (Tex. App.—Amarillo Jan. 13, 2014, no pet.) (mem. op.) (holding that trial court's award of prejudgment interest was implicit ruling granting motion asking for such relief).

Most of the courts of appeals agree that implied rulings can be made, but some require more explicit proof that they were made in summary-judgment cases. *See, e.g.*, *Am. Idol Gen., LP v. Pither Plumbing Co.*, No. 12-14-00134-CV, 2015 WL 1951579, at *2 (Tex. App.—Tyler Apr. 30, 2015, no pet.) (mem. op.) ("[T]he granting of a summary judgment motion, without more, does not provide an implicit ruling that either sustains or overrules objections to the summary judgment evidence."); *Parkway Dental Assocs., P.A. v. Ho & Huang Props., L.P.*, 391 S.W.3d 596, 604 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("[T]he trial court did not implicitly sustain the [appellee's] evidentiary objections or implicitly exclude [appellant's] affidavit by the trial court's granting summary judgment or by the language in the trial court's summary-judgment order."); *Atl. Shippers of Tex., Inc. v. Jefferson Cty.*, 363 S.W.3d 276, 284 (Tex. App.—Beaumont 2012, no pet.) ("Because the parties did not obtain express rulings on their respective objections, Atlantic's second issue is not preserved for review on appeal."); *Petro-Hunt, L.L.C. v. Wapiti Energy, L.L.C.*, No. 01-10-01030-CV, 2012 WL 761144, at *5 (Tex. App.—Houston [1st Dist.] Mar. 8, 2012, pet. denied) ("A trial court's ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment."); *Slagle v. Prickett*, 345 S.W.3d 693, 702 (Tex. App.—El Paso 2011, no pet.) ("When a trial court grants a summary judgment on the motion to which the special exceptions pertain, the trial court has implicitly overruled the special exceptions."); *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 100–01 (Tex. App.—Dallas 2010, pet. denied) (burden of obtaining ruling satisfied if record affirmatively indicates ruling or if "the grounds for summary judgment and the objections to the summary judgment evidence are of such a nature that the granting of summary judgment necessarily implies a ruling on the objections"); *Marx v. Elec. Data Sys. Corp.*, 418 S.W.3d 626, 638 (Tex. App.—Amarillo 2009, no pet.) ("[W]e find the trial court's statements in its amended order that it considered [appellee's] motion to strike, coupled with its grant of [appellee's] motion for summary judgment, constituted an implicit granting of the motion to strike as well."); *Mead v. RLMC, Inc.*, 225 S.W.3d 710, 713–14 (Tex. App.—Fort Worth 2007, pet. denied) (comparing *Frazier v. Yu*, 987 S.W.2d 607, 609–11 (Tex. App.—Fort Worth 1999, pet. denied) (holding that record showed that implied ruling was made), with *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 498 (Tex. App.—Fort Worth 2002, no pet.) (holding that record did not show whether implied ruling was made)); *Rosas v. Hatz*, 147 S.W.3d 560, 563 (Tex. App.—Waco 2004, no pet.) ("[W]e will not infer a ruling on a special exception based only upon the trial court's disposition of the summary judgment motion standing alone. . . . The excepting party must obtain an explicit ruling."); *Wilson v. Thomas Funeral Home, Inc.*, No. 03-02-00774-CV, 2003 WL 21706065, at *5 (Tex. App.—Austin July 24, 2003, no pet.) (mem. op.) (requiring something "in the record demonstrating that the trial court explicitly or implicitly sustained" or overruled an objection); *Sunshine Mining & Ref. Co. v. Ernst & Young, L.L.P.*, 114 S.W.3d 48, 51 (Tex. App.—Eastland 2003, no pet.) ("[W]e decline to infer an implicit ruling by the trial court sustaining any or all of [appellee's] objections to [appellant's] summary judgment evidence [because] we are unable to determine the trial court's rulings on the objections from its statement that it considered the 'competent' evidence."); *Trusty v. Strayhorn*, 87 S.W.3d 756, 761 (Tex. App.—Texarkana 2002, no pet.) ("[N]o ruling on the appellant's objections could be implied from the granting of summary judgment when the trial court did not give its reasons for granting summary judgment and there was no indication in the record that it ruled on or even considered the appellant's objections."); *Jones v. Ray Ins. Agency*, 59 S.W.3d 739, 753 (Tex. App.—Corpus Christi 2001, no pet.) ("[T]here must be something in the summary judgment or the record to indicate the trial court ruled on objections other than the mere granting of the summary judgment."); *Well Sols., Inc. v. Stafford*, 32 S.W.3d 313, 316–17 (Tex. App.—San Antonio 2000, no pet.) ("[A] ruling on the objection is simply not 'capable of being understood' from the ruling on the motion for summary judgment.").

Just as a party must complain of the explicit ruling on appeal, a party must complain of the implied ruling, if one was made, to preserve error. *Frazier*, 987 S.W.2d at 610.

In 2017, the Supreme Court of Texas ruled on whether an implied ruling may exist in the summary judgment context. In *Exxon Mobil Corporation v. Rincones*, the court cited to *Mitchell v. Baylor University Medical Center* out of the Austin Court of Appeals, for the proposition that "unless an order sustaining the objection is reduced to writing, signed, and entered of record," the objected-to evidence remains valid summary-judgment evidence. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 583 (Tex. 2017) (quoting *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842 (Tex. App.—Austin 2003, no pet.)). *Exxon Mobil* concerned late-filed summary-judgment evidence. *Id.* But *Mitchell* concerned a substantive defect. *Mitchell*, 109 S.W.3d at 842.

A year later, the supreme court, in *Seim*, referenced the split among the courts of appeals and held that "the Fourth and Fourteenth courts have it right," meaning that a ruling on a motion for summary judgment does not imply a ruling on an objection to summary-judgment evidence. *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 165–66 (Tex. 2018). The supreme court subsequently cited to a previous opinion, *In re Z.L.T.*—not a summary-judgment case, for the proposition that "an implicit ruling *may* be sufficient to preserve an issue for appellate review." *Id.* (citing *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003)). The court made it clear, however, that objections to the form of an affidavit in the summary-judgment context require a ruling to preserve the error. *Id.* at 166. "A trial court's on-the-record, unequivocal oral ruling on an objection to summary judgment evidence qualifies as a ruling under Texas Rule of Appellate Procedure 33.1, regardless of whether it is reduced to writing." *FieldTurf USA, Inc. v. Pleasant Grove Ind. Sch. Dist.*, 642 S.W.3d 829, 838 (Tex. 2022).

Therefore, the best practice is to obtain an explicit ruling on your objections, whether made orally at the hearing if a record is made or in writing if not, and not rely on an implied ruling for any objections to summary-judgment evidence.

G. Offer of Proof and Bill of Exception

If evidence is excluded, including cross-examination, the proponent has the burden to make an offer of proof or file a bill of exception. Tex. R. Evid. 103(a)(2) (offer of proof); Tex. R. App. P. 33.2 ("Formal Bills of Exception"). Even if the exclusion is erroneous, error is not preserved for appellate review unless the offer of proof or bill of exception is made. *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 334–35 (Tex. App.—Dallas 2008, no pet.). Without an offer of proof or bill of exception, the reviewing court can never know whether the exclusion of evidence was harmful. *Id.*

An offer of proof is sufficient to preserve error if it (1) is made before the court, the court reporter, and opposing counsel, outside the presence of the jury; (2) is preserved in the reporter's record; and (3) is made before the charge is read to the jury. *Id.* If no offer of proof is made, then a bill of exception must be filed. *Id.*

A bill of exception must state the court's ruling or action along with the objection to that ruling or action with sufficient specificity to make the trial court aware of the complaint. Tex. R. App. P. 33.2(a). If the record already contains the evidence, the bill does not need to repeat it but should have attached a certified transcript of the evidence. Tex. R. App. P. 33.2(b). The complaining party must present the bill to the trial court, and if the parties agree on its contents, the judge must sign and file it with the trial court clerk. Tex. R. App. P. 33.2(c). If the parties do not agree to its contents, the judge may, after notice and hearing, (1) sign the bill and file it with the trial court clerk if the judge finds that it is correct; (2) suggest any corrections the judge believes are necessary to accurately reflect the proceedings, and if those corrections are made, sign and file the bill with the trial court clerk, or (3) if the complaining party will not agree to the suggested corrections, return the bill to the complaining party with the written refusal on it and prepare, sign, and file with the trial court clerk a bill that, in the judge's opinion, accurately reflects the trial court proceedings. *Id.* If the complaining party is dissatisfied with the bill the judge signed and filed, that party may file the rejected bill. *Id.* If it does so, that party must also file affidavits of at least three people, who observed the matter the subject of the bill, that attest to the correctness of the bill as presented by the party. *Id.* If a formal bill of exception conflicts with the reporter's record, the bill of exception controls. Tex. R. App. P. 33.2(d). The party must file its bill no later than thirty days after the filing party's notice of appeal is filed. Tex. R. App. P. 33.2(e). By the standards and rules set forth above, an offer of proof is the more simple and direct way to both inform the trial court of the complaint and have the excluded evidence on the record before the reviewing court. But the bill of exception allows for more time to have the evidence put into the record.

H. The Contents of a Motion in Limine alone does not

Preserve Error

A pretrial motion in limine does not preserve error on appeal for evidentiary issues because the motion does not seek a ruling on admissibility; rather it seeks the prevention of introducing that evidence before the jury prior to a ruling on admissibility. *See Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 920 n.3 (Tex. 2015) (explaining when pretrial objections can and cannot preserve error). Regardless of a ruling on the motion in limine, an objection must be made at the time the evidence is offered, or the error will be waived, even if the party who requested the limine order itself introduces the evidence contrary to that order. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 760 (Tex. 2013).

I. Example Objections

Argumentative

Q: Isn't it true you did that because you are a huge liar, admit it!
O: Objection, this question is argumentative. Counsel is arguing with the witness instead of asking questions.

Assumes facts not in evidence

Q: Isn't it true you wrecked your car by running it into a tree?
O: Objection, the question assumes facts that are not in evidence at this time.

Best evidence rule

Q: Do you recognize your signature on this copy of the Premarital Agreement?
O: Objection, best evidence rule. The original document should be used.

Beyond the scope of direct/cross-examination

Q: Isn't it true that you bought your girlfriend a necklace?
O: Objection, that question exceeds the scope of my direct examination.

Compound question

Q: Isn't it true that your husband goes to the school to have lunch with the children and he drives the children to school twice a week?
O: Objection, this question is compound and should be broken into two separate questions.

Vague

Q: Isn't it true that you went to the school?
O: Objection, this question is vague. Can I get a timeframe?

Counsel is testifying for the witness

Q: Don't you want to get a fifty/fifty possession and access schedule because you believe it is in your child's best interest and because you have been trying to practice a fifty/fifty schedule?
O: Objection, her attorney is testifying for her.

Lack of foundation

Q: What did the child say?
O: Objection, hearsay.
Q: It's not hearsay, the child will show what her present mental state was at the time.
O: Objection, hearsay and lack of proper foundation to prove the exception.

Calls for hearsay

Q: What did your sister tell you?
O: Objection, hearsay.

Incompetent, calls for legal interpretation

Q: Did you commit family violence as defined by the Texas Family Code?
O: Objection, calls for legal conclusion by the witness.

Lack of personal knowledge

Q: What did your sister believe?
O: Objection, lack of personal knowledge as to what someone else believes.

Leading

Q: Isn't it true that you refused to let my client speak to his child?
O: Objection, the question is leading on direct examination.

Question misstates testimony

Q: So you just stated that you refused to let your husband see the child last Thursday, why did you do that?
O: Objection, question misstates my client's testimony. My client said that she called her husband and he did not answer.

Calls for narrative

Q: Tell me the story of how you and your husband met?
O: Objection, calls for the client to state a narrative

Calls for privileged or confidential information

Q: What did your attorney tell you?
O: Objection, the question asks for privileged information.

Calls for speculation

Q: What did your husband think?
O: Objection, calls for speculation

Asked and answered

Q: Isn't it true you signed the document?
A: No.
Q: But isn't it true you signed it?
O: Objection, asked and answered.

XVI. Ethical Concerns

A. ESI and Discovery

1. The New Federal Rules of Civil Procedure

The Supreme Court of the United States amended the Federal Rules of Civil Procedure in 2006 to address the discovery of electronically stored information. *See* Carl G. Roberts, *The 2006 Discovery Amendments to the Federal Rules of Civil Procedure*, August 2006, accessible at https://ccbjournal.com/articles/2006-discovery-amendments-federal-rules-civil-procedure (last visited, June 13, 2022). The changes specifically amended Rules 16, 26, 33, 34, 37, and 45. *Id.*, *see* Fed. R. Civ. P. 16; 26; 33; 34; 37; 45. In 2015, the Supreme Court again amended the rules, including amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84. *See* Joseph F. Marinelli, *New Amendments to the Federal Rules of Civil Procedure: What's the Big Idea?*, February 2016, accessible at https://www.americanbar.org/groups/business_law/publications/blt/2016/02/07_marinelli/ (last visited June 13, 2022). While there are many changes in the 2015 amendments, the most relevant to this paper are in Rule 37 about preservation of ESI, spoliation, and sanctions. *See* Fed. R. Civ. P. 37; *Thomas v. Butkiewicus*, No. 3:13-CV-747 (JCH), 2016 WL 1718368, at *7 (D. Conn. Apr. 29, 2016) (discussing the change in rules). The rules now guide the court in determining when the court can take action for lost ESI and what actions the court may take. These are important for Texas jurisprudence because, while discovery issues concerning ESI occur in Texas, much of Texas case law is guided by federal case law.

2. Federal Case Law

Judge Scheindlin, of the Southern District of New York, announced in a series of opinions, culminating in what is commonly referred to as *Zubulake I*, *III*, *IV*, and *V*, what have become significant protocols in the world of electronic discovery. *Zubulake I*, 217 F.R.D. at 312. The holdings of the *Zubulake* opinions addressing electronic discovery are significant, even though many states had released opinions prior to *Zubulake*, including Texas.

a) *Zubulake I and III*

In *Zubulake I*, released in 2003, Laura Zubulake, plaintiff, requested all documents regarding communications between herself and the defendant, UBS. *Id.* UBS produced emails and live data, but it failed to search its backup tapes, archives, or servers for documents responsive to the request. *Id.* at 313. Laura requested UBS do so, to which UBS objected, arguing that the cost of searching and retrieving the data was unreasonably high, approximately $175,000, and that Laura's request of the electronic data should be denied. *Id.* Judge Scheindlin, after considering the arguments of both parties, held that electronic documents are as equally subject to discovery as paper documents. *Id.* at 317.

The court analyzed the cost of discovery based on the accessibility of the data to be retrieved and held that fragmented, erased, and damaged data, as well as data held on backup tapes, was inaccessible, and thus a cost-shifting analysis must be considered to determine which party would pay for the production of the inaccessible data. *Id.* Judge Scheindlin created a then-new seven-factor balancing test:

1. The extent to which the request is specifically tailored to discover relevant information;

2. The availability of such information from other sources;

3. The total cost of production, compared to the amount in controversy;

4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information. *Id.* at 322.

Judge Scheindlin ordered UBS to produce all of the electronic information on its servers and backup tapes that Laura requested and to pay one-hundred percent of the costs associated with the production. *Id.* The court, upon review and application of the seven-factor balancing test, determined that Laura would be responsible for 25% of the remaining production costs, while UBS would pay for the other 75%. *Id.*

b) *Zubulake IV and V*

Judge Scheindlin handed down *Zubulake IV* in 2003, and both parties learned that relevant ESI, created after litigation had commenced, had been destroyed and were only available on UBS' backup tapes. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). The court held that UBS violated its duty to preserve the evidence because it should have known the evidence would be relevant to future litigation. *Id.* at 219. In *Zubulake V*, the court subsequently addressed the responsibility of counsel regarding electronic discovery and evidence and provided steps that counsel should take to create a "litigation hold" on ESI. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). This litigation hold to prevent the spoliation of evidence is discussed in more detail below.

3. Texas Rules

Although *Zubulake* is not recognized in Texas as mandatory law, *Zubulake* still provides ample guidance and instruction to the practitioner in cases dealing with ESI. However, Texas statutory and case law has expanded on the production and discovery of ESI, including the review and acknowledgment of a multitude of federal case law, including cases such as *Zubulake*.

a) TRCP 196.4

Unlike many states, Texas has a specific rule that pertains to the production and costs associated with ESI—Rule 196.4 of the Texas Rules of Civil Procedure. Rule 196.4 provides that electronic or magnetic data is discoverable in electronic or magnetic form. Tex. R. Civ. P. 196.4. To obtain the discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. *Id.* The responding party must produce the electronic or magnetic data responsive to that request, so long as it is reasonably available to the responding party in the ordinary course of business. *Id.* If the responding party cannot produce the data through reasonable efforts, the responding party must state an objection complying with the rules. *Id.*

Regarding costs, Rule 196.4 provides a method for shifting costs to the requesting party. *Id.* Under Rule 196.4, if the court orders the responding party to comply with the request and produce the electronic information, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the electronic information. *Id.*

b) TRCP 194.2

Rule 194.2 requires an initial disclosure "of all documents, electronically stored information, and tangible things that the responding party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment" Tex. R. Civ. P. 194.2(b)(6); *see also* Tex. R. Civ. P. 194.1(b) (requiring stating a reasonable time and method for the production of the items not produced with the response).

Practice Note: Although initial disclosures are mandatory, Rule 191.2 provides that reasonable agreements shall be made in each case to facilitate cooperation between parties and counsel to efficiently dispose of the case. Tex. R. Civ. P. 191.2. As such, prior to the deadline for the initial disclosures and drafting and sending other formal requests or motions to collect electronic data, learn about the responding party's electronic data system and how they store electronic data ahead of time to help formulate proper requests, and consider crafting agreements with opposing counsel regarding the protocol for collecting said data and the boundaries for such. *See In re Weekley Homes, L.P.*, 295 S.W.3d 309, 321 (Tex. 2009) (orig. proceeding); *see also In re Shipman*, 540 S.W.3d 562, 566–70 (Tex. 2018) (orig. proceeding).

4. Other Considerations

a) Model Orders

Several courts are now adopting model orders to promote the just and speedy production of ESI because it has become such a major player in discovery issues and is constantly the topic of pretrial discussions. For example, the Eastern District of Texas has adopted its own model

order regarding e-discovery in patent law cases. *See* model order at http://pdfserver.amlaw.com/legaltechnology/Model_E-Discovery_Patent_Order_w_Commentary.pdf (last visited June 13, 2022). Notable highlights of the model order include:

1. "A party's meaningful compliance" with the model order and "efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations";

2. ESI Production requests shall not include metadata without a showing of good cause or compliance with a mandatory disclosure order;

3. "Each electronic document shall be produced in . . . 'TIFF' . . . format";

4. "Absent a showing of good cause, no party need restore any form of media upon which backup data is maintained in a party's normal or allowed processes, including but not limited to backup tapes, disks, SAN, and other forms of media";

5. "Absent a showing of good cause, voice-mails, PDAs and mobile phones are deemed not reasonably accessible and need not be collected and preserved"; and
6. General ESI requests "shall not include e-mail," as a specific request must be made for email. http://pdfserver.amlaw.com/legaltechnology/Model_E-Discovery_Patent_Order_w_Commentary.pdf.

b) The Sedona Guidelines

Shortly before *Zubulake I* came down, the Sedona Conference, a working group of lawyers, consultants, academics, and jurists, began a public comment draft on the best practices regarding electronic evidence. *See* The Sedona Conference Publications page, https://thesedonaconference.org/publications (last visited June 13, 2022). The Sedona Conference has since published several articles regarding the management, best practice, discovery, and production of ESI. *See id.* Mainly intended for organizations, the Sedona Conference has published the following guidelines for managing electronic information and records:

1. An organization should have reasonable policies and procedures for managing its ESI;

2. An organization's ESI management policies and procedures should be realistic, practical, and tailored to the circumstances of the organization;

3. An organization does not need to retain all ESI ever generated or received;

4. An organization adopting an ESI management policy should also develop procedures that address the creation, identification, retention, retrieval, and ultimate disposition or destruction of ESI;

5. An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation, or audit. The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age, iv-v (Charles R. Ragan et al. eds., The Sedona Conference 2005).

The Sedona Conference has also created the following guidelines to help determine whether litigation should be reasonably anticipated and whether a duty to take affirmative steps to preserve relevant information exists:

1. "A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger and The Process*, 11 Sedona Conference J. 265, 269 (2010) [hereinafter *Commentary on Legal Holds*].

2. "Adopting and consistently following a policy or practice governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith." *Id.*

3. "Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith." *Id.*

4. "Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances." *Id.* at 270.

5. "Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions undertaken (including whether a legal hold is necessary and how it should be executed) at the time they are made." *Id.*

5. The Social Network

When lawyers have been unable to obtain the ESI regarding a website or social networking site directly from the party, many have resorted to sending civil subpoenas directly to the websites or companies themselves in search of the information. Unfortunately, however, federal laws and regulations seem to protect websites such as Facebook, Google, and Myspace from having to release such information.

a) Stored Communications Act

The Stored Communications Act ("SCA") essentially protects privacy interests in personal information that is stored on the internet. 18 U.S.C. §§ 2701—2712. Its essential purpose is to limit the government's ability to compel disclosure of an internet user's information contained on the internet and held by a third party.

More case law is coming out every year discussing whether internet sites such as Google, Facebook, and Myspace are protected under the SCA. *See, e.g.*, *Lucas v. Jolin*, No. 1:15-cv-108, 2016 WL 2853576, at *5 (S.D. Ohio May 16, 2016) (order granting motion to quash civil subpoena except as modified), and cases cited therein. The court in *Lucas* explained that, under Section 2702 of the SCA, the contents of communications only includes the information concerning the substance, purport, or meaning of those communications, and as such, the court modified the motion to quash and ordered Google to produce the "to/from fields and time/date fields" for any communications between two separate defendants. *Id.* at *9. In *In re Facebook, Inc.*, the Northern District of California quashed a subpoena for Facebook information, citing several cases dealing with subpoena's for email and other online services. 923 F.Supp.2d 1204, 1206 (N.D. Cal. 2012).

In contrast to *Lucas* and *In re Facebook*, in *Romano v. Steelcase, Inc.*, a New York court compelled a party to sign an authorization form to allow access to "Plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information . . . in all respects." 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010). The defendant argued that the plaintiff's social media sites contained information inconsistent with her claims in her personal injury action against the defendant. *Id.* at 651.

b) Sending out the Subpoenas

Notwithstanding the SCA, you may still be able to obtain vital information by attempting to subpoena information from a social media site. Each website and social media site, such as Facebook, Myspace, AOL, Yahoo, Ebay, Twitter, and Craigslist, to name a few, have their own policies and procedures for requesting personal information regarding their users. In fact, some sites, such as Facebook, simply have electronic request forms rather than subpoenas that a party may use. Electronic Frontier Foundation (EFF.com) has produced a "Social Network Law Enforcement Guides" that sets forth the policies and procedures for sending out a subpoena or request for information to multiple websites. EFF Social Network Law Enforcement Guides, accessible at https://www.eff.org/document/eff-social-network-law-enforcement-guides-spreadsheet-pdf (last visited, June 13, 2022). In addition, many of these sites allow users to download their own information into "archives." This is especially important to remember when drafting your requests for production to the other side.

c) Obtaining Information from the Social Network

Considering the availability of social media via a subpoena as described above, below are some of the practical ways to obtain discovery of social media without the use of a subpoena:

1. Facebook: On a desktop or laptop computer, click on the down arrow in the top right corner, at the far-right end of the blue bar at the top. Click on "Settings." Click on "Download a copy of your Facebook data." Facebook then begins the process of gathering your information and saving your Facebook archive. You will receive an email that a request has been made, and once the archive is complete, you will receive an email indicating that your Facebook download is complete, along with a link to allow you to download your Facebook data in .zip format. The link will remain active for only a few days.

2. Twitter: Like Facebook, a user can easily download his or her Twitter archive with the click of a button. On a desktop or laptop computer, click on the "Profile and settings" button at the top right, which is the square button of your profile picture. Click on "Settings." Towards the bottom of the page, under "Content," will be "Your Twitter archive" along with a button to "Request your archive." Click on "Request your archive." Again, like Facebook, Twitter will send you an email to download your Twitter archive in .zip format. The archive will include a list of all tweets, along with a date and time stamp for each message. In addition, if the Twitter feed is public, you can access a Twitter user's tweets without requesting to download the user's archive. Consider using a website such as AllMyTweets.net to assist you in searching for available public tweets.

3. Google: Your Google account is linked to Google's Google+ (including Circles, Pages, and Stream), Bookmarks, Calendar, Contacts, Drive, Fit, Photos, Play Books, Groups, Hangouts, Keep, Location History, Mail, Maps, Profile, Tasks, Wallet, and YouTube. Once logged in to any Google connected product, click on the settings link at the top right, which should be your profile picture (and where you click to logout). Click on "My Account." On that page, click on "Personal info & privacy" in the middle of the page. Scroll to the last section of the page, "Control your content." Under that section is a section to "Copy or move your content." Within that section, click on "CREATE ARCHIVE." You can select which Google Product you want to download archived information for. They are each automatically selected and show a green "check." Click on any you do not want to download and a grey "x" appears. Click on "Next" at the bottom of the list. You can select what format to download your data in, although .zip is the most widely available, already being on most computers. You can also select whether to receive a download link through email, or add it to your Google Drive, Dropbox, or OneDrive account. Files larger than 2 GB will be split into multiple .zip files. Any content from Google Play Music is not included and must be downloaded through Google Play Music Manager. Additionally, past searches are not included but may be generated under the "Web & App Activity" page, which link is available on the archive download page, or can be accessed under the "Activity controls" section above the "Control your content" section on the "Personal info & privacy" page.

B. Spoliation and the Duty to Preserve

1. *Zubulake* Guidelines

As stated above, *Zubulake V* regards an attorney's responsibility concerning electronic discovery and evidence. *Zubulake V*, 229 F.R.D. at 422. One of the main duties the *Zubulake* opinions address is the duty to preserve ESI when a party reasonably anticipates litigation. *See id.*; *Commentary on Legal Holds*, *supra*, at 268. *Zubulake V* offers three steps attorneys should take to maintain compliance with a party's preservation obligation:

1. Counsel must issue a "litigation hold" at the beginning of litigation or whenever litigation is reasonably anticipated. The hold should be re-issued periodically so that new employees are aware of it and all employees are reminded of their duties.

2. Counsel should communicate directly with "key players" in the litigation (i.e. people identified in a party's initial disclosure and any supplemental disclosure).

3. Counsel should instruct all employees to produce electronic copies of their relevant active files and make sure that all backup media which the party has a duty to retain is identified and stored in a safe place. *Zubulake V*, 229 F.R.D. at 422.

A litigation hold notice should describe the matter at issue, provide specific examples of the types of information at issue, identify potential sources of information, and inform recipients of their legal obligations. Case law has made it clear that no duty exists to preserve information if that information is not relevant. *Zubulake IV*, 220 F.R.D. at 217.

2. *Pension Committee*

In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, another opinion that Judge Scheindlin released, Judge Scheindlin revisited the *Zubulake* issues and clarified many of them concerning discovery abuse. 685 F.Supp.2d 456 (S.D.N.Y. 2010), *abrogated by Chin v. Port Authority of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012). Following are some of the key points from the opinion:

1. Negligence, gross negligence, and willfulness involved in discovery issues are all addressed on a case-by-case basis. However, Judge Scheindlin set forth a list of what constitutes negligence, gross negligence, and willful conduct, although the list is not exhaustive:

a. Gross Negligence: The failure to issue a written litigation hold, to identify all of the key players and to ensure that their electronic and paper records are preserved, to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

b. Willful Actions: The failure to collect records from key players identified during the process, and the intentional destruction of relevant paper or electronic email or records, including backup tapes.

c. Negligent Actions: The failure to collect information and data from employees, even if they are not key players as identified in the process, and the failure to assess the accuracy and validity of selected search terms.

2. The duty to preserve evidence arises when a party

reasonably anticipates litigation. Thereafter, a party must put a "litigation hold" in place to preserve the relevant documents. Many times, the plaintiff's duty to preserve is triggered before the defendant's.

3. The party claiming spoliation must prove 1) the spoliating party had control over the evidence and an obligation to preserve at the time of the destruction or loss; 2) acted with a culpable state of mind upon destroying or losing the evidence; and 3) that the missing evidence is relevant to the innocent party's claim or defense. Relevance and prejudice may be presumed when the spoliating party acts in bad faith or a grossly negligent manner. *Id.* at 466, 471.

3. Texas Spoliation Rules and Sanctions

In Texas, "the inquiry as to whether a spoliation presumption is justified requires a court to consider (1) whether there was a duty to preserve evidence; (2) whether the alleged spoliator breached that duty; and (3) whether the spoliation prejudiced the non-spoliator's ability to present its case or defense." *Trevino*, 969 S.W.2d at 954–55 (Baker, J., concurring).

Also, a duty to preserve arises "only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be potentially relevant to that claim." *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003).

There are few cases in Texas awarding sanctions for failing to properly preserve, search for, and produce responsive ESI. However, if a party intentionally or willfully fails to comply with the rules, courts become unforgiving. For example, in the federal case of *Green v. Blitz U.S.A., Inc.*, the court ordered the defendant, a year after the jury awarded damages and the case was closed, to pay $250,000 in sanctions to the plaintiff and to furnish a copy of the opinion awarding sanctions to "every Plaintiff in every lawsuit [the defendant] has had proceeding against it, or is currently proceeding against it, for the past two years. The Court issues an additional $500,000 sanction that will be tolled for thirty (30) days from the date of this Memorandum Opinion & Order. At the end of that time period, if [the defendant] has certified with this Court that it has complied with the Court's order, the $500,000 sanction will be extinguished. Finally, for the next five years, [the defendant] is ordered that in every new lawsuit it participates, whether plaintiff, defendant, or in another official capacity, it must file a copy of this Memorandum Opinion & Order with its first pleading or filing in that particular court." Civ. A. No. 2:07-CV-372, 2011 WL 806011, at *1 (E.D. Tex. Mar. 1, 2011), *vacated by*, No. 2:07cv372-TJW, 2014 WL 2591344 (E.D. Tex. June 10, 2014).

The court ordered such based on the fact that the defendant had failed to properly search for reasonably available data, including emails and Word documents, on obviously relevant and accessible custodian material. *Id.* at *10. Following a jury's award at the "low end" of damages, in part based on the defendant's defense, the plaintiff's counsel learned through discovery in another case that certain emails and documents existed that refuted the defense. *Id.* at *1. The plaintiff had sought those documents through discovery and motions to compel, but the defendant denied their existence (without, it turns out, properly searching for that material). In fact, the person tasked with searching for responsive documents told the court, "I am about as computer literate – illiterate as they come." *Id.* at *6.

The court did not accept the defendant's "illiterate" defense and found that its utter failure to consult its IT department or seek other assistance in searching for reasonably available data was a willful violation of its discovery obligations. *Id.* The court, after a review of the newly discovered evidence submitted by the plaintiff, found that the evidence would have affected the jury's verdict and, therefore, established the monetary and other unique sanctions. *Id.* at *7.

Though the order in *Green* was vacated, it illustrates what courts in Texas and the Federal system have been emphasizing for years—parties cannot simply ignore potential evidence that may exist and is relevant to an opposing party's discovery requests. Therefore, attorneys must make sure to comply with the rules by having a basic understanding of their clients' respective electronic storage systems, interview their clients to identify reasonably available ESI, and work with their opposing counsel to determine the form of production.

Practice Note: Now that you have identified the electronic evidence that you wish to discover, consider sending a spoliation letter to your client and/or the opposing counsel that specifically identifies the electronic evidence you wish to preserve. The purpose of such a letter is not only to preserve the electronic evidence but also to assist in a claim of spoliation later if the opposing party destroys or loses electronic data.

C. The Duty to Advise Clients

Texas lawyers must advise their clients about evidentiary issues. In state court, an attorney is held to the reasonably

prudent attorney standard of care concerning spoliation, which means that a reasonably prudent Texas attorney, familiar with spoliation laws, who has been retained by a client who has been sued in state court, would have: (1) determined that a duty exists to preserve evidence that is material and relevant to the dispute, (2) advised the client of the duty immediately and that the client must take reasonable measures to safeguard that evidence, and (3) inform the client that the deliberate destruction of that evidence can lead to sanctions. *See Wal-Mart Stores*, 106 S.W.3d at 722; *Trevino*, 969 S.W.2d at 957. The federal standard of care, however, is based on federal law, rather than state law, at least in diversity suits. *Condrey v. Sun Trust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005). The 5th Circuit has yet to adopt the *Zubulake* standards, but because the new Federal Rules of Civil Procedure incorporate more guidelines concerning spoliation and what to do about it, Texas lawyers in federal court must take this duty seriously.

Lawyers must also advise their clients about how to obtain evidence, even from their spouses. In *Miller v. Talley Dunn Gallery LLC*, husband took photographs of text messages on wife's cell phone between her and another individual. No. 05-15-00444-CV, 2016 WL 836775, at *1 (Tex. App.—Dallas Mar. 3, 2016, no pet.) (mem. op.). Husband also placed a recording device in wife's car and at home and recorded conversations she had in the car and also between him and her at their home. *Id.* About a year later, wife filed for divorce. *Id.* Just before wife filed for divorce, the art gallery that she owned sued husband for using confidential information that he accessed on wife's cell phone, claiming that he was using it to interfere with the business. *Id.* at 2. Husband claimed that photographs were not accessing the phone and, further, that wife's cell phone was community property that he had consent to use. *Id.* at 11. The court of appeals held that the photographs themselves did not violate the Harmful Access by Computer Act (HACA) but that retrieving the text messages did. *Id.* (citing Tex. Civ. Prac. & Rem. Code § 143.001(a); Tex. Penal Code Ann. § 33.01(1)). The court reasoned that, because the cell phone belonged to wife, she used it on a daily basis, it was the only way to reach her, she had the right to password protect it, and restricted access to it by password protection, husband had no rightful access to the phone, and HACA makes no distinction between community and separate property. *Id.* Furthermore, the recordings in the car, which husband was not a party to, violated the Interception of Communication Act (ICA) because wife did not consent to those recordings. *Id.* at *9 (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 123.001–123.002). The court of appeals also held that the other recordings husband made between him and wife at their home invaded wife's privacy under that common-law cause of action, even though the recordings did not violate the ICA. *Id.* at 10–11.

Accordingly, lawyers must inform their clients to not seek out information by accessing their spouses' cell phones or other electronic devices, or even other peoples' devices that may be synced with their spouses' devices, that could reasonably be considered a computer. Also, recording conversations that one is not a party to not only imposes civil liabilities, but it also subjects parties, and attorneys who use the evidence, to state and federal wiretapping laws. Further, one spouse can violate the privacy of another spouse, even while they are together. Lawyers should inform clients at the onset regarding how to obtain evidence and should thoroughly investigate all evidence that clients bring forward to determine that it was not obtained illegally. *See Taylor v. Tolbert*, 644 S.W.3d 637, 648–57 (Tex. 2022) (holding that attorney who uses illegally obtained evidence may assert attorney-immunity as defense to state claims but not to federal claims).

Practice Note: Facebook and other social media accounts can be deleted, which would violate the spoliation rules. Inform your clients that, rather than delete those accounts, simply deactivate them. This is usually done under the settings or security page of the particular website.

D. The Lawyer's Responsibility to Learn

ESI is commonplace in litigation today. Some states are taking steps to ensure that lawyers stay up to date in knowing rules concerning ESI, discovery, and spoliation. Several states have also adopted Comment 8 to the Model Rules of Professional Conduct, which states, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." Model Rules of Prof'l Conduct r. 1.1 cmt. 8 (Am. Bar Ass'n 2016). California issued an ethics opinion in 2015 that states that attorneys who are not familiar with the benefits and risks associated with the technology relevant to their case, and cannot acquire sufficient learning and skill before performance is required, must decline representation or associate with or consult competent counsel or technical experts familiar with that technology. Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Op. 2015-193 (2015); *see also* Erin Corken, Director of Legal Technology, U.S. Legal Support, *Ethical Issues that Arise in Preservation and Collection* (April 29, 2016). The opinion laid out nine skills that attorneys should be able to do: (1) initially

assess e-discovery needs and issues, if any; (2) implement or cause to implement appropriate ESI preservation procedures; (3) analyze and understand a client's ESI systems and storage; (4) advise the client on available options for collection and preservation of ESI; (5) identify custodians of potentially relevant ESI; (6) meet and confer with opposing counsel concerning an e-discovery plan; (7) perform data searches; (8) collect responsive ESI in a manner that preserves the integrity of that ESI; and (9) produce responsive non-privileged ESI in a recognized and appropriate manner. Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Op. 2015-193; Corken, *supra*. While this specific standard has not been adopted by other states, it is worthwhile for attorneys to be up-to-date on their knowledge of and ability to perform such skills, as mentioned in the comments to the Model Rules, because sanctions can be steep, both against the attorney and the client.

JURY SELECTION IN TEXAS

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Teaching Experience

South Texas College of Law
Guest Speaker on Estate and Trust Litigation – Probate Clinic
Houston, Texas: August 2017 – Present

University of Houston Law Center
Adjunct Professor – Pre Trial Advocacy
Houston, Texas: August 2015 – May 2017

Admissions

State Bar of Texas – November 2001
Southern District of Texas – February 2003
Northern District of Texas – August 2004
Eastern District of Texas – August 2004
Western District of Texas – September 2004

Legal Experience

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Partner
Fort Worth, Texas: November 2020 to Present

Munsch Hardt Kopf & Harr P.C.
Shareholder
Dallas, Texas: October 2019 to October 2020

Ostrom P.C.
Attorney
Houston, Texas: July 2018-September 2019

Holland & Knight LLP
Partner
Houston, Texas: June 2018-July 2018

Ostrom Morris, PLLC
Partner

Houston, Texas: January 2015 – June 2018

University of Houston Law Center
Adjunct Professor – Pre Trial Advocacy
Houston, Texas: August 2015 – May 2017

Jones | Morris | Klevenhagen, L.L.P.
Partner
Houston, Texas: January 2010 – December 2014

Barron, Newburger, Sinsley & Wier, PLLC
Senior Counsel
Houston, Texas: April 2008-December 31, 2009

The Morris Law Office
Shareholder
Houston, Texas: October 2005 – Present

Ford & Mathiason LLP -
Attorney of Counsel
Houston, Texas: October 2005-July 2007

Barrett, Burke, Wilson, Castle, Daffin, and Frappier, L.L.P. – Associate
Houston, Texas: August 2004 – September 2005

Knight & Scott L.L.P. – Associate
Houston, Texas: December 2002 – July 2004

The Morris Law Firm – Solo Practitioner
San Antonio, Texas: January 2002 – November 2002

Cacheaux, Cavazos, Newton, Martin, & Cukjati, L.L.P. – Associate
San Antonio, Texas: September 2001 – Until Partnership Dissolution in December 2001

Professional Associations

Association of Certified Fraud Examiners
National Association of Consumer Attorneys
Association of Trial Lawyers of America
National College of Probate Judges
National Guardianship Association
Texas Trial Lawyers Association – Past
Houston Trial Lawyers Association
Christian Trial Lawyers Association
College of the State Bar of Texas
Asian American Bar Association
State Bar of Texas

- Litigation Section
- Estate Planning and Probate Section

- Bankruptcy Section
- Business Law Section

Houston and San Antonio Young Lawyers Association
Houston Bar Association

- Bankruptcy Section
- Consumer and Commercial Law Section

San Antonio Bar Association

- Probate Section

Houston Heights Bar Association – Past

- Served as Treasurer for two terms

Austin Bar Association – Past

- Probate Section
- Bankruptcy Section

Professional Certifications and Training

Guardian Ad Litem Certification Course with Guardianship Alternatives - August 2015
National Institute for Trial Advocacy Trial Skills – June 2008
National Institute for Trial Advocacy Deposition Seminar – February 2004
Advanced Bankruptcy Seminar – September 2004
Wills and Probate Institute – September 2003
NCLC Fair Debt Collections Practices Seminar – March 2007
National College of Probate Judges Spring Meeting – May 2008
Wills and Probate Institute – September 2011
Fiduciary Litigation: Beyond the Basics – December 2011
Role of the Ad Litem in Mental Health Cases – December 2011
Advanced Trial Strategies – February 2012
Fundamentals of Serving as an Attorney Ad Litem – October 2012
Protecting and Administering Digital Assets – February 2013
Advanced Trial Strategies – February 2013
Ethical Digital Marketing for Lawyers – May 2013
Fiduciary Duties in Real Estate Transactions – May 2013
Advanced Estate Planning and Probate 2013 – June 2013
Advanced Estate Planning and Probate 2014 – June 2014
Fundamentals of Serving as an Attorney Ad Litem – October 2014
Fiduciary Litigation Course – December 2014
Advanced Estate Planning Strategies – April 2015
Advanced Estate Planning and Probate 2015 – June 2015
Estate Planning, Guardianship and Elder Law – August 2015

Publications

The Servicemembers Civil Relief Act: Layers of Concern for Bankruptcy and Collection Lawyers, Norton Bankruptcy Law Adviser, December 2004

The Texas Guardianship Manual,
State Bar of Texas
Editor and Co-Author
June 2015

COVID-19 Has Increased Demand for Estate Planning. Here is How to Do it Right

Texas Lawyer
July 2020

The Role of Litigators in a Modern Estate-Planning Practice
Trusts and Estates Magazine
February 2023

Speaking Engagements

Before You Go Podcast….Things You Should Know About Estates, Trusts, and Guardianships
Co-Host with Stacy Kelly
January 2024 to Present

The Last Line of Defense or the Final Hurdle?: Navigating Frustrating Real Estate Transactions in Estate and Trusts
Tarrant County Probate Bar Association
November 2022

Addressing Creditor Claims
National Business Institute – Texas Probate Process – 7 Simple Steps
June 2022

Estate Planning and Cryptocurrency
WEB3 Law Conference
April 2022

Fiduciary Duties in Real Estate and Beyond
American National Bank and Trust CLE
August 2021

Probate Property vs. Non-Probate Assets & Handling Claims Against the Estate
National Business Institute – Texas Probate Process Start to Finish
June 2021

Fiduciary Duties in Real Estate and Beyond
Tarrant County Probate Bar Association
March 2021

Estate Planning and Probate
University of Houston Law Center
The People's Law School – October 2019,
The People's Law School – April 2018
The People's Law School – April 2017
The People's Law School – April 2016
The People's Law School – October 2015

"Signing" Without Signing: What Every Estate Planner Should Know About the Federal E-Sign Act and the Texas Uniform Electronic Transactions Act

Montgomery County Bar Association
November 2018

Agents and Managers for Athletes, Actors and Musicians and the Related Fiduciary Duties
State Bar of Texas CLE Webinar
September 2018

"Signing" Without Signing: What Every Estate Planner Should Know About the Federal E-Sign Act and the Texas Uniform Electronic Transactions Act
2018 NAELA Summer Conference
August 2018

How Not to Pay the Piper – Creditors and Estates
Docket Call In Probate Court – San Antonio Estate Planners Council
February 2018

Dealing with MERP Claims Through Probate Proceedings
Advanced Elder Law
April 2017

The Changing Face of the Jury Trial
Fiduciary Litigation Seminiar
December 2016

Working with Creditors and Claims in Guardianship, Dependent and Independent Administrations
2016 UT Estate Planning, Guardianship and Elder Law Conference
August 2016

Prejudgment Processes and Procedures to Level the Playing Field – Tricks, Traps and Opportunities From a Litigator and Judicial Perspective
Advanced Estate Planning and Probate 2016
June 2016

Prejudgment Processes and Procedures to Level the Playing Field – Tricks, Traps and Opportunities From a Litigator and Judicial Perspective
Fiduciary Litigation Seminar
December 2015

The Probate Process from Start to Finish
National Business Institute
April 2015

The Probate Process from Start to Finish
Institute for Paralegal Education
November 2013

Fiduciary Duty in Real Estate Transactions

HBA Real Estate Section
May 2013

Protecting and Administering Digital Assets
HBA Litigation Section Westside Luncheon
February 2013

Estate Planning and Probate with Social Media in Mind
HBA Estate Planning and Probate Section
December 2012

Guardian Ad Litems and Contested Matters
Guardian Ad Litem Certification Course
2011 Wills and Probate Institute – South Texas College of Law
September 2011

Planning for the Future
Mended Hearts Support Group
Annual Meeting – July 2011

Estate Planning and Probate
University of Houston Law Center
The People's Law School – October 2009

Estate Administration Procedures: Why Each Step Is Important
National Business Institute
May 2009

*Estate Planning and Probat*e
University of Houston Law Center
The People's Law School
April 2009

Finding FDCPA Claims in Bankruptcy
Houston Association of Debtor's Attorneys
February 2008

Consumer Credit and Debt – How to safeguard your credit
Stonewall Lawyers Association Law Day
June 2007

Consumer Credit and Debt – Debt Collection and your Credit Report
University of Houston Law Center
The People's Law School – April 2007

Living the Dream: Perspectives on Solo Practice or Starting your own Firm
Asian American Bar Association
March 2007

Basics of Estate Planning

Interfaith Care Partners
February 2006

Organizing for the Future
Interfaith Care Partners
March 2006

Probate Law for Personal Injury Attorneys
Texas Trial Lawyers Association CLE
Maximizing Your Case Recovery in 2006
April 2006

Death and Dying:
Wills, Living Wills and Powers of Attorney
University of Houston Law Center – The People's Law School
October 2006

Basics of Estate Planning
The American Legion
October 2006

LYNN WALLER KELLY

Attorney/Partner **January 2024 - present**
The Blum Firm, PC **Fort Worth, TX**

* Representation of individual and corporate clients in both contested and uncontested probate matters, including estates and guardianships in courts throughout North Texas
* Mediator in estate proceedings and disputed guardianship matters

Associate Judge **May 1, 2017 – Dec. 2023**
Probate Court No. 2, Tarrant County **Fort Worth, TX**

* Preside over estates hearings (uncontested and contested; approximately 6,000 hearings)
* Preside over contested guardianship hearings on weekly basis
* Review Annual and Interim Court Visitor Reports in each of the court's pending guardianship matters; work with Court staff social workers/court visitors to resolve concerns
* Primary responsibility for civil mental health commitment docket (over 2,000 case filings per year)
* Preside over civil commitment trials and probable cause hearings at public county hospital (over 1,000 hearings)
* Preside over Assisted Outpatient Treatment docket (one of few such programs for civil mental health commitment patients in Texas)
* Assist in training of psychiatry and psychology residents in giving court testimony
*Preside over forensic medication hearings at various Texas State Mental Hospitals (approximately 200+)
* Preside over forced medication hearings for criminal detainees at Tarrant County jail
* Preside over guardianship proceedings (person and estate)
* Public speaking on topics of interest (Texas A&M Law School, Baylor Law School, Texas Guardianship Association; local mental health and parent groups)

Attorney and Counselor at Law **July 2010 – April 2017**
Lynn Kelly Law Firm PC **Fort Worth, TX**

* Civil litigation, concentrating in employment law
* Advised business clients regarding employment matters, contracts, risk management/insurance matters
* Conducted independent investigations into employment issues for employers, including governmental entities
*Represented clients in Alternative Dispute Resolution proceedings including mediation and arbitration
*Court appointed guardian ad litem in personal injury litigation
*State Bar of Texas Certified Attorney Ad Litem in Texas Probate Courts with court appointed clients in several North Texas counties
*Represented clients in civil mental health commitment proceedings in Tarrant County

Of Counsel **June 2008 – July 2010**

Lynn, Pham & Ross, LLP **Fort Worth, TX**

* Civil litigation and administrative law practice, concentrating in management side labor/employment law

* Advised business clients regarding contracts, risk management/insurance matters

* Conducted independent investigations into employment issues for governmental entities

* Represented governmental entities in civil service and non-civil service employment hearings and litigation

* Represented clients in Alternative Dispute Resolution proceedings including mediation and arbitration.

Assistant Vice President and Legal Counsel **Jan. 2006 – Nov. 2007**

D. R. Horton, Inc. **Fort Worth, TX**

Managed litigation and claims for Central and Eastern U.S. operations, including contractual disputes, construction issues, employment matters and personal injury claims; advise all levels of employees in claims, compliance and litigation matters; negotiated and drafted settlement agreements; represented corporate entities before state regulatory agencies such as Texas Residential Construction Commission; coordinated responses to subpoenas, garnishments, and governmental agency requests; worked directly with senior management and corporate communications team in responding to high-profile matters. Assigned and supervised outside counsel.

Attorney **May 2002 – Dec. 2005**

Whitaker, Chalk, Swindle & Sawyer, L.L.P. **Fort Worth, TX**

Represented variety of corporate entities in commercial litigation matters, intellectual property disputes and employment claims; participated in several jury trials through verdict (both first and second chair); defended numerous Texas non-subscriber employers in personal injury litigation; advised business clients regarding entity formation, contracts and general corporate matters

Legal Counsel **Nov. 1998 – April 2002**

Nationwide Mutual Insurance Company **Richardson, TX**

Attorney for North Texas claims operation

- Managed litigation and large claims under auto, homeowners and commercial insurance policies
- Supervised first and third-party litigation assigned to outside counsel and staff attorney office
- Addressed coverage questions for adjusters and managers; approved first party coverage denials; made coverage opinion assignments to outside counsel
- Provided litigation and coverage training for claim adjusters

Lead Trial Attorney **Oct. 1994 to Nov. 1998**

Law Office of Lynn W. Kelly (formerly Law Offices of Robert J. Mabel) **Irving, TX**

- Prepared and tried personal injury and commercial liability lawsuits in Texas state courts, including approximately **40 solo jury trials**; handled caseload of approximately 60-90 active litigation files
- Beginning 8/97, managed a staff of 15 employees (including 7 trial attorneys)
- Served as liaison with claims customers from Nationwide, Wausau, Scottsdale, and Farmland Insurance, receiving and assigning new case referrals in addition to maintaining a personal caseload of 30-45 active litigation files
- Invited as speaker at national claims counsel meeting on trial strategies for soft-tissue injury cases

Assistant District Attorney **Jan. 1990 to Oct. 1994**

Dallas County District Attorney **Dallas, TX**

Prosecution of felony and misdemeanor cases, including approximately **90 jury trials**, in Organized Crime Division, Felony Trial Division, and Misdemeanor Trial Division (Chief Prosecutor)

EDUCATION

Pepperdine University School of Law, Malibu, CA, J.D., 1989

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Abilene Christian University, Abilene, TX, B.A. Government, 1986, *magna cum laude*

PROFESSIONAL ASSOCIATIONS AND HONORS

Voted by colleagues to Tarrant County's Top Attorneys, *Fort Worth Magazine*, 2003, 2004, 2006, 2010 - 2016

Named Power Attorney by Fort Worth Business Press, 2014

Recognized by 360 West Magazine as a top attorney in Fort Worth, June 2017

Board of Directors, Fortress Youth Development Center (2015-17)

Board of Directors, Tarrant County Bar Association, Women Attorneys Section (2014-16)

Board of Directors, The Parenting Center, Fort Worth (2012-15)

State Bar of Texas award for Best Series of Articles – Feature for series of judicial profiles in Tarrant County Bar Bulletin (2011-12)

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THE CHANGING FACE OF JURY SELECTION

I. INTRODUCTION

The jury was believed to have originated in 11th Century England brought by William the Conqueror, but some historians believe that the jury system may have existed even earlier. Although the number of jury trials have steadily decreased over the years, the jury system still remains a very important part of the United States system of justice. Jury selection and persuasion is both an art and a science and many of the best trial lawyers in the country spend their entire careers improving their tradecraft in order to gain an advantage in jury trials. However, new challenges face trial lawyers as there are currently four distinct generational groups in the jury pool, each with their own unique traits and learning preferences that make effective communication with the diverse jury pool a new wrinkle for judges and trial lawyers alike.

It is no longer just enough to know how to communicate with jurors from different ethnic and socioeconomic backgrounds, but judges and trial lawyers also need to understand how the jurors' life experiences and access and understanding of technology and access to information influence their decision making. Many trial lawyers, depending on the size of the case and the cost of winning or losing, enlist the help of jury consultants whose job it is to understand all of the factors associated with juror decision making and how to effectively communicate and choose the juror that is right for the case that is being tried. There are many different articles on the internet from all different sources that discuss the learning patterns, work preferences, use of technology in decision making and many other categories of analysis that cross generational lines and educators and employers can use these characteristics to their advantage. However, there seems to be little discussion of how the justice system in America should incorporate and embrace these differences and what that means for the future of the jury system.

The Texas Rules of Civil Procedure describe the instructions that must be given to the prospective jurors, the jurors that are selected in order to impanel them and instructions to the jurors when rendering their verdict. The most interesting feature of these instructions are that they specifically do not address technology, whether it be the use of hardware, software, the internet or social media, and the prohibitions associated with the use of technology. The problem with those instructions is that they are inherently prohibiting the use of the primary modes of communication and information gathering in the 21st Century. Jurors, no matter what generational group they fall into, are all technologically savvy at some level and the restrictions on the use of technology, albeit fairly recent, may prevent some jurors from fully being able to fulfill their jury service. This paradox is one that should be considered, analyzed, and explored by legislators, judges and lawyers alike in order to allow the jury system to evolve with technology instead of maintaining a system that ignores the pervasive use of technology. The train has left the station, and the justice system needs to get on board to keep up.

II. GENERATIONAL GROUPS AND WHAT DIFFERENTIATES ONE GENERATION FROM ANOTHER

A. The Four Current Generational Group

Generally, there are four current generational groups that are eligible to serve on juries;

- Traditionalists - Born between 1925 and 1945,
- Baby Boomers - Born between 1946 and 1964,
- Generation X - Born between 1965 and 1980, and
- Generation Y (Millennials) Born between 1981 and 2006.

The generations are defined by the events that influenced them, the socioeconomic and political climates of the times, the level of access to and use of technology in education, as well as daily life, their attitudes toward work and their work ethic.

B. Traditionalists (1925-1945)

Traditionalists are currently the eldest generation, but for one reason or another, many of them are still in the work force and remain active in society. Traditionalists were influenced by the Great Depression, the Roaring 20's, World War I&II, the Korean War and the G.I. Bill and as a result they remain patriotic and loyal, and that loyalty typically translates to loyalty in the workplace and Traditionalists usually work for one company their entire career. In addition, due to the strong military influence their general managerial style is a military-like, top-down approach where the information comes from either one chief executive officer or a board of directors. Traditionalists believe in discipline, dedication, sacrifice, delayed gratification, duty before pleasure and law and order.

As one might expect, the Traditionalist generation's approach to learning is also "traditional". They learn for the purpose of acquiring information to assist them in their chosen career, they prefer "command and control" type structured learning and prefer a classroom structure. They still learn by doing and by reading printed materials and follow instructions. It is fairly clear that the current jury system was tailored for this generation and the current structure provides the optimal conditions for conveying information to the Traditional generation.

C. Baby Boomers (1946-1964)

Baby Boomers are currently the largest generation, although the Millennials are not running far behind in terms of size. This generation was named after the large number of post-World War babies and are currently ages 59-77. The Baby Boomer generation was influenced by the advent of suburbia, the television, Vietnam, Watergate, protests, the Human Rights Movement, and sex, drugs and rock and roll. The Baby Boomers are a generation of competitive idealists that constantly want to question authority. Baby Boomers are also known as the "Me" generation because this generation strives for money, title and recognition and want to build a stellar career full of accomplishment and success. Baby Boomers are ambitious, competent, competitive, ethical and do not believe in convention. Baby Boomers like to think outside the box, are politically correct, and eternal optimists.

The Baby Boomer's approach to learning is transformational in nature. They want to learn information that will change them and ultimately cause a paradigm shift. Baby Boomers want the educational experience directed toward them and tailored to their individual needs. This generation still prefers classroom learning, but rather than sitting and listening to a lecture like the Traditionalist generation, Baby Boomers want the experience to be more interactive and they want recognition and feedback from the instructors. Based on the learning habits, the current jury system starts to fail to adapt to the learning habits in this generation because it is not an interactive process which Baby Boomers prefer.

D. Generation X (1965-1980)

Generation X is generally considered the skeptical generation. Generation X was influenced by the likes of Sesame Street, MTV, Game Boys, the Personal Computer, a large divorce rate and were "latch key" children which means that the house was empty when they returned home for the day because both parents were working. Generation X is the smallest of the generations but also the most independent. This generation is characterized by eclectic, resourceful, and self-reliant members. They are generally distrustful of institutions and view them as stale and rigid. Members of this generation are capable of change, have an unexplained drive and anger, are self-starters, fiercely independent, entitled and are not impressed with authority. Generation X is highly adaptive to change and technology and makes use of technology to advance themselves. They are the most misunderstood generation and their self-reliance is often viewed as stubbornness. Generation X values a balance between work and life, desires freedom, they are flexible and internally motivated and value the idea of a portable career. Generation X is comprised of individuals that are entrepreneurs at heart and believe that they can effectuate change on an individual level.

In terms of education, Generation X are stimulated by self-directed learning and are fiercely independent. They like the idea of learning at their own pace and on their own schedule rather than being constrained by a rigid structure of a classroom. In the context of serving on a jury, their individualism comes directly into conflict of a consensus and the information is generally directed at them and there is no opportunity for independent discovery and analysis.

E. Generation Y or Millennials (1981-2000)

Generation Y or commonly known as "Millennials" are influenced by expanded use and access to technology and diversity in all aspects of their lives. They have been negatively influenced by natural disasters, gangs and global violence. The ready access to global information makes Millennials more globally concerned rather than locally or nationally focused. They are realists, are very cyber-literate and are very focused on personal safety. They value diversity and change, want their work to have meaning and have been involved their entire life. Although they prioritize personal safety, they are also concerned about others' well-being. Millennials are team players, thrive in collaborative environments, optimistic about the future and their ability to effectuate change, want to please others and respect someone's competence rather than their title. Millennials, although extraordinarily entitled because of their over-indulgent parents but still value others and want to make a contribution to the world.

In terms of education, Millennials are highly educated and constantly want to seek out and acquire knowledge and make use of their almost instantaneous access to information. They would never go to a library because anything that they want to learn can be

"Googled". They thrive on informal learning, that is highly personalized and tailored to their schedule. They are suspicious of set schedules and artificial deadlines. They prefer to learn by hearing, seeing and doing rather than being lectured. Clearly, the current jury system is not focused on educating these members of the jury pool and it is a challenge to tailor the system for this type of learning.

III. THE CURRENT JURY SYSTEM IN TEXAS

A. Current Rules for Jury Selection – TRCP 226a

Texas Rule of Civil Procedure 226a provides the Court with the instructions that are required to be given to jurors as they are in the jury panel during the voir dire examination, which informs them of the number of jurors being sought for the specific case, discusses the use of communication devices, technology and specifically social media to discuss or record the proceeding, how they will analyze the facts of the case, a brief background of the case to familiarize them with the issues at hand, and how they are allowed to interact with the lawyers and parties during the jury selection process. TEX. R. CIV. PROC. 226a.

Prior to the lawyers being allowed to question the jurors, the judge reads these instructions to the jury panel to prevent misunderstandings or misconduct in the process. Voir Dire is the process of allowing the trial attorneys the opportunity to question the jury panel to vet their thoughts and biases so that the parties receive a fair trial and ensure that certain jurors which might skew the process because of bias, prejudice or preconceived notions are not chosen for the jury panel. TRCP 226a does not prescribe a specific time period for voir dire and that is generally left up to the discretion of the judge based on the complexity and number of parties in the case.

B. The Current Approach to *Voir Dire*

Based on what was discussed previously about the different generations approaches toward social interaction, learning and views on authority the current jury selection process is very limited in the ability to convey a uniform message to prospective jurors. Traditionalists prefer a more directed and less interactive educational experience whereas Millennials prefer a high degree of interaction. As it stands, generally the judge provides the jury panel instructions about the process and then the lawyers have the opportunity to ask questions of certain, but usually not all members, of the jury panel. At present, this is really the only opportunity for jurors to interact with the lawyers during the process and that fact is routinely pointed out by the court prior to lawyers beginning their questioning. Although the lawyers are permitted to question the jurors, it is rare that any lawyer is able to individually question each prospective juror because of the time limitations that are imposed by the court. This presents a number of issues based on the preferences of the different generations because although Traditionalists prefer to lead, they might be less apt to volunteer information but a Millennial may be offended by not being allowed to speak freely and included in the process because they have a strong feeling of entitlement and have been "involved" their entire lives. The fact that jurors are only allowed to speak when questioned by the lawyers presents issues that in the current system cannot be addressed.

Generally speaking, trial lawyers do not make use of technology during voir dire and so the generations that prefer to use technology to receive information and prefer ready access to that information are not given the opportunity to make use of technology in this process. The result might be that some of the potential members of the jury may not pay attention to the information that is being conveyed in a more traditional way not because they are being stubborn or obstinate but because it does not comport with their educational experience or preferences.

It is difficult to imagine how to alter the process to provide a more comprehensive experience to all jurors but initially a system that allows for a greater use of technology might be a good start. Trial lawyers that mix in some technology to aid in the selection of the jury panel might benefit greatly over those that do not and provide a more thorough experience for the members of the potential jury and therefore weed out individuals that are not suited to serve on the jury in a particular type of case.

Trial attorneys are limited by the current system in their ability to get into the specific facts of the case in voir dire but if the rules were slightly relaxed it would allow the introductions of technology to convey a different and more thorough message to the prospective jurors without tainting the process.

C. Peremptory Challenges

After all counsel conclude their voir dire examination the preemptory challenge procedure starts. TEX. R. CIV. PROC. 232, 233. Peremptory challenges allow attorneys to exclude potential jurors from serving on the jury without providing a specific reason or justification. Each party to a civil suit is entitled to six

peremptory challenges in a case tried in the district court, and to three in the county court. TEX. R. CIV. PROC. 233. Each side is also entitled to one additional peremptory challenge if one or two alternate jurors are to be impaneled. Each side is entitled to two additional peremptory challenges if three or four alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and none of the normal peremptory challenges may be used against an alternate. TEX. GOV'T CODE. § 62.020(e). *See, e.g., Temple EasTex, Inc. v. Old Orchard Creek Partners, Ltd.,* 848 S.W.2d 724 (Tex. App.–Dallas 1992, writ den'd)(when the trial court impanels alternate jurors, the trial court committed error in refusing Temple EasTex an additional peremptory challenge).

In multi-party cases, it is the trial court's duty, before the exercise of peremptory challenges, to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. TEX. R. CIV. PROC. 233. In addition, upon the motion of any litigant in a multiparty case, it is also the trial court's duty to "equalize" the number of peremptory challenges so that no litigant or side is given an unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges. *See Frank B. Hall & Co. v. Beach, Inc.*, 733 S.W.2d 251, 256- 57 (Tex. App.–Corpus Christi 1987, writ ref'd n.r.e.). Thus, when multiple litigants are involved on one side of a lawsuit, the threshold question answered in allocating peremptory challenges is whether any of those litigants are antagonistic with respect to an issue of fact that the jury will decide. *See Scurlock Oil Co. v. Smithwick,* 724 S.W.2d 1, 5 (Tex.1986); *Garcia v. Central Power & Light Co.,* 704 S.W.2d 734, 736 (Tex.1986); *Patterson Dental Co. v. Dunn,* 592 S.W.2d 914, 918 (Tex.1979). The determination of antagonism is one of law. Tex. R. Civ. P. 233; *Patterson*, 592 S.W.2d at 917. If no antagonism exists, each side must receive the same number of challenges. *See Scurlock,* 724 S.W.2d at 5; *Garcia,* 704 S.W.2d at 736-37; *Patterson,* 592 S.W.2d at 919.

D. The Jury Panel During Trial

Once the jury has been sworn in and seated, the court provides the next set of instructions that are required by TEX. R. CIV. PROC. 226a. The instructions are somewhat similar, jurors are not allowed to use electronic devices in the courtroom to communicate with anyone, they cannot record the proceedings or post information on social media sites. They are not allowed to interact with the lawyers, witnesses or the parties, except for routine pleasantries, for fear that it will appear that they favor one side or the other. They are not permitted to accept favors from the lawyers, witnesses or the parties. Jurors are not allowed to discuss the case with anyone, either other jurors or family, friends or casual acquaintances, or use social media to convey any information about the case in order to prevent the juror from forming any opinion about the case until they have heard all the evidence. The jurors cannot independently investigate the facts of the case such as internet research, visiting any venue mentioned during the course of the trial to perform their own inspection, research the law, independently inspect any item mentioned unless presented as evidence in court. Along with the prohibition from discussing the case with other jurors, the jurors may not discuss their own independent knowledge about a subject or a life experience that might be similar to the case that they are deciding. The jurors are permitted to take notes to assist them in the jury room, matters of law are decided by the judge and the jury's job is to listen to the admissible evidence and render a verdict based on the evidence and the questions presented in the charge of the court that will be provided to them after the close of the evidence and closing arguments. TEX. R. CIV. PROC. 226a.

The reasoning, according to the rule, is to prevent the juror from rendering a verdict based on any information that is not presented in court. The fundamental problem with those instructions is that judges and lawyers alike know that jurors routinely violate those rules and there is absolutely no way to prevent such abuses. In fact, there is quite a bit of anecdotal evidence that suggests that jurors have made up their mind after opening arguments and only pay cursory attention to the witness testimony. As such issues can and do exist, it might be beneficial to figure out how to modify those restrictions to allow some independent participation on the part of the jurors so that they feel that they can have some level of interaction and be a part of the process, rather than just a repository for argument and testimony.

As is routinely mentioned during voir dire, the ability for the jury to speak and interact with the lawyers has ended in the current system with the exception of facial expressions, signs and sometimes laughter. Usually the lawyers then do their opening statements, the witnesses are questioned, and the lawyers present closing arguments. During that entire process, whether the trial lasts a day or six months, the jurors are only permitted to sit and listen and take notes. Based on the current research about generational learning and preferences, the lack of interaction and collaboration during that entire process might result in some jurors ceasing to pay

attention or some circumstances get frustrated because the lawyers failed to ask a question that the juror really wanted answered to help them formulate their opinion. The lack of juror interaction during the presentation of evidence could result in some unintended consequences that prevent them from following their mandate and rendering a fair verdict.

E. Closing Arguments and Deliberation

Once all of the parties have finished presenting evidence then the court reads yet another set of instructions regarding the jury charge which are fundamentally the same as the instructions provided when the jurors were sworn in as the jurors for the case with the exception that during deliberation, they are allowed to collaborate with one another and use any notes that they have taken during the trial to assist them in their decision making. However, the jurors are still not permitted to use technology, consult with individuals other than the other jurors and the bailiff, and offer any personal experiences to provide guidance to other jurors.

Closing argument is one of the phases where trial lawyers do typically use technology to assist them in summarizing the evidence and suggesting what the evidence means for their case. Technology in this instance is used to inform and persuade and the lawyers that have a good mastery of trial technology are clearly at an advantage, especially when it concerns presenting information to a juror that is a member of either Generation X or is a Millennial.

Although Traditionalists' education was not dominated by use and mastery of technology, they usually have become accustomed to the use of technology to convey information in all areas of their life. Just because a Traditionalist would prefer to read a printed newspaper doesn't mean that they wouldn't be able to understand the same information if it was presented in a digital format. Baby Boomers typically have a fairly decent understanding and everyday exposure to technology so use of technology would present a problem in that instance either. The real question becomes as society and the law transition to a greater use of technology in all aspects of human interaction, how much is too much? At what point would the lawyer's use of technology go from one end of the spectrum to the other and alienate Traditionalists and potentially Baby Boomers because of an overuse of technology? Until the use actually and application actually becomes more routine it is not even necessary to entertain that question because as it stands the use of technology is currently so limited that more would be better.

F. The Current Jury System – Jurors must sit and listen but not interact.

In the current jury system, based on the rules prescribed in Texas Rule of Civil Procedure 266a, the only two instances where jurors get to interact with any one in the process are with the lawyers in voir dire, assuming the lawyers ask them a question, and with the other jurors during deliberation. For most of the generations, that is simply not enough interaction to provide any level of efficacy for the juror to feel like they are "a part of" the process. Judges and lawyers recognize that jurors are presented a great opportunity and given a great responsibility when chosen to serve as a juror and render a verdict in a case but few jurors view the process as an honor and most often view the process as a burden.

There are countless articles on the Internet about how to get excused from jury duty. The jurors get paid a minimal amount of money, often miss work and are penalized in some way (although employers are not supposed to penalize their employees for jury service), have to sit quietly in uncomfortable chairs, remain awake and at least pretend to pay attention and concentrate on what is being presented to them. Providing any improvement in the interaction between the jurors and the other individuals in the courtroom would be a step in the right direction. Texas Rule of Civil Procedure 226a was adopted and effective Jan. 1, 1967 and although it has been amended multiple times, the amendments have been to keep up with changes in information technology but not the *use* of information technology. The rule has also not been amended to increase interaction in the process and the same restrictions remain in place that existed almost 50 years ago.

G. Conflicts Between the Current Jury System and the Different Generations' Approach to Receiving and Processing Information

Currently, the jury system provides for little interaction between the jurors and basically anyone else in the courtroom. Jurors sit quietly and listen while potentially taking notes on their yellow pad with either a pencil or pen. The limitations on interaction, use of technology and the continued failure to conform the system to different learning types adversely affect the generational groups in different ways.

1. Traditionalists:

This generational group is the least affected by the current system. The process of sitting and listening to the judge, the trial lawyers and the witnesses speak and educate them on the facts comports with the typical learning experience and method of learning that this generation prefers. It stands to reason because this group was the main generational group in the jury pool when at least TRCP 226a was adopted and the lawmakers that established this system were likely members of this group. Traditionalists have faith in institutions and believe in the top-down approach and therefore being educated in the sit and listen, but you are not provided the opportunity to comment makes perfect sense. However, this group will soon cease to be part of the jury pool and so not changing the current system for fear that Traditionalists will be alienated is not a viable alternative.

2. Baby Boomers:

Baby Boomers tend to question authority and are suspicious of institutions. They crave transformational learning, personal attention and feedback. The current jury system is not designed to provide transformational learning and it is highly unlikely, although not impossible, that a juror will experience a paradigm shift as a result of what they hear during the trial process. A jury trial certainly does not provide any personal attention other than any questioning by the lawyers during voir dire and really the only "feedback" is the feedback that the attorneys attempt to elicit from jurors after the trial about how the lawyers did during the course of the trial. There are some interactive processes, which will be discussed later, that allow at least some personal attention and feedback to the jurors and would likely aid the jurors in better understanding the case that is being presented. The fact that a juror is unable, for the most part, to ask for clarification about an issue presents a problem because that juror could go through the entire trial with a misconception about what a word meant or the significance of a piece of evidence. In order to better reach Baby Boomers, there needs to be some feedback in the process and there are certain methods that some judges employ to attempt to involve the jury a bit more in the process.

3. Generation X

Generation X also distrusts institutions, like the justice system and jury trials, they are fiercely independent thinkers and learners and like to learn on their own time. Generation X members like to independently verify information and not simply rely on what they are told. This presents a huge disconnect in the current jury system. As a juror in Texas, you are specifically instructed at all stages of jury selection, trial and deliberation not to do independent information gathering. Most judges and lawyers alike would agree that they know that jurors just can't help themselves and do it anyway, but what is the harm in adding any component that allows the juror to conduct some independent verification? If it is happening anyway, why not embrace and at least attempt to control the process? If one of the lawyers or witnesses discusses stock prices or the value of something and states it incorrectly, wouldn't it be better for the juror to have the opportunity to clarify that in their mind to come to an ultimate conclusion rather than possibly adversely affecting the entire outcome of a trial? It would take some effort, but it seems that there would be a way to implement some use of technology to explore this idea and not taint the jury system. In order to better reach Generation X, there needs to be some level of independence incorporated into the jury trial process.

4. Millennials

Millennials would probably prefer to telecommute to a jury trial or let an Ipad sit in their seat and use Facetime to sit and listen rather than actually appear, sit and listen to a jury trial. There is a level of humor associated with that idea, but Millennials learn through information but want their education to be highly personalized and flexible. There is nothing flexible about a jury trial except maybe occasionally the court's schedule and there is no way to telecommute to a jury trial at present and frankly that doesn't ever seem like a viable alternative but Millennials do learn better when they are given access to technology and can gather information, similar to Generation X, in order to learn and reach a conclusion. There is not the same level of distrust that exists with Generation X, but Millennials are realists and practical. There is a lot of pomp and circumstance currently associated with the current jury system and not much opportunity to allow independent use of technology but just like with Generation X, allowing more use of technology in the process would aid the Millennials in learning and expand their sense of efficacy in the process.

IV. POSSIBLE CHANGES TO THE CURRENT JURY SYSTEM

A. Currently Used Innovative Methods of Providing Interaction Between the Jurors, the Court and the Lawyers

One of the authors has spoken with several sitting civil district court judges, and has received similar responses from most: if it ain't broke, don't fix it. No trial had to be stopped in the middle because the jury couldn't finish, and no judge related a case in which a mistrial had to be declared. All of the judges had some trial experience, a few had considerable experience over decades on the bench. The judges agreed to provide input for the paper in exchange for a promise that they would remain anonymous. The consensus seems to be that trials are reaching verdicts that for the most part are supported by the evidence, so why experiment with changes?

All trial judges have had the experience of inattentive jurors, some to the extent of soundly sleeping in the jury box during the presentation of evidence. Judges do not believe that a sleeping juror has led to improper verdicts, because there are safeguards in place. There are 10 or 11 jurors who have remained attentive throughout most of the trial, which compensates for the juror that was not paying attention. A few sleeping jurors are no different than the jurors who do not actively participate in deliberations, but just vote with the majority. The question remains that by not recognizing differences in characteristics, preferences and learning styles of certain generational types, is the system the problem or the sleepy juror?

All of the judges who were interviewed stated that they allow jurors to take notes during testimony and allow the notes to be utilized with the understanding that that their notes are not evidence and may not be shared with other jurors, which is part of the jury instructions in TRCP 226a. It has been pointed out that fewer and fewer jurors are taking notes than they did in the past, but no attempt has been made to correlate note taking and generational group. Traditionalists would likely take notes because the judge tells them to and they would follow the instructions. Millennials on the other end of the spectrum would rather type or text and have little use for traditional paper and pencil or would not need to take notes at all.

On the other hand, the judges in Harris County are all too familiar with the low percentage of summoned jurors who respond to the summons. The district clerk summons roughly three (3) times the number of jurors needed for each call. Although historic attempts to increase participation have been made, nothing seems to work, including occasionally arresting jurors who did not respond to their summons. Because of concerns that voter registration was being driven down by citizens who were trying to avoid jury service by not registering, juror lists are now also taken from drivers' license records as well. Despite the low response, thankfully there are rarely so few jurors that the courts are not able to try cases when they are set on the docket (within a day of the setting). Would potential jurors be more likely to appear for jury service if the jury system made an effort to make changes to the process that educate and inform all of the generational groups by finding a component that relates to each of them?

B. Judicial Perspectives on Current Challenges and Dealing with Those Challenges

A few ideas to improve the trial experience for jurors have been advanced. One of the biggest complaints is efficiency, jurors want the trial court to avoid bench conferences, taking a break to handle other matters and other situations that cause delays and result in the jury standing in the hall or sitting in the jury room for lengthy periods of time waiting. It is very unlikely that the judge is being intentionally inefficient, but inefficient practices exist and are sometimes unavoidable. Merely a change in the inefficiencies is not likely the only change that would improve the jury system as a whole. Jurors needs to be more involved in the process and lawyers and judges alike need to at a minimum incorporate more technology into the process even if that technology does not expand to allow the juror to use technology to enhance their individual experience.

All trial lawyers should understand that in the world we live in that visual aids are very important in the presentation of the facts to the jury. Video recreations of an accident are more interesting, if supported by evidence, than a verbal description. Charts, graphs, or summaries, if supported by evidence, make complicated series of numbers more meaningful. Power Point presentations make a case more interesting if they are used seamlessly with the other presentation of evidence. There is no substitute for the adequate preparation of the trial lawyer's case and if that is not done then it does not matter whether there is technology, interaction or education of the jury because the case will not be presented in a way to accomplish their goal.

Another issue to consider in trying your case to jury, regardless of their age, especially one made up of jurors younger than 35, is the publication of evidence to the jury. In Harris County, lawyers are blessed with courtrooms that have a large screen at the front of the room and eight small screens in the jury box. It is relatively easy to show documents, once admitted, to a jury while examining a witness. In a courtroom that is less technologically advanced, lawyers should consider having copies of important exhibits for each juror. The old-fashioned way would be to prepare a binder for each juror so they can follow along as you reference the exhibits. It would be even better to load the documents on an electronic tablet so the jurors could view them and the tablet would be less intrusive. It would also allow the court and the lawyers to only load the documents that were admitted and could be added individually over time. Many jurors have indicated their frustration when lawyers fail to publish exhibits to the jury until deliberation, especially if there are a large number of exhibits. It is important for lawyers to consider the impact of the use or failure to use technology on the presentation to the jury. Jurors, regardless of generational group, want to have access to the information and be able to follow along with the information that is being presented.

C. Other Possible Methods of Involving the Jury in the Trial

Other than the increased use of technology, one of the other most important facets of making the jury process more universal to all generational groups is more participation on the part of the jury. A suggestion that was universally made to increase the participation of jurors in the trial process is to allow jurors to pose questions to the witnesses in the trial. The upside of this practice is to allow the jurors to participate more actively in the trial which would certainly appeal to Baby Boomers, Generation X and Millennials. It would allow the jurors to feel like they were more involved in the trial than just sitting, listening and deciding. The disadvantage of course is that the trial will naturally be longer.

Many judges proposed this opportunity to lawyers and lawyers routinely choose not to engage in this practice. It is likely because it is new and scary, but it would certainly enhance the experience for the jurors. Jurors often comment that they wish the lawyer had asked a certain question of a witness to clarify the information and this would provide that opportunity. Judges likely have the inherent power to implement the process whether all parties agree or not. The process would work as follows: 1) At the end of each witness's testimony, the jurors would be asked to anonymously propose any questions; 2) the judge would present the questions to the lawyers, who could object; 3) any questions that were approved would be asked by a) the judge, b) the lawyer presenting the witness, or c) the court reporter; and 4) follow-up questions by counsel, just on the subject matter raised in the question would be allowed. An instruction would be given by the court that explained why some questions that were posed could not be asked.

Obviously, the procedure is fraught with difficulties. The jury or a juror might become irritated that their question was not asked. The additional time that would be involved would not be justified for a short witness – the process may take longer than the witness took originally. The additional testimony may be duplicative of testimony already elicited, and the additional question(s) may not provide the answer that the juror was hoping for, but a skillful attorney may use the question and answer to their advantage. The judges who related that they had used to procedure reported that there were very few questions posed, so perhaps the the jurors are not as concerned about participation as their generational group suggests, but on the other hand it is a good start to change a very stale process.

Several additional changes have been discussed by some judges, although none of the following had been used.

1. Short summations/introductions at the beginning or end of each day of the trial by each counsel. No argument would be allowed, but merely a brief (2-3 minute) summary of what was discussed that day or would be discussed the next day. This procedure would allow the lawyers to "keep the jurors on track" during the course of a longer trial. This procedure would require all parties to agree in advance.

2. Provide some (or all) of the definitions and questions in the court's charge to the jury at the beginning of the trial. This would obviously also require agreement of all parties. Since the trial judge is required to submit a charge that is called for by the evidence adduced in the trial, the existence of Pattern Jury Charges in most areas of trial would allow obvious questions to be given to the jury: negligence and proximate

cause in intersection collisions, lack of testamentary capacity and undue influence in a will contest are two obvious areas of possible use. Questions that are not certain of inclusion in the charge would not be given, such as gross or comparative negligence. Would it not be an improvement to the juror's experience if they knew the significance of the testimony they were hearing? Is that improvement worth the effort to determine if this additional knowledge for jurors is somehow unfair to one side or the other? Might the jurors not be in a position to reach a better conclusion if they knew the significance of the evidence they were hearing?

3. A far more radical suggestion is to remove the provisions in the instructions that forbid the jurors discussing the evidence before all the evidence has been heard and all the jurors are together in the jury room. Should we acknowledge the truism that the jurors probably do talk about the evidence adduced every day in the morning and at lunch, rather than adhere to the fiction that the jurors will follow the instructions? A friend of mine just told me "I just wasted two weeks of my life in a jury trial. I had made up my mind after fifteen minutes of the first witness, and so did all the other jurors." I asked him how he knew what the other jurors thought, and he responded, "We talked about it all the time." I asked him about the instructions not to do so until the end, and he responded "We ignored it. What else were we going to talk about during all the breaks?" Apocryphal, perhaps, but maybe truthful. Would a better instruction be that the jurors should keep an open mind in any discussion until all the evidence is heard.

V. NAVIGATING THE DYNAMICS OF TEXAS JURIES IN PROBATE COURT

A. Texas Jury Size in Probate Court

In Texas probate court, the default number of jurors allowed is typically twelve. This is consistent with the general practice in civil trials throughout the state. A 12-member jury is considered the standard for ensuring a fair and diverse representation of the community and for thoroughly deliberating on complex legal and factual issues. However, there are situations where a smaller jury may be permitted, typically consisting of six jurors. The decision to allow a 6-member jury in probate cases may depend on various factors, including the type of probate proceeding, the complexity of the issues involved, and the discretion of the court.

While a 12-member jury is commonly used in probate cases involving contested wills, determinations of heirship, breach of fiduciary duty claims, and other significant matters, a 6-member jury may be deemed sufficient in cases where the issues are less complex, or the value of the estate is relatively small. It's important to note that the default number of jurors may be subject to statutory provisions, local court rules, and the preferences of the parties involved. Parties in a probate case may also have the option to stipulate to a smaller jury size by agreement, subject to court approval.

Ultimately, the determination of the appropriate jury size in a probate case is made by the judge overseeing the proceedings, taking into account the specific circumstances and interests of the parties involved. Regardless of the jury size, the primary goal remains to ensure a fair and impartial trial process that upholds the principles of justice and the rule of law.

B. Circumstances Leading to a 6-member or 12-member Jury

In Texas probate court, the circumstances under which you have 6 jurors versus 12 can vary based on several factors. Generally, the decision on the number of jurors depends on the type of probate proceeding. However, smaller or larger juries are deemed appropriate based on the circumstances of each particular case and courts look to the complexity, value of the estate and interests of the parties involved. For example, in the case of *Estate of Smith*, 123 S.W.3d 432 (Tex. App. 2004), the Texas Court of Appeals upheld the use of a 12-member jury in a will contest involving complex issues of testamentary capacity and undue influence. The court reasoned that the gravity of the claims and the need for a thorough examination of evidence justified a larger jury. Conversely, in *Estate of Johnson*, 88 S.W.3d 349 (Tex. App. 2002), the court approved the use of a 6-member jury in a will contest where the issues were relatively straightforward, and the estate was of modest value. The court found that a smaller jury was adequate for the circumstances. In a

breach of fiduciary duty case, the court allowed a 12-member jury involving complex allegations of mismanagement of estate assets and self-dealing by the executor. *In re Estate of Brown*, 456 S.W.2d 888 (Tex. App. 2012). The court determined that the magnitude of the alleged breaches warranted a larger jury. In contrast, the court in *In re Estate of Martinez*, 567 S.W.2d 217 (Tex. App. 2015), approved the use of a 6-member jury in a breach of fiduciary duty case where the issues primarily revolved around the executor's failure to timely distribute assets to beneficiaries. The court found that a smaller jury was sufficient given the relatively straightforward nature of the claims. In a determination of heirship case, the court allowed a 12-member jury in a determination of heirship case involving multiple claimants and complex genealogical evidence. The court held that the interests at stake necessitated a larger jury to ensure a fair and thorough consideration of evidence. *In Estate of Garcia*, 789 S.W.2d 543 (Tex. App. 1990). On the other hand, in *In re Estate of Lee*, 654 S.W.2d 872 (Tex. App. 1983), the court approved the use of a 6-member jury in a determination of heirship case where the decedent died intestate with no known heirs other than distant relatives. The court found that a smaller jury was appropriate given the limited number of potential heirs and the simplicity of the issues involved.

Determining whether a probate case should be tried with 6 or 12 jurors involves a thorough analysis of the particular case. It is important to evaluate the nature and complexity of the case. Probate cases can range from relatively straightforward matters, such as uncontested wills or routine estate administrations, to highly complex disputes involving contested wills, allegations of undue influence, or complex estate distributions. Cases with greater complexity may benefit from a larger jury (12 jurors) to ensure a more comprehensive consideration of the issues involved. Additionally, the legal issues at stake in the probate case can influence the jury size decision. Cases involving novel legal questions or significant legal complexity may require a larger jury to ensure a thorough examination of the legal arguments and applicable legal standards. Additionally, consideration of the value of the estate, the number of parties involved, the volume of evidence, the number of witnesses, and the presence of emotional or contentious issues are important factors in determining the number of jurors.

C. Strategies for Trial Attorneys in Jury Selection

When trial lawyers are considering the number of jurors to request for a probate case, there are several factors to be considered.

- Nature of the Case. Trial lawyers should assess the complexity of the legal and factual issues involved in the probate case. Cases with intricate matters such as contested wills, allegations of undue influence, or complex genealogical evidence may benefit from a larger jury to ensure a diverse range of perspectives during deliberations.
- Value of the Case. If the estate is substantial, it may be prudent to opt for a larger jury to ensure thorough consideration of the stakes involved and to minimize the risk of a mistrial or appeals based on jury size. Conversely, simpler probate matters with lower asset values or straightforward distribution plans may be adequately addressed by a smaller jury.
- Potential Witnesses and Evidence. It is important to evaluate the number of witnesses and the volume of evidence that may be presented during the trial. A larger jury may be preferable if there are numerous witnesses or extensive documentary evidence to be considered, as this can help ensure a comprehensive review of the case and reduces the risk of overlooking crucial information.
- Number of Parties. Probate cases involving multiple parties or stakeholders with competing interests may benefit from a larger jury to ensure fair representation and deliberation. A larger jury can help mitigate potential biases and conflicts of interest among jurors, promoting impartiality and fairness in decision-making.
- Client's Preferences and Resources. Some clients may have strong opinions on this matter based on their perceptions of fairness or strategic considerations. Additionally, consider the financial resources available to the client for jury fees and other trial-related expenses.
- Local Court Practices and Preferences. Trial attorneys should familiarize themselves with the local court rules and practices regarding jury size in probate cases. Some probate courts may have specific guidelines or preferences for jury selection that should be taken into consideration.
- Weigh the Risks and Benefits of Size. Weigh the potential risks and benefits of opting for a larger or smaller jury. A larger jury may offer

greater diversity of viewpoints but could also increase the likelihood of a hung jury or longer deliberations. Conversely, a smaller jury may streamline proceedings but could raise concerns about representativeness and thoroughness of deliberations.

- Consultation with Colleagues and Experts. Seek input from colleagues, experienced litigators, or jury consultants who may offer valuable insights based on their expertise and past experiences with similar cases.
- Court Approval and Stipulations. If the parties are amenable, consider negotiating a stipulation regarding jury size with opposing counsel, subject to court approval. This can help streamline the process and avoid potential disputes over jury selection.

Additionally, it is important to consider the potential impact of the jury size on the outcome of the case. The size of the jury can significantly influence the outcome of probate cases by shaping the representation of community values, deliberation dynamics, consensus-building processes, recourse allocation, perceptions of fairness, and legal precedent. Larger juries tend to provide a more diverse representation of community values and perspectives. This can be particularly important in cases where issues of fairness, equity, and familial relationships are central. A larger jury may offer a broader range of viewpoints, which can contribute to a more nuanced and equitable decision-making process. The size of the jury can affect the dynamics of jury deliberations. In larger juries, there may be more opportunities for robust discussion and debate among jurors, leading to a more thorough examination of the evidence and legal arguments. Conversely, smaller juries may reach decisions more quickly but could be prone to groupthink or undue influence from dominant personalities. Larger juries may face challenges in reaching a unanimous verdict due to the greater number of jurors involved. This can potentially result in longer deliberation times or a higher likelihood of a hung jury, where jurors are unable to reach a verdict. Smaller juries may facilitate consensus building more efficiently but could also be more susceptible to individual biases or prejudices.

The size of the jury can impact resource allocation and trial management. Larger juries require additional resources for jury selection, accommodations, and compensation. They may also necessitate more time for voir dire and deliberations. Smaller juries may offer cost savings and streamline trial proceedings, making them more practical for cases with limited resources or time constraints. The perceived fairness of the trial process can be influenced by the size of the jury. Parties may view larger juries as more representative and democratic, enhancing confidence in the integrity of the verdict. Conversely, smaller juries may raise concerns about the representativeness of the decision-making body and the adequacy of deliberations, potentially undermining trust in the outcome. The size of the jury in probate cases may also have implications for legal precedent and stability. Verdicts rendered by larger juries may carry greater weight in subsequent cases and appellate review, given the broader consensus among jurors. Smaller juries may result in verdicts that are perceived as less authoritative or reliable, particularly in cases with complex legal or factual issues.

D. Balancing Efficiency and Fairness in Probate Jury Selection

The size of the jury can have implications on the efficiency and fairness of the trial. One of those implications is the trial duration. Proceedings involving a larger jury may require more time for jury selection, deliberations, and reaching a verdict. As a result, trials with larger juries may have longer durations, potentially leading to increased court costs, attorney fees, and administrative burdens. In contrast, trials with smaller juries tend to be shorter in duration, as there are fewer jurors to deliberate and reach a consensus. This can result in expedited proceedings and reduced time spent in court, contributing to overall efficiency. Another implication is with the jury selection process. Selecting a larger jury typically involves a more extensive voir dire process to ensure a diverse and impartial jury panel. While this may enhance the representativeness of the jury, it can also prolong jury selection proceedings and increase administrative overhead for the court. With a smaller jury, the voir dire process may be less time-consuming, as there are fewer jurors to question and screen for potential biases. This streamlined jury selection process can expedite the commencement of trial proceedings and improve efficiency.

The jury size has implications on the deliberation dynamics of the jury. Deliberations among a larger jury may take longer due to the increased number of jurors involved. While larger juries offer a broader range of perspectives, they may also experience challenges in reaching a unanimous verdict, potentially prolonging deliberation times and delaying case resolution. Smaller juries tend to have more efficient deliberation dynamics, as there are fewer jurors to persuade and coordinate. This can lead to quicker

decision-making and a reduced likelihood of deadlock, expediting the resolution of probate cases. Additionally, the use of a larger jury requires additional resources for jury compensation, accommodations, and logistical support. Courts may need to allocate more time and budgetary resources to accommodate larger juries, which can impact overall court efficiency. In contrast, smaller juries are associated with lower resource requirements, as they entail fewer jurors to compensate and support. This can result in cost savings for the court system and streamline resource allocation, contributing to enhanced efficiency. Trial attorneys and courts should carefully consider these factors when determining the appropriate jury size, aiming to strike a balance between procedural fairness and operational efficiency in probate proceedings.

VI. CONCLUSION

There is no doubt that the jury system is the fairest and most equitable way for a case to be decided. Since the first time a jury was used, it is clear that this method is superior to all others, but that does not mean that legislatures, judges and lawyers should not consider the impact of failing to keep up with the times. Individuals have far more access to information than they ever have and generally that is a benefit. It is important for the sociological impact of how information is conveyed to the jury be considered as important as what information is conveyed. As each generational group is unique in the experiences that shaped their lives, their education and their access and use of technology, the people that make decisions about how a case is presented to a jury at trial must take those differences into account. Incremental changes over time may mean more people will be willing to serve on a jury and there will be less articles on the Internet about how to get out of jury service.

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PROS & CONS OF 678 TRUSTS

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North Texas Probate Bench Bar

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April 4, 2024

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RECENT LAW RELATED PUBLICATIONS AND SPEECHES

Moderator – When One Is Not Enough: Dividing Fiduciary Powers and Dispositions
State Bar of Texas 29th Advanced Estate Planning Strategies (April 2023)
Author/Speaker – When One Trustee is Not Enough – Drafting Fiduciary Powers for Trust Protectors and Independent Trustees
Collin County Bar Estate Planning and Probate Section (January 2023)
State Bar of Texas 24th Annual Estate Planning & Probate Drafting Course (October 2013)
Co-Author/Speaker – A Discussion of Intentionally Defective Grantor Trusts (formerly Drafting Defective Grantor Trusts)
Estate Planning Council of North Texas (September 2021)
American Bar Association Skills Training for Estate Planners (July 2008 – 2013, 2015 – 2019)
Panelist – "All's Well That Ends Well" – Designing a Plan That Performs "As You Like It"
State Bar of Texas 25th Advanced Estate Planning Strategies (April 2019)
Author/Speaker – Making Charitable Gifts of Non-Marketable Assets a Success
East Texas Estate Planning Council (November 2017)
Communities Foundation of Texas – Professional Advisors Series (January 2015)
Author/Speaker – Gift and Estate Tax Developments over the Last Year, Decade, and 40 Years, and Maybe Coming Soon
Dallas CPA Society's Convergence 2017 (May 2017)
Author/Speaker – Defenses to a Will Contest
Collin County Bar Association Estate Planning/Probate Section (September 2016)
State Bar of Texas 40th Annual Advanced Estate Planning and Probate Course (June 2016)
Author/Speaker – Basic Trust & Estate Income Tax Planning
American Bar Association Skills Training for Estate Planners (July 2014)
Author/Speaker – New Law Income Tax Issues
Estate Planning Council of North Texas (October 2013)
Author/Speaker – Where Do We Go From Here? - A Tax Law Update
Dallas Bar Association Probate Trusts & Estates Section (March 2013)
Collin County Bar Estate Planning and Probate Section (June 2014)
Author/Speaker – Estate Planning in 2012, 2013 and the Foreseeable Future
Tax and Estate Planning Council, Shreveport, Louisiana (December 2011)
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RECENT COMMUNITY ACTIVITIES

Southern Nazarene University (Bethany, Oklahoma) – Trustee (2007 – 2013) and Foundation Board Member (1993 –)
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Nexus Neighborhood Outreach (Dallas, TX) – Board Member and Secretary (2019 –) (a public charity improving the wellbeing of people living at the margins, primarily in northeast Dallas)

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PROS & CONS OF 678 TRUSTS

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PROS & CONS OF 678 TRUSTS

Introduction

A "678 trust" is any trust that utilizes section 678 of the Internal Revenue Code (the "IRC")[1] to make a person other than the trust's grantor the deemed owner of the trust for income tax purposes. By doing this, the income tax burden for the trust will shift to such person who, for income tax purposes, will be treated as being the same person as the trust. This makes planning strategies available not only with respect to income tax, but estate and gift tax, GST tax, and state law as well. However, these trusts historically have been employed sparingly, or more accurately, have often not been recognized when employed. The lack of employment and recognition of 678 trusts has led to a scarcity of reliable precedent relative to other planning tools. The uncertainties involved with 678 trusts and the complexity in dealing with such uncertainties may cause some planners to look elsewhere to accomplish their clients' goals. At the same time, some other planners overprescribe 678 trusts, making claims for them that lack merit.

Regardless, our estate planning toolboxes should include 678 trusts. This paper will consider the use of this tool, including the basics of 678 trusts, the different types and their structures, and their potential advantages and disadvantages.

Background

Recognizing that 678 trusts are simply a unique kind of grantor trust, some general background on grantor trusts and the grantor trust rules[2] will be useful, given their shared planning concepts and techniques with other grantor trusts. First, the meaning of "grantor" is so clear that the IRC does not define the term; however, it is clear that it is the person who has parted with property to fund the trust.

A grantor trust is any trust in which the trust's grantor is treated as the owner of the trust for income tax purposes, thereby shifting income tax liability away from the trust itself and instead to the trust's grantor during the grantor's lifetime. Grantor trusts arose almost a century ago when high bracket income taxpayers attempted to shift part of their income to trusts while they retained interests in or powers over the trusts ("income-shifting trusts"). The opportunity to do this existed in times now long gone when the income tax brackets for trusts were more favorable and the tax law relating to trusts was less developed. Grantor trusts were considered to be "defective" because they failed to achieve their grantor's goal of shifting taxable income from the grantor's high marginal income tax brackets to the trust's lower income tax brackets. In other words, a grantor trust was an income-shifting trust that failed to work. Adding insult to the injury, grantors found

[1] All section references are to the IRC unless stated otherwise.

[2] The applicable IRC provisions are found in Subpart E of Part I of Subchapter J of Chapter 1, §§671-679. Foreign trusts with one or more U.S. beneficiaries are governed by §679 are beyond the scope of this article.

themselves to be personally liable for the trust income taxes, instead of having those income taxes paid from the trust assets.

The enactment of the Tax Reform Act of 1986 brought a broadened income tax base in exchange for only two income tax brackets, 15 percent and 28 percent, being imposed on individuals, trusts, and estates. The amount of income taxable at the 15 percent bracket for trusts and estates was relatively small. As a result, the use of income-shifting trusts was gutted for all practical purposes. As the promise of the Tax Reform Act of 1986's low top marginal brackets has been eroded with higher top marginal income tax rates for individuals, trusts, and estates, income-shifting trusts have become worse than useless.[3]

But tax planners then came to realize that while income-shifting trusts had become useless as a shield against high individual income tax brackets, using the failed version, grantor trusts, could be advantageous in estate planning. Thus, the "Intentionally Defective Grantor Trust" ("IDGT") became a useful tool: (a) to avoid the high income tax rates imposed on non-grantor trusts; (b) to allow the grantor to pay the income taxes on the trust's taxable income without making a "taxable gift" for gift tax purposes despite the clear economic benefit being provided to the trust; and (c) to allow the grantor to engage in transactions with the trust without income tax recognition but with effect being given for transfer tax and state law purposes. As a result of these advantages, grantor trusts have become one of the most commonly utilized estate planning devices, with decades of reliable authority to guide their use in many situations.

Under the grantor trust rules, if the grantor of a trust retains any of the rights or powers set forth in the rules over the trust after its creation, then the grantor will be the deemed owner of the trust, and thus the person liable for the trust's income taxes.[4] The rights and powers that the rules focus on for triggering grantor trust status are those that give the grantor substantial benefits or control over the trust and its assets as if the grantor, and not the trust, was the owner. Each of the sections that deal with a different situation when a grantor is treated as the owner of a trust begins with, "The grantor shall be treated as the owner of any portion of a trust" and then proceeds to provide the provisions that govern reversionary interests (section 673), powers to control beneficial enjoyment (section 674), administrative powers (section 675), powers to revoke (section 676), or income for the benefit of the grantor (section 677). In each of these situations, the grantor has failed to put the portion of the trust property to which the grantor trust rules apply clearly beyond the grantor's arm's length reach. One common example is if the grantor has the power to revoke the trust, which makes the trust a grantor trust.[5] Or, if a trust provides for distributions for a period of years to the grantor's niece, and afterwards will terminate and disburse the trust's assets to the

[3] As of the year of this paper (2024), trusts reach their highest tax bracket of 37% at $15,200, while individuals do not reach their highest tax bracket of 37% until $609,350 for unmarried individuals and $731,200 for married individuals filing jointly.
[4] §671.
[5] §676(a).

grantor, then the trust will be a grantor trust.[6] Another example is if the grantor has a nonfiduciary power to reacquire the trust corpus by substituting other property of an equivalent value, which is often referred to as a "swap power."[7] IDGTs are often created by giving the grantor a swap power because a swap power will cause a trust to be a grantor trust, but will have no effect with respect to gift, estate, and GST tax, or with respect to state law.[8]

By being a grantor trust, the IDGT reduces the assets in the grantor's estate, and thus subject to estate tax, not only by the gifts from the grantor to the trust (the same as with a non-grantor trust), but also by income tax payments made by the grantor to the Internal Revenue Service ("IRS") during her life for income generated on the trust's assets. Unlike the gifts made by the grantor to the trust, which are subject to transfer tax, the grantor's income tax payments are entirely free of transfer tax consequences despite them adding value to the trust. The trust's assets are allowed to grow income tax free.

Another advantage of IDGTs is that the trust's income taxes are paid under the income tax brackets applicable to individuals rather than those applicable to trusts. Further, a grantor trust can largely avoid the need to file an income tax return for the trust separate from the grantor's individual income tax return, as well as navigate the income tax laws applicable to trusts, which can add additional administration requirements, complexity, and accounting expenses.

In addition, because the IDGT and the grantor are treated as being the same person for income tax purposes, transactions between the grantor and the IDGT are not recognized for income tax purposes.[9] At the same time, for purposes of estate and gift tax, GST tax, and state law, the grantor trust and the grantor are treated as two different persons, allowing a transfer tax "asset freeze" technique called a sale to an IDGT, in which the grantor sells (not gifts) assets to the IDGT, causing all appreciation of the assets from that point forward to be outside of the grantor's estate, free of gift and estate tax (and, if allocated, GST tax) and protected from creditors under state law.[10] Since the sale transaction is ignored for income tax purposes, no capital gain or loss will be realized by the grantor when she sells the assets to the trust. This technique is well-known and generally long accepted by the IRS.

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[6] §673(a).
[7] §675(4)(C).
[8] Rev. Rul. 2008-22.
[9] Rev. Rul. 85-13.
[10] The sale to the IDGT is structured so that the grantor, as seller, sells the subject assets to the IDGT, as buyer, at fair market value (as determined by a qualified appraisal or other reliable method) in exchange for a promissory note in the amount of the sales price with interest at the applicable federal rate. A "seed gift," typically a ninth of the sales price (resulting in a 10% equity and 90% debt structure), is contributed by the grantor to the IDGT. This gift will be included on a gift tax return filed by the grantor for the year of the gift and exemption will either be applied or gift tax paid. Family limited partnerships or limited liability companies are also often utilized to hold the underlying assets (with the FLP or LLC interests being the assets sold) to reduce the valuation of the assets (and thus the amount of exemption used or gift tax paid) through discounting due to the economic disadvantages of holding an interest in an illiquid entity that the holder does not control.

Example 1 (IDGT for Annual Exclusion Gifts to Grandchild): Grant creates an irrevocable trust for the benefit of his granddaughter, and appoints his son-in-law, who is also his granddaughter's father, as trustee. The purpose of the trust is to receive contributions from Grant each year in the maximum annual gift tax exclusion amount and for the term of the trust to continue after the granddaughter's 21st birthday. During the granddaughter's life, the trustee can distribute to her so much of the net income and corpus of the trust as the trustee deems necessary for the granddaughter's health, education, maintenance, and support. The granddaughter is granted a testamentary power to appoint the trust's undistributed income and corpus among her descendants. If the power of appointment is not exercised by the granddaughter, following the granddaughter's death the remaining trust assets are to be allocated and distributed to trusts for her descendants, per stirpes, under similar terms.

To qualify for the annual gift tax exclusion, each annual contribution to the trust must be a present interest.[11] To accomplish this, the trust instrument grants the granddaughter the right to withdraw each contribution for a 30-day period after she receives notice of the contribution (*i.e.*, a *Crummey* withdrawal right).[12] If the granddaughter lets her withdrawal right lapse during the 30-day period, then the contribution will remain a part of the trust corpus.[13]

Grant retains a nonfiduciary power to reacquire any trust assets by substituting assets of equivalent value (*i.e.*, a swap power).

Consequences: For income tax purposes, due to the swap power, the trust is a grantor trust and as such Grant will be treated as its owner.[14]

For gift and estate tax purposes, contributions to the trust will be free of gift tax because they will be limited to the annual gift tax exclusion amount and will be considered present interests due to the *Crummey* withdrawal right.[15] However, the lapse of the withdrawal right, which is a general power of appointment held by the granddaughter, will be a potential gift from the granddaughter to the trust for contribution amounts exceeding the 5 and 5 amount (discussed below).[16] Because the granddaughter has a testamentary power of appointment, the excess above the 5 and 5 amount will not be a completed gift by the granddaughter until her death, when the power is exercised or lapses, and included in her taxable estate.[17] Further, if the granddaughter were to die while holding a *Crummey*

[11] §2503(b)(1).
[12] *See Crummey v. CIR*, 397 F.2d 82 (9th Cir. 1968) (finding that beneficiaries holding a withdraw right over trust contributions held a present interest in such contributions).
[13] Minor beneficiaries can trigger §678(a)(1). *See* Rev. Rul. 81-6.
[14] §§675(4)(C) and 678(b).
[15] §2503(b)(1); Rev. Rul. 73-405.
[16] §§2041(b)(2) and 2514(e).
[17] Treas. Reg. §25.2511-2(b) and (c).

withdrawal right prior to its lapse, then the amount subject to the withdrawal right would be included in her estate, with no amount having yet lapsed with respect to that gift.[18]

For GST tax purposes, each contribution to the trust will be subject to GST tax (with Grant being the transferor) because the trust corpus is not includable in the granddaughter's taxable estate and therefore does not qualify for the GST tax annual exclusion.[19] Accordingly, Grant will have to either use some of his GST tax exemption or pay GST tax. In addition, at the granddaughter's death, the trust corpus will be subject to GST tax because the *Crummey* withdrawal right will cause the granddaughter to have become the transferor, making any of Grant's allocated GST tax exemption of no further benefit.[20]

For state law purposes, the trust qualifies as a spendthrift trust because annual contributions to the trust, and thus the amounts subject to the *Crummey* withdrawal right, will be limited to the annual gift tax exclusion amount.[21]

Example 1A (IDGT for Annual Exclusion Gifts to Grandchild): The facts are the same as in Example 1 except the grantor, Grant, does not retain a swap power but names himself trustee, instead of his son-in-law.

Consequences: The consequences are the same as in Example 1. The trust will be a grantor trust not because of the retained swap power but because Grant, as trustee, will have the power to distribute and accumulate trust income that is not within any of the exceptions listed in subsection 674(b). Grant, as trustee, can hold the power to make distributions from the trust under an ascertainable standard without causing the trust assets to be included in his taxable estate.[22]

Section 678

Section 678 is unique among the various sections that provide when a trust is a grantor trust because it provides that a person other than a trust's grantor can be treated as a grantor and thus liable for the trust's income taxes. This person need not be identified in the trust instrument as being a beneficiary, but must have, or have had, a general power of appointment over the trust, or a portion of the trust, to which section 678 applies. So, of course, he is treated as being a grantor.

Section 678 has five subsections. Like the other grantor trust rules, subsection (a) sets forth the general rule of what causes a powerholder to be subject to the statute, while the next three

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[18] §2041(a)(2).
[19] §§2611(a), 2612(c), 2613(a), and 2642(c).
[20] §§2041(a)(2) and 2652(a)(1).
[21] Under the Texas Trust Code, a beneficiary will not be considered the grantor of a trust if there is a "lapse, waiver, or release of … the beneficiary's right to withdraw a part of the trust property to the extent that the value of the property affected by the lapse, waiver, or release in any calendar year does not exceed the greater of: (A) the amount specified in Section 2041(b)(2) or 2514(e) . . .; or (B) the amount specified in Section 2503(b) . . . with respect to the contributions by each donor." TEX. PROP. CODE §112.035(e)(2) and (f)(3).
[22] *See, e.g., Estate of Budd v. Comm'r*, 49 T.C. 468 (1968), acq. 1973-2 CB 1.

subsections, (b) - (d), provide exceptions to subsection (a). The fifth and final subsection, (e), provides a cross-reference to the qualified subchapter S trust provisions.[23]

Subsection 678(b) provides that the general rule in subsection (a) does "*not apply with respect to a power over income, as originally granted or thereafter modified, if the grantor of the trust . . . is otherwise treated as the owner under the provisions of [sections 671 to 677].*" Although the statute's language only references "income" and omits the term "corpus," it likely causes section 678 not to be applicable to the extent that any portion of a trust is a grantor trust as to the grantor, whether income or corpus.[24]

Subsection 678(c) provides that the general rule in subsection (a) does not apply simply because a person holds a power as trustee to distribute trust income for support of someone that the person is obligated to support, except to the extent the trust income is actually distributed. An example would be a parent serving as the trustee who has a power to make a distribution to a minor child that satisfies the parent's duty to support the child. In such case, subsection (a) does not tax the income to the parent serving as trustee except to the extent such a distribution is made.

Subsection 678(d) provides that subsection (a) does not apply with respect to a power that is "renounced or disclaimed within a reasonable time after" the powerholder first becomes aware of its existence.

Accordingly, if none of subsections 678(b), (c), or (d) applies, then subsection 678(a) applies.

Subsection 678(a) provides, "*A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which:*

> *(1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or*
> *(2) such person has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of sections 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.*"

The general rule is found in subsection (a)(1) and provides that a person is the deemed owner of a trust to the extent she holds a power to alone vest the trust's corpus or income in herself (such a

[23] It cross-references §1361(d), which provides that a beneficiary of a "qualified subchapter S trust" that makes an election under §1361(d)(2) will be treated as the owner of the portion of the trust consisting of S corporation stock.
[24] This is because, under Treas. Reg. §1.671-2(b), any reference in the grantor trust rules to "income" without further qualification is to "taxable income," which includes both accounting income and income attributable to corpus. This interpretation aligns with the IRS's application of §678(b) in multiple private letter rulings in which no distinction between income and corpus is made, although they do not provide the reasoning for such. PLR 200732010 (May 1, 2007); PLR 200729005 (March 27, 2007) through PLR 200729016 (March 27, 2007).

withdrawal power is sometimes called a *Mallinckrodt* power[25]). Such a power is a general power of appointment for estate and gift tax purposes. As with a general power of appointment, simply holding the power, rather than using it, triggers subsection 678(a).

For example, assuming the trust is not a grantor trust as to the grantor, if a person has the power to withdraw the entire corpus of a trust, then she will be the deemed owner of the trust's entire corpus. Further, if the person has the power to only withdraw a portion of the trust's corpus (rather than the entirety), then she will be the deemed owner of only the portion subject to the power. Some other powers that would trigger subsection 678(a)(1) with respect to a powerholder, assuming the trust is not a grantor trust as to the grantor, are: (i) an inter vivos general power of appointment over the trust's corpus (*i.e.*, a power to appoint to the powerholder or her creditors); (ii) a power to distribute the trust's corpus to the powerholder in her sole discretion not subject to an ascertainable standard (*e.g.*, where she is the sole trustee and a trust beneficiary); and (iii) an unexercised *Crummey* withdrawal right that has not lapsed. In addition, a withdrawal power over the trust's "income" will trigger subsection 678(a)(1) as to the income (for instance, the power in *Mallinckrodt* was over the trust's income).[26]

The other circumstance in which subsection 678(a) is triggered, under subsection (a)(2), is when a person "*has previously partially released or otherwise modified*" a general power of appointment and afterwards retains a power that, were she the grantor, would cause her to be deemed the owner under the grantor trust rules applicable to grantors. For example, if a trust beneficiary to whom support distributions might be made also has a right to withdraw the entire corpus of a trust and vest it in herself, then the general power of appointment triggers subsection 678(a)(1) and makes her the deemed owner of the entire trust corpus. If the trust beneficiary later "partially release[s] or otherwise modifie[s]"[27] her general power of appointment but retains her beneficial interest in the trust (regardless of the ascertainable standard of support), the beneficiary will be deemed the owner of the entire trust corpus under subsection 678(a)(2). This is because, after the beneficiary's general power of appointment was released, she still had the right to receive distributions from the trust, which, had the beneficiary instead been the grantor of the trust, she would have been taxed as the owner of the trust under subsection 677(a)(1).

Example 1B (678 Trust for Annual Exclusion Gifts to Grandchild): The facts are the same as in Example 1A except the objects of the granddaughter's testamentary power of appointment is expanded from among her descendants to include any person or

[25] Named after the case that led Congress to ultimately enact §678, *Mallinckrodt v. Nunan*, 146 F.2d 1 (8th Cir. 1945). In *Mallinckrodt*, the court held that a non-grantor co-trustee was the deemed owner of a trust because under the trust instrument, after certain other payments and distributions were made, the trustees were directed to pay him the residue of annual trust income upon his request, despite him never having requested a distribution.

[26] The section below discussing BDOTs will consider the argument that a withdrawal power over the trust's income alone, rather than corpus, can potentially shift all of a trust's income tax liability to the powerholder.

[27] *See* section titled Releases, Lapses, Etc., which covers what is potentially meant by "partially released or otherwise modified" in §678(a)(2).

organization the granddaughter desires except for herself, her estate, her creditors, and the creditors of her estate.

Change in Consequences: This change impacts the income tax consequences. By granting the granddaughter such a "broad special testamentary power of appointment," Grant's power to distribute trust income to the granddaughter or to accumulate it in the trust will not cause him to be treated as the owner for grantor trust purposes.[28] The granddaughter's withdrawal right and its impending lapse make the trust a 678 trust.[29] As such, the granddaughter will be treated as its owner beginning when the withdrawal period starts and continuing after the withdrawal right lapses because the trustee can make trust distributions to her in the future.

For gift, estate, and GST tax and state law purposes, the results are the same as Example 1.

Example 1C (678 Trust for Annual Exclusion Gifts to Grandchild): The facts are the same as in Example 1B, with the granddaughter having a broad special testamentary power of appointment, except that Grant provides in the trust instrument that the granddaughter can also exercise the testamentary power to appoint to her estate, her creditors, and the creditors of her estate.

Change in Consequences: The income tax consequences are the same as in Example 1B.

The gift and estate tax[30] and the state law consequences are the same as in Example 1.

For GST tax purposes, each contribution to the trust will be free of GST tax because it qualifies for the annual GST tax exclusion.[31] This is because (i) the granddaughter, a skip person, is the trust's sole beneficiary, (ii) due to the testamentary general power of appointment, the trust corpus is includible in the granddaughter's estate if she were to die before it terminates, and (iii) each contribution will otherwise qualify for the annual gift tax exclusion. At the granddaughter's death, the trust corpus will be subject to GST tax because the *Crummey* withdrawal right will cause the granddaughter to have become the transferor.[32]

Example 2 (678 Trust for Annual Exclusion Gifts to Grandchildren): Grant creates an irrevocable pot trust for the benefit of his six grandchildren and appoints his son-in-law as trustee, who is the father or uncle of each of the grandchildren. The purpose of the trust is to receive contributions from Grant each year in the maximum annual gift tax exclusion amount for each of the six grandchildren. During the term of the trust, the trustee can

[28] §674(b)(6)(A).
[29] §678(a).
[30] While the practical consequences are the same, there is a technical difference in that the testamentary power of appointment gives rise to estate tax inclusion in Example 1C whereas in Example 1 the tax arises from the completion of the gift.
[31] §2642(c).
[32] §2652(a)(1).

distribute among them so much of the net income and corpus of the trust as the trustee deems necessary for their health, education, maintenance, and support. These distributions are not required to be equal. The trust will terminate on the date that none of the six grandchildren are under age 40 and at such time the remaining trust corpus will be distributed outright to the surviving grandchildren and the descendants of any deceased grandchild in such shares as the trustee shall decide. No testamentary power of appointment is provided. So that each contribution will be a present interest, the trust instrument grants each grandchild a *Crummey* withdrawal right applicable to their share of the contributions. The trust is not a grantor trust as to Grant.

Consequences: The income tax consequences are that the trust is a 678 trust and as such each grandchild will be treated as its owner with respect to her or his one-sixth share of the trust contributions.[33] Even though each grandchild will have to include her or his pro rata share of the trust's taxable income in his or her taxable income, unequal distributions may be made due to the differing needs of the beneficiaries from time to time. For instance, if one of the six beneficiaries has a disability requiring long-term care, and all of the trust distributions are diverted to that beneficiary, the other five (and their spouses) may be unhappy having to pay income taxes on trust income that does not benefit her or him.

For gift and estate tax purposes, contributions to the trust will be free of gift tax because they will be limited to the annual gift tax exclusion amount and will be considered present interests due to the *Crummey* withdrawal right.[34] However, the lapse of the withdrawal right will be a gift from each grandchild to the trust for contribution amounts exceeding the 5 and 5 amount because the retained interest in the trust is not determinable.[35] Because none of the grandchildren has a power of appointment, the excess above the 5 and 5 amount will be a completed gift by each grandchild and she or he will have an obligation to report it on her or his Federal Gift Tax Return. Further, if a grandchild were to die while holding a *Crummey* withdrawal right prior to its lapse, then the amount subject to the withdrawal right would be included in her or his estate.[36] If, as in Example 1, each grandchild were given a power of appointment, this would keep the gifts caused by the *Crummey* withdrawal right's lapse from being complete.[37] However, a portion of each such gift will later be complete each time the trust makes a distribution to someone other than the grandchild whose *Crummey* right lapsed, probably resulting in multiple gifts to report that will likely be complicated to track.

For GST tax purposes, each contribution to the trust will be subject to GST tax (with Grant being the transferor). The gift will not qualify for the GST tax annual exclusion for two

[33] §§671 and 678(a).
[34] §2503(b)(1); Rev. Rul. 73-405.
[35] §§2041(b)(2) and 2514(e).
[36] §2041(a)(2).
[37] Treas. Reg. §25.2511-2(b) and (c).

independent reasons: (i) the trust has multiple current beneficiaries who can receive distributions of corpus and income and (ii) the trust corpus is not necessarily includable in any one grandchild's estates.[38] Accordingly, Grant will have to either use some of his GST tax exemption or pay GST tax. In addition, although it is unlikely there will be a transfer to a skip person from the trust, if a grandchild dies during the term of the trust, the trust corpus will be subject to GST tax because the grandchild's respective *Crummey* withdrawal right will cause her or him to be the transferor. In such case, Grant's GST tax exemption would be of no further benefit.

For state law purposes, the result is the same as the above examples.

When to Use 678 Trusts

There are times to use 678 trusts and times to carefully avoid doing so. An example of the former is when you want the trust income to be taxed at the beneficiary's marginal income tax rates and the trust funds are expected ultimately to go to that beneficiary. This is often the case with annual exclusion gifts that are made in trust to a single current beneficiary. An example of the latter is when the planning is dynastic, with the trust funds expected to hopefully go to that beneficiary's descendants, with the grantor having planned carefully to avoid transfer taxes. The reason for this distinction is that triggering the application of section 678 requires a withdrawal power, and that is also a general power of appointment. General powers of appointment, at least in excess of a 5 and 5 power, will result in the imposition of a transfer tax during and at the end of the powerholder's life. This can also result in the loss of the donor's GST tax exemption allocated to the trust because the powerholder becomes the transferor for GST tax purposes. General powers of appointment can also give rise to the loss of spendthrift protections.

Releases, Lapses, Etc.

A careful reader will notice that subsection 678(a)(2) applies (a) if a person who had a power exercisable solely by herself to vest the corpus or the income of any portion of a trust therefrom in herself has (b) previously partially *released or otherwise modified* such a power and afterwards retains control in the way specified. This is in contrast to subsections 2041(b)(2) and 2514(e), which are clear that a lapse of a power of appointment is considered a release except to the extent a *lapsed power* does not exceed the 5 and 5 power.[39] This gives rise to whether a lapse of a withdrawal right can trigger subsection 678(a)(2). There is currently no authority for this on which a taxpayer can rely, such as a statute, regulation, revenue ruling, or case.[40] Instead, the position that a lapse is a partial release or modification for purposes of subsection 678(a)(2) depends largely

[38] §2642(c).

[39] A release may qualify as a 5 and 5 power, but the statutes and the related regulations expressly provide that the 5 and 5 power applies if there is a lapse. So, lapsing the withdrawal power is the conservative position, and also easier to administer because a lapse, unlike a release, can occur without any action being taken by the powerholder.

[40] Although there are two Revenue Rulings where the IRS has stated that a beneficiary holding a *Crummey* power was the trust's deemed owner, in each case they did not address what the effect of the *Crummey* power's lapse was. Rev. Rul. 67-241; Rev. Rul. 81-6.

on legal analysis that (a) sections 2041 and 2514 treat all lapses as being a release for gift and estate tax purposes and (b) there is no reason why a lapse should not be within the scope of subsection 678(a)(2)'s "partial[41] release or other modification," a lapse being an "other modification." One well regarded commentator's logical argument in support of the lapse triggering subsection 678(a)(2) is that, if the lapse does not trigger subsection 678(a)(2), then similarly situated taxpayers will be treated differently if one simply acts to partially release her withdrawal power while another allows hers to lapse.[42] This analysis is also supported by the IRS consistently ruling this way in any number of private letter rulings, which, of course, can only be relied on by the letter's recipient.[43] In the private letter rulings, the IRS provided little reasoning for its position, suggesting that it does not think the question deserves much thought. Nonetheless, one commentator claims that this may be "the weakest link in the chain" as to how BDITs may be challenged; however, in evaluating his opinion, it should be kept in mind that he is the creator and leading advocate for the Beneficiary Deemed Owner Trust, which he views is a superior alternative to BDITs.[44]

The Beneficiary Defective Inheritor's Trust[45] ("BDIT")

The above discussion and examples all relate the use of trusts in making gifts. Unlike some other states, Texas does not permit self-settled spendthrift trusts, with limited exceptions.[46] This severely limits Texans' ability to use trusts to protect their own assets. The Beneficiary Defective Inheritor's Trust (the "BDIT") is promoted as a vehicle to place one's assets beyond the reach of one's creditors and also transfer taxes.[47] The BDIT begins as a 678 trust set up for the beneficiary of the trust by a third person, such as a parent or someone else (other than a spouse) who is willing to establish the 678 trust and fund it with $5,000. The $5,000 must be a true gift, and not money that the beneficiary directly or indirectly provides.

Example 3 (BDIT): Grant's father creates an irrevocable trust for the benefit of Grant and appoints Grant as trustee. During Grant's life, the trustee can distribute to him so much of the net income and corpus of the trust as the trustee deems necessary for Grant's health, education, maintenance, and support. Additionally, an independent trustee (or any trustee at a trust consultant's direction) can distribute the trust's net income and corpus to Grant for any reason. Following Grant's death, the remaining trust assets are allocated and added to trusts for his descendants. Further, Grant and any future beneficiaries are granted a

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[41] The release or modification is "partial" because if it were complete, the beneficiary would no longer have an interest in the trust to which §678 would apply. *But cf.* Blattmachr, Jonathan G., Gans, Mitchell M., and Lo, Alvina H., *A Beneficiary as Trust Owner: Decoding Section 678*, 35 ACTEC Journal 106, 116 (2009).
[42] *See Blattmachr* at 116.
[43] PLR 201216034; PLR 200104005; PLR 200147044; PLR 200022035.
[44] Morrow, Edwin P., *IRC Section 678 and the Beneficiary Deemed Owner Trust (BDOT)*, 148 (April 19, 2018).
[45] Sometimes called a Beneficiary Defective *Irrevocable* Trust.
[46] TEX. PROP. CODE §112.035.
[47] The BDIT might also protect one's assets in the event of a failed marriage, at least if it is only funded with one's separate property.

testamentary broad special power of appointment over the trust corpus (*i.e.*, he can appoint to any person other than himself, his creditors, his estate, or creditors of his estate).

Grant's father contributes $5,000 to the trust at its creation. So that the gift is a present interest for purposes of qualifying for the annual gift tax exclusion, the trust instrument grants Grant the right to withdraw the contribution for a 30-day period after he receives notice of the contribution. If Grant does not exercise his withdrawal right during the 30-day period, the contribution will remain a part of the trust corpus.

The trust instrument includes no provision that would cause the trust to be a grantor trust as to Grant's father.

Prior to the filing deadline, Grant's father will file a gift tax return to report the $5,000 gift and allocate $5,000 of GST exemption to it.

Consequences: For income tax purposes, the trust is a 678 trust and as such Grant will be treated as its owner beginning when the withdrawal period starts and continuing after the withdrawal right lapses.[48] *See* the discussion in the section titled Releases, Lapses, Etc. above.

For gift and estate tax purposes, the $5,000 contribution to the trust will be free of gift tax because it is considered a present interest due to the withdrawal right and will be below the maximum annual gift tax exclusion amount.[49] Further, the lapse of the withdrawal right will not cause a taxable gift from Grant to the trust because the $5,000 contribution does not exceed the 5 and 5 amount.[50] If Grant were to die while holding the withdrawal right prior to its lapse, then the amount subject to the withdrawal right would be included in his taxable estate.[51]

For GST tax purposes, the $5,000 contribution to the trust will not be subject to GST tax because Grant is not a skip person as to his father (the transferor).[52] Further, at Grant's death, no GST tax will be triggered because the withdrawal right's lapse will not be a release due to the $5,000 being within the 5 and 5 amount, meaning that Grant's father will still be treated as the transferor at such time.[53] Accordingly, the GST exemption allocated by Grant's father will apply when a later taxable termination or distribution occurs, causing no GST tax to be incurred.

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[48] §678(a).
[49] §2503(b)(1); Rev. Rul. 73-405.
[50] §§2041(b)(2) and 2514(e); the trustee will want to hold the $5,000 in a non-interest-bearing account until the withdrawal power lapses so that the lapse will not exceed $5,000 and will also apply to all of the assets in the trust so that the powerholder will be the owner of all of the trust assets for purposes of §678(a)(2).
[51] §2041(a)(2).
[52] §2613(a).
[53] §2652(c).

For state law purposes, the trust qualifies as a spendthrift trust because the contribution to the trust, and thus the amount subject to the withdrawal right, will be limited to the applicable 5 and 5 amount of $5,000.[54]

A moment of reflection will reveal that the trust in Example 3 (the "BDIT") is simply like the other 678 trusts discussed above except that limiting the funding of the trust to $5,000 does not lead to the incomplete gift and other transfer tax complications that arise with a withdrawal right for a larger amount. That's nice, but it leaves the beneficiary with a trust of limited utility and is probably not worth the effort to create if more is not done with it.

Example 3A (Sale to the BDIT): After the BDIT described in Example 3 is in place and Grant's withdrawal right has lapsed, Grant enters into a bona fide installment sale with the BDIT structured as the asset freeze technique commonly called a sale to an IDGT (except the beneficiary is the seller rather than the grantor). Specifically, Grant, as seller, will sell to the BDIT, as buyer, $45,000 of assets desired to be transferred to the trust (and out of the beneficiary's estate), which amount is the fair market value of the assets as determined by a qualified appraiser or other reliable means.[55] The size of the sale is limited to nine times the then value of the corpus of the trust so that the trust's debt will be no more than ninety percent of the value of the BDITs assets. As consideration for the sale, the BDIT will execute a secured promissory note for $45,000 payable to Grant evidencing indebtedness in the amount of the sales price plus interest at the applicable federal rate for the term of the note. This sale transaction "freezes" the value of the transferred assets at the point in time of the sale (*i.e.*, the value of the promissory note plus interest), leaving all subsequent appreciation of the assets to grow outside of the beneficiary's estate.

Consequences: For income tax purposes, the installment sale to the BDIT will be ignored because the beneficiary, being the trust's deemed owner, and the BDIT should be treated as the same person.[56]

For transfer tax purposes, as long as the sale is recognized as being a bona fide sale for such purposes, there will be no transfer tax consequences, and thus the sale will not be treated as a gift or incomplete gift that would cause gift tax or estate inclusion as to the beneficiary.

The sale will be recognized for state law purposes, including spendthrift protections.

The sale in Example 3A will result in the BDIT having $50,000 of assets, subject to $45,000 of debt. That's ten times the assets in Example 3, but it still leaves the beneficiary with a trust of

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[54] TEX. PROP. CODE § 112.035(e)(2) and (f)(3).

[55] Grant might sell a limited partnership interest in his family limited partnership that is worth $45,000, which would convey an interest that has a materially higher liquidation value.

[56] Rev. Rul. 85-13, but if, as discussed in the section titled Releases, Lapses, Etc. above, the BDIT is not a grantor trust as to the beneficiary under §678(a)(2), then the beneficiary would be liable for any capital gains from the sale and the resulting interest, and potentially penalties.

limited utility. Even with an additional $45,000 of assets, subject to a like debt, it is still probably not worth the effort to create it unless more can be done with it.

Some "more" things that might be done with a $50,000 trust are to give it an interest in a promising business opportunity that requires a small amount of capital to invest that is commercially reasonable. For example, a beneficiary who was a real estate developer might be permitted to invest her BDIT in a new project undertaken with other partners who are providing the capital and even guaranties for the project loans.[57] Or the BDIT might buy common interests in an entity whose equity has been recapitalized in a preferred interest freeze. In both cases, the BDIT's opportunity might arise because of the beneficiary's personal participation. There is no tax law requirement that such a beneficiary be compensated if she is willing to work for free.

Example 3B (Overleveraged Sale to the BDIT): The facts are the same as in Example 3A except that the amount of assets sold is $1 million and the promissory note is for $1 million.

Change in Consequences: The BDIT, as so leveraged, would have trust corpus of less than 0.5 percent of the value of the BDIT's assets. With such extreme leverage, it is doubtful that the sale to the BDIT would be recognized for any tax purpose. The conveyance of the assets might well be viewed as a contribution to the trust or the note might be viewed as a nonqualified retained interest under section 2702, which would result in the conveyance being taxed in full as a gift (although it might be an incomplete gift). For state law purposes, the conveyance of the assets might result in the BDIT being viewed as a self-settled spendthrift trust, except as to $5,000.

Example 3C (Sale to the BDIT with Guaranty): The facts are the same as in Example 3B except that the $1 million sale is financed with a bank loan, paying interest at the rate the bank demands. In order to get the bank to make the loan, Grant provides his personal guaranty without compensation, which the bank accepts because Grant has more than enough other liquid assets to satisfy the guaranty if the BDIT defaults.

Change in Consequences: This transaction may well be analyzed as being a circuitous route to implementing what is in essence the same transaction as described in Example 3B as the ultimate risk of default is borne by Grant in both Example 3B and Example 3C.

Example 3D (Sale to the BDIT with Third-Party Guaranty): The facts are the same as in Example 3C except that the guaranty is provided by a third-party.

Change in Consequences: In theory, this should have the same consequences as Example 3A.

[57] Is it problematic for the beneficiary to provide her own guaranty with the other investors when she does not personally have an equity interest? What if she personally is also an investor in the project and the guaranties all provide for joint and several liability?

Example 3D sounds promising, but there is reason for serious doubt as to whether a third-party would provide such a guaranty. If, however, a third-party guarantor could be found, what would the guaranty fee be? This question is especially relevant if the guarantor is a related trust.

Some years ago, when discussing sales to BDITs with other practitioners, one of the authors was told that the annual guaranty fee was two percent of the amount guaranteed. For these transactions, the guarantor was *always* a related party. When the author pressed what the evidence was for such a low fee, he was told it was what "everyone" was doing and common knowledge. Perhaps a well-known Texas estate planning firm should be commended for being more conservative and using a "rule of thumb" for the annual guaranty fee that is 50% higher, three percent. [58] They typically have the guaranty fee paid on 15 to 20 percent of the note amount.[59] Further, they note, "The size of the guaranty impacts the amount of LP interests the Client can sell, as the guaranty must be at least 10% of the note amount."[60]

If this really is "market," one has to ask why we are practicing law instead of setting up two thinly capitalized LLCs that each obtain a $2.5 million loan that is credit-enhanced with a guaranty of 20 percent of the loan amount that costs three percent a year and then having the one LLC go long in the stock market and the other go short. Regardless of how the market does, odds are that at the end of the year one of the LLC's with $2.5 million invested will have done quite well and the other will be broke, sticking the guarantor with the obligation to pay back 20 percent of the $2.5 million, which is $500,000.[61] This seems like a reasonable place to start because the annual three percent guaranty fees on 20 percent of the loan amount would only be $30,000 on loans totaling $5 million, and $30,000 is probably within the reach of most of us to capitalize on such a promising opportunity. It might well be possible to then take the profits and do another set of transactions, but the second time bigger. Repeating this series of transactions several years in a row, or at least as long as the "market" for guaranty fees is so accommodating, would provide a series of larger, can't lose transactions.

Careful reflection will lead a serious practitioner to recognize that the guaranty fee should not be set based on a rule of thumb but should be based on the nature of the assets that are held in the BDIT and its balance sheet. The business track-record of the trustee might also be relevant. When a business valuation firm was asked about how such a guaranty fee might be reasonably determined, one appraiser, thinking out loud, suggested that if the assets in trust were marketable securities, perhaps it might be valued using a Black-Scholes model. Wikipedia defines this as "a

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[58] *See* The Blum Firm, P.C., *678 Trusts: Fundamentals and Drafting Strategies*, 5 (Oct. 2016)("typically guarantees 15% to 20% of the note amount in exchange for a 3% annual fee"); *see* also Blum, Marvin E., *Squeeze, Freeze, & Burn: Estate Planning with 678 Trusts*, Slides 30 – 32 (Oct. 2018) ("The rule of thumb we use to value the guaranty fee is 3% of the amount of assets pledged"; however, with the example given, it says the "guarantor of 20% of the promissory note amounts" paid annual fees equal to 3% of the amount guaranteed.).

[59] *Id.*

[60] *Id*.

[61] A 1.2% market move on a $2.5 million portfolio will return a profit of $30,000, getting one to breakeven, with any larger market move in a year being profit. Note that the lender will bear any loss in excess of $500,000.

mathematical model for the dynamics of a financial market containing derivative investment instruments." That is not a simple fixed percentage of the amount guaranteed.

As this outline is being written, it is reported that Donald Trump cannot find anyone to take his real estate interests as security for an appellate bond approaching a half billion dollars. This suggests that there is a strong reluctance in the marketplace to take illiquid assets as security for an obligation that might require the guarantor to put up cash. Query if the same reality exists when you ask a guarantor to provide a guaranty where default will result in the guarantor taking a limited partnership interest in a family limited partnership after paying off the trust's note.

If the guarantor is a related party, paying an arm's length guaranty fee is not an academic question – it can be the difference between having a successful transaction as set out in Example 3D, and a disaster of a transaction, as set out in Example 3C.

Example 3E (Sale to the BDIT with Related Party Guaranty): The facts are the same as in Example 3D above, except the guaranty is provided by an irrevocable trust settled by Grant for his descendants, with the BDIT paying what is reasonably believed to be an arm's length annual guaranty fee to the guaranteeing trust.

Change in Consequences: In theory, this should have the same consequences as Example 3A, but that assumes that the trustee of the BDIT can prove that the guaranty fee is an arm's length amount. Even if the trustee can do so, she might still be subject to fiduciary liability for guaranteeing a loan to the uncreditworthy BDIT, and imprudently putting the assets of the guaranteeing trust at risk.

Given that the principal benefit of the BDIT is to move value out of the beneficiary's taxable estate and to protect those assets from creditors, it is unsettling to realize that getting the statute of limitations to run on any gift tax liability does not bar the IRS from adding the assets back into the beneficiary's taxable estate under sections 2036 and 2038 after the beneficiary's death, which may be decades later. Remember that the beneficiary's executor may be pressed to prove the bona fides of the original sale to the BDIT many years in the future. It also does not bar creditors from going after the BDIT assets on a fraud on the creditors theory.

Beneficiary Deemed Owner Trusts ("BDOTs")

One author with impressive credentials has argued that what he calls the Beneficiary Deemed Owner Trust ("BDOT") is another type of 678 trust, one that this proponent (the "Proponent") argues is superior to the BDIT[62] and can be more widely used to make all manner of trusts, such

[62] The proponent of the BDOT notes that the BDIT relies on both §678(a)(1) (during the withdrawal period) and §678(a)(2) (after the withdrawal power lapses) to cause the beneficiary to be the trust's deemed owner; however, he asserts that the BDOT relies only on §678(a)(1) to reach the same result. He goes on to assert that by relying only on the §678(a)(1) trigger, for which he asserts that the law is more certain, the BDOT avoids what he sees as the main issues with the BDIT – the uncertainty of the effect of the lapsing withdrawal right and the limited seed gift to the BDIT.

as marital trusts, into 678 trusts. The BDOT beneficiary's withdrawal power covers only the trust's taxable income. The Proponent correctly notes that the Treasury Regulations for grantor trusts generally define "income" for grantor trust purposes to includes both ordinary income and capital gains. The BDOT does not provide a power to withdraw the trust's corpus, other than corpus that comes from net taxable capital gains realized during the term of the trust.

The Proponent argues that Treasury Regulation section 1.678-1(a), which tracks subsection 678(a)(1), should be read as follows. "Where a person other than the grantor of a trust has a power exercisable solely by himself to vest the corpus **or** the income [remember, "income" here means taxable income not accounting income] of any portion of a testamentary or inter vivos trust in himself, **he is treated** under section 678(a) **as the owner of that portion**." (Emphasis and bracketed language added by the Proponent).[63] That is, to again quote the Proponent, "a §678 beneficiary '**shall be treated as the owner**' for income tax purposes of 'any portion of a trust with respect to which such person has a power exercisable solely by himself to vest the corpus **or the income therefrom** in himself.'"[64] To be clear, he is asserting that the beneficiary of the trust is treated as the income tax owner of the entire trust if the beneficiary has *either* a power to vest *corpus or the income* therefrom in himself.[65] He then asserts that since a power of the beneficiary to vest income in himself is sufficient to make the entire trust the same as the beneficiary for income tax purposes, there is no need for the beneficiary to have a power to withdraw the trust's corpus to be deemed to be the owner of the entirety of the trust. If the Proponent is correct, the BDOT would be superior to the BDIT because it is not limited in its corpus to the $5,000 that the beneficiary can withdraw under a 5 and 5 power.

Clifford Trusts

The application of the grantor trust rules when different persons have interests in the corpus and the income has long been settled law. A clear example is found in how *Clifford* trusts were treated before Congress abolished them in the Tax Reform Act of 1986.[66] *Clifford* trusts took their name from the famous case of *Helvering v. Clifford*.[67] In that case, the Supreme Court approved the Bureau of Internal Revenue's (the predecessor of the IRS) extension of the then statutory grantor trust rules to a 1934 short-term (five-year) irrevocable trust of which the grantor was the trustee and the grantor's spouse was the income beneficiary. At the end of the trust term, the corpus was returned to the grantor. Meanwhile, the Treasury Department issued regulations under those statutes that arguably extended those statutory provisions, including extension to irrevocable trusts with a reversion to the grantor within 15 years. The regulations were commonly referred to as the

[63] *Morrow* at 96.
[64] *Id*.
[65] *Id* at 96-97.
[66] To the objection that the long-gone *Clifford* trust is not relevant to the issue, the answer is that §678 has not been amended in material aspect since sometime before 1976, if ever. The §678 Treas. Regs. were issued in 1956 and have never been amended.
[67] 309 U.S. 331 (1940), *rev'g* 105 F.2d 586 (8th Cir. 1939) and *aff'g* B.T.A. Memo. 1938-335.

"Clifford Regulations."[68] After expanding the grantor trust rules to cover additional situations, they were largely codified in sections 671 – 678 of the Internal Revenue Code of 1954, with Clifford trusts permitted if they had a term of at least ten years or, if shorter, the life of the income beneficiary.[69]

EXAMPLE 4: In 1981, son creates a *Clifford* trust for his mother. The trust instrument[70] provided that the trustee shall pay to the mother "all of the net income of the trust during her lifetime; all of such income shall be distributed during each taxable year or within 30 days after the end of the taxable year." "Upon the death of [the mother], this trust shall terminate. Within a reasonable period of time after termination of the trust, the Trustee shall distribute all accumulated income to the estate of [the mother] and the Trustee shall distribute the principal of the trust to" the son. The trust instrument contained typical language regarding trust accounting income and trust principal.

Clifford trusts typically gave the current beneficiary the right to all of the trust accounting income, on which she was taxable, pursuant to the non-grantor trust rules in Subchapter J of the IRC. In a *Clifford* trust, the grantor retained the right to the return of the corpus at the end of the trust term, making him taxable on the capital gains, pursuant to subsection 673(a). With such a trust, it was clear that the income beneficiary had the income interest in the trust while the corpus remained with the grantor, making the trust a grantor trust with respect to only corpus. When the trust realized a capital gain or loss, it was reported by grantor on his income tax return because those items were charged by the trust to the corpus.[71]

Thus, you can think about a typical *Clifford* trust as providing for a horizontal slice of the interests in the trust, with the income interest in the non-grantor trust slice and the corpus in the grantor trust slice.

EXAMPLE 4A: The facts are the same as in Example 4 except instead of providing for mandatory income distributions to the mother, the trust instrument gave her the right to withdraw the trust accounting income of the trust from time to time as she requested.

With this change, the mother was taxable on the trust's accounting income under subsection 678(a)(1), making each of the income interest and the corpus a grantor trust slice. Thus, the trust would be a wholly grantor trust, with two different persons owning different interests, both of which were taxable under the grantor trust provisions, and each reporting her or his portion of the trust's income on her or his income tax return.

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[68] *See* Ronald D. Aucutt, *Shall We Dance? Celebrating Seventy-Five Years of ACTEC by Looking at Ten Decades of Tax Law Changes* which was the Seventy-Fifth Anniversary Presentation at the 2024 ACTEC Annual Meeting (March 8, 2024).

[69] Mr. Clifford's failed attempt to split his income with his wife was effectively permitted when The Revenue Act of 1948 introduced joint income tax returns for married couples.

[70] The quoted language is from a 1981 *Clifford* trust instrument.

[71] *See* Treas. Reg. §1.677(a)-1(g) Ex. 2.

EXAMPLE 4B: The facts are the same as in Example 4A except the son also provided in the trust instrument that his sister had the power to withdraw the net capital gains from the trust, which were to be paid to her, if at any time during the taxable year she so requested, as promptly as reasonably possible after such net capital gains could be computed after the close of the taxable year.

With this change, the sister would also be taxable on the trust's net capital gains under subsection 678(a)(1), adding a third horizontal slice, which would no longer be part of the corpus horizontal slice. Each of the three slices would be taxed under the grantor trust rules. The trust would continue to wholly be a grantor trust, with three different persons owning different interests, all of which would be taxable under the grantor trust provisions, and each reporting her or his portion of the trust's income on her or his income tax return.

EXAMPLE 4C: The facts are the same as in Example 4B except the mother has the power to withdraw taxable income (*i.e.*, both ordinary income and net capital gains) from the trust, and the sister has no interest in the trust.

With this change, the mother would be taxable on the trust's accounting income and net capital gains under subsection 678(a)(1), making each of the income and net capital gains interest and the corpus a grantor trust slice. Thus, the trust would be a wholly grantor trust, with two different persons owning different interests, both of which were taxable under the grantor trust provisions, and each reporting her or his portion of the trust's income on her or his income tax return. Note that a net capital loss from the trust would still be allocated to the son.

The analysis of Examples 4A, 4B, and 4C all follow the same pattern. There is no logical reason to think that in Example 4C the mother would be deemed to own the entirety of the trust simply because she has the taxable income horizontal slice, regardless of whether this could be restated as her having the taxable income horizontal slice of the trust. What would happen in Example 4C if there was a net capital loss? It is not logical to "withdraw" a loss.[72]

In his paper, the Proponent has given considerable thought to whether the capital loss would be passed through to the person who can withdraw the taxable income. However, while conceding the question is by no means clear, the Proponent, continuing to misread section 678(a)(1), concludes the net capital loss probably would be deductible by the mother.[73] Taking a step back, it is clear that the son would be the person who would have suffered the net capital loss, which would reduce the amount of capital that would be returned to him. It follows that the net capital loss deduction should be taken on his income tax return, calling into doubt the Proponent's reading of subsection 678(a)(1).

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[72] It brings to memory a major accounting firm's tax opinion that began with the suggestion that the client "donate" their short position and then proceeded to analyze the charitable gift of what is a liability, not an asset. When a credit card bill arrives, it would be nice to "donate" it and be done with the matter. One could even pick their least favorite charity.

[73] *Morrow* at 59-65.

Rather, subsection 678(a)(1) should be read the way it has long been read and consistent with its threshold test that the powerholder have a general power of appointment. This is, as if it were restated to separately state the rule with respect to the trust's income and then with respect to the trust's corpus (quoting the subsection in full twice and striking "corpus" in one quotation and "income" in the other quotation and removing unneeded punctuation) as follows:

> A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which such person has a power exercisable solely by himself to vest ~~the corpus or~~ the income therefrom in himself
>
> A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which such person has a power exercisable solely by himself to vest the corpus ~~or the income~~ therefrom in himself

This understanding of subsection 678(a)(1) restores the important role of the word "portion" in correctly understanding the provision and the requirement that the powerholder have a general power of appointment over the portion of the trust over which he will be treated as the owner. Also, there is nothing that requires the word "portion" to refer to a vertical slice of the trust, *i.e.*, a slice in every trust interest that exists with respect to a separate share of the trust or an undivided interest in the trust.

The Proponent's interpretation of this language means that, so long as the withdrawal power adequately covers all of the trust's taxable income, it is unnecessary that it also cover the trust's corpus in order for the powerholder to be the deemed owner of the entire trust (including all of its ordinary income and income attributable to corpus) for income tax purposes.[74] But as we know from how *Clifford* trusts worked, this is not how the grantor trust rules are to be read.

The Proponent's 195-page paper (updated as of September 2022) analyzes what seems like a limitless number of aspects of the BDOT. Despite the impressive amount of work, the BDOT is built on a misreading of subsection 678(a)(1). There is no authority or even a nonbinding ruling that supports his specific reading of this subsection, and it requires one to take two steps past the authority that does exist. The first step is that one can be deemed to own the entirety of a trust for income tax purposes when she did not create the trust or have a general power of appointment over all of the beneficial interests in the trust (or in a vertical slice of the trust). The second step is that if one did not create the trust, or have a general power of appointment over all of the beneficial interests in the trust (or in a vertical slice of the trust), that the trust will be ignored for income tax purposes and the powerholder treated as if she owned all of the assets and owed all of the liabilities of the trust (or of a vertical slice).

With respect to the first step, the Proponent's misreading of subsection 678(a)(1) has led him to totally disregard to whom the corpus of the trust belongs. If the corpus without a right to net capital

[74] *Morrow* at 17-18.

gains does not belong to the powerholder, there must be rights in property that belong to someone else, either to someone who is the "owner" under the grantor trust rules or to a trust taxed under the regular IRC Subchapter J provisions. His over-attribution of the entire trust as being deemed to be owned by those who only have a right to withdraw taxable income also leads to a conundrum if, for instance, his deemed owner purchases an asset from the trust which has $20,000 of unrealized appreciation. If the Proponent is correct, the trust is a grantor trust as to the powerholder, the gain is not recognized, and the powerholder will not be able to withdraw the $20,000 of gain. In contrast, if the asset were sold to a third-party, the powerholder could withdraw the $20,000 of realized gain. Note that the powerholder and a third-party would pay the same amount for the asset, so the $20,000 stays in the trust, with the corpus, if the powerholder buys the asset but the gain is not taxed. This makes no sense. After discussing the issue, the Proponent suggests a best practice would be to "simply avoid it."[75] When one comes to such a conclusion, it is appropriate to reconsider how one has analyzed the applicable tax law.

Further, if the Proponent were correct, the taxable income beneficiary would be able to exchange her low basis assets for the trust's high basis assets without income tax recognition even though she is not entitled to the trust's corpus.[76] Likewise, the taxable income beneficiary would be able to exchange her assets with a short-term holding period for the trust's assets with a long-term holding period without income tax recognition even though she is not entitled to the trust's corpus. It makes sense to allow the grantor of a trust to exchange assets without income tax recognition with the trust. But why should this result be extended to the taxable income beneficiary of a BDOT, who never had any right to the original corpus of the trust? Indeed, if the Proponent were correct, the sale of residential property deemed under the grantor trust rules to be the principal residence of the taxable income beneficiary would be excluded from taxable income under section 121, meaning the gain would be added to corpus and retained by the trust, which would benefit the trust's remainder beneficiaries when the trust terminated. Why this should be so?

With respect to the second step, under section 671 a trust may be treated as owned by its grantor, with the trust's income, deductions, and credits against tax attributed for income tax purposes to its grantor, essentially as though the trust does not exist or, in other words, as if its grantor owned the assets of the trust. But it does not necessarily follow that that the existence of a grantor trust is ignored for all income tax purposes.[77] In Revenue Ruling 64-302, the IRS dealt with a contributions by a grantor to a *Clifford* trust of his United States savings bond on which the interest had been deferred. The trust instrument provided that the unreported interest income on the contributed bond was to be allocated to corpus and upon the occurrence of a taxable event with respect to that interest income during the term of the trust, the interest income was to be taxable to the grantor pursuant to 677(a)(2). The Proponent's analysis ignores the corpus horizontal slice of

[75] *Morrow* at 105-106.
[76] The BDOT structure assumes the powerholder is also the trustee. Such an exchange might be a breach of the trustee's fiduciary duty owed to the trust's beneficiaries entitled to the corpus, who will exist.
[77] *See Rothstein v. United States*., 735 F.2d 704 (2d Cir. 1984) (ruling a trust owned by a grantor must be regarded as a separate taxpayer capable of engaging in sales transaction with the grantor).

the trust that the grantor had retained; however, it is clear that the result in the ruling turned on the fact the grantor had retained the unreported interest income as a part of the corpus horizontal slice.

It is the well-established position of the IRS and at least one court that the existence of a grantor trust is ignored for all income tax purposes, but that position has only been taken in cases with respect to the trust's grantor.[78] It might be reasonable to extend that tax treatment to someone who holds or held a general power of appointment over *all* of the beneficial interests in the trust, or at least a vertical slice of all of those beneficial interests. But not extending this rule to BDOTs, where a powerholder held a general power of appointment over either income or corpus – but not both, would resolve several of the anomalies discussed above and by the Proponent otherwise.

[78] *Madorin v. Commissioner*, 84 T.C. 667 (1985) (ruling that the sole grantor should be treated as the owner of partnership interests the grantor transferred to his grantor trusts over which he had retained the power to add beneficiaries); Rev. Rul. 85-13 (grantor received the entire corpus of the trust in exchange for a promissory note given to the trust, which caused the grantor to be the owner of the entire trust (or a vertical slice portion of the trust) and IRS announced it would not follow *Rothstein*); Rev Rul. 58-2 (grantor established trust and had power of revocation and contribution to trust did not trigger gain); Rev. Rul. 66-159 (grantor created trust and qualified for nonrecognition of gain under then §1034 for residence used by grantor as his principal residence).

THE CORPORATE TRANSPARENCY ACT (CTA)

North Texas Probate Bench Bar
April 4th, 2024

Kimberly N. Loveland
Loveland & Hurley, PLLC

Abbreviations &Acronyms

CTA

Confusion. Trepidation. Aggravation.

Corporate Transparency Act

FinCEN

Financial Crimes Enforcement Network (U.S. Treasury)

CTA – Why Should We Care?

Imposes significant reporting requirements on US (law firms) & OUR CLIENTS.

Clients (compliant & noncompliant) will look to us.

Impacts in excess of 33 million existing entities & new creations.

Our malpractice carriers will want us to care.

CORPORATE TRANSPARENCY ACT BACKGROUND

- Enacted under the National Defense Authorization Act (2021)
- "Corporate" title is a misnomer.
  - CTA applicable to all "Reporting Companies" (not just corporations).
- Resulted from numerous legislative attempts.
- Significant international pressure based on non-compliant status of U.S. under Financial Action Task Force standards.
- Target: money laundering (Panama Papers, etc.), organized crime, and financing of terrorism.
- General Requirement –transparency & disclosure of beneficial owner and information via FinCEN.
  - Broad reach, beyond stated targets.

UNCONSTITUTIONAL COURT CASE RULING

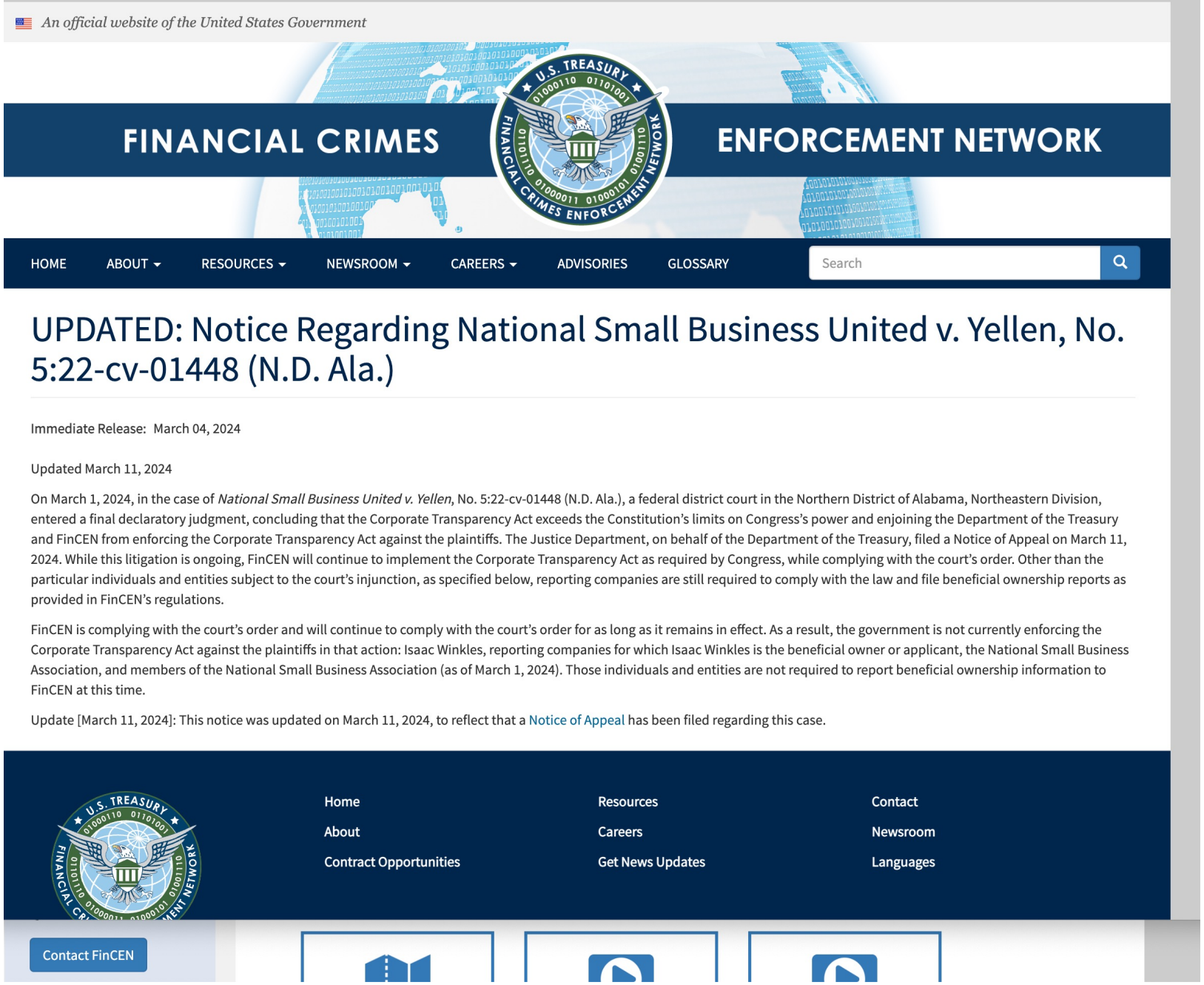
National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.), ruling:

- On March 1, 2024, a federal district court in the Northern District of Alabama, Northeastern Division, entered a final declaratory judgment,
- Concluded that the CTA exceeds the Constitution's limits on Congress' power and enjoined the Department of the Treasury and FinCEN from enforcing the CTA against the plaintiffs.
- The Justice Department, on behalf of the Department of the Treasury, filed a Notice of Appeal on March 11, 2024.

MOST RECENT DEVELOPMENTS

Do you remember Constitutional law & the Commerce Clause?

- *Boyle v. Yellen*, et al, Case No. 2:2024cv00081 (U.S. Dist. Ct., D. Maine), a business owner contends that the CTA is an unconstitutional usurpation of the states' power to regulate entity formations.
- Filed March 15, 2024.
- *Eventually may make its way to 1st Circuit in Boston?*



FinCEN Press Release

March 11, 2024

- Other than the particular individuals and entities subject to the court's injunction, reporting companies are still required to comply…

CTA: Things To Know

- Reporting Companies disclose, via FinCEN filing of beneficial ownership information report, sensitive information regarding the Reporting Company itself, as well as its Beneficial Owners, and Company Applicants.
- Reporting Companies existing BEFORE *January 1, 2024*, will have until January 1, 2025 to file its initial beneficial ownership information report.
- A reporting company created or registered ON OR AFTER January 1, 2024, will have 90 days to file its initial beneficial ownership information report.
    - This 90-day deadline runs from the time the company *receives actual notice* that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier.
- A reporting company created or registered ON OR AFTER January 1, 2025, will have 30 days to file its initial beneficial ownership information report.

- *Good news*: No fee for submitting the beneficial ownership information report.

If you remember absolutely nothing from today…

- Existing entities before 1/1/24=clock ticking to 1/1/25
- File for a new entity this year 2024=clock ticking 90 days from effective date
- File for a new entity in 2025 or after= click ticking 30 days from effective date

REPORTING REQUIREMENTS

- Reporting Companies disclose, via FinCEN filing, information regarding the Reporting Company itself, as well as its Beneficial Owners and Company Applicants.
- Record keeping requirements introduces high volume cyber security issues (imagine the hacking opportunities and sensitive data).

What will a reporting company have to report about its ***beneficial owners*** *and* ***company applicants****?*

- For Beneficial Owners and Company Applicants:
  - Name
  - DOB
  - **Residential Address:** Beneficial Owners and Applicants
  - **Business Address:**Professionals (attorneys/CPAs)
  - Identifying Number (DL or Passport) or FinCEN Identifier
- Voluminous Private Information Storage
- Reporting requirement – obligation of the Reporting Company
  - Reporting company will have **30 days** to report any changes/update to reported information.
    - Even if the beneficial owner changes their information.

What is Beneficial Ownership?

- Disclose identifying information about the individuals who **directly** or **indirectly own** or **control** a company.
- A beneficial owner is any individual (1) who directly or indirectly *exercises "substantial control"* over the reporting company, or (2) who *directly or indirectly owns or controls 25 percent* or more of the "ownership interests" of the reporting company.

Substantial Control

- Exercise substantial control ON BEHALF OF Reporting Company *or* owns or controls at least 25% of the Reporting Company.
  - Substantial Control – depends on the power they may exercise over a reporting company
    - Final Rule clarified that the "control" is exercised on behalf of Reporting Company, including certain officers of the company (think of all the executives), regardless of ownership (can include a Trust).
    - Can exercise substantial control indirectly
  - *Ownership* OR *Control*
    - Trustee or other individual with "ability to dispose of assets"?

What is a Reporting Company?

- There are two types of reporting companies — domestic reporting companies and foreign reporting companies (unless exemption applies).
- *A <u>domestic reporting company</u> is defined as —*
  - a corporation,
  - a limited liability company, or
  - any other entity created *by the filing of a document with a secretary of state or any similar office* under the law of a state or Indian tribe.
- *A <u>foreign reporting company</u> is any entity that is —*
  - a corporation, limited liability company, or other entity formed under the law of a foreign country, AND
  - registered to do business in any U.S. state or in any Tribal jurisdiction, by the filing of a document with a secretary of state or any similar office under the law of a U.S. state or Indian tribe.

What is a Reporting Company?

- Corporation, LLC or SIMILAR ENTITY created by the **FILING OF A DOCUMENT** pursuant to laws…
- Any entity formed via filing with Secretary of State, etc.
- Note: A Trust is NOT a Reporting Company;
  - However, a Trust, its Trustee(s) and potentially its beneficiaries, may be Beneficial Owners upon whom the Reporting Company reports information in its Beneficial Owner Information Report (**BOI Report**)

Clarification regarding Trusts as Beneficial Owners

- Trusts deemed Beneficial Owners either via the 25% ownership threshold OR Substantial Control over Entity via its Trustee

- Once a Trust is a Beneficial Owner, reporting addresses Trustee and a beneficiary who is the sole permissible recipient to receive income/principal or the right to demand distribution.

- Grantor with a right to revoke is also a Beneficial Owner.

- “Clarification” - exercise of Substantial Control references exercise of control **ON BEHALF OF REPORTING COMPANY**

What will a ***reporting company*** have to report about itself?

- Its legal name;
- Any trade names, "doing business as" (d/b/a), or "trading as" (t/a) names;
- The current street address of its principal place of business if that address is in the United States (for example, a domestic reporting company's headquarters), or, for reporting companies whose principal place of business is outside the United States, the current address from which the company conducts business in the United States (for example, a foreign reporting company's U.S. headquarters);
- Its jurisdiction of formation or registration; and
- Its Taxpayer Identification Number.
  - *A reporting company will also have to indicate the type of filing it is making (that is, whether it is filing an initial report, a correction of a prior report, or an update to a prior report).*

What will a reporting company have to report about its *beneficial owners* and *company applicants*?

- For Beneficial Owners and Applicants:
  - Name
  - DOB
  - **Residential Address** for Individual Beneficial Owners and Applicants
  - **Business Address** for Professionals (Attorneys/CPAs)
  - Identifying Number (DL or Passport) or FinCEN Identifier
- Voluminous Private Information Storage

Who is a ***company applicant*** of a reporting company?

1. Individual who ***files the document*** to create the entity.

2. Individual who is ***primarily responsible for directing or controlling*** the filing by another.

You, your paralegal, assistant, clients, etc.

Only reporting companies formed or registered *on or after* January 1, 2024, will have to report their company applicants. Companies created or registered *before* January 1, 2024, do not have to report their company applicants.

How do you report?

- You will do so electronically through a secure filing system available via FinCEN's website.
- Name of System: Beneficial Ownership Secure System (BOSS).


FINANCIAL CRIMES ENFORCEMENT NETWORK
HOME
ABOUT
RESOURCES
NEWSROOM
CAREERS
ADVISORIES
GLOSSARY
Search
Small Business Resources
Reference Materials
BOI Newsroom
Get FinCEN News Updates
Stay Informed with FinCEN Updates
Subscribe
Beneficial Ownership Questions?
Contact FinCEN
About FinCEN
BOI
BENEFICIAL OWNERSHIP INFORMATION
Many companies are required to report information to FinCEN about the individuals who ultimately own or control them. FinCEN began accepting reports on January 1, 2024. Learn more about reporting deadlines.
Prepare
How do I file?
Do I qualify for an exemption?
How do I get a FinCEN ID?
File
File a report using the BOI E-Filing System
Create a FinCEN ID (optional)
FAQ
Need More Information? View our FAQ page.
Need More Information? Chat With Us Here.
Stay Informed. Subscribe to FinCEN Updates.
Alert: FinCEN has been notified of recent fraudulent attempts to solicit information from individuals and entities who may be subject to reporting requirements under the Corporate Transparency Act.
Alert: Notice Regarding National Small Business United v. Yellen, No. 5:22-cv-01448 (N.D. Ala.)
Brochure Introduction to BOI Reporting
Video: Secretary Yellen on Corporate Transparency
Video: BOI Overview with Under Secretary Nelson

EXEMPTIONS

- The CTA exempts 23 types of entities: 20 employees and gross revenue of $5 million as shown on tax return.

- Take note of whether YOUR own law firm is exempt or will be a Reporting Company.

- Terminating Dormant/Inactive Entities: limited exemption
  - DORMANT/INACTIVE ENTITY: a corporation, limited liability company or other similar entity:
    - (i) in existence for over one year as of the enactment of the CTA;
    - (ii) that has not engaged in active business;
    - (iii) that is not owned, directly or indirectly, by a foreign person;
    - (iv) that has not, in the preceding 12- month period, experienced a change in ownership or sent or received funds in an amount greater than $1,000; and
    - (v) that does not otherwise hold any kind or type of assets, including an ownership interest in any corporation, limited liability company or other similar entity (an “exempt grandfathered entity”).

EXEMPTIONS: entities already otherwise regulated or already required to report

- an issuer of securities registered under Section 12 of the Securities Exchange Act
- A **U.S. governmental** authority
- a **bank**;
- a Federal or state **credit union;**
- a bank or savings and **loan holding company**;
- a registered money transmitting business;
- Entities registered with the SEC;
- a **public accounting firm** registered under the Sarbanes-Oxley Act of 2002;
- a broker or dealer registered under Section 15 of the Exchange Act;
- an exchange or clearing agency registered under Section 6 or Section 17A of the Exchange Act;
- any other entity registered with the Securities and Exchange Commission (the "SEC") under the Exchange Act;
- an **investment company** or investment adviser **registered with the SEC**;
- an investment adviser that has made certain required filings with the SEC;
- an **insurance company** as defined in the Investment Company Act of 1940;
- an insurance producer that is authorized by a state and subject to supervision by the insurance commissioner or a similar official or agency of a state and has an operating presence at a physical office within the United States;
- certain entities registered with the Commodity Futures Trading Commission under the Commodity Exchange Act;
- a **public utility** that provides telecommunication services, electrical power, natural gas, or water and sewer services within the United States;
- a financial market utility designated by the Financial Stability Oversight Council;
- a pooled investment vehicle that is operated or advised by certain entities described in other clauses above;
- certain corporations, limited liability companies or other similar entities that operate exclusively to provide financial assistance to, or hold governance rights over, **tax-exempt Section 501(c) corporations**, political organizations, charitable trusts or split-interest trusts exempt from taxation;

EXEMPTIONS (Cont.)

- If a minor is a beneficial owner, the minor's parents' information may be reported instead of the minor child's information.

But what if there are changes to or inaccuracies in reported information?

- Your company will have **30 days** to report any changes to reported information.
- For updates, the 30 days start from *when* the relevant change occurs.
- For corrections, the 30 days start after you become aware of, or have reason to know of, an inaccuracy in a prior report.

What to do?

- If beneficial owner, obtain FinCEN ID.
  - Confidential number similar to an SSN or EIN that can be given to a reporting company
- The reporting company than would file its report using the beneficial owner's FinCEN identifier.
- To obtain a FinCEN ID, an individual provides FinCEN with the information required to be collected under the CTA.
  - Individual can then supply this FinCEN ID to any reporting company requesting info for the CTA reporting compliance purposes.
- That individual will be responsible for updating FinCEN with any reportable changes within 30 days of any such change.
  - Odd that responsibility for reporting changes falls on individual who experiences the change, rather than on the reporting company who may not know the change has occurred.

Penalties

- Willfully failing to report complete or updated BOI or providing false or fraudulent BOI info
- Reporting requirement – obligation of the Reporting Company and/or FinCEN ID owner
  - 30 days following a change/update
- Any person who provides false information, or fails to report complete or updated information, is subject to:
  - a civil penalty of not more than $500 for each day that the violation continues and may face fines not more than $10,000,
  - imprisonment for not more than two years, or both.

PLANNING IMPLICATIONS

- Vet third-party services before recommendation of filing on behalf of your client. FRAUD ALERT!
- Over-communicate information about the CTA on a regular basis.
- Recommend as a default all companies collect a FinCEN ID from each beneficial owner.
  - If you think might be a beneficial owner because of direct ownership or control of the company or via an indirect interest
  - Individuals can update their own CTA reports.
- TERMINATE: Review existing status in order to modify, merge, or liquidate entities before the first CTA filing to avoid the need to file.
  - Clean it up.

Hypothetical CYA for the CTA

- *We are not working on CTA compliance unless specifically engaged to do X, Y, Z.*
- *We are not prepared to gather necessary data or to annually report to FinCEN on your behalf.*
- *We will assist you in your understanding of the obligations under the CTA; however, we are not engaging in any CTA compliance work at this time.*

Other FinCEN Rumblings / Proposed Rules

- New proposed rule from FINCEN requiring the reporting on any cash and non-financed sale of residential real property to an entity or trust
- The reporting requirements are similar to those in place for the Corporate Transparency Act.
- Transfer exceptions include easements, transfers by death or divorce, and a transfer to a bankruptcy estate.
- Note that a conveyance to a trust for no consideration is not exempt and must be reported.
- Information proposed rule may be found here.

See also 89 Fed. Reg. 12424.

- The deadline for comments is April 16, 2024.
- A FINCEN Fact Sheet is also here.

THANK YOU!

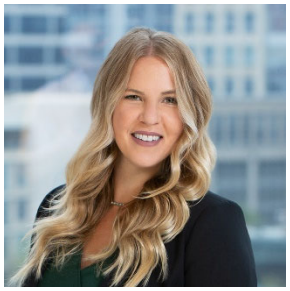
LOVELAND & HURLEY PLLC

- For more detailed information, links, case updates, etc. please email: kloveland@lhestatelaw.com
- Scan code to go to FinCEN.gov for more uplifting & reassuring information:

A Texas Newcomer:
The Non-Charitable Purpose Trust

Selby Rains, *Dallas*
Jackson Walker, LLP

NORTH TEXAS PROBATE BENCH BAR
April 3-5, 2024
Arlington, Texas



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PRIOR EXPERIENCE

Loveland & Hurley, PLLC, Frisco, TX, *Associate Attorney, Trusts and Estates* (June 2022-Feb. 2023)
Sharpe Law Group, Dallas, TX, *Associate Attorney, Trusts and Estates* (Nov. 2019-June 2022)
Tolleson Wealth Management, Dallas, TX, *Trust Officer* (June 2018-Nov. 2019)
Hallman & Associates, P.C., Dallas, TX, *Associate Attorney, Trusts and Estates* (Nov. 2016-June 2018)

MEMBERSHIPS & DESIGNATIONS

Board Certified in Estate Planning and Probate Law, Texas Board of Legal Specialization (Dec. 2022)
Licensed Attorney, State Bar of Texas (Nov. 2016)
Board of Governors, Dallas Estate Planning Council (2023-2025)
Chairperson, Emerging Professionals of the Dallas Estate Planning Council (2020-2023)
Member, Dallas Estate Planning Council
Member, Texas Bar College
Member, State Bar of Texas – Real Estate, Probate & Trust Law Section
Member, Dallas Bar Association – Probate, Trust and Estates Section
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EDUCATION

UNIVERSITY OF OKLAHOMA COLLEGE OF LAW, Norman, OK (August 2013-May 2016)
Doctor of Jurisprudence
American Indian Law Review, Note and Comment Editor

SOUTHERN METHODIST UNIVERSITY, Dallas, TX (August 2006-December 2009)
Bachelor of Arts, International Studies and Spanish Literature
Minors, Psychology and Human Rights

PUBLICATIONS & SPEECHES

PICK THE RIGHT POWER OF ATTORNEY INSTRUMENT (March 31, 2017) American Bar Association, Senior Lawyers Division, Voice of Experience March 2017: Essential Estate Planning Documents

THE CORPORATE TRANSPARENCY ACT OF 2021 (April 26, 2023) American National Bank & Trust, Online CLE

MECHANICS OF TRANSFERRING DIGITAL ASSETS (June 6, 2023) Intermediate Estate Planning and Probate, Texas Bar CLE Course, Co-Author

THE CORPORATE TRANSPARENCY ACT OF 2021 (July 27, 2023) Southwest Community Foundation, an Affiliate of the DJCF, Supporting Women Attorneys Network, CLE

THE CORPORATE TRANSPARENCY ACT OF 2021 (February 16, 2024) Andersen Tax LLC, CLE

A Texas Newcomer: The Non-Charitable Purpose Trust

This article provides an overview of the developing area of non-charitable trusts without ascertainable beneficiaries by exploring the historical context of these trusts, as well as the Texas legislative context surrounding the new statute. Finally, by discussing specific examples, the author aims to provide the audience with a framework to identify when purpose trusts may be helpful to clients in meeting their estate planning needs.

I. Introduction.

The Texas Trust Code recently welcomed a newcomer. The 2023 Texas Legislature added Subchapter F to the Property Code authorizing the creation of "non-charitable trusts without ascertainable beneficiary." These trusts are commonly referred to as "purpose trusts" (interchangeably referred to herein as "non-charitable purpose trusts" or "purpose trusts"). In short, purpose trusts allow wealth creators to focus on a specific goal rather than on a specific beneficiary.

Non-charitable purpose trusts are different from traditional and charitable trusts in a handful of ways. Traditional trusts benefit identifiable individuals or entities. Some examples of traditional trusts include: (i) revocable living trusts used for estate planning and asset management during the settlor's lifetime; (ii) irrevocable trusts created to protect assets, minimize taxes, or provide for beneficiaries; and (iii) testamentary trusts established through a will or will replacements, such as revocable living trusts, that take effect after the settlor's death. The beneficiaries of traditional trusts are named, ascertainable individuals or entities. The trust property of traditional trusts is managed by the trustee, and beneficiaries have certain rights pursuant to the trust agreement and under the law.

Charitable trusts are a type of purpose trust, but unlike non-charitable purpose trusts, charitable trusts serve specific charitable objectives, such as environmental conservation, education, or public welfare. Some examples of charitable trusts include trusts established to: (i) provide educational scholarships; (ii) support advancements in healthcare and disease prevention; (iii) benefit museums, theaters, and cultural institutions; and (iv) focus on the environment. The beneficiaries of charitable trusts are specific charitable causes or named organizations. These trusts are overseen by the trustee and subject to state attorney general oversight.

Key parameters governing non-charitable purpose trusts include: (1) instead of a beneficiary, the trust needs a "trust enforcer" who has the same rights as a beneficiary and must act as a fiduciary to carry out the terms of the trust; (2) if the settlor appoints more than one trust enforcer, a majority is needed to act with the trustee serving as tie breaker in instances where there is an even number of enforcers; (3) trust enforcers are entitled to reasonable compensation; (4) the settlor may provide for how the successor trust enforcers are determined; (5) if there is a vacancy in the office of trust enforcer and the document does not provide for a successor enforcer, the court must appoint one; (6) trust property may be used only for the intended purpose; and (7) if a court determines the amount is excessive, the excess passes under the terms of the trust, or if there are none, back to the

settlor if the settlor is then living (otherwise to the settlor's successors in interest).[1]

II. History.

While new in Texas, non-charitable purpose trusts are not a novel concept. Initially, they were used in offshore jurisdictions, such as the British Virgin Islands, Bermuda, the Cayman Islands, and the Cook Islands, for "off-balance sheet" financing and other business purposes.[2] Purpose trusts can also be traced to England centuries back.[3] Trusts for the maintenance of tombs, monuments and gravesites, performance of religious services, and care of animals are common examples of how purpose trusts were used during the nineteenth and early twentieth centuries.[4]

Due to doctrinal issues, however, courts tended to take a dim view of non-charitable purpose trusts.[5] Specifically, courts refused to recognize the validity of many trusts that failed to qualified as charitable because they were either perpetual in nature or the trust's duration was measured by something other than a human life.[6] While the Rule Against Perpetuities has been modified or terminated in many jurisdictions, it is still a challenge in those that retain it.

Courts also historically held purposes trusts to be invalid because there was no human beneficiary to enforce them.[7] The rationale behind "the beneficiary principle rule" was that the lack of an acceptable beneficiary ran contrary the origins of equity.[8] In other words, it was a fatal flaw (to not have an ascertainable beneficiary) because:

> …it is difficult to visualize the growth of equitable obligations which nobody can enforce…[and] because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court…can control, or…reform."[9]

In the early days, another major hurdle that purposes trusts faced was whether the objective could actually be obtained.[10] If the purpose of the trust was not capable of execution, it would fail to be a valid trust.[11] In instances where the provisions were impossible to carry out, such as the creation of a new alphabet[12] or saying of the masses for the testator's soul,[13] it was common for the court to refuse to enforce the trust.[14] In other words, the trust's purpose must be reasonably attainable, legal, not frivolous and not against public policy.[15] Moreover, if the trust was not sufficiently funded, many courts took the same approach holding the trust to be invalid.[16] On the opposite end, if the trust property was excessive in carrying out the stated purpose, the trust property was often reduced.[17]

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[1] Dr. Gerry W. Beyer *Summary of Changes to Estate Planning Law Made By the 2023 Texas Legislature*, 4 (2023).
[2] Richard C. Ausness *Non-Charitable Purpose Trusts: Past, Present, and Future*, 51 Real Property, Trust and Estate Law Journal 322, 322-23 (2016).
[3] Id. at 328.
[4] Id. at 323.
[5] Id. at 328, 327.
[6] Id. at 323, 328.
[7] Id.
[8] Id. at 330.
[9] Id. (quoting Justice Roxburgh in *In re Astor's Settlement Trusts* [1952] 1 All E.R. 1067 (Eng.)).
[10] Id.
[11] Id.
[12] Id. at 331.
[13] Id. at 334.
[14] Id. at 330.
[15] Id. at 330.
[16] Id. at 331.
[17] See https://abcnews.go.com/US/leona-helmsleys-dog-trouble-richest-world-dies-12/story?id=13810168#:~:text=Trouble%20owed%20her%20coddled%20lifestyle,husband%2C%20billionaire%20hotelier%20Harry%20Helmsley (last visited March 20, 2024); *see* also https://www.dailymail.co.uk/news/article-2001471/Trouble-dog-inherited-12m-billionaire-Leona-Helmsley-dies.html (last visited March 20, 2024).

At common law, enforcement issues and invalidity outcomes were normal in the United States, but purpose trusts gained traction, in large part, due to the popular desire to provide for pets after the owner's death. Modern cases illustrate well the developing trend. For example, in 2008, Trouble, the white Maltese of a very wealthy hotelier and real estate empress, stood to inherit $12 million under her owner's will.[18] A judge later reduced Trouble's inheritance, but the small pup still became the primary beneficiary of a $2 million pet trust.[19] Betty White's Golden Retriever, Pontiac, apparently inherited $5 million after White's passing in 2021.[20] The beloved pets of Oprah Winfrey similarly stand to inherit significant wealth. Oprah's dogs, Sadie, Sunny, Lauren, Layla, and Luke, will be the beneficiaries of a canine care trust slated to received $30 million out of Oprah's estimated $2.5 billion dollar estate.[21]

Beyond the desire to care for those who brought comfort during life, the desire to manage businesses and wealth for a purpose other than economic gain is not new. As such, to partly address the issues that purpose trusts faced under the common law in the United States, the Uniform Trust Code ("UTC") introduced Section 408 and Section 409 in 2000.[22]

Section 408 of the UTC deals with trusts created for the care of a designated domestic or pet animal separating trusts for pets from trusts for created for all other lawful non-charitable purposes.[23] Specifically Section 408(a) provides:

> [a] trust may be created to provide for the care of an animal alive during the settlor's lifetime. The Trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.[24]

Moreover, Section 408(b) addresses the enforcement of pet trusts:

> A trust authorized by this Section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a

[18] *See* https://www.nytimes.com/2008/07/02/us/02gift.html (last visited March 20, 2024).
[19] See https://abcnews.go.com/US/leona-helmsleys-dog-trouble-richest-world-dies-12/story?id=13810168#:~:text=Trouble%20owed%20her%20coddled%20lifestyle,husband%2C%20billionaire%20hotelier%20Harry%20Helmsley (last visited March 20, 2024); *see* also https://www.dailymail.co.uk/news/article-2001471/Trouble-dog-inherited-12m-billionaire-Leona-Helmsley-dies.html (last visited March 20, 2024).
[20] *See* https://www.yahoo.com/lifestyle/oprah-winfrey-dogs-set-inherit-195640424.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAK1ag92VkrnBhihS1zaQc3bAF19XGxD2mjSl9Ty1HeeiDq8Xz6LUtbZBxgawddLs7ul0trpGgTC34SsYXhPs_eJCeex6WAzOVOQ9jB3K-yFZ_8GFRvqTFo5Yo1-Oa5QM5zrWOoDTfllvFBaSWFOhWBAc3RgrHJDEeyXRSqsIpwf6#:~:text=As%20it%20turns%20out%2C%20these,if%20their%20entrepreneurial%20owner%20passes.&text=According%20to%20Forbes%2C%20Winfrey%27s%20net,some%20of%20that%20wealth%20along (last visited March 20, 2024).
[21] See https://www.yahoo.com/lifestyle/oprah-winfrey-dogs-set-inherit-195640424.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAK1ag92VkrnBhihS1zaQc3bAF19XGxD2mjSl9Ty1HeeiDq8Xz6LUtbZBxgawddLs7ul0trpGgTC34SsYXhPs_eJCeex6WAzOVOQ9jB3K-yFZ_8GFRvqTFo5Yo1-Oa5QM5zrWOoDTfllvFBaSWFOhWBAc3RgrHJDEeyXRSqsIpwf6#:~:text=As%20it%20turns%20out%2C%20these,if%20their%20entrepreneurial%20owner%20passes.&text=According%20to%20Forbes%2C%20Winfrey%27s%20net,some%20of%20that%20wealth%20along (last visited March 20, 2024).
[22] *See* Richard, *supra* note 2 at 361.
[23] *See generally* Gerry W. Beyer *Pet Animals: What Happens When Their Humans Die?* 40 SANTA CLARA L. REV. 617 (2000) (available at https://www.animallaw.info/article/wills-trusts-pet-animals-what-happens-when-their-humans-die).
[24] *See* UNIF. TRUST CODE § 408(a).

> person to enforce the trust or to remove a person appointed.[25]

Finally, Section 408(c) provides a mechanism to return the trust property not necessary for the care of the animal to the settlor or the settlor's successors interest:

> [p]roperty of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.[26]

A trust for pet animals is relatively straightforward, but a gap remained for clients who desired to create a trust with thoughtful and benevolent—yet non-charitable—purposes. Therefore, the UTC brought along an intriguing solution by authorizing non-charitable trusts without ascertainable beneficiaries (other than trusts for the care of animals) under Section 409.[27] Specifically, Section 409(1) provides that:

> A trust may be created for a non-charitable purpose without a definite or definitely ascertainable beneficiary or for a non-charitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than twenty-one years.[28]

The fact that the trustee holds the authority to select a valid non-charitable purpose for the trust is a unique feature, together with the time restriction to less than twenty-one (21) years.[29] Similar to Section 408, amounts that exceed what is reasonable for the trust's purpose are returned to the settlor or settlor's successors in interest.[30] Finally, Section 409(2) provides that: "[a] trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court."[31]

As the history shows, purpose trusts have generally been a tool for narrow goals, like maintaining a gravesite or the care of a pet after the death of the owner, but the UTC did well to widen the path forward. After the incorporation of purpose trusts in the UTC, non-charitable trusts without an ascertainable beneficiary found increasing acceptance in the United States with similar statues having already been enacted across the country.[32]

III. HB 2333 and the 2023 Legislature.

HB 2333[33] (the "Bill") brought new vision to trusts in Texas when it proposed to authorize the creation of a trust for a non-charitable purpose without an ascertainable beneficiary. Prior to the Bill, the only non-charitable purpose trust authorized in Texas was for the care of pets under Property Code Section 112.037.[34]

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[25] *See* Id. § 408(b).
[26] *See* Id. § 408(c).
[27] *See* generally, Id. § 409.
[28] *See* Id. § 409(1).
[29] See Id. § 409(1).
[30] See Id. § 409(3).
[31] See Id. § 409(2).
[32] *See* Richard at 322.
[33] *See* https://capitol.texas.gov/tlodocs/88R/billtext/html/HB02333S.htm (last visited March 25, 2024).
[34] *See* https://statutes.capitol.texas.gov/Docs/PR/pdf/PR.112.pdf (last visited March 23, 2024).

As introduced, the Bill outlined two similar but different trust concepts.[35] The first portion of the Bill authorized the creation of a non-charitable purpose trust. Much like the Section 409 of the UTC, it included the concept of a trust enforcer to replace the quintessential trust beneficiary.[36] As such, the trust would need one or more trust enforcers, charged with enforcing the purpose and terms of the trust.[37] In a deviation from Section 409, however, HB 2333 did not contemplate trustee authority to select the trust's purpose,[38] and while the UTC version limits the duration of such trusts to twenty-one (21) years, HB 2333 contained no such restriction.[39]

The second portion of HB 2333 proposed permitting a "commercial legacy trust" for a commercial purpose, including seeking economic and noneconomic benefits.[40] It also provided that a commercial legacy trust may have a business committee, which would act more or less like the board of directors of the trust.[41] Accordingly, the trustee would be obligated to follow the instructions of the business committee in most matters.[42]

Whether influenced by the professional community or otherwise, the "commercial legal trust" piece never made it out of the House Committee.[43] A major concern was the ability of the "business committee" to remove and replace the trust enforcer and in doing so effectively provide unchecked authority to the business committee.[44] Other anxieties included whether: (i) the proposed statute would inadvertently create a new business entity, (ii) the proposed trust language left the planner without design control, (iii) the requirement of funding the controlling interest in the applicable entity would stunt the settlor's interest in funding the trust with non-controlling interests, and (iv) the fiduciary duties stated in the statute caused confusion for the trust's stakeholders.[45]

In turn, on June 18, 2023, Governor Greg Abbott signed HB 2333, which revised part of Texas Property Code Section 111.004(4) by adding Subsection (B). Subsection (B) provides that an express trust may be created "for a particulate purpose, in the case of a trust subject to Subchapter F." HB 2333 also amended Chapter 11 of the Property Code by adding Subchapter F to read as follows:

SUBCHAPTER F. NONCHARITABLE TRUST WITHOUT ASCERTAINABLE BENEFICIARY

Sec. 112.121. VALIDITY OF TRUST; APPLICABILITY.

(a) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary. A noncharitable purpose may include seeking economic or noneconomic benefits.

(b) This subchapter does not apply to a trust created under Section 112.037.

Sec. 112.122. ENFORCEMENT OF TRUST.

(a) A trust created under this subchapter must be enforced by one or more persons appointed in the terms of the trust to serve as a trust enforcer.

[35] *See* Bryan A. Phillips *Purpose Trusts: An Opportunity for Tailored Planning and Governance or Beneficiaries? We Don't Need No Stinking Beneficiaries!* STATE BAR OF TEXAS, 3 (2023).
[36] See Id.
[37] See Id.
[38] See Id.
[39] See Id.
[40] See Id.
[41] See Id.
[42] See Id.
[43] See Id at 4.
[44] See Id.
[45] See Id.

(b) A trust enforcer shall enforce the purpose and terms of the trust. The trust enforcer is not a beneficiary of the trust, but has the rights of a beneficiary provided under this title and the common law of this state, or as otherwise provided by the terms of the trust.

(c) A trust enforcer shall exercise any authority granted under the terms of the trust or the provisions of this section as a fiduciary owing a duty to the trust and is entitled to reasonable compensation for serving as trust enforcer.

(d) A trust enforcer may consent to, waive, object to, or petition an appropriate court concerning any matter regarding the purpose or administration of the trust.

(e) Except as otherwise provided by the terms of the trust, if more than one person is acting as a trust enforcer, any action in that capacity must be decided by the majority vote of the persons acting as trust enforcers. If there are an even number of trust enforcers and a majority vote cannot be established, the decision of the trustee controls.

(f) The terms of the trust may provide for the succession of a trust enforcer or a process of appointing any successor trust enforcer.

(g) If no person is serving as a trust enforcer for a trust created under this subchapter, a court properly exercising jurisdiction shall appoint one or more persons to serve as the trust enforcer.

Sec. 112.123. APPLICATION OR DISTRIBUTION OF TRUST PROPERTY.

(a) Property of a trust created under this subchapter may be applied only to the intended purpose of the trust, except to the extent that a court finds that the value of the trust property exceeds the amount required for the intended purpose of the trust.

(b) Except as provided by the terms of the trust, property found by a court not to be required for the trust's intended purpose shall be distributed:

(1) as provided by the terms of the trust; or

(2) if the trust does not provide for the distribution of such property, to the settlor if then living or to the settlor's successors in interest.

IV. Organically Grown Company. (2018) (Oregon)

Since 1978, Organically Grown Company (OGC) has been a pioneer in sustainable, organic agriculture.[46] From its roots as a nonprofit started by a diverse group of gardeners, small-scale farmers, and environmental activists, OGC has grown into one of the largest independent organic produce distributors in the United States.[47] Over the last 40 years, OGC evolved its ownership structure, from nonprofit to farmers' cooperative to an S-Corp with an employee stock ownership plan, to

[46] *See* https://www.bizjournals.com/portland/news/2020/12/29/1-1-cover-story-edited.html (last visited March 24, 2024).

[47] *See* Id.

continually deepen the company's mission and multi-stakeholder approach.[48]

In 2018, OGC began looking for an ownership structure that would allow it to: (i) put purpose ahead of profits, (ii) be accountable to multiple stakeholder groups (workers, growers and other allies) and (iii) be perpetual in nature so as to remove any pressure to exit.[49] As a long-term ownership solution, OGC adopted a unique purpose trust strategy when it established a form of "steward-ownership"[50] via the Sustainable Food and Agriculture Perpetual Purpose Trust (the "SFAPPT").[51]

Since inception, the SFAPPT has allowed OGC to remain purpose-driven and independent. The SFAPPT was created as an Oregon Benefit Company[52] and received majority ownership.[53] Unlike most trusts, the SFAPPT does not have a finite time period and is committed to serving multiple stakeholder groups.[54] One the day to day side, SFAPPT is managed by "stewards" who actively engage with the organization.[55] Overall governance of the trust, however, is left to five stakeholder groups: (i) employees; (ii) producers; (iii) customers; (iv) community; and (iv) investors.[56] Ultimately, this structure has enabled OGC to remain permanently independent and to continue to deliver on its positive environmental, social, and economic goals, without the pressure to demonstrate short-term quarterly profits or to produce exit-value for shareholders.[57]

V. Facebook, Inc. (2019) (Delaware)

In an effort to create and fund an independent body to address appeals related to content censorship, Facebook, Inc. ("Facebook") established a purpose trust, called the Oversight Board Trust, pursuant to Section 3556 of the Title 12 of the Delaware Code (the "Delaware Purpose Trust Statute") in 2019.[58] The Oversight Board Trust (the "Trust") established an independent panel of approximately twenty (20) formers political leaders, human rights activities and journalists,[59] tasked with fulfilling the following purpose:

> …to facilitate the creation, funding, management, and oversight of a structure that will permit and protect the operation of an Oversight Board for Content Decisions (the "Oversight Board" or "Board"), whose purpose is to protect free expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook's content policies.[60]

[48] *See* https://provender.org/organically-grown-companys-journey-to-trust-ownership-and-beyond/ (last visited March 24, 2024).
[49] *See* Id.
[50] *See generally* Susan N. Gary *The Oregon Stewardship Trust: A New Type of Purpose Trust that Enables Steward-Ownership of a Business*, 99 U. Cin. L. Rev. 707 (2020); *see also* Susan N. Gary *The Need for a New Type of Purpose Trust, the Stewardship Trust*, ACTEC Law Journal Vol. 45: No. 1, Article 8 (2019).
[51] See https://sustainablefoodandagtrust.com/our-story (last visited March 24, 2024).
[52] See https://sos.oregon.gov/business/Pages/benefit-company.aspx (last visited March 24, 2024).
[53] See https://www.bizjournals.com/portland/news/2020/12/29/1-1-cover-story-edited.html (last visited March 24, 2024).
[54] https://www.bizjournals.com/portland/news/2020/12/29/1-1-cover-story-edited.html
[55] See generally Susan N. Gary *The Oregon Stewardship Trust: A New Type of Purpose Trust that Enables Steward-Ownership of a Business*, 99 U. Cin. L. Rev. 707 (2020); see also Susan N. Gary *The Need for a New Type of Purpose Trust, the Stewardship Trust*, ACTEC Law Journal Vol. 45: No. 1, Article 8 (2019).
[56] See https://provender.org/organically-grown-companys-journey-to-trust-ownership-and-beyond / (last visited March 24, 2024).
[57] See https://www.bizjournals.com/portland/news/2020/12/29/1-1-cover-story-edited.html (last visited March 24, 2024).
[58] See https://businesslawtoday.org/2019/12/independence-purpose-facebooks-creative-use-delawares-purpose-trust-statute-establish-independent-oversight/ (last visited March 24, 2024).
[59] See https://time.com/5918499/facebook-oversight-board-cases/ (last visited on March 23, 2024).
[60] See https://businesslawtoday.org/2019/12/independence-purpose-facebooks-creative-use-delawares-purpose-trust-statute-establish-independent-oversight/ (last visited on March 23, 2024).

The members are selected by Facebook and based in London.[61] The Board provides a way for the public to challenge decisions made by Facebook regarding harmful or hateful posts.[62] Mark Zuckerberg, Facebook's CEO, wanted to avoid having the company make the final decision on speech.[63] Therefore, the Board takes cases referred by Facebook or the public, and it selects five (5) members to deliberate on each case.[64]

So far, the Board has issued decisions on a handful of takedowns, with the majority overturning Facebook's initial rulings.[65] For example, after temporarily locking former President Donald J. Trump's account, Facebook referred the case to the Oversight Board.[66] The Board upheld the ban but asked Facebook to review the indefinite suspension.[67] Moreover, after revising the original charter, Facebook made the Board's decisions binding on the company, even if Facebook's own leadership disagreed with them, unless enforcing the decision would break the law.[68]

Other attributes of Facebook's overall strategy include: (i) the Trust serves as the main source of funds needed to facilitate the operations of the Oversight Board; (ii) the Trust is irrevocable and is treated as a settlor trust for federal income tax purposes; and (iii) pursuant to the Delaware LLC Act, the trustees of the Trust have formed and, collectively, on behalf of the Trust, will be the member of a single-member Delaware limited liability company that will be managed by a corporate manager and one or more individual managers.[69]

While critics argue that Facebook's approach has limitations that prevent it from effectively addressing the platform's major issues,[70] the flexibility of Delaware Trust Law and the Delaware LLC Act has allowed Facebook to create path toward carrying out its intended purpose of providing additional transparency and clarity to its users with respect to content decisions and policies.

VI. Patagonia. (2022) (Oregon)

In September 2022, Yvon Chouinard, the founder of Patagonia, took a groundbreaking step to address climate change. After learning his children did not have a desire to take over the family business, Chouinard transferred the voting stock of the $3 billion outfitter to a purpose trust, called the Patagonia Purpose Trust.[71] The trust's purpose: to perpetuate Chouinard's mission of fighting the planet's environmental crisis.[72] In an excerpt on the Patagonia website, Chouinard states that the company's continued purpose is to "save our home planet."[73] Chouinard elected not to sell the company, as he worried a new owner might have different values and his employees would not retain job security.[74]

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[61] See https://www.nytimes.com/2021/05/05/technology/What-Is-the-Facebook-Oversight-Board.html (last visited March 23, 2024).
[62] See https://www.reuters.com/technology/facebook-oversight-board-widens-scope-rule-content-left-up-platform-2021-04-13/ (last visited March 23, 2024).
[63] See Id.
[64] See https://www.nytimes.com/2021/05/05/technology/What-Is-the-Facebook-Oversight-Board.html (last visited March 23, 2024).
[65] See https://www.reuters.com/article/idUSL1N2IH12G/ (last visited March 23, 2024).
[66] See https://www.reuters.com/technology/facebooks-oversight-board-decide-if-trump-should-stay-suspended-2021-01-21/ (last visited March 23, 2024).
[67] See Id.
[68] See https://www.inc.com/business-insider/facebook-oversight-board-content-moderation-zuckerberg-big-tech.html (last visited March 23, 2024).
[69] See https://www.nytimes.com/2021/05/05/technology/What-Is-the-Facebook-Oversight-Board.html (last visited March, 23, 2024).
[70] See https://time.com/5918499/facebook-oversight-board-cases/ (last visited March, 23, 2024).
[71] See https://wealth-counselors.com/blog/purpose-trusts-a-new-means-of-business-succession/ (last visited March 23, 2024).
[72] See https://www.patagonia.com/ownership/ (last visited March 23, 2024).
[73] See https://www.patagonia.com/ownership/ (last visited March 23, 2024).
[74] See Id.

The Patagonia Purpose Trust, guided by the family and advisors, took over the voting stock of the company to ensure that its values were upheld and profits were used for their environmental protection goals.[75] A 501(c)(4) nonprofit organization, called Holdfast Collective, was also set up to transfer the nonvoting stock to ensure that profits generated by the company would be channeled directly into saving the planet.[76] The nonprofit will be funded by Patagonia's dividends, amounting to an estimated $100 million a year.[77]

The tax effect from the transaction is enticing. The business interests were not donated to a charity, so they will encounter an estimated $17.5 million in gift tax since no charitable deduction will be available to Chouinard.[78] That being said, he effectively avoided $700 million in capital gains taxes and substantial estate tax liability upon his death.[79]

Ultimately, this is an pioneer example of using wealth for purpose. Instead of pursuing traditional profit extraction, Patagonia commits to using its wealth to protect the earth. Moreover, the Patagonia Purpose Trust represents an ongoing commitment to a higher purpose, alongside a continuation of a nearly 50-year experiment in responsible business, and other companies are exploring similar structures to align their business objectives with broader societal and environmental goals.

VII. Bloomberg. (TBD)

Mike Bloomberg, the billionaire founder of Bloomberg LP, has made a significant commitment to philanthropy by planning to leave his media and financial information company to Bloomberg Philanthropies.[80] In looking ahead to the company's transition and future when its 81-year-old leader steps back, Bloomberg intends to transfer ownership of Bloomberg LP to his charity, Bloomberg Philanthropies, either upon his death or sooner.[81]

Bloomberg is likely to place the company in a perpetual purpose trust and all of the company's profits would directly support Bloomberg Philanthropies.[82] His two daughters may potentially oversee the trust.[83] Bloomberg's lifetime giving has already approached $15 billion.[84] In 2010, Bloomberg signed the Giving Pledge, publicly committing to donate a majority of his wealth to address societal needs.[85] Bloomberg Philanthropies focuses on areas such as arts, education, environment, government innovation, and public health.[86] By structuring the company ownership this way, he ensures that the income generated from Bloomberg LP will continue to serve charitable purposes.[87] This move echoes the approach taken by Yvon Chouinard, founder of Patagonia, who (as discussed above) similarly gave away the outdoor apparel company to a trust dedicated to fighting climate change.[88]

[75] See Id.
[76] See https://wealth-counselors.com/blog/purpose-trusts-a-new-means-of-business-succession/ (last visited March 23, 2024).
[77] See Id.
[78] See Id.
[79] See Id.
[80] See https://news.yahoo.com/mike-bloomberg-planning-leave-company-231400805.html (last visited March 23, 2024).
[81] See Id.
[82] See Id.
[83] See Id.
[84] See Id.
[85] See Id.
[86] See Id.
[87] See Id.
[88] See Id.

VIII. Conclusion.

With estate and gift tax exemptions at their highest levels since the estate tax was implemented in 1918, there has been a paradigm shift. Many now give greater reflection to the true meaning of legacy over tax considerations. Texas's non-charitable purpose trust statute helps accommodate these shifting attitudes; it provides a new vehicle in Texas designed to help wealth creators transfer purpose through values, relationships and commitments, as well as financial wealth.

The downsides are niche applicability and potentially problematic draftsmanship (especially if the trust may last for 300 years). In drafting a purpose trust, thorough consideration must be given to: (i) clearly defining the settlor's specific objective; (ii) how much property should be retained in trust; (iii) the duration of the trust; (iv) who shall serve as trustee; (v) who shall serve as trust enforcers; and (vi) what happens to the trust property after termination.

Nevertheless, by providing additional flexibility in creating trusts for specific purposes beyond traditional and charitable beneficiaries, purpose trusts are a powerful and flexible new tool for creating shared ownership models for businesses, real estate assets, land, personal property collections, and more. It seems to be a given that more wealth creators will likely be interested in the optionality and innovation that this newcomer brings to the world of estate planning in Texas.

PROBATE, GUARDIANSHIP, AND TRUST JURISDICTION IN TEXAS

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INTRODUCTION

The jurisdiction of Texas courts over the estates of decedents and incapacitated persons has evolved for many years and was fairly well-settled until the passage of the Texas Estates Code (the "TEC"), which became effective on January 1, 2014. A decision was made to redraft virtually all of the jurisdictional provisions of the Texas Probate Code when the TEC was enacted. While this redraft did not make many major substantive changes in the law, it incorporated entirely new language that must now be interpreted by the courts.

The jurisdiction of Texas courts over trusts has remained fairly constant since the passage of Section 115.001 of the Texas Trust Code, which became effective on January 1, 1984 and was based, in part, on the Uniform Probate Code. That is not to say that there have not been some changes, but these changes in trust jurisdiction have not been *as* substantive as those to estate jurisdiction (which, again, were not very substantive to begin with).

The jurisdictional provisions of the TEC describe four different types of jurisdiction:

1. "**Jurisdiction**" is generally defined as "[a] court's power to decide a case or issue a decree." Black's Law Dictionary (7th ed. 1999).

2. "**Concurrent Jurisdiction**" is generally defined as "[j]urisdiction exercised simultaneously by more than one court over the same subject matter and within the same territory, with the litigant having the right to choose the court in which to file the action." Black's Law Dictionary (7th ed. 1999).

3. "**Original Jurisdiction**" is generally defined as "[a] court's power to hear and decide a matter before any other court can review the matter." Black's Law Dictionary (7th ed. 1999).

4. "**Exclusive Jurisdiction**" is generally defined as "[a] court's power to adjudicate an action or class of actions to the exclusion of all other courts." Black's Law Dictionary (7th ed. 1999).

This paper deals with the jurisdiction of four different types of Texas courts:

1. **CONSTITUTIONAL COUNTY COURTS ("CCCs")**:

    1.1. There is a CCC for each of the 254 counties in Texas. Texas Constitution, Article V, Section 15 provides, in part, that "[t]here shall be established in each county in this State a County Court . . . ."

1.2. Article V, Sections 15 through 17 of the Texas Constitution, as well as Chapters 25 and 26 of the Texas Government Code, outline the duties of CCCs and their officers. The CCC "has jurisdiction as provided by law." Tex. Const. art. V, § 16.

1.3. The judges of CCCs are not required to be licensed attorneys, but Article V, Section 15 of the Texas Constitution provides that the judge of a CCC "shall be well informed in the law of the State . . . ."

2. **COUNTY COURTS AT LAW (STATUTORY COUNTY COURTS) EXERCISING PROBATE JURISDICTION ("CCLs"):**

2.1. CCLs are courts created by the Texas Legislature.

2.2. Article V, Section 1 of the Texas Constitution provides, in part, that "[t]he Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto."

2.3. Texas Government Code Section 25.0003(a) provides that "[a] statutory county court has jurisdiction over all causes and proceedings, civil and criminal, original and appellate, prescribed by law for county courts."

2.4. Texas Government Code Section 25.0003(d) provides that "[e]xcept as provided by Subsection (e), a statutory county court has, concurrent with the county court, the probate jurisdiction provided by general law for county courts."

2.5. Texas Government Code Section 25.0003(e) provides that "[i]n a county that has a statutory probate court, a statutory probate court is the only county court created by statute with probate jurisdiction." In other words, if the county has a SPC, then any CCLs in that county lack probate jurisdiction.

2.6. Texas Government Code Section 25.0003(f) provides that "[a] statutory county court does not have the jurisdiction of a

statutory probate court granted statutory probate courts by the Texas Probate Code." Because the Texas Probate Code has been repealed, this section should be construed to apply to the Texas Estates Code.

2.7. The legal jurisdiction of CCLs varies considerably and is established by the statute that creates the particular CCL. The jurisdiction of statutorily created CCLs may be concurrent with the jurisdiction of the CCC and District Courts in the county.

2.8. The judges of CCLs are required to be licensed attorneys. Tex. Gov't Code § 25.0014(3).

3. **STATUTORY PROBATE COURTS ("SPCs"):**

3.1. Article V, Section 1 of the Texas Constitution provides, in part, that "[t]he Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto."

3.2. TEC Section 22.007(c) defines a "Statutory Probate Court" as "a court created by statute and designated as a statutory probate court under Chapter 25, Government Code. For the purposes of this code, the term does not include a county court at law exercising probate jurisdiction unless the court is designated as a statutory probate court under Chapter 25, Government Code."

3.3. Texas Government Code Section 25.0021(b) provides, in part, that "[a] statutory probate court as that term is defined in Section 3 (ii), Texas Probate Code, has:

(1) the general jurisdiction of a probate court as provided by the Texas Probate Code; and

(2) the jurisdiction provided by law for a county court to hear and determine actions, cases, matters, or proceedings instituted under:

(A) Section 166.046, 192.027, 193.007, 552.015, 552.019, 711.004, or 714.003, Health and Safety Code;

(B) Chapter 462, Health and Safety Code; or

(C) Subtitle C or D, Title 7, Health and Safety Code."

There are two potential problems with these statutory definitions:

First, the Texas Probate Code was repealed when the Texas Estates Code went into effect on January 1, 2014. Texas Estates Code Section 21.002(b) probably solves this problem by providing that "[t]his code and the Texas Probate Code, as amended, shall be considered one continuous statute, and for the purposes of any instrument that refers to the Texas Probate Code, this code shall be considered an amendment to the Texas Probate Code."

Second, the definitions are circular: Section 25.0021(b) of the Texas Government Code provides, in part, that "[a] statutory probate court as that term is defined in Section 3 (ii), Texas Probate Code has certain jurisdiction. Section 22.007(c) of the Texas *Estates* Code, on the other hand, defines a "Statutory Probate Court" as a court created by statute and designated as a statutory probate court under Chapter 25, Government Code.

3.4. Texas has eighteen SPCs, which are located in the ten following counties:

(1) Bexar County (two courts);

(2) Collin County (one court);

(3) Dallas County (three courts);

(4) Denton County (one court);

(5) El Paso County (one court);

(6) Galveston County (one court);

(7) Harris County (four courts);

(8) Hidalgo County (one court);

(9) Tarrant County (two courts); and

(10) Travis County (one court).

3.5. The judges of SPCs are required to be licensed attorneys. Tex. Gov't Code § 25.0014(3).

4. **DISTRICT COURTS**:

4.1. The District Court is the court of general jurisdiction in Texas. Texas Constitution, Article V, Section 8 provides, in part, that "District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body."

4.2. The judges of District Courts are required to be licensed attorneys. Tex. Const. art. 5, § 7.

PART 1

PROBATE JURISDICTION

1. **DEFINITIONS**:

1.1. TEC Section 22.007(a) contains the following definition of the word "Court": "(1) a county court in the exercise of its probate jurisdiction; (2) a court created by statute and authorized to exercise original probate jurisdiction; and (3) a district court exercising original probate jurisdiction in a contested matter."

1.2. TEC Section 22.007(b) also provides that "[t]he terms 'county court' and 'probate court" are synonymous and mean: (1) a county court in the exercise of its probate jurisdiction; (2) a court

created by statute and authorized to exercise original probate jurisdiction; and (3) a district court exercising probate jurisdiction in a contested matter."

1.3. TEC Section 22.029 states that "[t]he terms 'probate matter,' 'probate proceedings,' 'proceedings in probate,' and 'proceedings for probate' are synonymous and include a matter or proceeding relating to a decedent's estate."

2. **PRELIMINARY MATTERS**:

2.1. TEC, Chapter 32 deals with jurisdiction and provides that all "probate proceedings" must be filed and heard in a court exercising original probate jurisdiction. TEC § 32.001(a). It is the author's opinion that, in order for Chapter 32 to confer jurisdiction, there must be a pending action that relates to the administration of an estate. If there is no estate administration pending, then TEC Chapter 32 does not apply. This is far more complicated that might initially appear because attorneys in Texas seldom formally close the administration of an estate subject to independent administration. So, when actions are brought years after administration is granted, there is almost always a question on whether the estate remains under administration.

2.2. TEC Section 31.001 defines the term "probate proceeding." TEC Section 31.002 defines "a matter related to a probate proceeding."

2.2.1. The jurisdiction conferred on courts by the TEC depends on whether the matters before a given court are "probate proceedings" or "matters related to a probate proceeding."

2.2.2. TEC Section 32.001(a) provides, in part, that "[a]ll *probate proceedings* must be filed and heard in a court exercising *original probate jurisdiction*." (emphasis added).

2.2.3. Consequently, all "probate proceedings" (as defined by TEC Section 32.001) must be filed and heard in a court exercising original probate jurisdiction.

2.2.4. TEC Section 32.001(a) further provides that "[t]he court exercising original probate jurisdiction also has jurisdiction of all *matters related to the probate proceeding* as specified in Section 31.002 for that type of court." (emphasis added).

2.2.5. Consequently, courts exercising original probate jurisdiction have jurisdiction over "matters related to the probate proceeding" (as such term applies to the court), and that jurisdiction is *not original jurisdiction*.

2.3. TEC Section 32.001(b) provides that "[a] probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy."

2.3.1. Some courts and commentators argue that "pendent and ancillary" is merely another way of saying "matters related to a probate [or guardianship] proceeding" or "matters appertaining or incident to" an estate (or guardianship). *See Goodman v. Summit at W. Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App.—Austin 1997, no pet.) ("[T]he probate court may only exercise 'ancillary' or 'pendent' jurisdiction over a claim that bears some relationship to the estate. Once the estate settles, the claim is 'ancillary' or 'pendent' to nothing, and the court is without jurisdiction."); § 14:9. Pendent and ancillary jurisdiction, 2 Tex. Prac. Guide Probate § 14:9 ("Pendent and ancillary jurisdiction is essentially another name for what we now refer to as a 'matters related to a probate proceeding'" or "'matters appertaining or incident to' an estate or guardianship.")

2.3.2. Other courts disagree, holding that a court may exercise jurisdiction over pendent and/or ancillary matters that are *unrelated* to the underlying probate (or guardianship) proceeding so long as the court's exercise of pendent and ancillary jurisdiction will promote judicial efficiency and economy. *In re Estate of Trevino*, 195 S.W.3d 223, 229 (Tex. App.—San Antonio 2006, no pet.); *Schuchmann v. Schuchmann*, 193 S.W.3d 598, 603 (Tex. App.—Fort Worth 2006, pet. denied); *Sabine Gas Transmission Co. v. Winnie Pipeline Co.*, 15 S.W.3d 199, 201-02 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

2.3.3. The latter is likely the correct interpretation because "pendent and ancillary jurisdiction" is in a subsection separate from the subsection addressing a court's jurisdiction of "matters related to" the probate (or guardianship) proceeding in both statutes (the probate statute and the guardianship statute). TEC §§ 32.001(a)-(b), 1022.001(a)-(b). But this is not without limitation: courts seem to agree that the pendent and/or ancillary matters must have at least some "close relationship" with the underlying probate (or guardianship) proceeding. *Schuchmann*, 193 S.W.3d at 603; *Sabine Gas Transmission Co*, 15 S.W.3d at 202. Just how close remains unclear.

2.4. TEC Section 32.001(c) provides that "[a] final order issued by a probate court is appealable to the court of appeals."

2.4.1. Generally, appeals are available only from final judgments. This principal is known as the "one final judgement" rule. *De Ayala v. Mackie,* 193 S.W.3d 575, 578 (Tex. 2006).

2.4.2. The administration of a decedent's estate is an ongoing process as opposed to an independent event such as a personal injury lawsuit. In the

administration of an estate, the court will frequently make numerous ongoing, interrelated, and independent administrative decisions.

2.4.3. Probate proceedings are an exception to the one final judgment rule because probate proceedings routinely involve multiple final judgments. *Id.* Not every probate order, however, is appealable. *Id.*

2.4.4. The Texas Supreme Court has adopted the following test for determining whether there is appellate jurisdiction over a particular probate court order:

> If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory.

Id. (quoting *Crowson v. Wakeham,* 897 S.W.2d 779, 783 (Tex. 1955)).

2.4.5. Accordingly, if there is no express rule or statute that declares a particular probate court order final and appealable, then the *De Ayala* test is applied.

2.4.6. Parties may also need a severance order to eliminate ambiguities about whether an order is final and appealable under *De Ayala. De Ayala*, 193 S.W.3d at 578.

2.5. TEC Section 32.001(d) provides that "[t]he administration of the estate of a decedent, from the filing of the application for probate and administration, or for administration, until the

decree of final distribution and the discharge of the last personal representative, shall be considered as one proceeding for purposes of jurisdiction. The entire proceeding is a proceeding in rem."

3. **CONSTITUTIONAL COUNTY COURTS ("CCCs"):**

3.1. In a county in which there is no SPC or CCL exercising original probate jurisdiction, the CCC has original jurisdiction of probate proceedings. TEC § 32.002(a). In such a county, the CCC also has original jurisdiction over matters related to a probate proceeding as specified by TEC Section 31.002. TEC §§ 32.001(a), 31.002(a).

3.2. Therefore, in a county in which there is no SPC or CCL exercising original probate jurisdiction, the CCC has original jurisdiction over the following matters:

3.2.1. the probate of a will, with or without administration of the estate (a Probate Proceeding) (TEC §§ 31.001(1), 32.002(a));

3.2.2. the issuance of letters testamentary and of administration (a Probate Proceeding) (TEC §§ 31.001(2), 32.002(a));

3.2.3. an heirship determination or small estate affidavit, community property administration and homestead and family allowances (a Probate Proceeding) (TEC §§ 31.001(3), 32.002(a));

3.2.4. an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent (a Probate Proceeding) (TEC §§ 31.001(4), 32.002(a));

3.2.5. a claim arising from an estate administration and any action brought on the claim (a Probate Proceeding) (TEC §§ 31.001(5), 32.002(a));

3.2.6. the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate (a Probate Proceeding) (TEC §§ 31.001(6), 32.002 (a));

3.2.7. a will construction suit (a Probate Proceeding) (TEC §§ 31.001(7), 32.002(a));

3.2.8. an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(1), 32.002(a), 32.001(a));

3.2.9. an action against a surety of a personal representative or former personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(2), 32.002(a), 32.001(a));

3.2.10. a claim brought by a personal representative on behalf of an estate (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(3), 32.002(a), 32.001(a));

3.2.11. an action brought against a personal representative in the representative's capacity as personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(4), 32.002(a), 32.001(a));

3.2.12. an action for trial of title to real property that is estate property, including enforcement of a lien against the property (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(5), 32.002(a), 32.001(a)); and

3.2.13. an action for trial of the right of property that is estate property (a Matter Related to Probate

Proceeding) (TEC §§ 31.002(a)(6), 32.002(a), 32.001(a)).

3.3. General Observations Regarding Removal of Contested Probate Proceedings from a CCC:

3.3.1. The Texas Legislature believes that every litigant should be entitled to have a contested probate proceeding tried before a judge who is a licensed attorney. CCC judges (as opposed to CCL judges, SPC judges, and District Court judges) are not required to be licensed attorneys. Consequently, the TEC contains provisions providing for the transfer of contested probate proceedings from a CCC to a CCL exercising original probate jurisdiction, SPC, or District Court.

3.3.2. If a "contested probate proceeding" is filed in a CCC, then either the CCC itself or any party to the proceeding may cause to have the contested probate proceeding transferred out of the CCC.

3.3.3. But if the CCC judge and all parties agree, then a contested probate proceeding may nevertheless be tried in the CCC.

3.3.4. A CCC judge is required, however, to assign a contested probate proceeding on the motion of any party to the proceeding.

3.3.5. A motion filed by any such party may designate whether the transfer is to be made to a SPC or a District Court.

3.3.6. In counties in which there is no SPC, but in which there is a CCL exercising original probate jurisdiction, then the transfer may be made only to the CCL (i.e., *not* to a District Court).

3.3.7. In certain circumstances, and only at the request of the judge of the CCC, the entire probate proceeding—the contested and uncontested portions—may be transferred to a SPC.

3.3.8. In any event, once the contested probate proceeding is resolved, the SPC or the District Court must transfer the proceeding back to the CCC.

3.3.9. If an entire probate proceeding (rather than only the contested portions thereof) is transferred to the CCL, then there is no apparent requirement that the proceeding be transferred back to the CCC.

3.4. Contested Probate Proceedings in Counties with no SPC or CCL:

3.4.1. TEC Section 32.003(a) provides that, in a county in which there is no SPC or CCL exercising original probate jurisdiction, when a matter in a probate proceeding is contested, the judge of the CCC may, on the judge's own motion, or shall, on the motion of any party to the proceeding: (1) request the assignment of a SPC judge to hear the contested matter as provided by Section 25.0022 of the Government Code; or (2) transfer the contested matter to the District Court, which may then hear the contested matter as if originally filed in the District Court.

3.4.1.1. Texas Government Code Section 25.0022(h) provides that a judge or former or retired judge of a SPC may be assigned by the presiding judge of the SPCs to hold court in a SPC, a CCC, or any CCL exercising probate jurisdiction when a CCC judge requests the assignment of a SPC judge to hear a probate matter in the CCC.

3.4.1.2. Texas Government Code Section 25.0022(n) provides that a judge who has jurisdiction over a suit pending in one county may, unless a party objects, conduct any of the judicial proceedings except the trial on the merits in a different county.

3.4.1.3. While the TEC does not expressly deal with this situation, it is apparent that, once a probate proceeding ceases to be contested, the assigned court loses jurisdiction and must transfer the "contested matter" back to the CCC pursuant to TEC Section 32.003(e).

3.4.2. TEC Section 32.003(b) provides that, if a party to a probate proceeding files a motion for the assignment of a SPC judge to hear a contested matter in the proceeding before the judge of the CCC transfers the contested matter to a District Court under TEC Section 32.003, the CCC judge shall grant the motion for assignment of a SPC judge and may not transfer the matter to the District Court unless the party withdraws the motion.

3.4.3. TEC Section 32.003(b-1) provides that, if a judge of a CCC requests the assignment of a SPC judge to hear a contested probate proceeding on the judge's own motion or on the motion of a party to the proceeding as provided by TEC Section 32.003, the judge may request that the SPC judge be assigned to the entire proceeding on the judge's own motion or on the motion of a party.

3.4.4. TEC Section 32.003(c) provides that a party to a probate proceeding may file a motion for the assignment of a SPC judge under TEC Section 32.003 before a matter in the proceeding becomes

contested, and the motion is given effect as a motion for assignment of a SPC judge under TEC Section 32.003(a) if the matter later becomes contested.

3.4.5. TEC Section 32.003(d) provides that, notwithstanding any other law, a transfer of a contested matter in a probate proceeding to a District Court under any authority other than the authority under TEC Section 32.003: (1) is disregarded for the purposes of TEC Section 32.003; and (2) does not defeat the right of a party to the proceeding to have the matter assigned to a SPC judge in accordance with this TEC Section 32.003.

3.4.6. TEC Section 32.003(e) provides that a SPC judge assigned to a contested matter in a probate proceeding or to the entire proceeding under TEC Section 32.003 has the jurisdiction and authority granted to a SPC by the TEC. A SPC judge assigned to hear only the contested matters in a probate proceeding shall, on resolution of the matter, including any appeal of the matter, return the matter to the CCC for further proceedings not inconsistent with the orders of the SPC or court of appeals, as applicable. A SPC judge assigned to the entire proceeding as provided by TEC Section 32.003 (b-1) shall, on resolution of the contested matter in the proceeding, including any appeal of the matter, return the entire proceeding to the CCC for further proceedings not inconsistent with the orders of the SPC or court of appeals, as applicable.

3.4.7. TEC Section 32.003(f) provides that a District Court to which a contested matter is transferred under TEC Section 32.003 has the jurisdiction and authority granted to a SPC by the TEC. On resolution of a contested matter transferred to the District Court under TEC Section 32.003, including

any appeal of the matter, the District Court shall return the matter to the CCC for further proceedings not inconsistent with the orders of the District Court or court of appeals, as applicable.

3.4.8. TEC Section 32.003(g) provides that, if only the contested matter in a probate proceeding is assigned to a SPC judge under TEC Section 32.003, or if the contested matter in the probate proceeding is transferred to a District Court under TEC Section 32.003, the CCC shall continue to exercise jurisdiction over the management of the estate, other than a contested matter, until final disposition of the contested matter is made in accordance with TEC Section 32.003. Any matter related to a probate proceeding in which a contested matter is transferred to a District Court may be brought in the District Court. The District Court in which a matter related to the proceeding is filed may, on its own motion or on the motion of any party, find that the matter is not a contested matter and transfer the matter to the CCC with jurisdiction of the management of the estate.

3.4.9. TEC Section 32.003(h) provides that, if a contested matter in a probate proceeding is transferred to a District Court under TEC Section 32.003, the District Court has jurisdiction of any contested matter in the proceeding that is subsequently filed, and the CCC shall transfer those contested matters to the District Court. If a SPC judge is assigned under TEC Section 32.003 to hear a contested matter in a probate proceeding, the SPC judge shall be assigned to hear any contested matter in the proceeding that is subsequently filed.

3.4.10. TEC Section 32.003(i) provides that the clerk of a District Court to which a contested matter in a probate proceeding is transferred under TEC Section 32.003 may perform in relation to the

contested matter any function a county clerk may perform with respect to that type of matter.

3.5. Contested Probate Proceedings in Counties with a CCL but no SPC:

3.5.1. TEC Section 32.004(a) provides that, in a county in which there is no SPC, but in which there is a CCL exercising original probate jurisdiction, when a matter in a probate proceeding is contested, the judge of the CCC may, on the judge's own motion, or shall, on the motion of any party to the proceeding, transfer the contested matter to the CCL. In addition, the judge of the CCC, on the judge's own motion, or on the motion of any party to the proceeding, may transfer the entire proceeding to the CCL.

3.5.2. TEC Section 32.004(b) provides that a CCL to which a proceeding is transferred under TEC Section 32.004 may hear the proceeding as if originally filed in that court. If only a contested matter in the proceeding is transferred, on the resolution of the matter, the matter shall be returned to the CCC for further proceedings not inconsistent with the orders of the CCL.

4. **COUNTY COURTS AT LAW (STATUTORY COUNTY COURTS) EXERCISING PROBATE JURISDICTION ("CCLs"):**

4.1 In a county in which there is no SPC, but in which there is a CCL exercising original probate jurisdiction, the CCL exercising original probate jurisdiction and the CCC have concurrent original jurisdiction of probate proceedings, unless otherwise provided by law. The judge of a CCC may hear probate proceedings while sitting for the judge of any other county court. TEC § 32.002(b). In such a county, the CCC and CCL also have concurrent original jurisdiction over matters related to a probate proceeding as specified by TEC Section 31.002. TEC §§ 32.001(a), 31.002(a)-(b).

4.2 Therefore, in a county in which there is no SPC, but in which there is a CCL exercising original probate jurisdiction, the CCL has original jurisdiction concurrent with the CCC over the following matters:

4.2.1 the probate of a will, with or without administration of the estate (a Probate Proceeding) (TEC §§ 31.001(1), 32.002(b));

4.2.2 the issuance of letters testamentary and of administration (a Probate Proceeding) (TEC §§ 31.001(2), 32.002 (b));

4.2.3 an heirship determination or small estate affidavit, community property administration, and homestead and family allowances (a Probate Proceeding) (TEC §§ 31.001(3), 32.002(b));

4.2.4 an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent (a Probate Proceeding) (TEC §§ 31.001(4), 32.002(b));

4.2.5 a claim arising from an estate administration and any action brought on the claim (a Probate Proceeding) (TEC §§ 31.001(5), 32.002(b));

4.2.6 the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate (a Probate Proceeding) (TEC §§ 31.001(6), 32.002(b));

4.2.7 a will construction suit (a Probate Proceeding) (TEC §§ 31.001(7), 32.002(b));

4.2.8 an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a

personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(1); 32.002(b), 32.001(a));

4.2.9 an action against a surety of a personal representative or former personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(2), 32.002(a), 32.00(b));

4.2.10 a claim brought by a personal representative on behalf of an estate (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(3), 32.002(b), 32.001(a));

4.2.11 an action brought against a personal representative in the representative's capacity as personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(4), 32.002(b), 32.001(a));

4.2.12 an action for trial of title to real property that is estate property, including enforcement of a lien against the property (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(5), 32.002(b), 32.001(a));

4.2.13 an action for trial of the right of property that is estate property (a Matter Related to Probate Proceeding) (TEC §§ 31.002(a)(6), 32.002(b), 32.001(a));

4.2.14 the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court (a Matter Related to Probate Proceeding) (TEC §§ 31.002(b)(2), 32.002(b), 32.001(a)); and

4.2.14.1 [Note that the term "interpretation and administration" of a testamentary trust is a fairly narrow definition and

may or may not include breach-of-fiduciary-duty claims against a trustee.]

4.2.15 the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court (a Matter Related to Probate Proceeding) (TEC §§ 31.002(b)(3), 32.002(b), 32.001(a)).

4.2.15.1 Again, the term "interpretation and administration" of an inter vivos trust is a fairly narrow definition and may or may not include breach-of-fiduciary-duty claims against a trustee.

5. **STATUTORY PROBATE COURTS ("SPCs")**:

5.1. In a county in which there is a SPC, the SPC has original jurisdiction of probate proceedings. TEC § 32.002(c).

5.2. Further, in a county in which there is a SPC, the SPC has exclusive jurisdiction of all probate proceedings, regardless of whether the proceeding is contested or uncontested. TEC § 32.005(a). In such a county, a cause of action related to the probate proceeding must also be brought in the SPC unless the jurisdiction of the SPC is concurrent with the jurisdiction of a District Court as provided by TEC Section 32.007 or with the jurisdiction of any other court. TEC § 32.005(a).

5.3. TEC Section 32.005(a) is construed in conjunction and in harmony with TEC Chapter 401, TEC Section 402.001, and a number of other sections of the TEC relating to independent executors. TEC § 32.005(b). But Section 32.005(a) may not be construed to expand a court's control over an independent executor. TEC § 32.005(b).

5.4. Therefore, in a county in which there is a SPC, the SPC has original jurisdiction (either exclusive or not—*see* TEC Section 32.005(a)) over the following matters:

5.4.1. the probate of a will, with or without administration of the estate (a Probate Proceeding) (TEC §§ 31.001(1), 32.002(c));

5.4.2. the issuance of letters testamentary and of administration (a Probate Proceeding) (TEC §§ 31.001(2), 32.002(c));

5.4.3. an heirship determination or small estate affidavit, community property administration and homestead and family allowances (a Probate Proceeding) (TEC §§ 31.001(3), 32.002(c));

5.4.4. an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent (a Probate Proceeding) (TEC §§ 31.001(4), 32.002(c));

5.4.5. a claim arising from an estate administration and any action brought on the claim (a Probate Proceeding) (TEC §§ 31.001(5), 32.002(c));

5.4.6. the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate (a Probate Proceeding) (TEC §§ 31.001(6), 32.002(c));

5.4.7. a will construction suit (a Probate Proceeding) (TEC §§ 31.001(7), 32.002(c));

5.4.8. an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(1), 32.002(c), 32.001(a));

5.4.9. an action against a surety of a personal representative or former personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(2), 32.002(c), 32.001(b));

5.4.10. a claim brought by a personal representative on behalf of an estate (a Matter Related to Probate Proceeding) (TEC §§ 31.002(3), 32.002(c), 32.001(a));

5.4.11. an action brought against a personal representative in the representative's capacity as personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(4), 32.002(c), 32.001(a));

5.4.12. an action for trial of title to real property that is estate property, including enforcement of a lien against the property (a Matter Related to Probate Proceeding) (TEC §§ 31.002(5), 32.002(c), 32.001(a));

5.4.13. an action for trial of the right of property that is estate property (a Matter Related to Probate Proceeding) (TEC §§ 31.002(5), 32.002(c), 32.001(a));

5.4.14. the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court (a Matter Related to Probate Proceeding) (TEC §§ 31.002(b)(2), 32.002(b), 32.001(a));

5.4.15. the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court (a Matter Related to Probate Proceeding) (TEC §§ 31.002(b)(2), 32.002(b), 32.001(a)); and

5.4.16. any cause of action in which a personal representative of an estate pending in the SPC is a party in the representative's capacity as a personal representative (a Matter Related to Probate Proceeding) (TEC §§ 31.002(c)(2), 32.002(b), 32.001(a)).

5.5. The SPC also has jurisdiction over the following matters:

5.5.1. an action by or against a trustee (TEC § 32.006(1));

5.5.2. an action involving an inter vivos trust, testamentary trust, or charitable trust (TEC § 32.006(2));

5.5.3. an action by or against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent (TEC § 32.006(3)); and

5.5.4. an action to determine the validity of a power of attorney or to determine the agent's rights, powers, or duties under a power of attorney (TEC § 32.006(4)).

5.6. The SPC also has <u>concurrent</u> jurisdiction with a District Court over the following matters:

5.6.1. a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative (TEC § 32.007(1));

5.6.2. an action by or against a trustee (TEC § 32.007(2));

5.6.3. an action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Texas Property Code Section 123.001 (TEC § 32.007(3));

5.6.4. an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate (TEC § 32.007(4));

5.6.5. an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent (TEC § 32.007(5)); and

5.6.6. an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney (TEC § 32.007(6)).

5.7. TEC Section 34.001 deals with a SPC's ability to transfer certain proceedings related to probate proceeding.

5.7.1. TEC Section 34.001(a) provides that "[a] judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in the estate, may transfer to the judge's court from a district, county, or statutory court a cause of action related to a probate proceeding pending in the statutory probate court or a cause of action in which a personal representative of an estate pending in the statutory probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate."

5.8. Texas Government Code Section 25.00222 deals with the transfer of cases by a SPC judge and provides that:

(a) The judge of a statutory probate court may transfer a cause of action pending in that court to another statutory probate court in the same county that has jurisdiction over the cause of action that is transferred.

(b) If the judge of a statutory probate court that has jurisdiction over a cause of action appertaining to or incident to an estate pending in the statutory probate court determines that the court no longer has jurisdiction over the cause of action, the judge may transfer that cause of action to:

(1) a district court, county court, statutory county court, or justice court located in the same county that has jurisdiction over the cause of action that is transferred; or

(2) the court from which the cause of action was transferred to the statutory probate court under Section 5B or 608, Texas Probate Code. [Note that both of these sections have been repealed by the TEC. Section 5B has been replaced by TEC Section 304.001, and Section 608 has been replaced by TEC Section 1022.107.

(c) When a cause of action is transferred from a statutory probate court to another court as provided by Subsection (a) or (b), all processes, writs, bonds, recognizances, or other obligations issued from the statutory probate court are returnable to the court to which the cause of action is transferred as if originally issued by that court. The obligees in all bonds and recognizances taken in and for the statutory probate court, and all witnesses summoned to appear in the statutory probate court, are required to appear before the court to which the cause of action is transferred as if originally required to appear before the court to which the transfer is made.

5.9. Texas Government Code Section 25.0026 provides that:

(a) A statutory probate court or its judge may issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas, and all writs necessary for the enforcement of the jurisdiction of the court. It may issue writs of habeas corpus in cases in

cases in which the offense charged is within the jurisdiction of the court or any court of inferior jurisdiction in the county.

(b) A statutory probate court or its judge may punish for contempt as prescribed by general law.

(c) The judge of a statutory probate court has all other powers, duties, immunities, and privileges provided by law for county court judges.

(d) The judge of a statutory probate court has no authority over the county's administrative business that is performed by the county judge.

6. **DISTRICT COURTS:**

6.1. A District Court does not have original probate jurisdiction over "probate proceedings" or "matters related to probate proceedings" (save and except for its jurisdiction over trusts). It only has jurisdiction to hear a contested probate proceeding that has been transferred to it. When a transfer occurs, the District Court has the jurisdiction of a SPC. TEC § 32.003(f). On resolution of a contested matter transferred to the District Court, the District Court shall return the matter to the CCC for further proceedings not inconsistent with the orders of the District Court or court of appeals, as applicable. *Id.*

PART 2

GUARDIANSHIP JURISDICTION

1. **DEFINITIONS:**

1.1. TEC Section 1002.008 contains the following definition of "Court": "(1) a county court exercising its probate jurisdiction; (2) a court created by statute and authorized to exercise original probate jurisdiction; or (3) a district court exercising original probate jurisdiction over a contested matter. (b) 'Statutory probate court' means a court created by statute and designated as a statutory probate court under Chapter 25, Government

Code. The term does not include a county court at law exercising probate jurisdiction unless the court is designated as a statutory probate court under Chapter 25, Government Code."

1.2. TEC Section 1002.015 contains the following definition of "Guardianship Proceeding": "[a] matter or proceeding related to a guardianship or any other matter covered by this title, including: (1) the appointment of a guardian of a minor or other incapacitated person, including an incapacitated adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child; (2) an application, petition, or motion regarding guardianship or a substitute for guardianship under this title; (3) a mental health action; and (4) an application, petition, or motion regarding a trust created under Chapter 1301."

2. **PRELIMINARY MATTERS**:

2.1. TEC, Chapter 1021 deals with jurisdiction and provides that all "guardianship proceedings" must be filed and heard in a court exercising original probate jurisdiction. TEC § 1022.001(a). It is the author's opinion that, in order for Chapter 1021 to confer jurisdiction, there must be a pending guardianship proceeding pending. If no guardianship proceeding is pending, then TEC Chapter 1021 does not apply.

2.2. TEC Section 1002.015 defines the term "guardianship proceeding." TEC Section 1021.001 defines the term "a matter related to a guardianship proceeding."

2.2.1. The jurisdiction conferred on courts by the TEC depends on whether the matters before a given court are "guardianship proceedings" or "matters related to a guardianship proceeding."

2.2.2. TEC Section 1022.001(a) provides that "[a]ll *guardianship proceedings* must be filed and heard in a court exercising *original probate jurisdiction*." (emphasis added).

2.2.3. Consequently, all "guardianship proceedings" (as defined in TEC Section 1002.015) must be filed and heard in a court exercising original probate jurisdiction. (*See* Part 1, *supra*)

2.2.4. TEC Section 1022.001(a) further provides that "[t]he court exercising original probate jurisdiction also has jurisdiction of all *matters related to the guardianship proceeding* as specified in Section 1021 for that type of court." (emphasis added).

2.2.5. Consequently, courts exercising original probate jurisdiction have jurisdiction over "guardianship proceedings" and "matters related to the guardianship proceeding" (as such terms apply to the court), and that jurisdiction is *not* original jurisdiction.

2.3. TEC Section 1022.001(b) provides that "[a] probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy." *See* discussion of TEC Sections 32.001(b) and 1022.001(b) in Part 1, *supra*.

2.4. TEC Section 1022.001(c) provides that "[a] final order issued by a probate court is appealable to the court of appeals." *See* discussion of TEC Section 32.001(c) in Part 1, *supra*.

2.5. TEC Section 1022.002(d) provides that "[f]rom the filing of the application for the appointment of a guardian of the estate or person, or both, until the guardianship is settled and closed under this chapter, the administration of the estate of a minor or other incapacitated person is one proceeding for the purposes of jurisdiction and is a proceeding in rem."

3. **CONSTITUTIONAL COUNTY COURTS ("CCCs")**:

3.1. In a county in which there is no SPC or CCL exercising original probate jurisdiction, the CCC has original jurisdiction of guardianship proceedings. TEC § 1022.002(a). In such a county, the CCC also has original jurisdiction over matters related to a

guardianship proceeding as specified by TEC 1021.001. TEC §§ 1022.001(a), 1021.001(a).

3.2. Therefore, in a county in which there is no SPC or CCL exercising original probate jurisdiction, the CCC has original jurisdiction over the following matters:

3.2.1. the appointment of a guardian of a minor or other incapacitated person, including an incapacitated adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child (a Guardianship Proceeding) (TEC §§ 1022.002(a), 1022.001(a), 1002.015(1));

3.2.2. an application, petition, or motion regarding guardianship or a substitute for guardianship under this title (a Guardianship Proceeding) (TEC §§ 1022.002(a), 1022.001(a), 1002.015(2));

3.2.3. a mental health action (a Guardianship Proceeding) (TEC §§ 1022.002(a), 1022.001(a), 1002.015(3));

3.2.4. an application, petition, or motion regarding a trust created under Chapter 1301 (a Guardianship Proceeding) (TEC §§ 1022.002(a), 1022.001(a), 1002.015(4));

3.2.5. the granting of letters of guardianship (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(1), 1022.001(a));

3.2.6. the settling of the account of a guardian and all other matters relating to the settlement, partition, or distribution of a ward's estate (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(2), 1022.001(a));

3.2.7. a claim brought by or against a guardianship estate (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(3), 1022.001(a));

3.2.8. an action for trial of title to real property that is guardianship estate property, including the enforcement of a lien against the property (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(4), 1022.001(a));

3.2.9. an action for trial of the right of property that is guardianship estate property (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(5), 1022.001(a));

3.2.10. after a guardianship of the estate of a ward is required to be settled as provided by TEC Section 1204.001:

3.2.10.1. an action brought by or on behalf of the former ward against a former guardian of the ward for alleged misconduct arising from the performance of the person's duties as guardian (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(A), 1022.001(a));

3.2.10.2. an action calling on the surety of a guardian or former guardian to perform in place of the guardian or former guardian, which may include the award of a judgment against the guardian or former guardian in favor of the surety (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(B), 1022.001(a));

3.2.10.3. an action against a former guardian or the former ward that is brought by a

surety that is called on to perform in place of the former guardian (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(C), 1022.001(a));

3.2.10.4. a claim for the payment of compensation, expenses, and court costs, and any other matter authorized under Chapter 1155 (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(D), 1022.001(a)); and

3.2.10.5. a matter related to an authorization made or duty performed by a guardian under Chapter 1204 (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(E), 1022.001(a)); and

3.2.11. the appointment of a trustee for a trust created under Section 1301.053 or 1301.054, the settling of an account of the trustee, and all other matters relating to the trust. (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(7), 1022.001(a)).

3.3. General Observations Regarding the Removal of Contested Guardianship Proceedings from a CCC:

3.3.1. The Texas Legislature believes that every litigant should be entitled to have a contested guardianship proceeding tried before a judge who is a licensed attorney. CCC judges (as opposed to CCL judges, SPC judges, and District Court judges) are not required to be licensed attorneys. Consequently, the TEC contains provisions providing for the transfer of <u>contested</u> guardianship proceedings from a CCC to a CCL exercising probate jurisdiction, a SPC, or a District Court.

3.3.2. If a "contested guardianship proceeding" is filed in a CCC in a county in which there is no SPC or CCL exercising original probate jurisdiction, then either the CCC judge, or any party to the proceeding, may cause to have the "contested guardianship proceeding" (rather than the entire proceeding) transferred out of the CCC to either a District Court or a SPC.

3.3.3. Notwithstanding this fact, if the CCC judge and all parties agree, then the contested probate proceeding may be tried in the CCC.

3.3.4. A CCC judge is required, however, to assign the "contested guardianship proceeding" to a SPC (rather than to a District Court) on the motion of any party to the proceeding.

3.3.5. If the CCC judge or any party to the proceeding requests assignment of a SPC judge to hear a "contested guardianship matter," then the CCC judge may also request that the SPC be assigned the "entire guardianship proceeding" (rather than only the contested portions of the guardianship proceeding).

3.3.6. In counties where there is no SPC, but in which there is a CCL exercising original probate jurisdiction, then the transfer may be made only to the CCL (i.e., not to a District Court).

3.3.7. If there is a SPC in the county, then the SPC has exclusive jurisdiction of all guardianship proceedings, regardless of whether they are contested.

3.3.8. In certain circumstances, and only at the request of the judge of the CCC, the entire guardianship proceeding—the contested and uncontested

portions—may be transferred to a SPC pending resolution of the contested guardianship proceeding. In any event, once the contested guardianship proceeding is resolved, the SPC must transfer the proceeding back to the CCC.

3.4. Contested Guardianship Proceedings in Counties with no SPC or CCL:

3.4.1. TEC Section 1022.003(a) provides that, in a county in which there is no SPC or CCL exercising original probate jurisdiction, when a matter in a guardianship proceeding is contested, the judge of the CCC may, on the judge's own motion, or shall, on the motion of any party to the proceeding: (1) request the assignment of a SPC judge to hear the contested matter as provided by Section 25.0022 of the Government Code; or (2) transfer the contested matter to the District Court, which may then hear the contested matter as if originally filed in the District Court.

3.4.1.1. Texas Government Code Section 25.0022(h) provides that a judge or former or retired judge of a SPC may be assigned by the presiding judge of the SPCs to hold court in a SPC, a CCC, or any CCL exercising probate jurisdiction when a CCC judge requests the assignment of a SPC judge to hear a probate matter in the CCC.

3.4.1.2. Texas Government Code Section 25.0022(n) provides that a judge who has jurisdiction over a suit pending in one county may, unless a party objects, conduct any of the judicial proceedings except the trial on the merits in a different county.

3.4.1.3. While the TEC does not expressly deal with this situation, it is apparent that, once a guardianship proceeding ceases to be contested, the assigned court loses jurisdiction and must transfer the "contested matter" back to the CCC pursuant to TEC Section 32.003(e).

3.4.2. TEC Section 1022.003(b) provides that, if a party to a guardianship proceeding files a motion for the assignment of a SPC judge to hear a contested matter in the proceeding before the judge of the CCC transfers the contested matter to a District Court under TEC Section 32.003, the CCC judge shall grant the motion for assignment of a SPC judge and may not transfer the matter to the District Court unless the party withdraws the motion.

3.4.3. TEC Section 1022.003(c) provides that, if a judge of a CCC requests the assignment of a SPC judge to hear a contested guardianship proceeding on the judge's own motion or on the motion of a party to the proceeding as provided by TEC Section 1022.003, the judge may request that the SPC judge be assigned to the entire proceeding on the judge's own motion or on the motion of a party.

3.4.4. TEC Section 1022.003(d) provides that a party to a guardianship proceeding may file a motion for the assignment of a SPC judge under TEC Section 1022.003 before a matter in the proceeding becomes contested, and the motion is given effect as a motion for assignment of a SPC judge under TEC Section 1022.003(a) if the matter later becomes contested.

3.4.5. TEC Section 1022.003(e) provides that, notwithstanding any other law, a transfer of a

contested matter in a guardianship proceeding to a District Court under any authority other than the authority under TEC Section 1022.003: (1) is disregarded for the purposes of TEC Section 1022.003; and (2) does not defeat the right of a party to the proceeding to have the matter assigned to a SPC judge in accordance with TEC Section 1022.003.

3.4.6. TEC Section 1022.003(f) provides that a SPC judge assigned to a contested matter in a guardianship proceeding or to the entire proceeding under TEC Section 1022.003 has the jurisdiction and authority granted to a SPC by the TEC. A SPC judge assigned to hear only the contested matters in a guardianship proceeding shall, on resolution of the matter, including any appeal of the matter, return the matter to the CCC for further proceedings not inconsistent with the orders of the SPC or court of appeals, as applicable. A SPC judge assigned to the entire proceeding as provided by TEC Section 1022.003(c) shall, on resolution of the contested matter in the proceeding, including any appeal of the matter, return the entire proceeding to the CCC for further proceedings not inconsistent with the orders of the SPC or court of appeals, as applicable.

3.4.7. TEC Section 1022.003(g) provides that a District Court to which a contested matter is transferred under TEC Section 1022.003 has the jurisdiction and authority granted to a SPC by the TEC. On resolution of a contested matter transferred to the District Court under TEC Section 1022.003, including any appeal of the matter, the District Court shall return the matter to the CCC for further proceedings not inconsistent with the orders of the District Court or court of appeals, as applicable.

3.4.8. TEC Section 1022.003(h) provides that, if only the contested matter in a guardianship proceeding is

assigned to a SPC judge under TEC Section 1022.003, or if the contested matter in the guardianship proceeding is transferred to a District Court under TEC Section 1022.003, the CCC shall continue to exercise jurisdiction over the management of the guardianship, other than a contested matter, until final disposition of the contested matter is made in accordance with TEC Section 1022.003. Any matter related to a guardianship proceeding in which a contested matter is transferred to a District Court may be brought in the District Court. The District Court in which a matter related to the proceeding is filed may, on its own motion or on the motion of any party, find that the matter is not a contested matter and transfer the matter to the CCC with jurisdiction of management of the guardianship.

3.4.9. TEC Section 1022.003(i) provides that, if a contested matter in a guardianship proceeding is transferred to a District Court under TEC Section 1022.003, the District Court has jurisdiction of any contested matter in the proceeding that is subsequently filed, and the CCC shall transfer those contested matters to the District Court. If a SPC judge is assigned under TEC Section 1022.003 to hear a contested matter in a guardianship proceeding, the SPC judge shall be assigned to hear any contested matter in the proceeding that is subsequently filed.

3.4.10. TEC Section 1022.003(j) provides that the clerk of a District Court to which a contested matter in a guardianship proceeding is transferred under TEC Section 1022.003 may perform in relation to the transferred matter any function a county clerk may perform with respect to that type of matter.

3.5. Contested Guardianship Proceedings in Counties with a CCL but no SPC:

3.5.1. TEC Section 1022.004(a) provides that, in a county in which there is no SPC, but in which there is a CCL exercising original probate jurisdiction, when a matter in a guardianship proceeding is contested, the judge of the CCC may, on the judge's own motion, or shall, on the motion of any party to the proceeding, transfer the contested matter to the CCL. In addition, the judge of the CCC, on the judge's own motion or on the motion of any party to the proceeding, may transfer the entire proceeding to the CCL.

3.5.2. TEC Section 1022.004(b) provides that a CCL to which a proceeding is transferred under TEC Section 1022.004 may hear the proceeding as if originally filed in that court. If only a contested matter in the proceeding is transferred, on the resolution of the matter, the matter shall be returned to the CCC for further proceedings not inconsistent with the orders of the CCL.

3.6. Contested Guardianship Proceedings in Counties with a SPC:

3.7. TEC Section 1022.005(a) provides that, in a county in which there is a SPC, the SPC has exclusive jurisdiction of all guardianship proceedings, regardless of whether the proceeding is contested or uncontested.

3.8. TEC Section 1022.005(b) provides that a cause of action related to a guardianship proceeding of which the SPC has exclusive jurisdiction as provided by TEC Section 1022.005(a) must be brought in the SPC unless the jurisdiction of the SPC is concurrent with the jurisdiction of a District Court as provided by TEC Section 1022.006 or with the jurisdiction of any other court.

3.9. TEC Section 1022.006 provides that a SPC has concurrent jurisdiction with the District Court in: (1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a guardian; and (2) an action involving a guardian in which each other party aligned with the guardian is not an interested person in the guardianship.

4. **COUNTY COURTS AT LAW (STATUTORY COUNTY COURTS) EXERCISING PROBATE JURISDICTION ("CCLs"):**

4.1. In a county in which there is no SPC, but in which there is a CCL exercising original probate jurisdiction, the CCL and the CCC have concurrent original jurisdiction of guardianship proceedings, unless otherwise provided by law. The judge of a CCC may hear guardianship proceedings while sitting for the judge of any other county court. TEC § 1022.002(b). In such a county, the CCC and CCL also have concurrent original jurisdiction over matters related to a guardianship proceeding as specified by TEC 1021.001. TEC §§ 1022.001(a), 1021.001(a).

4.2. Therefore, in a county in which there is no SPC, but in which there is a CCL exercising original probate jurisdiction, the CCL has original jurisdiction concurrent with the CCC over the following matters:

4.2.1. the appointment of a guardian of a minor or other incapacitated person, including an incapacitated adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child (a Guardianship Proceeding) (TEC §§ 1022.002(b), 1002.015(1));

4.2.2. an application, petition, or motion regarding guardianship or a substitute for guardianship under Title 3 of the TEC (a Guardianship Proceeding) (TEC §§ 1022.002(b), 1002.015(2));

4.2.3. a mental health action (a Guardianship Proceeding) (TEC §§ 1022.002(b), 1002.015(3));

4.2.4. an application, petition, or motion regarding a trust created under Chapter 1301 of the TEC (a Guardianship Proceeding) (TEC §§ 1022.002(b), 1002.015(4));

4.2.5. the granting of letters of guardianship (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(1), 1022.001(a));

4.2.6. the settling of the account of a guardian and all other matters relating to the settlement, partition, or distribution of a ward's estate (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(2), 1022.001(a));

4.2.7. a claim brought by or against a guardianship estate (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(3), 1022.001(a));

4.2.8. an action for trial of title to real property that is guardianship estate property, including the enforcement of a lien against the property (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(4), 1022.001(a));

4.2.9. an action for trial of the right of property that is guardianship estate property (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(5), 1022.001(a));

4.2.10. after a guardianship of the estate of a ward is required to be settled as provided by TEC Section 1204.001:

4.2.10.1. an action brought by or on behalf of the former ward against a former guardian of the ward for alleged

misconduct arising from the performance of the person's duties as guardian (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(A), 1022.001(a));

4.2.10.2. an action calling on the surety of a guardian or former guardian to perform in place of the guardian or former guardian, which may include the award of a judgment against the guardian or former guardian in favor of the surety (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(B). 1022.001(a));

4.2.10.3. an action against a former guardian of the former ward that is brought by a surety that is called on to perform in place of the former guardian (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(C), 1022.001(a));

4.2.10.4. a claim for the payment of compensation, expenses, and court costs, and any other matter authorized under Chapter 1155 of the TEC (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(D), 1022.001(a)); and

4.2.10.5. a matter related to an authorization made or duty performed by a guardian under Chapter 1204 (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(6)(E), 1022.001(a)); and

4.2.11. the appointment of a trustee for a trust created under Section 1301.053 or 1301.054 of the TEC, the

settling of an account of the trustee, and all other matters relating to the trust. (a Matter Related to Guardianship Proceeding) (TEC §§ 1021.001(a)(7), 1022.001(a)).

5. **STATUTORY PROBATE COURTS ("SPCs")**:

5.1. In a county in which there is a SPC, the SPC has original jurisdiction of guardianship proceedings. TEC § 1022.002(c).

5.2. Further, in a county in which there is a SPC, the SPC has exclusive jurisdiction of all guardianship proceedings, regardless of whether the proceeding is contested or uncontested. TEC § 1022.005(a). In such a county, a cause of action related to a guardianship proceeding of which the SPC has exclusive jurisdiction as provided by TEC Section 1022.005(a) must be brought in the SPC unless the jurisdiction of the SPC is concurrent with the jurisdiction of a District Court as provided by TEC Section 1022.006 or with the jurisdiction of any other court. TEC § 1022.005(b).

5.3. TEC Section 1022.006 provides that a SPC has concurrent jurisdiction with the District Court in: (1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a guardian; and (2) an action involving a guardian in which each other party aligned with the guardian is not an interested person in the guardianship.

5.4. Therefore, without in any way limiting the generality of the foregoing provisions, in a county in which there is a SPC, the SPC has exclusive jurisdiction over the following matters:

5.4.1. the appointment of a guardian of a minor or other incapacitated person, including an incapacitated adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child (a Guardianship Proceeding) (TEC §§ 1022.005(a), 1002.015(1));

5.4.2. an application, petition, or motion regarding guardianship or a substitute for guardianship under this Title 3 of the TEC (a Guardianship Proceeding) (TEC §§ 1022.005(a), 1002.015(2));

5.4.3. a mental health action (a Guardianship Proceeding) (TEC §§ 1022.005(a), 1002.015(3)); and

5.4.4. an application, petition, or motion regarding a trust created under Chapter 1301 of the TEC (a Guardianship Proceeding) (TEC §§ 1022.005(a), 1002.015(4)).

5.5. Similarly, in a county in which there is a SPC, the following matters must be brought in the SPC unless the SPC's jurisdiction is concurrent with a District Court as provided by TEC Section 1022.006 or with the jurisdiction of any other court (TEC § 1022.005(b)):

5.5.1. the granting of letters of guardianship (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(1), 1022.001(a));

5.5.2. the settling of the account of a guardian and all other matters relating to the settlement, partition, of distribution of a ward's estate (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(2), 1022.001(a));

5.5.3. a claim brought by or against a guardianship estate (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(3), 1022.001(a));

5.5.4. an action for trial of title to real property that is guardianship estate property, including the enforcement of a lien against the property (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(4), 1022.001(a));

5.5.5. an action for trial of the right of property that is guardianship estate property (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(5), 1022.001(a));

5.5.6. after a guardianship of the estate of a ward is required to be settled as provided by TEC Section 1204:

5.5.6.1. an action brought by or on behalf of the former ward against a former guardian of the ward for alleged misconduct arising from the performance of the person's duties as guardian (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(6)(A), 1022.001(a));

5.5.6.2. an action calling on the surety of a guardian or former guardian to perform in place of the guardian or former guardian, which may include the award of a judgment against the guardian or former guardian in favor of the surety (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(6)(B), 1022.001(a));

5.5.6.3. an action against a former guardian or the former ward that is brought by a surety that is called on to perform in place of the former guardian (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(6)(C), 1022.001(a));

5.5.6.4. A claim for the payment of compensation, expenses, and court

costs, and any other matter authorized under Chapter 1155 (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(6)(D), 1022.001(a));

5.5.6.5. A matter related to an authorization made or duty performed by a guardian under Chapter 1204 (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(6)(E), 1022.001(a));

5.5.7. the appointment of a trustee for a trust created under Section 1301.053 or 1301.054, the settling of an account of the trustee, and all other matters relating to the trust. (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(a)(7), 1022.001(a));

5.5.8. a suit, action, or application filed against or on behalf of a guardianship or a trustee of a trust created under TEC §§ 1301.053 or 1301.054 (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(b)(2), 1022.001 (a)); and

5.5.9. a cause of action in which a guardian in a guardianship pending in the statutory probate court is a party (a Matter Related to Guardianship Proceeding) (TEC §§ 1022.005(b), 1021.001(b)(3), 1022.001(a)).

5.6. TEC Section 1022.007 deals with a SPC's ability to transfer to itself from another court certain matters related to a guardianship proceeding that is pending in the SPC.

5.6.1. TEC Section 1022.007(a) provides that a judge of a SPC, on the motion of a party to the action or on the motion of a person interested in the guardianship, may (1) transfer to the SPC from a

district, county, or statutory court a cause of action that is a matter related to a guardianship proceeding pending in the SPC, including a cause of action that is a matter related to a guardianship proceeding pending in the SPC and in which the guardian, ward, or proposed ward in the pending guardianship proceeding is a party; and (2) consolidate the transferred cause of action with the guardianship proceeding to which it relates and any other proceedings in the SPC that are related to the guardianship proceeding.

5.7. Texas Government Code Section 25.00222 deals with the transfer of cases by a SPC judge and provides that:

(a) The judge of a statutory probate court may transfer a cause of action pending in that court to another statutory probate court in the same county that has jurisdiction over the cause of action that is transferred.

(b) If the judge of a statutory probate court that has jurisdiction over a cause of action appertaining or incident to an estate pending in the statutory probate court determines that the court no longer has jurisdiction over the cause of action, the judge may transfer that cause of action to:

(1) a district court, county court, statutory county court, or justice court located in the same county that has jurisdiction over the cause of action that is transferred; or

(2) the court from which the cause of action was transferred to the statutory probate court under Section 5B or 608, Texas Probate Code. [Both of these sections have been repealed by the TEC. Section 5B has been replaced by TEC Section 304.001. Section 608 has been replaced by TEC Section 1022.107].

(c) When a cause of action is transferred from a statutory probate court to another court as provided by Subsection (a) or (b), all processes, writs, bonds, recognizances, or other obligations issued from the statutory probate court are returnable to the court to which the cause of action is transferred as if originally issued by that court. The obligees in all bonds and recognizances taken in and for the statutory probate court, and all witnesses summoned to appear in the statutory probate court, are required to appear before the court to which the cause of action is transferred as if originally require to appear before the court to which the cause of action is transferred as if originally required to appear before the court to which transfer is made.

5.8. Texas Government Code Section 25.0026 provides that:

(a) A statutory probate court or its judge may issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari, supersedeas, and all writs necessary for the enforcement of the jurisdiction of the court. It may issue writs of habeas corpus in cases in cases in which the offense charged is within the jurisdiction of the court or any court of inferior jurisdiction in the county.

(b) A statutory probate court or its judge may punish for contempt as prescribed by general law.

(c) The judge of a statutory probate court has all other powers, duties, immunities, and privileges provided by law for county court judges.

(d) The judge of a statutory probate court has no authority over the county's administrative business that is performed by the county judge.

6. **DISTRICT COURTS**:

6.1. A District Court does not have original probate jurisdiction over "guardianship proceedings" or "matters related to guardianship proceedings" (save and except for its jurisdiction over trusts). It only has jurisdiction to hear a contested guardianship proceeding that has been transferred to it. When a transfer occurs, the District Court has the jurisdiction of a SPC. TEC § 1022.003(g). On resolution of a contested matter transferred to the District Court, the District Court shall return the matter to the CCC for further proceedings not inconsistent with the orders of the District Court or court of appeals, as applicable. *Id.*

7. **TRANSFER OF CONTESTED GUARDIANSHIP OF THE PERSON OF A MINOR**:

7.1. TEC Section 1022.008(a) provides that, "[i]f an interested person contests an application for the appointment of a guardian of the person of a minor or an interested person seeks the removal of a guardian of the person of a minor, the judge, on the judge's own motion, may transfer all matters related to the guardianship proceeding to a court of competent jurisdiction in which a suit affecting the parent-child relationship under the Family Code is pending."

7.2. TEC Section 1022.008(b) provides that, "[t]he probate court that transfers a proceeding under this section to a court with proper jurisdiction over suit affecting the parent-child relationship shall send to the court to which the transfer is made the complete files in all matters affecting the guardianship of the person of the minor and certified copies of all entries in the judge's guardianship docket. The transferring court shall keep a copy of the transferred files. If the transferring court retains jurisdiction of the guardianship of the estate of the minor or of another minor who was subject of the suit, the court shall send a copy of the complete files to the court to which the transfer is made and shall keep the original files."

7.3. TEC Section 1022.008(c) provides that, "[t]he court to which the transfer is made under this section shall apply the procedural and substantive provisions of the Family Code, including Sections 115.005 and 115.205, in regard to enforcing an order

rendered by the court from which the proceeding was transferred."

PART 3

TRUST JURISDICTION

1. **DEFINITIONS**:

1.1. "TTC" refers to the Texas Trust Code.

1.2. TTC Section 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."

2. **PRELIMINARY MATTERS**:

2.1. Trust jurisdiction is governed by Texas Trust Code Section 115.001. Originally, the District Court had exclusive and original jurisdiction over trusts, except for jurisdiction conferred on Statutory Probate Courts. Section 115.001 originally contained a "laundry list" of trust matters over which the District Court had jurisdiction. Interpretation of this laundry list led to litigation, which ultimately caused the legislature to change the statute and give District Courts original and exclusive jurisdiction over "all proceedings by or against a trustee and all proceedings concerning trusts . . . ." When the legislature made these changes, it left the laundry list in Section 115.001. If a proceeding is brought by or against a trustee, or if a proceeding "concerns" a trust, then the laundry list is irrelevant—the District Court has jurisdiction.

2.2. District Courts and, to some extent, SPCs had original and exclusive jurisdiction over trust matters when TTC Section 115.001 was originally enacted. Over the years, this jurisdiction has been expanded to include other courts.

3. **DISTRICT COURTS**:

3.1. TTC Section 115.001(a) provides that, "[e]xcept as provided by Subsection (d) of this section, a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to:

(1) construe a trust instrument;

(2) determine the law applicable to a trust instrument;

(3) appoint or remove a trustee;

(4) determine the powers, responsibilities, duties and liability of a trustee;

(5) ascertain beneficiaries;

(6) make determinations of fact affecting the administration, distribution or duration of a trust;

(7) determine a question arising in the administration or distribution of a trust;

(8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or this subtitle;

(9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and

(10) surcharge a trustee."

3.2. TTC Section 115.001(a-1) provides that, "[t]he list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding against a trustee or a proceeding concerning a trust under

Subsection (a) whether or not the proceeding is listed in Subsection (a)."

3.3. TTC Section 115.001(b) provides that, "[t]he district court may exercise the powers of a court of equity in matters pertaining to trusts."

3.4. TTC Section 115.001(c) provides that, "[t]he court may intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. A trust is not subject to continuing judicial supervision unless the court orders continuing judicial supervision."

3.5. TTC Section 115.001(d) provides that the jurisdiction of the district court is exclusive except for jurisdiction conferred by law on:

3.5.1. a statutory probate court;

3.5.1.1. [Note that bracketed comments are the author's and are not part of TTC Section 115.001(d).]

3.5.1.2. [TEC Section 32.006(1) provides that a SPC has jurisdiction over an action by or against a trustee.]

3.5.1.3. [TEC Section 32.006(2) provides that a SPC has jurisdiction over an action involving an inter vivos trust, testamentary trust, or charitable trust.]

3.5.1.4. [TEC Section 32.007(2) provides that a SPC has concurrent jurisdiction with the District Court over actions by or against a trustee.]

3.5.1.5. [TEC Section 32.007(3) provides that a SPC has concurrent jurisdiction with

the District Court over actions involving a inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Section 123.001 of the Texas Property Code.]

3.5.2. a court that creates a [management] trust under Section 867, Texas Probate Code [which has been repealed and is now TEC Section 1301.051 et seq.];

3.5.2.1. [TEC Section 1301.052(a) provides that an application for the creation of a management trust under Section 1301.054 must be filed in the same court in which a proceeding for the appointment of a guardian of the person is pending, if any.]

3.5.2.2. [TEC Section 1301.052(b) provides that, if a proceeding for the appointment of a guardian for an alleged incapacitated person is not pending on the date an application is filed for the creation of a trust under Section 1301.054 for the person, venue for a proceeding to create a trust must be determined in the same manner as venue for a proceeding for the appointment of a guardian is determined under Section 1023.001. This section does not confer jurisdiction on any court if a proceeding for the appointment of a guardian is not pending.]

3.5.2.3. [To make this more confusing, TEC Section 1301.053(a) provides that, on application by an appropriate person, the court with jurisdiction over the

proceedings may enter an order that creates a management trust.]

3.5.2.4. [This section obviously contemplates that Section 1301 (management) trusts may be created by courts exercising jurisdiction over guardianship matters.]

3.5.3. a court that creates a trust under Section 142.005 [of the Texas Property Code];

3.5.3.1. [Texas Property Code Section 142.005(a) provides that "[a]ny court of record with jurisdiction to hear a suit involving a beneficiary" may create a Section 142.005 Trust. This would grant jurisdiction to District Courts and SPCs. Further, this could conceivably grant jurisdiction to CCLs exercising probate jurisdiction under TEC Section 31.002(b)(2) and (3).]

3.5.4. a justice court under Chapter 27, Government Code;

3.5.4.1. [Texas Government Code Section 27.031 does not expressly confer justice courts jurisdiction over trusts. There is, consequently, a question as to whether justice courts have any trust jurisdiction despite this provision. The phrase "except for jurisdiction conferred by law" in TTC Section 115.001(d) should relate to a court somehow being conferred specific trust jurisdiction.]

3.5.4.2. [Texas Government Code Section 27.031 does confer justice courts

jurisdiction over "civil matters in which exclusive jurisdiction is not in the district or county court and in which the amount in controversy is not more than $10,000, exclusive of interest." TTC Section 115.001(b)(4) was probably inserted to prevent a District Court from hearing matters in which the amount in controversy does not exceed $10,000.]

3.5.5. a small claims court under Chapter 28, Government Code; or

3.5.5.1. [In 2011, the Texas Legislature repealed all of Chapter 28, and the effective date of this repeal was August 31, 2013.]

3.5.5.2. [When it existed, Texas Government Code Section 28.003 did not expressly confer small claims courts jurisdiction over trusts. There is, consequently, a question as to whether small claims courts have any trust jurisdiction despite this provision. The phrase "except for jurisdiction conferred by law" in TTC Section 115.001(d) should relate to a court somehow being conferred specific trust jurisdiction.]

3.5.5.3. Texas Government Code Section 28.003 does confer small claims courts jurisdiction over "actions by any person for recovery of money in which the amount involved, exclusive of costs, [did] not exceed $10,000." TTC Section 115.001(d)(5) was probably inserted to prevent a District Court from hearing matters in which the

amount in controversy did not exceed $10,000.]

3.5.6. a county court at law.

3.5.6.1. [TEC Section 31.002(b)(2) provides that, in counties in which there is no SPC, but in which there is a CCL exercising original probate jurisdiction, the CCL has jurisdiction over the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court.]

3.5.6.2. [TEC Section 31.002(b)(3) provides that, in counties in which there is no SPC, but in which there is a CCL exercising original probate jurisdiction, the CCL has jurisdiction over the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court.]

PART 4

DOMINANT JURISDICTION

1. **DEFINITION**:

1.1 The principle of "dominant jurisdiction" is well-established in Texas jurisprudence. The general rule is that, "if two lawsuits concerning the same controversy and parties are pending in courts of coordinate jurisdiction, the court in which suit was first filed acquires dominant jurisdiction to the exclusion of the other court." *Sweezy Constr., Inc. v. Murray*, 915 S.W.2d 527, 531 (Tex. App.—Corpus Christi 1995, orig. proceeding) (citing *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988)); *San Miguel v. Bellows*, 35 S.W.3d 702, 704 (Tex. App.—Corpus Christi 2000, pet. denied); *Hartley v. Coker*, 843 S.W.2d 743, 747-48 (Tex. App.—Corpus Christi 1992, no writ); *Curtis v. Gibbs*, 511

S.W.2d 263, 267 (Tex. 1974) (citing *Cleveland v. Ward*, 285 S.W. 1063 (Tex. 1926)).

1.2 Courts must answer the "dominant-jurisdiction question" only if there is an "inherent interrelation of the subject matter . . . in two pending lawsuits." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287 (Tex. 2016) (orig. proceeding) (citing *Wyatt*, 760 S.W.2d at 247). If there is no inherent interrelation, "then dominant jurisdiction is not an issue, and both suits may proceed." *Id.*

2 **PRELIMINARY MATTERS**:

2.1 Dominant jurisdiction excludes multiple courts from exercising jurisdiction over the same case. *Curtis*, 511 S.W.2d at 267. Once dominant jurisdiction is established, any subsequent lawsuit involving the same parties and controversy must be dismissed. *Id.*; *In re Sims*, 88 S.W.3d 297, 303 (Tex. App.—San Antonio 2002, orig. proceeding) (court that first acquires jurisdiction retains jurisdiction undisturbed by the interference of another court). Dominant jurisdiction supports the longstanding policy of Texas courts to "avoid a multiplicity of lawsuits." *Wyatt*, 760 S.W.2d at 246.

2.2 Dominant jurisdiction recognizes that, while tangential matters may arise, they should be decided by the first-filed court. As one court observed in analyzing a dominant-jurisdiction issue, the first-filed court "is ordinarily in the best position to determine ancillary matters relating to the prosecution of that lawsuit." *Sweezy Constr.*, 915 S.W.2d at 527.

2. **APPLICATION**:

2.1. For purposes of dominant jurisdiction, it is not required that the two lawsuits involve the exact same parties and issues. In most dominant-jurisdiction cases, "the parties and controversies are *similar*, but not *identical*." *Hartley v. Coker*, 843 S.W.2d at 747-48 (emphasis added). "Nevertheless, abatement may still be mandatory." *Id.* Further, "it is not required that the exact issues and all parties be included in the first action before the second

is filed, provided that the claim in the first suit may be amended to bring in all necessary and proper parties and issues." *Id.* at 748 (citing *Wyatt*, 760 S.W.2d at 247); *see also Niemeyer v. Tanner Oil & Gas Corp.*, 952 S.W.2d 941, 944 (Tex. App.—Austin 1997, no pet.); *In re ExxonMobil Prod. Co.*, 340 S.W.3d 852, 856 (Tex. App.—San Antonio 2011, orig. proceeding).

2.2. The "test is whether there is an inherent interrelation of the subject matter in the two suits." *In re Sims*, 88 S.W.3d at 303; *Hartley*, 843 S.W.2d at 748 (citing *Wyatt*, 760 S.W.2d at 247); *Davis v. Guerro*, 64 S.W.3d 685, 690-91 (Tex. App.—Austin 2002, no pet.).

2.3. Dominant jurisdiction is established, and other courts must yield, if a litigant shows that: (1) there was a first-filed lawsuit that is still pending; (2) the first-filed lawsuit could be amended to include all of the parties; and (3) the controversies are the same or the first-filed lawsuit could be amended to include all of the same claims. *ExxonMobil*, 340 S.W.3d at 856. If these are shown, then the cases are inherently interrelated, and dominant jurisdiction is established. *See id.*

2.4. A document is often the link that makes cases "inherently interrelated." For example, the San Antonio Court of Appeals concluded that two cases with the same document at the center of the controversy provided the "inherent interrelation" to support dominant jurisdiction.

2.5. In the case *In re Sims*, Sims filed a breach-of-contract action and sued to enforce a divorce decree in Bexar County. 88 S.W3d 297, 301 (Tex. App.—San Antonio 2002, orig. pet.) Frost Bank filed a subsequent suit in Medina County seeking declaratory judgment regarding the duty to pay under the parties' agreement incident to divorce. *Id.* The Bexar County Court abated the first-filed case. *Id.* According to the court of appeals, however, "the same subject matter, the Agreement and its application to the Alamo Water Marmon Group transaction, exists in both suits." *Id.* at 303. The court of appeals went on to explain that "it was not necessary that the exact same issues had to be included in the Bexar County action before Frost Bank

filed its lawsuit in Medina County. The pleadings in Bexar County [the first-filed suit] *have been amended to bring the issues asserted in the second-filed suit.*" *Id*. at 304 (emphasis added); *see also Sweezy Constr.*, 915 S.W.2d at 531-32 (construction contract was the basis for establishing dominant jurisdiction).

3. **EXCEPTIONS**:

3.1. There are exceptions to the general rule that the first-filed court acquires dominant jurisdiction to the exclusion of coordinate courts. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 287. The first-filed court will not have dominant jurisdiction if: (1) the party seeking abatement is estopped from asserting the first-filed court's jurisdiction; (2) all parties cannot be joined in the first-filed court, or the first-filed court does not have the power to bring such parties before itself; or (3) the parties in the first-filed court lack intent to prosecute that action. *Hartley v. Coker*, 843 S.W.2d at 747 (citing *Wyatt*, 760 S.W.2d at 248).

3.1.1. The first exception, also known as the "inequitable-conduct exception," provides that "the plaintiff in the first-filed suit may be guilty of such inequitable conduct as will estop him from relying on that first-filed suit to abate a subsequent proceeding brought by his adversary." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 287 (citing *Curtis*, 511 S.W.2d at 267).

3.1.2. It is not clear when the second exception should apply. The court in *Hartley* stated that the second exception applies when "all persons cannot be joined in the first court, or the first court does not have the power to bring such parties before the court . . . ." 843 S.W.2d at 747. In support of this, the *Hartley* court cited the Texas Supreme Court in *Wyatt*, but *Wyatt* says the second exception exists when there is a "lack of persons to be joined *if feasible* . . . ." 760 S.W.2d at 248 (emphasis added).

3.1.3. The third exception is shown when the party filing the first suit did so "merely to obtain priority, without a bona fide intention to prosecute the suit." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d at 287 (citing *Curtis*, 511 S.W.2d at 267). To avoid the application of this exception, the party filing the first suit "must exhibit 'actual diligence [after filing suit] in getting out citation and otherwise prosecuting his suit.'" *Id.* (citing *Reed v. Reed*, 311 S.W.2d 628, 631 (Tex. 1958).

PUBLIC BENEFITS IN TEXAS

April 2024

Public benefits are needs-based programs
for people with limited income and resources/assets.

Supplemental Security Income (SSI)

- Disability, blindness, or age over 65
- Includes Medicaid as health insurance

Countable Resource Limits	
Individual	$ 2,000
Couple	$ 3,000
Maximum Monthly Benefit	
Individual	$ 943
Couple	$ 1,415

Medicaid for the Elderly and People with Disabilities[1]

- Primarily skilled nursing facilities (nursing homes)
- Star+Plus Waiver – at home and very few assisted living facilities
- Federally funded, state-managed program

Countable Resource Limits	
Individual	$ 2,000
Couple (both applying)	$ 3,000
Couple (only one applying)	
Minimum SPRA[2]	$ 30,828
Maximum SPRA	$ 154,140
MMMNA[3] for Community Spouse	$ 3,853.50
Income Cap (need QIT[4] if over)	$ 2,829
Maximum exempt home equity (if single)	$ 713,000
Personal Needs Allowance (monthly)	$ 75
Divisor (determine length of penalty period)	$ 242.13
Medicare Part B premium (standard monthly)	$ 174.70
Medicare Daily Copayment after 20 days	$ 204

[1] Community Attendant Services is helpful for some people, but has different requirements than shown above.
[2] SPRA = Spousal Protected Resource Amount
[3] MMMNA = Minimum Monthly Maintenance Needs Allowance
[4] QIT = Qualified Income Trust, aka Miller Trust

VA Pension (Veterans and Surviving Spouses)

- Non-service connected disability pension
- Disability, age over 65, or resident in skilled nursing facility
- Discharge other than dishonorable
- Minimum 90-day period of active duty, at least one day in wartime period
    - Mexican Border period (May 9, 1916 – April 5, 1917)
    - World War I (April 6, 1917 – November 11, 1918)
    - World War II (December 7, 1941 – December 31, 1946)
    - Korean conflict (June 27, 1950 – January 31, 1955)
    - Vietnam War era – service inside Republic of Vietnam (November 1, 1955 – May 7, 1975)
    - Vietnam War era – service outside Republic of Vietnam (August 5, 1964 – May 7, 1975)
    - Gulf War (August 2, 1990 – date to be set by law or presidential proclamation)

Net Worth Limit	$ 155,356
Veteran – Single (monthly)	
Service Pension	$ 1,379
Housebound	$ 1,685
Aid & Attendance	$ 2,300
Veteran – Married (monthly)	
Service Pension	$ 1,806
Housebound	$ 2,112
Aid & Attendance	$ 2,727
Surviving Spouse (monthly)	
Death Pension	$ 925
Housebound	$ 1,130
Aid & Attendance	$ 1,478

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