Introduction

• Trustees possess, manage, and control assets for beneficiaries – usually for compensation.
• This is significant authority and power.
• There are many corresponding duties: one of the most important duties is the duty to disclose information.
• This presentation is intended to provide the current legal authority in Texas dealing with a Trustee’s duty to disclose.
Sources For Duty To Disclose

• There are four independent sources for a duty to disclose in Texas:
  • The Trust Document;
  • Texas Statutory Law;
  • Texas Common Law; and
  • Litigation Rules.
Trust Document’s Duty To Disclose

• A trust document may have express provisions regarding the disclosure of information to beneficiaries that are more onerous than statutory or common law.

• Generally, the trust document governs and should be followed. See Tex. Prop. Code Sec. 111.0035(b).
Trust Document’s Duty To Disclose


• “The powers conferred upon the trustee in the trust instrument must be strictly followed.” *Id.*

• Therefore, if a trust instrument provides additional disclosure requirements, a trustee should follow them or else risk a breach of duty claim.
Trust Document’s Duty To Disclose

• Trust document may limit the duty to disclose: is that allowed?
• A settlor may limit disclosure obligations in a revocable trust – the settlor can always revoke the trust.
• However, in an irrevocable trust, statutes limit what a settlor can do regarding limiting the duty of disclosure.
• A trust document may not limit a trustee’s duty to respond to a demand for an accounting if the demand is from a beneficiary who is entitled or permitted to receive distributions or would receive a distribution if the trust terminated at the time of the demand. See Tex. Prop. Code Sec. 111.0035(b)(4).
Trust Document’s Duty To Disclose

• In an irrevocable trust, a trust document may not limit a trustee’s common law duty to keep a beneficiary who is 25 years of age or older informed at any time during which the beneficiary is entitled or permitted to receive distributions or would receive a distribution if the trust terminated at the time of the demand. See Tex. Prop. Code Sec. 111.0035(c).
Trust Document’s Duty To Disclose

• Other than these two exceptions, a settlor may restrict or eliminate the right of any other beneficiary to demand an accounting or otherwise have common laws rights to disclosure.

• Example: Contingent Beneficiaries

• Accordingly, a trustee should carefully review a trust document to see if there are any changes regarding the duty to disclose.
Statutory Duty to Disclose

- After reviewing the trust document, a trustee should be aware of statutory duties of disclosure.

- “A trustee shall administer the trust in good faith according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust, a trustee shall perform all of the duties imposed on trustees by the common law.” Tex. Prop. Code Sec. 113.051.
Statutory Duty to Disclose

• In 2005, the Texas Legislature enacted Texas Property Code Section 113.060 that imposed on trustees a duty to keep beneficiaries reasonably informed concerning the trust’s administration and “the material facts necessary for the beneficiaries to protect [their] interests.”

• This created certain problems regarding whether this displaced the common law and whether it imposed higher burdens than required by the common law.
Statutory Duty to Disclose

- So, in 2007, the Texas Legislature repealed Section 113.060 stating:
- “The enactment of Section 13.060 was not intended to repeal any common-law duty to keep a beneficiary reasonably informed, and the repeal of this Act of Section 113.060 does not repeal any common-law duty to keep a beneficiary informed. The common-law before January 1, 2006, is continued and in effect.”
Statutory Duty to Disclose

- There is no specific statutorily defined duty to disclose in Texas.
- Rather, the statutes state that a trustee has to act in good faith and consistent with all common law duties – including the common law duty to disclose.
Statutory Duty To Disclose


- A beneficiary may give a written demand for accounting, and a trustee has 90 days to provide a written accounting covering all transactions since the last accounting or the creation of the trust, whichever is later.
Statutory Duty To Disclose

- If the accounting is not provided in 90 days (or the court does not allow an extension), the beneficiary can bring suit to compel.
- A court may award attorney’s fees and costs to the beneficiary as against the trustee (individually or against trust).
- Trustee cannot be compelled to do an accounting more than once a year, unless court orders otherwise.
Statutory Duty To Disclose

• In *Grinnell v. Munson*, a court of appeals affirmed a trial court’s summary judgment on a beneficiary’s claim that a fiduciary had failed to prepare an accounting on demand when the fiduciary had previously provided a detailed accounting less than a year before. 137 S.W.3d 706, 721-22 (Tex. App.—San Antonio 2004, no pet.).
Statutory Duty To Disclose

• An “interested person” can seek an accounting.
• An “interested person” means 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.” Tex. Prop. Code Sec. 111.004(7).
• A court should find that the nature of the interest in the trust of, the claim against the trust by, or the effect of the administration of the trust on the interested person is sufficient to require an accounting by the trustee. See Id. at 113.151(b).
Statutory To Disclose

• Absent a contrary provision in the trust instrument, a trustee must respond to any demand for an accounting by any beneficiary, including contingent beneficiaries.

• Absent a request or other term of the trust instrument, a trustee is under no duty to prepare an accounting.

• However, a trustee is under a duty to maintain adequate records to be able to prepare an accounting at any time.
Statutory Duty To Disclose

- The accounting should include:
- All assets that belong to the trust (whether in the trustee’s possession or not);
- All receipts, disbursements, and other transactions, including their source and nature, with receipts of principal and interest shown separately;
- Listing of all property being administered;
- Cash balance on hand and the name and location of the depository where the balance is maintained; and
- All known liabilities owed by the trust.
- Tex. Prop. Code Sec. 113.152
A beneficiary may simply be impossible to please, no matter the accountings and disclosures given.

Repeated and detailed requests for accountings can be a substantial cost to the trust – a cost that may impact other beneficiaries.

Accordingly, a trustee should consider the cost in responding to difficult beneficiaries.

Further, a trustee may seek protection from a court via a declaratory judgment suit from unreasonable requests for information. See Tex. Civ. Prac. & Rem. Code Sec. 37.005 (court may declare rights to any question arising from administration of trust).
Statutory Duty To Disclose

• Texas Property Code 115.001(9) provides that a district court has jurisdiction to require an accounting, review trustee fees, and settle interim or final accounts.

• This provision allows trustees to file suit for a final accounting and judicial discharge, which can usually be avoided if the beneficiaries will sign an adequate receipt, release, and refunding agreement.
Common Law Duty To Disclose

• Texas precedent on the common-law duty to disclose has not been particularly clear.

• The Texas Supreme Court has stated that “trustees and executors have a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries’] rights.” *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996). See also *Valdez v. Hollenbeck*, No. 13-0709, 2015 Tex. LEXIS 556 (Tex. June 12, 2015).
Common Law Duty To Disclose

• Is there an affirmative duty to disclose?
• Yes, and maybe no.
• It is clear that there is a duty to affirmatively disclose certain matters, such as self-dealing or information that a trustee has that may significantly impact a beneficiary’s interest.
• However, there may not be a duty to disclose routine trust activities. See Restatement (Third) Trusts, Sec. 82(1)(b), cmt. d.
Common Law Duty To Disclose

- The Restatement (Third) of Trusts, Section 82(1) provides that a trustee has a duty to:
- Promptly inform beneficiaries of the existence of the trust, their right to obtain further information, and basic information concerning the trusteeship;
- Inform beneficiaries of significant changes in their beneficiary status; and
- Keep beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.
Common Law Duty To Disclose

• Who is entitled to disclosure?
• Certainly, any active beneficiary that currently may receive a distribution is entitled to information.
• Whether remote beneficiaries are also entitled to information is not entirely clear.
• Once again, the Texas Property Code would seem to indicate that remote beneficiaries are entitled to information absent a trust provision to the contrary.
• Restatement (Third) of Trusts, Sec. 82 cmt. a(1) would indicate that disclosure to remote beneficiaries is not required.
Common Law Duty To Disclose

• A trustee does not have a duty to disclose:
  • Non-material facts;
  • Facts about trustee’s non-trust related activities; and
  • Attorney/client communications.
Recent Case: Attorney/Client Privilege


• Trustee hired consultant to assist in the management of a trust, including supervising employees and assisting with attorneys.

• In litigation, the trustee designated the consultant as an expert and disclosed his file and everything that was provided to him, reviewed by, prepared by, or prepared for him “in anticipation of his expert testimony.”
Recent Case: Attorney/Client Privilege

• The opposing party sought production of much broader information from the consultant, which the trial court granted.

• The court of appeals granted mandamus relief because the information was protected by the attorney/client privilege.

• The court focused on the consultant’s testimony, that he “sent and reviewed confidential communications with the trust’s attorneys for the purposes of effectuating legal representation for the trust.”
Disclosure In Litigation

• Texas Property Code Section 115.012 states that all actions are to be governed by the Texas Rules of Civil Procedure and other statutes and rules that are applicable in civil actions generally.

• So, if a trustee is in litigation with a beneficiary, it will have to follow the normal rules of disclosure of information that litigants have to follow.
Disclosure In Litigation

- Rules generally provide for disclosure via:
  - Requests for disclosure;
  - Requests for production (documents and things);
  - Interrogatories;
  - Depositions and pre-suit depositions;
  - Physical and mental examinations; and
  - Access to real property.
Disclosure In Litigation

• The harm in not disclosing information in litigation is that a court may sanction a party for failing to disclose when there is an obligation to do so.

• These sanctions can be severe and case dispositive.
Disclosure In Litigation

• There is an issue as to whether a trustee’s common-law duty to disclose is in addition to discovery during litigation, such that a trustee only has to respond to discovery and not informal requests for information.

• Multiple authors have different views on this issue.

• The safest course is to disclose all material facts that may impact a beneficiary’s interest – whether requested in discovery or via informal means.
Ramifications For Failure To Disclose

• One ramification is that limitations may not accrue on an underlying claim.
• A father and mother set up an irrevocable trust in the 1970s, and in the 1980s, father and his company borrowed money from the trust and issued a note.
• After default, the trustees and father settled in the mid-1990s and entered into a renewal note with principal of $2 million due in January of 2000.
Ramifications For Failure To Disclose

• After default in 1998 on interest, the trustees decided to not file suit at that time and communicated that to the beneficiary.

• Ultimately, the father defaulted on the interest payments and the underlying principal payment, but the trustees never sued the father to enforce the debt.

• In 2008, the beneficiary, a son, discovered that the father denied making the renewal note and that the trustees never pursued claims thereon.
Ramifications For Failure To Disclose

• The beneficiary sued the trustees for breach of fiduciary duty and later added the father for aiding same.
• The trial court dismissed the claims due to limitations.
• A cause of action generally accrues when: 1) a wrongful act 2) causes some legal injury.
• As the principal payment was due on February 1, 2000, the Trust’s claim for that payment was extinguished via a six-year limitations period on February 1, 2006.
• The Son’s claims against the Trustees accrued when the “wrongful acts” occurred.
Ramifications For Failure To Disclose

- The court held: “just as the question of whether a party breached a fiduciary duty is generally treated as a fact question, we conclude the date on which the Trustees' inaction can be said to cross the line into a breach of their fiduciary obligations to appellant remains a fact question.”
- The court of appeals held that a jury must determine that issue and remanded for trial.
- So, a decision and communication of the decision would have constituted a “wrongful act” that would have started limitations.
- Case is in the Texas Supreme Court at this time.
Ramifications For Failure To Disclose

- Plaintiffs attempted by bill of review to reopen probate proceeding to allow claims against administrator for breaching duties.
- Court held that tolling doctrines did not extend the two-year limitations period due to disclosure of evidence that “would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to the discovery of the concealed cause of action.”
Ramifications For Failure To Disclose

- Texas Property Code Section 113.082 provides that a trustee may be removed in accordance with the terms of the trust instrument or a court may remove a trustee if:
  - The trustee materially violated a term of the trust or attempted to do so and that resulted in a material financial loss to the trust;
  - The trustee fails to make an accounting that is required by law or by the terms of the trust; or
  - Or the court finds other cause for removal.
Ramifications For Failure To Disclose

• A court may compel a trustee to perform its duties and, specifically, may order a trustee to account. See Tex. Prop. Code Sec. 114.008

• Court may reduce or deny a trustee compensation for breaches. *Id.*; Sec. 114.061.
Ramifications For Failure To Disclose

- Texas Property Code Section 114.064 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.”

- So, if a beneficiary sues for breach of the duty of disclosure, a court may order the trustee, individually, to pay the beneficiary’s attorney’s fees.
Ramifications For Failure To Disclose

• A beneficiary who has legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability, including liability for past violations. See Tex. Prop. Code Sec. 114.005.

• Releases are enforceable if the beneficiary has full knowledge of the circumstances surrounding the agreement. See Tex. Prop. Code Sec. 114.032.

• So, a release may not be enforceable if disclosure is not adequate.

• Release agreements should have detailed disclosures in the recitals.
Ramifications For Failure To Disclose

• Trustees have potential liability for co-trustee’s actions if the trustee does not act with reasonable care. See Tex. Prop. Code Sec. 114.006.

• Trustee should exercise reasonable care to prevent a co-trustee from committing a serious breach of trust and compel a co-trustee to redress a serious breach.

• Trustee may need to seek accountings and disclosures from co-trustee to meet its duty to prevent breaches.
Conclusion

• Trustees take on significant duties when they accept the position.
• One of the most important duties is the duty of disclosure.
• Due to the potentially extreme consequences for failing to meet this duty, Trustees should be very cautious.
• The Author hopes that this presentation was helpful in analyzing the duty to disclose.