WHAT TO KNOW ABOUT OUR PROBATE AND PLANNING FILES: PREPARING TO DEFEND THE ESTATE PLAN

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CHAPTER 13

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Brian has committed himself to a single area of practice since receiving his law license. Even while excelling in one of the most rigorous trial advocacy programs in the country, Brian worked one-on-one with some of the state's foremost authorities on trusts, estates and fiduciary law. Brian cut his legal teeth in both Houston and Dallas, representing individuals in probate and guardianship cases where the stakes are at their highest. He understands that many people experience probate, estate or guardianship matters only once or twice in their lives, making his role as counselor and advocate even more important. Experience, confidence, and dogged determination are critical when a client wants their story presented to the court. Brian believes that every case has the chance for resolution, but that clients should be ready and professionally equipped to fight for their own success.

Education

- B.B.A., Baylor University (2000)
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Public Speaking & Publications

The Probate Process from Start to Finish for Paralegals, National Business Institute, Houston, Texas, 2008, Dallas, Texas, 2016 – Scheduled for November, 2018

- "Ethical Perils in the Probate Process"
- "The Rights of the Surviving Spouse"
- "Probate Litigation"

Find it Free and Fast on the Net: Strategies for Legal Research on the Web, National Business Institute, Dallas, Texas, 2008, 2011, 2012

- "How to Search Like a Pro"
- "Finding Free Legal Research Sites and Free Caselaw"

Estate Administration Procedures: Why Each Step is Important, National Business Institute, Dallas, Texas, April, 2009

- "Ethical Challenges in Estate Administration"
- "Common Issues to be Prepared for in Litigation and Probate"

Estate, Financial and Healthcare Planning for Elder Clients, National Business Institute, Dallas, Texas, July, 2010

- "Tips and Traps When Consulting with the Elder Client"
- "Understanding Post Mortem Options"
- "Understanding Long-Term Care Options"

Administering Small Estates: Time-Saving Tips, National Business Institute, National Teleconference, 2011, 2012

The Art of Trust Administration, National Business Institute, National Teleconference, 2011, 2013, 2014, 2015, 2016

Trusts 101, National Business Institute, Arlington, Texas, January 2012

- "Ethical Considerations"
- "Estate Planning for the Disabled"

Trust Administration: Challenges and Best Practices, Strafford Publishing, National Teleconference, February, 2012

Trust Administration: Practical Considerations in Trustee Liability, Tolleson Wealth Management, Dallas, Texas, March, 2012

Will Contests, Estate Planning Council of North Texas, Plano, Texas, March 2012

Closing the Estate and Handling Distributions, National Business Institute, National Teleconference, May, 2012

Remedies for Attorney in Fact Misconduct, TexasBarCLE, Webcast, July, 2012; Collin County Bar Association, October, 2012

Resolving Legal and Financial Issues in Elder Care, National Business Institute, Dallas, Texas, August, 2012

- "How to Protect an Elderly Client's Assets"
- "Insurance to Fund All or Part of Long-Term Care Costs"

Estate Administration: Opening and Closing the Estate and Resolving Related Issues; Strafford Publishing, National Webinar, August, 2012

Trust Litigation: Navigating Defenses of Fiduciaries and Claims of Beneficiaries and Third Parties: Trust Contests, Construction Issues and Fiduciary Duties; Strafford Publishing, National Webinar, October, 2012

Handling Final Beneficiary Distributions, National Business Institute, National Teleconference, March, 2013

Winning the Battle and the War: A Remedies Centered Approach to Litigation Involving Durable Powers of Attorney; Estate Planning Council of North Texas, Dallas, Texas, Co-Presenter, May, 2013

Powers of Attorney & Fiduciary Duties; Wealth Management & Trust: Texas Graduate Trust School, Dallas, Texas, 2013, 2014, 2015, 2016, 2017, 2018

A Creditors' Perspective on Administration of Estates; Presented to the Dallas City Attorneys' Office, Dallas, Texas, July 2013

Trust Administration for Paralegals, Institute for Paralegal Education, National Telewebinar, October, 2014

Trust and Estate Accounting for Paralegals, Institute for Paralegal Education, National Webcast, March, 2015

Estate Planning 101, Texas State Teachers Association, Annual State House of Delegates / Convention, April, 2015

Paralegals Essential Guide to Wills and Trusts, Institute for Paralegal Education, National Telewebinar, November, 2015

The Shortest Route to Victory: Summary Judgment Practice in Probate and Trust Litigation, TexasBarCLE, Advanced Estate Planning and Probate, San Antonio, Texas, June, 2016

The Probate Process from Start to Finish, National Business Institute, Dallas, Texas, May, 2017

- "Uncovering the Laws of Intestacy and How They May Apply"
- "Litigating the Case in Probate Court"
- "Putting the Case to Rest: Closing the Estate"

Litigation Involving Powers of Attorney and Bank Accounts, TexasBarCLE, Advanced Estate Planning and Probate, Houston, June, 2017

Choosing Your Own "Adventure" and Navigating Self-Dealing Transactions Under the New Power of Attorney Rules, Houston Estate Planning and Business Council, February, 2018; Tarrant County Probate Bar Association – May, 2018

What to Know About our Probate and Planning Files: Preparing to Defend the Estate Plan, TexasBarCLE, Estate Planning and Probate Drafting, Dallas, October, 2018

TABLE OF CONTENTS

WHAT TO KNOW ABOUT OUR PROBATE AND PLANNING FILES: PREPARING TO DEFEND THE ESTATE PLAN

I. INTRODUCTION

A. Summary

Probate litigation almost always subjects estate planners and their work to intense criticism. Just as sound estate planning contemplates myriad contingencies for the client (*e.g.* incapacity, divorce, death, etc.), so should estate planners plan for their own futures and consider that the emergence of conflict is rarely negotiable. Conflict will invariably arise, and even good estate plans will be challenged. Planners should plan with defense of their work in mind. In doing so, estate planners will better understand their role in potential litigation, build and maintain better files, and prepare themselves to be a critical target of discovery.

B. Genesis of this Article

Nietzsche said, "there are no facts, only interpretations." Most scholars of the philosopher argue that he meant there is no use fighting our subjectivity in the individual perceptions of "facts" or "truth." In other words, two people might look at the same thing and discern two very different facts based on their own deeply-held views. Basically, humans see what they *want* to see.

Nietzsche might never have participated in a will contest, either as an estate planner, proponent or contestant, but those who *have* would admit that he's probably onto something. Our clients can see and hear the same thing and view it quite differently. We, their advocates, apply subjective interpretations to persuade our way to the ultimate facts. When the execution of a contested will is examined, we do as Nietzsche explained. What *really* happened in an estate planner's office on the day a will was signed depends on whom you ask.

This paper began as an outline for the deposition of an estate planner in the typical will contest. Originally, it was meant to help litigators for the will contestant organize and plan for this important event and make the discovery opportunity as effective as possible. Over time, and after significant input and feedback from a variety of sources (for which the author is very grateful), the article grew to serve three purposes: (1) to aid counsel contesting a will in what may prove to be one of the most critical oral depositions, (2) to assist the proponent's counsel in identifying the potential weaknesses and trial themes that contestants try to develop through the estate planner, and (3) to help estate planners support their work when they are inevitably deposed in a typical will contest.

Having outlined preparation strategies for the contestant's counsel, I realized that the article also produced a series of cautionary tales to pass along from probate litigators to our estate planning brothers and sisters, so that those planners may review (and perhaps modify) their current practices to plan for a time when probate litigation continues to surge and the integrity of their own documents and even their own professional integrity comes under fire. With these goals in mind, counsel on all sides should find something useful herein.

C. The Varying Perspectives

Many types of probate litigation focus highly upon an estate planning transaction in some manner. Will and trust contests, for example, center intensively on the planning, counseling, development, drafting, and execution of a client's estate planning documents. Thanks to recent legislation, we may well see the creation of powers of attorney come under similar scrutiny.[1] In these cases, counsel both challenging and defending the estate planning documents will invariably spend considerable time and energy learning more about the documents' creation. Though some facts may already be known about the genesis of the documents, the discovery process always yields information that may be used to support or invalidate the integrity of the estate plan.

The scope of discovery in a will or trust contest may be deep, wide, and unique to the circumstances of the individual case. But there are some elements of discovery in these cases that are ubiquitous and play out like a familiar tune. One of the most useful and common discovery tools in every case of these types is the deposition of the estate planner that helped craft the subject document. This is true for all sides in the typical will contest. Before diving in, let's straighten out and clarify some roles and nomenclature that this article will refer to.

1. The Contestant

Used herein, the "contestant" means the party challenging the validity of the will. In most cases, the contestant was not present when the will was executed. For contestants, the common theme of discovery targeting the estate planner generally focuses on two fronts: (1) gather information, and (2) assail the estate planner's credibility.

2. The Proponent

The term "proponent" means the party defending the validity of the will. The proponent might, like the contestant, also not know much about the execution of

[1] *See* Tex. Estates Code § 751.251.

the will. Or, in some cases involving allegations of undue influence, the proponent might have been intimately involved in the creation of the estate plan. The proponent's common themes to cultivate through estate planner discovery include: (1) support the estate planner's work, and (2) distance themselves from the estate planning process to negate allegations of undue influence.

3. The Estate Planner

By "estate planner," we mean the attorney(s) responsible for planning, drafting, and (usually) overseeing the execution of the challenged instrument. Remarkably, for as many will contests as are filed, many estate planners have never given deposition testimony before, and have never had the integrity of their work otherwise questioned. Anxiety levels tend to run high for our transactional colleagues when thrust into the spotlight of litigation. As a result, most estate planners simply want to navigate their deposition by (1) bolstering their professional practices and (2) not opening themselves up to potential claims of professional negligence.[2]

4. The Taking Attorney

Used throughout this article, the "taking attorney," "contestant's attorney," or "deposing attorney" all mean the same thing. We mean the attorney representing the contestant and asking the estate planner questions at the estate planner's deposition.

5. The Defending Attorney

Not to be confused with the attorney representing the proponent in a will contest, references herein to the defending attorney mean the attorney representing the estate planner witness at his or her deposition, if the estate planner even retains one.[3]

6. The Quasi-Defending Attorney

Here, we mean the attorney representing the proponent of the challenged will. Though this attorney cannot, or at least under our rules, should not, represent both the proponent *and* the estate planner, this attorney will assuredly be looking for ways to protect the estate planner. Protecting the estate planner, and potentially keeping unfavorable information out, serves to protect the estate planner's work product, which ultimately serves the will proponent's overall interests.

D. Why the Estate Planner's Deposition is Critical

To accomplish our three goals, the article uses the typical will contest involving allegations of: (1) a lack of testamentary capacity on the part of the testator and (2) the exertion of undue influence upon him or her and addresses the estate planner's deposition from the perspective of the will's contestant. By the time that these disputes come to a head, the testator is either incapacitated or deceased. One key witness – the testator – is no longer available to describe the events of the will's execution. The litigants are thus left with a finite crop of discoverable facts to harvest with respect to the event of execution itself from only a handful of sources – the estate planner, the attesting witnesses and perhaps a notary public. Of the available witnesses, the estate planner often provides the most fertile ground upon which the contesting party can begin to identify, develop, and present viable theories aimed at invalidating the subject document.

The estate planner is a key witness for several reasons. He or she is, of course, a fact witness. Often, the estate planner is the last legal professional that the testator consulted with prior to execution of the challenged document, or prior to the testator's death. When a document is challenged based on a lack of mental capacity or undue influence, the estate planner's testimony provides key facts about the actual events of counseling and execution. Thus, since both two types of challenges focus primarily on the date of execution, the estate planner's recollection of the execution ceremony often provides some of the most persuasive evidence in the case.[4]

But the estate planner is much more than a sterile fact witness, and certain common themes in a will contest can be amplified or minimized by the estate planner's testimony. Importantly, the estate planner is an advocate in at least two important ways.

On behalf of the deceased client, the estate planner may rightfully consider herself an advocate for the testator – a champion for the decedent's last known lawful testamentary desires. Most jurors presume that it is the estate planner's continuing job to safeguard against circumstances that might invalidate those

[2] *See Belt v. Oppenheimer, Blend, Harrison & Tate, Inc*., 192 S.W.3d 780 (Tex. 2006).

[3] They absolutely should, but often do not, retain their own counsel. Many estate planners, either unaccustomed to litigation procedures or looking to avoid costs that eat into their own business, assume that their deposition in a will contest is informational, informal, and not adversarial. These estate planners are often under-prepared to defend their work and, as a result, often do not perform well during their depositions.

[4] *See Croucher v. Croucher*, 660 S.W.2d 55 (Tex. 1983); *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968) (quoting 1 McCormick and Ray, Texas Law of Evidence § 896, at 675 [2d ed. 1956] and holding that testamentary incapacity may be proven by direct evidence, but that evidence of incapacity at other times can also be used to establish testamentary incapacity on the day the will was executed if the evidence demonstrates a persistent condition that has some probability of existing on the date of execution).

desires at every stage – from planning, to execution, to admission to probate. On top of that, the estate planner is also an advocate for himself or herself. In virtually every challenge brought forth in a will contest, the estate planner's competence, ethics, professionalism, and work product are all under intense scrutiny. Make no mistake that, in most cases, to an estate planner, a will contest involving a will that he drafted is (understandably) a personal and professional attack. Any attorney would staunchly defend the integrity of his or her work.

If the estate planner was simply a fact witness, preparations for his or her deposition would be minimal. The deposition might only cover the who, what, when, and where of the planning and execution of the subject document. In return, the deposition testimony would amount to little more than a play-by-play recollection of the relevant events perceived by the estate planner. This, while necessary, leaves a great opportunity on the table for all the litigants. Viewing the estate planner's deposition as a more critical moment in a will contest allows the contesting party to utilize it to its fullest, and to mine it for all the impact that can be gained through the discovery tool.

E. How This Article Approaches Deposition Planning

The considerations highlighted in this article are organized in a somewhat chronological order. First, it is instructive to recognize the estate planner's role in the litigated case, how that role might shift into a litigator stance, and how the rules of attorney disqualification might arise early in a case, considering that shifting role.

Next, the parties to a will contest must identify their key themes and theories in advance of taking (or quasi-defending) the estate planner's deposition so that useful testimony might be obtained that fits well with those themes and theories. This process necessarily involves a close examination of the legal and factual foundations for the will contest and consideration of how the estate planner's testimony will advance those foundations.

Third, careful attention should be paid to maximizing the use of other discovery procedures and products that can enhance the efficiency and efficacy of the estate planner's testimony – namely, pre-suit discovery, the production of critical medical evidence and the production of the estate planner's client file. Careful consideration should be paid to several of the privilege rules in Texas, as they will likely form the basis for an attempt to keep important information from the contestant.

Finally, with a core understanding of the fundamental rules of compelling, taking and ultimately using deposition testimony, the contestant needs to plan effectively by identifying critical deposition goals, making the most of a flexible outline and laying out as many potential traps as possible for the estate planner to fall into.

The redacted deposition excerpts used throughout this article have been collected from depositions taken, defended, or attended by the author. Most, but not all of them, come from estate planner depositions. While the author cannot claim ownership of every technique demonstrated herein, he is thankful for the opportunity to learn from some truly gifted advocates.

II. THE ESTATE PLANNER'S ROLE IN THE LITIGATED CASE

When the estate planner engages in legal work for his or her client, she is a listener, an educator, a counselor, and a scrivener. Beyond that, the estate planner serves as a warden of the work product. What good is a well-drafted will if the counseling was compromised or the execution ceremony improperly conducted? An estate planner's primary objectives at engagement should include:

- Identifying who the actual client is;
- Gathering relevant information from the client to assess his or her unique estate planning objectives and needs, including whether the transaction is one in which the client can legitimately engage;
- Educating the client on the availability of a possible array of estate planning tools consistent with those objectives and needs;
- Counseling with the client on the considerations, and decisions to make, with respect to the structure and mechanics of a plan, the disposition of assets, and the nomination of fiduciaries; and
- Drafting the necessary instruments to memorialize the client's choices, and to supervise the due execution of the instrument(s) in a manner that helps ensure their legal efficacy and impermeability.

However, when (the often inevitable) litigation ensues – whether, days, months or years after the estate planning work is completed – the estate planner's role can shift dramatically. At this point, the estate planner becomes more than the testator's former attorney. He becomes a key fact witness – a custodian of vital evidence that is important and often outcome-determinative. Candidly, at least to the contestant, the estate planner is also often a reluctant, defensive deponent and trial witness.

A. Dealing with the Estate Planner Turned Litigator

In numerous cases, the proponents offering the will for admission to probate retain the decedent's estate planner to assist them. This decision is natural, expected and routine for several reasons.

First, most estate planners intentionally position themselves for this sort of "returning-client" work. The executed original will might be enclosed and kept in an envelope bearing the estate planner's letterhead and contact information, or the letterhead might appear on a "blue-back" that staples the will and other important estate planning papers together.

Additionally, though increasingly rare, the decedent's estate planner might be in actual possession of the original will.

Likewise, the decedent's estate planner might be the only attorney that the proponent knows and trusts to handle the administration of the estate. If the estate planning transaction was recent, or the culmination of an extended series of engagements, the estate planner is likely well-positioned to assist in the administration. She may, for example, have familiarity with the decedent's unique assets or business interests. She may also be particularly familiar with the facts, allegations and parties at the center of the will contest.

Regardless of the reason, many estate planners often initially represent the proponent offering the will for admission to probate. When litigation arises and the landscape shifts to one fraught with conflict, the estate planner is frequently put to a choice – fight or flee. Represent or refer. The estate planner could attempt to defend his own work and litigate for the proponent (sometimes stretching beyond known areas of skill and expertise), or the estate planner may recognize that his best use in the case lies elsewhere. The estate planner might consider her knowledge (and testimony) more useful coming from them in a position of a "neutral" fact witness in aid of the proponent's case and may seek to substitute out for counsel more familiar with the litigation of a will contest.

In the case of the estate planner who decides to fight, he or she may be disqualified from representing the proponent. The contestant should consider the tactical use of the disqualification rules, as well as their limits. In doing so, the contestant must consider whether any advantage is gained by the proponent having her attorney serve in dual roles as both an advocate and a fact witness.

1. The Disqualification Rule

Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct prohibits an attorney from accepting or continuing employment as an advocate before a tribunal if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact.[5] This general prohibition is only inapplicable if one of five narrow exceptions is met:

(1) the testimony relates to an uncontested issue;
(2) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
(3) the testimony relates to the nature and value of legal services rendered in the case;
(4) the lawyer is a party to the action and is appearing *pro se*; or
(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter, and disqualification of the lawyer would work substantial hardship on the client.[6]

2. Application of the General Rule and the Disqualification Exceptions

By the time a will contest arises, the estate planner representing the proponent must know, or at least believe, that he or she is a witness needed to establish an essential fact. Frequently, estate planners will make themselves indispensable in matters of proof, either by attesting to the will itself or notarizing a self-proving affidavit, which limits the pool of otherwise credible witnesses to the event of execution. But even in cases where the estate planner recuses himself from these unnecessary roles, the estate planner should know, or at least believe, that his testimony will be required to help the proponent make their case.

The estate planner's testimony will almost always relate to a contested issue in a will contest, whether that issue is the decedent's mental capacity or the decedent's freedom from the operation of undue influence. In fact, it is quite reasonable to presume that the estate planner is the only attorney with whom the decedent consulted concerning the nature, effect, and execution of the subject document. Further, it is also reasonable to presume that the estate planner privately and confidentially met with the decedent, meaning that the planner is the one and only living party to any sort of confidential planning discussion.

Counsel considering disqualifying an estate planner from the litigation should identify the unique and special knowledge that the estate planner possesses. It is probably insufficient, for example, to simply allege that an estate planner was there when the challenged will was signed. The will might also be witnessed by other individuals, rendering information available from multiple sources. Unless and until the trial court knows that the estate planner is the sole source of unique relevant knowledge that cannot be introduced through

[5] Tex. Disciplinary Rules Prof'l Conduct R. 3.08(a), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2005) (Tex. State Bar R., Art. X §9).

[6] *Id*.

another witness, disqualification is a tough route for the contestant.[7]

The estate planner's anticipated testimony should hardly ever relate solely to a matter of formality. He or she said, saw, and heard things. The planner's unique factual perception of the estate planning transaction, as well as his or her beliefs, will be developed for the jury, and there is ample reason to believe that at least some evidence will be offered to contradict the estate planner's testimony.

Similarly, the estate planner's testimony frequently relates to much more than the nature and value of legal services, and rarely is the estate planner appearing *pro se* as an applicant.

Finally, it is difficult to imagine a case where *early* disqualification of the estate planner as the proponent's counsel would work a substantial hardship on the proponent – provided that the issue is timely raised and counsel for the contestant does not seek to deprive the proponent of his or her attorney on the eve of trial. When the disqualification is shown to truly work a disadvantage to the proponent, the trial court will almost always (and probably should) deny the disqualification.

The practical purpose of disqualification should be obvious. Left unchallenged, an advocate in the case might depart from his or her role to take the witness stand and offer disputed facts through direct and cross examinations, only to then resume their role as advocate and argue the weight and credibility the jury should afford to <u>their own testimony</u>. Juries should rarely be subjected to such confusion, and the distinction between presenting evidence and arguing or analyzing the evidence should remain clear.

3. <u>Limits of the Disqualification Rule</u>

Barely a handful of Texas cases discuss the applicability, exceptions, and limits of Rule 3.08 in the context of probate litigation. However, the fact that the disqualification rule is located in the rules of professional conduct is an important one. These rules were adopted to establish the "minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action."[8] The rules are not controlling as standards governing motions to disqualify *per se*, but instead are regularly viewed by our courts as guidelines for the consideration of such motions.[9] Review of the caselaw clarifies these guidelines.

"Disqualification is a severe remedy."[10] The measure has the effect of depriving a party of the counsel of his choosing. Accordingly, motions to disqualify must adhere to an exacting standard lest their use as dilatory tactics be encouraged.[11]

In *May v. Crofts*, a will contestant sought to set aside a will on the basis of: (1) lack of testamentary capacity, (2) lack of requisite formalities and (3) undue influence.[12] The estate planner, an attorney named Old Bird ("Bird"), prepared the decedent's will and subsequently represented the decedent's siblings as the primary beneficiaries in a will contest brought forth by the decedent's surviving spouse.[13]

The will contestant sought to disqualify Bird, and the motion was denied. Next, the will contestant sought mandamus when the trial judge refused to disqualify Bird from representing the proponents and alleged that she intended to call Bird as a fact witness in the case.[14] The appellate court denied mandamus because the contestant could not show that she would be prejudiced by Bird serving as both a fact witness and an advocate.[15]

Similarly, in the case of *In re Atherton*, a litigant moved to disqualify an estate planning attorney as well as the other members of his law firm on the basis that the estate planner possessed personal knowledge surrounding the challenged instrument.[16] The basis for disqualifying the entire firm, the litigant alleged, was that the estate planner's unique knowledge was imputed to every other attorney in his firm. Ultimately, the appellate court held that the estate planner should not have been disqualified, and thus neither should any other attorney in the estate planner's law firm be disqualified.

B. Practical and Tactical Considerations of Disqualification

Many lessons can be learned from our appellate courts' treatment of the disqualification issue. The contestant's counsel should take a page from *May v.*

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[7] *See In re Duke Investments*, 454 B.R. 414 (United States Bankruptcy Court, S.D. Texas, Houston Division, 2011); *In re Sandoval*, 308 S.W.3d 31, 34 (Tex. App. – San Antonio 2009, no pet.) (holding that where multiple witnesses were present at the signing of an agreement, the attorney's testimony was not necessary to establish an essential fact).

[8] Tex. Disciplinary Rules Prof'l Conduct preamble ¶ 7, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2005) (Tex. State Bar R. art. X §9).

[9] *Ayres v. Canales*, 790 S.W.2d 554, 556 n. 2 (Tex. 1990).

[10] *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654 (Tex. 1990) (citing *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989).

[11] *Id.*

[12] *May v. Crofts*, 868 S.W.2d 397, 398 (Tex. App. – Texarkana 1993).

[13] *Id.*

[14] *Id.* at 398-399 (Interestingly, Bird alleged that he did not intend to call himself as a witness, and the dual-role issue appears to have been raised primarily because the contestant's counsel alleged that he intended to call Bird to the stand).

[15] *May v. Crofts*, 868 S.W.2d 397, 399 (Tex. App. – Texarkana 1993).

[16] *In re Atherton*, 2002 WL 31160059 *1 (Tex. App. – Dallas 2002).

Crofts and focus her efforts on highlighting the prejudice that would result in the wake of such confusion.

Equitable application of the rule, however, compels counsel for the contestant to timely raise the issue. Remember that an exception to the "lawyer as advocate" rule could apply if the estate planner timely advised opposing counsel of his or her likelihood to testify, and disqualification would work a hardship on the proponent. Should opposing counsel try to use disqualification as an "eve of trial" tactic to gain some advantage, the court is more likely to conclude that forcing the applicant to bring in new counsel at such a late stage would cause hardship. Rather than lie in wait, proactive counsel for the contestant should be the first to spot the issue and bring it to the attention of the estate planner turned advocate.

LITIGATOR PRACTICE TIP: Consider the issue of potential disqualification of the estate planner early in the case. The longer you wait, the less likely the court is willing to deprive the proponent of his chosen attorney.

Additionally, the rule of disqualification might apply only to the disqualified lawyer, as *Atherton* demonstrates. Say, for example, that the subject document was drafted by Attorney Doe, and that the applicant is represented primarily by Doe of the law firm Doe, Smith and Jones LLP – a law firm specializing in probate litigation. The rule should prohibit Doe from both testifying as a fact witness and at the same time advocating for the applicant. Should the disqualification rule prohibit another attorney of the law firm?

Probably not. Applying the rule equitably and practically would likely result in the court concluding that Doe (who will testify) cannot actively participate in the presentation of the applicant's case at trial but may still represent the applicant. This sort of "soft disqualification" allows Doe, Smith and Jones LLP to continue representing the applicant, permitting the applicant to her first choice of counsel. Behind the scenes, Doe would probably be permitted to aid in trial preparation. The soft disqualification segregates Doe from an advocate role in the sense that Doe will probably be prohibited from speaking to the jury in voir dire, opening statements or closing arguments. It further segregates Doe from his advocate role in the sense that he will likely not be permitted to examine another witness. Most trial courts would probably stop short of prohibiting Doe from sitting at counsel table alongside the applicant. In other words, the court might apply this soft disqualification as a measure to avoid jury confusion based purely on what the jury sees and hears. Doing so addresses the prejudice upon which the contestant's motion was likely premised.

Although this soft disqualification may not give the contestant the full relief he or she seeks, consider how a contestant could use such soft disqualification to his advantage. Sitting at the same table, and as a part of the trial team, the estate planner – the attorney for the decedent – is visually tethered to the proponent. Some proponents in will contests do not have the cleanest of hands, and the estate planner's visual alignment with them could taint the estate planner as well.

Optics, from the jury's perspective, are sometimes so important that they are decisive. The proponent, at least in many will contests, likely benefits under the contested will. Themes of selfishness, greed, or exploitation may naturally arise. The contestant often claims that the will was the result of (a) the estate planner drafting a will for an incapacitated person, or (b) the estate planner drafting a will under circumstances of undue influence.

Thus, the proponent is sitting right next to someone the jury is led to believe engaged in poor work. Further, the proponent is also paying the estate planner, or at least his law firm to advocate on his behalf. Silencing the estate planner's advocacy might help avoid jury confusion, but that jury might afford less credibility to the estate planner as a witness when his testimony seems as though it has been paid for by the proponent sitting next to him. Similarly, for the estate planner, the jury might associate the proponent's motives – good, bad or otherwise, with the estate planner.

III. KEY THEMES AND THEORIES OF THE CASE INVOLVING THE ESTATE PLANNER

A. Developing Three Critical Themes in a Will Contest

When preparing for a deposition, there is an easy tendency to focus on the witness and only on the witness, at the risk of neglecting the opportunity to obtain good evidence that may enhance other themes (unrelated to the witness). Doing so runs the risk of losing an opportunity to cultivate the contestant's trial theme and narrative. While some fact witness depositions might lend themselves to further only one of several potential trial themes, the estate planner's deposition often offers the contestant the chance to explore and test many different themes all in one sitting.

From most contestants' perspectives, the story of a will contest typically takes on one of three actor-oriented themes that will guide the narrative they use to persuade the jury: (1) the testator, (2) the "bad actor," and (3) the estate planner. The estate planner's deposition provides an important opportunity to explore the facts from each of these perspectives to learn important facts and reinforce these three key trial themes from all points of view.

1. Theme 1: The Testator Lacked Capacity

From the testator's perspective, the focus rests upon the testator himself or herself. Supporting or defending a challenge to a will from this perspective necessarily involves inquiries into the testator's capacity (physical and mental), as well as her susceptibility or vulnerability to mistakes of fact, over-reliance upon a single person of trust and confidence, and even ongoing exploitation.

The disposition of property by a will is a statutory right, and the statute demands the testator be of "sound mind."[17] No specific standard has been announced to establish, as a bright-line rule, what constitutes sound-mindedness.[18] Rather, the measure of a testator's mind is determined by the facts and circumstances of the case.[19] Testamentary capacity – deemed synonymous with "sound mind" – is a not as much a measure of sanity as it is a measure of mental ability. The standard announced in the 1890 Texas Supreme Court case of *Prather v. McClelland* is used in virtually every will contest today. A testator has testamentary capacity if he or she has sufficient mental ability at the time the will is executed to:

- understand the business in which he or she is engaged, specifically the making of the will;
- understand the effect of his or her act in making the will;
- understand the general nature and extent of his or her property;
- know his or her next of kin, and the natural objects of his or her bounty, and the claims upon him; and
- collect in his mind the elements of the business to be transacted and hold them long enough to perceive their obvious relation to each other and to form a reasonable judgment as to them.[20]

The contestant's trial theme from the testator's perspective might look and sound something like this: "Dementia robbed the decedent of his ability to make good decisions." As a part of developing this trial theme, the contestant would undoubtedly scour available medical records for useful information and probably retain an expert to explain to a jury all the science behind the decedent's cognitive maladies. But this theme, though based largely on science, and centered on the testator, can also be enhanced by and through other witnesses, including the estate planner.

As the contestant begins to develop a deposition plan for the estate planner, his counsel should look for opportunities to confirm and further establish any medical evidence. For example, in a recent case, the author discovered medical records (dated a month prior to the will's execution) tending to show that the testator had difficulty finding words. We already know that this medical evidence will be used to support our testator-centric theme of incapacity. Moreover, we could develop that theme for the jury with the medical records alone and the benefit of an expert witness. But doing so ignores how much more compelling our evidence could be when it is complemented from other points of view. So, in our example, why not see if the estate planner wants to (a) add to that theme and confirm that the testator exhibited a difficulty finding words, or (b) attempt to water it down and downplay the testator's symptom?

> Q: Do you recall [the testator] having any trouble finding words to express himself?
>
> A: During that meeting, no.
>
> Q: At any time, other than that meeting, do you recall [the testator] having any trouble finding words to express himself?
>
> A: Well, I mean. I --- I don't --- I don't really recall because, I mean, I'd only talked to him or met him maybe once or twice.

Two simple questions, using a theme focused on the testator (not the estate planner) have just accomplished a host of objectives for the contestant and opened several doors for further inquiry of the estate planner:

- The estate planner just controverted recent and relevant medical evidence by suggesting that a medical symptom did not present itself during meetings with the estate planner;
- The estate planner demonstrated his own recall weakness; and
- The estate planner just admitted that he spent only a modest amount of time with the testator and thus might not have had enough time to meaningfully evaluate the testator's capacity or identify potential signs of incapacity.

Obviously, these conclusions involve some logical leaps and (to the estate planner's credit) consider only one argumentative side of the facts, but the point is simple. Don't focus only on the witness that you are deposing. Consider how each of the trial themes can be enhanced by the estate planner's deposition.

[17] Tex. Estates Code § 251.001.

[18] *Smith v. Welch*, 285 S.W.2d 823 (Tex. App. – Texarkana 1955).

[19] *Farmer v. Dodson*, 326 S.W.2d 57 (Tex. App. – Dallas 1959).

[20] *Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890).

2. Theme 2: The Testator was Unduly Influenced

From the bad actor's perspective, the focus rests upon the person(s) alleged to have overreached in the estate planning process to unlawfully guide the testator toward executing a document that the testator would not otherwise have signed. Here, the inquiry involves an exploration into the components of undue influence, the opportunity to mislead the testator toward mistakes of fact, or outright fraud.

Seasoned litigators know that most cases involving undue influence rest primarily upon subtle, circumstantial evidence. Inferences are more available than direct facts. We rarely find the case where videotape evidence clearly shows the influencer "holding a gun" to the testator's head to ensure execution of the will the influencer (and not the testator) desires.

Nearly 80 years ago, the Texas Supreme Court admitted that undue influence was all but impossible to define.[21] The tort – a species of fraud – is subtle, and by its very nature typically "involves an extended course of dealings and circumstances."[22]

Rather than rely upon direct evidence, undue influence themes routinely incorporate a group of factors compiled and highlighted by the Texas Supreme Court in the case of *Rothermel v. Duncan*. When determining whether undue influence exists, Texas courts have considered the following factors:

- The nature and type of the relationship existing between the testator, the contestants and the party accused of exerting influence;
- The opportunities existing for the exertion of the type of influence or deception possessed or employed;
- The circumstances surrounding the drafting and execution of the testament;
- The existing of a fraudulent motive;
- Whether there has been a habitual subjection of the testator to the control of another;
- The state of the testator's mind at the time of the execution of the testament;
- The testator's mental or physical incapacity to resist, or the susceptibility of the testator's mind to the type and extent of the influence exerted;
- Words and acts of the testator;
- Weakness of mind and body of the testator, whether produced by infirmities of age or by disease or otherwise; and
- Whether the testament executed is unnatural in its terms of disposition of property (the "*Rothermel* Factors").[23]

From these factors, several areas of inquiry for the estate planner naturally develop. For example, many undue influence cases involve some well-worn fact patterns:

- The alleged influencer found the estate planner and contacted him or her "for mom";
- The alleged influencer was a source or conduit of information (sometimes the only one) between the testator and the planner;
- The alleged influencer brought or accompanied the testator to the planner's office; or
- The alleged influencer paid the bill when the estate plan was completed.

The will contestant could (and likely would) dive into all these areas in the alleged influencer's own deposition. However, as with the incapacity theme focused on the testator, the planner's deposition provides the contestant an opportunity to enhance an influencer-centric theme through the estate planner. Given that circumstantial evidence (the typical building blocks of an undue influence claim) requires stacking inference upon inference, validating circumstances through the estate planner often makes those building blocks stronger and more convincing to the jury.

Take the following example from a recent estate planner's deposition and note how the taking attorney enhances the contestant's theme (focused on the bad actor) through the estate planner's testimony. In the case, the taking attorney highlighted the fact that all the information provided to the estate planner came not from the testator herself, but from the alleged undue influencer.

> Q: And you're taking down these [estate planning] instructions from [the alleged influencer], who was already a client of yours, correct?
>
> A: Correct.
>
> Q: Did you think [the alleged influencer] was a client on the date you received these instructions?
>
> A: I don't remember.
>
> Q: But it's clear you took all your instruction from him and no one else, right?
>
> A: That's correct.

[21] *Long v. Long*, 133 Tex. 96, 125 S.W.2d 1034 (Tex. 1939).
[22] *Id.*
[23] *Rothermel v. Duncan*, 369 S.W.2d 917, 923 (Tex. 1963).

Q: You don't think you took any instructions from [the testator], do you?

A: Based on my file, I agree, I don't think I did.

Q: You never told [the testator] that you were [the alleged influencer's] lawyer, did you?

A: Not that I know of.

An hour or so later…

Q: You don't know whether [the testator] had a good relationship with her family or a bad relationship at that time, do you?

A: That's correct.

Q: You don't even know whether she had any relationship with [the alleged influencer] at the time you prepared these documents, do you?

A: That's correct.

Q: You did all of this based on the instruction of another client, [the alleged influencer], correct?

A: Yes.

Q: And at the time, you knew that [the alleged influencer] was instructing you to include him as a beneficiary of the documents?

A: Yes.

Q: In that kind of situation, doesn't that call upon you to exercise extra care to make sure that's what [the testator] really wanted?

A: Yes.

Here, we see the taking attorney unearthing several of the *Rothermel* factors and further enhancing a trial theme that will, in part, intensely focus on the alleged undue influencer as much as, or more than, the estate planner. The taking attorney has compiled a good foundation of direct and circumstantial evidence of:

- The relationship between the testator, estate planner, and contestants;
- The opportunity for influence; and
- The existence of a potentially fraudulent motive.

3. Theme 3: The Estate Planner was Lazy, Sloppy, or Just Plain Fooled

From the estate planner's perspective, the focus rests upon the adequacy of counsel and the estate planner's adherence to good and ethical estate planning practices. Broad inquiries focusing on this perspective might include the estate planner's professional abilities and experience in estate planning, his level of professional care in the actual execution of the subject instrument and the level of detail that they devoted to the preparation and execution of the instrument itself.

Through the deposition, counsel for the contestant might develop a trial theme that the estate planner was: (1) out of his depth in an unfamiliar area of law; (2) lazy, sloppy, or uninformed in the estate planning transaction; or (3) actually or tacitly complicit in the preparation of a will that should never have been signed by the testator.

Though the taking attorney can and should use the estate planner's deposition to develop as many independent themes and narratives as possible, the estate planner's deposition will best enhance the theme focused on the estate planner herself.

LITIGATOR PRACTICE TIP: Start developing the contestant's theme(s) and theory of the case as soon as facts start rolling in. Commit eventually but be adaptable and see which themes are naturally strengthened or weakened by what the product of further discovery reveals.

IV. GATHERING INFORMATION BEFORE THE ESTATE PLANNER'S DEPOSITION

A. Pre-Suit Discovery Opportunities

Filing a lawsuit unlocks an array of discovery tools to be employed by the contestant and proponent of a will alike. Discovery accomplished prior to filing a lawsuit, however, remains an underused tool in a significant share of will contests. There might be many considerations that lead a cautious litigant to utilize these tools before filing his or her lawsuit.

For example, many modern wills contain *in terrorem* or "no-contest" clauses that, taken at face value, could effectively prohibit the filing of a petition to challenge a will, or could at least give the would-be contestant reason to carefully consider such a course of action. In these cases, pre-suit discovery could accomplish two things: (1) pre-suit discovery might yield the futility of a lawsuit – learning facts the contestant does not know might avoid the time, expense, and emotional frustration attendant in virtually all litigation; and (2) pre-suit discovery might later support the argument that an inevitable suit is not frivolous but

was brought only after a reasonable and good faith investigation into the available facts.[24]

From the proponent's side of things, pre-suit discovery could be used prophylactically to shut down a will contest before one is even filed. For example, perhaps the decedent's will is unnatural in the sense that it leaves the decedent's entire estate to one child instead of both equally. The inheriting daughter (who is also the executor) suspects and anticipates that her sibling will file a contest, based on heated comments made around the time of the decedent's funeral. The inheriting daughter knows that the estate planner is retired, and not in good health. Likewise, one of the witnesses to the will is preparing to move overseas. The inheriting daughter might seek to preserve deposition testimony from these important fact witnesses before they become otherwise unavailable.

1. Rule 202 Depositions (Pre-Suit Depositions)

Rule 202 of the Texas Rules of Civil Procedure permits two (or maybe three) forms of pre-suit discovery, as ordered, and narrowly tailored, by the court. Prior to the filing of a lawsuit, a person may seek an oral deposition or a deposition on written questions.[25] Our appellate courts are divided on the issue of whether or not the pre-suit deposition rule also permits a request to produce documents (either in conjunction with the deposition or standing alone).[26] Though pre-suit discovery certainly has its uses, several courts reluctant to permit the overuse of the pre-suit deposition have noted that pre-suit discovery is not, and should never be, intended for routine use.[27] Authorizing pre-suit depositions is purely within the trial court's discretion.[28]

a. Grounds for Pre-Suit Depositions

Pre-suit discovery may be sought in two limited circumstances under Rule 202: (1) to perpetuate or obtain a person's testimony for use in an anticipated suit, or (2) to investigate a potential claim or suit.[29] The petitioner's reason determines the finding that the trial court must make when ordering the deposition. If sought to perpetuate or obtain testimony, the court must find that allowing the petitioner to take the deposition may prevent a failure or delay of justice.[30] If sought to investigate a claim or suit, the court must find that the likely benefit of allowing the deposition outweighs the burden or expense associated with it.[31] The petitioner may, of course, seek a pre-suit deposition under both grounds at the same time.

b. Formalities of the Pre-Suit Deposition Petition

Rule 202.2 outlines the necessary contents of petition. A pre-suit deposition petition must:

- Be verified;
- Be filed in the proper court of any county:
  - Where venue of the anticipated suit may lie, if suit is anticipated; or
  - Where the witness resides, if no suit is anticipated;
- Be in the name of the petitioner;
- State either:
  - That the petitioner anticipates the institution of a suit in which the petitioner may be a party; or
  - That the petitioner seeks to investigate a potential claim by or against petitioner;
- State the subject matter of the anticipated action, if any, and the petitioner's interest therein;
- If suit is anticipated, either:
  - State the names of the persons petitioner expects to have interests adverse to petitioner's in the anticipated suit, and the

[24] *See* Tex. Estates Code § 254.005 (A finding of good faith could be the most critical component of a will contestant's case. Enacted in 2009, Section 254.005 clarifies a longstanding common-law exception to the enforcement of no-contest clauses against unsuccessful contestants who would otherwise forfeit their interest under a will. A contestant who, though unsuccessful, brings their will contest forward in good faith and with just cause will not forfeit their inheritance.

[25] Tex. R. Civ. P. 202.1.

[26] *In re Anand*, 2013 WL 1316436 (Tex. App. – Houston [1st Dist.] 2013, no pet.) (holding that "there is nothing in the language of Rule 202 that prohibits the petitioner from requesting documents be produced along with the deposition," and reasoning that Rule 202 depositions are governed by the same deposition rules governing a non-party's deposition in an ordinary case – which would ordinarily permit the production of documents at an oral deposition via subpoena duces tecum). But see *In re Azko Nobel Chem., Inc*., 24 S.W.3d 919, 921 (Tex. App. – Beaumont 2000, no pet.) (holding that making an accident scene available for pre-suit investigation and inspection was not a discovery tool authorized by Rule 202).

[27] *See In re DePinho*, 505 S.W.3d 621 (Tex. 2016); *In re PrairieSmarts LL*C, 421 S.W.3d 296 (Tex. App. – Fort Worth 2014); *In re Reassure America Life Ins. Co*., 421 S.W.3d 165 (Tex. App. – Corpus Christi – Edinburgh 2013).

[28] *In re Reassure America Life Ins. Co*., 421 S.W.3d 165 (Tex. App. – Corpus Christi – Edinburgh 2013).

[29] Tex. R. Civ. P. 202.1(a), (b).

[30] Tex. R. Civ. P. 202.4(a)(1).

[31] Tex. R. Civ. P. 202.4(a)(2).

addresses and telephone numbers for such persons; or
- State the names, addresses and telephone numbers of persons petitioner expects to have interests adverse to petitioner's in the anticipated suit cannot be ascertained through diligent inquiry, and describe those persons;

- State the names, addresses and telephone numbers of the persons to be deposed, the substance of the testimony that the petitioner expects to elicit from each, and the petitioner's reasons for desiring to obtain the testimony of each; and
- Request an order authorizing the petitioner to take the depositions of the persons named in the petition.

There might be numerous sources of information worth perpetuating, particularly in a potential will contest where drafting attorneys, attesting witnesses, or others might be of advancing age. Likewise, there is a number of sources of information worth investigating before filing suit and investigating for the express purpose of determining whether a suit should eventually be filed. For example, the potential litigant might seek to depose:

- Attesting and subscribing witnesses;
- Attorneys;
- Caregivers; or
- Prior or current fiduciaries.

From a strategic standpoint, the estate planner could be a valuable source of information to a potential litigant well in advance of filing a lawsuit challenging an instrument that he or she prepared. Thus, while the availability of Rule 202 depositions can frequently be limited by the circumstances and ultimately the court, their utility should not be underestimated.

B. Obtaining the Estate Planner's Client File

The estate planner is (typically) a nonparty in a will contest. Thus, there are three discovery tools available to the will contestant as relate to the nonparty estate planner under Rule 205.1 of the Texas Rules of Civil Procedure. They are:

- An oral deposition;[32]
- A deposition on written questions;[33] and
- The production of documents (alone or in conjunction with an oral deposition or deposition on written questions).[34]

Importantly, the estate planner's role as a key fact witness is not limited only to his or her deposition or trial testimony. There is also, or at least should be, a written record of their entire representation of the decedent, and the file can often be a gold mine for the contestant. Failing to seek the estate planner's file itself could be a fatal mistake. The planner's file on the decedent often represents a treasure trove of useful information that may ultimately enhance the contestant's narrative and themes. In most cases, production of the estate planning file should be sought as early in the case as possible.

In the author's view, simply obtaining the estate planning file, without also deposing the estate planner, runs the risk of leaving valuable information (good and bad) on the table. Few cases should involve only the production of documents or only a deposition. The better-prepared case utilizes both discovery opportunities.

1. Subpoenaing the File

The will contestant may obtain the estate planner's file under the traditional discovery rules related to nonparties. That is, in addition to seeking discovery through a court order, the contestant may either issue a request for production of the estate planning file, or a request for production of the estate planning file in conjunction with the estate planner's deposition appearance.

Because a significant part of the estate planner's deposition may involve questions related to the file's contents, securing the estate planning file prior to the deposition typically makes more sense and allows the contestant's counsel time to review the produced records in advance of the deposition. It is not altogether uncommon that the proponent's counsel has already had the opportunity to review the same relevant information.

a. The Notice

Securing documents from a nonparty without a court order involves a two-step process – a notice and a subpoena that contains a request to produce responsive documents. First, a notice must issue to the estate planner directing either (a) the production of documents and tangible things only, or (b) the production of documents and tangible things at an oral deposition.[35] This notice must be filed.[36] It must also be served on all parties.[37]

When only documents are sought, the notice must provide (a) the name of the person from whom production is sought, (b) a reasonable time and place for production and (c) a description of the items to be

[32] Tex. R. Civ. P. 205.1(a).
[33] Tex. R. Civ. P. 205.1(b).
[34] Tex. R. Civ. P. 205.1(c).
[35] Tex. R. Civ. P. 205.3(a).
[36] Tex. R. Civ. P. 191.4(b)(1).
[37] Tex. R. Civ. P. 205.2.

produced.[38] If only documents are sought, the estate planner is not required to appear in person at the time and place of production.[39] If documents are sought as well as an oral deposition, the additional requirements of a deposition notice must also be met.[40] In those cases, pursuant to Rule 199.2, the notice must:

- Be served on the witness and all parties a reasonable time before the deposition;
- Identify the name of the witness;
- Set forth a reasonable time and place for the oral deposition; and
- State any alternative means of conducting the deposition.

No matter whether only documents are sought, or documents and a deposition are sought together, the notice must be served at least ten (10) days before the actual service of the subpoena.[41] This brief window provides both the estate planner and any other party affected by the discovery an opportunity to object to the requested production, or the deposition, and to move for a protective order and/or move to quash the deposition.[42]

b. The Subpoena

The subpoena is the instrument that is used to compel a nonparty to comply with a discovery request – in this case a request to produce responsive documents. It is the writ through which the requesting party commands a person to appear and/or produce documents.[43]

To avoid being quashed for some defect in form, counsel for the contestant should take steps to ensure that the subpoena seeking the estate planner's client file meets the strict standards set forth in Rule 176.1 of the Texas Rules of Civil Procedure. The subpoena commanding the production of the estate planner's file must:

- Be issued in the name of "The State of Texas";
- Include the style and cause number of the lawsuit;
- Identify the court where the suit is pending;
- State the date the subpoena is issued;
- Identify the person to whom the subpoena is directed;
- State the time, place and nature of the action required of the person being subpoenaed;
- Identify the party at whose instance the subpoena is issued;
- Be signed by the person issuing the subpoena; and
- Command a person to produce and permit inspection of the books, papers, documents and tangible things designated in the subpoena.

c. The Request for Documents

The subpoena should clearly describe the documents the contestant seeks from the estate planner. Typically, when the taking attorney subpoenas the planner's client file, he or she wants everything. Nevertheless, "Give me everything you have" rarely generates useful discovery.

Knowing specifically what to ask for means knowing what to look for. Many of the common components of an estate planning file are identified in Section VI *infra*, and counsel for the contestant should consider crafting a request for documents that is broad and sweeping, but consistent with the rules requiring particularity in all discovery requests.

LITIGATOR PRACTICE TIP: Be complete and use acceptable definitions in your requests. Don't give the estate planner an opportunity to hide production behind an ambiguous request.

2. Challenges, Responses and Production

If no objection is made during the window afforded by the requisite 10-day notice, a nonparty such as the estate planner must respond to the contestant's discovery subpoena.[44] The responsive documents produced must be organized as proscribed by the rules of procedure. That is, the producing party must organize and produce the responsive documents (1) as they are kept in the ordinary course of business, or (2) organized and labeled to correspond to each request.[45]

Notably, the rules related to a nonparty's response to a discovery request do not strictly track the rules related to a party's response. For example, for a party, Rule 196.2(b) outlines four acceptable responses to a request for the production of documents: (1) production will be permitted as requested, (2) the requested items are being served with the response, (3) production will take place at a specified time and place (if the responding party objects to the requesting party's time and/or place), or (4) no items have been identified – after a diligent search – that are responsive to the request.[46]

The contents of a nonparty's response are instead tethered to Rule 176.6, which only requires compliance with the subpoena and the organization of responsive documents as stated herein. In the author's experience,

[38] Tex. R. Civ. P. 205.3(b).
[39] Tex. R. Civ. P. 176.6(c).
[40] Tex. R. Civ. P. 199.2
[41] Tex. R. Civ. P. 205.2.
[42] *See* Tex. R. Civ. P. 192.6(a).
[43] Tex. R. Civ. P. 176.2
[44] Tex. R. Civ. P. 176.6, 205.3(d).
[45] Tex. R. Civ. P. 196.6; *Limas v. De Delgado*, 770 S.W.2d 953, 954 (Tex. App. – El Paso 1989, no writ).
[46] Tex. R. Civ. P. 196.2(b).

though some nonparty estate planners might respond with the formality of Rule 196.2(b), most will simply produce their responsive client file, or rely upon the proponent's counsel to object, assert a privilege or move for protection.

Though a party affected by the discovery may object to the production of documents to the contestant by the estate planner, or seek a protective order, the nonparty (who does not himself object) may still produce the requested documents.[47] Rule 176.6(e) appears to give the estate planner some choice in the matter, as the estate planner "need not comply with the part of a subpoena from which protection is sought…unless ordered to do so by the court."[48]

When a party obtains responsive materials from a nonparty in response to a request for production, two additional considerations come to light: (1) cost and (2) sharing.

A party that requires the production of documents by a nonparty must reimburse the nonparty's reasonable costs of production.[49] Only a handful of reported cases discuss these reasonable costs, and most discuss such costs in the context of medical records, for which there is a specific statute that basically caps and defines "reasonable."[50] On occasion, some subpoenaed estate planners want to know whether they can charge for their time pulling an old estate planning file out of storage, or otherwise compiling their client's estate planning file. Some analogies are probably properly drawn from the medical records request, and it appears that reasonable copying charges are fine, but that attorneys' fees incurred in responding to a document request are not.[51]

The party who obtains the production of documents from a nonparty must make all produced materials available to any other party on reasonable notice, and the party who obtained the documents must furnish copies to the other party at that party's expense.[52] Presumably, this sharing rule contemplates similar costs when it mentions "that party's expense." Thus, the party who received the documents could pass along a reasonable copy charge to other party.

In a time when many document requests are fulfilled by electronic means, and thus no copying of hard documents is involved, it is somewhat uncertain if this expense provision covers some additional cost(s). For example, if an estate planner charges the requesting party $100 for printing out the testator's client file, but then the requesting party scans the pages into her own system, can the requesting party recover any part of her cost when sharing the records with another party by email or thumb drive (and thus incurring no "copy" expense)?

Certainly, the party producing the records would urge that the expense should be passed along, or at least split. The party who did not request, but wants, the records would urge that there is no expense if the materials can be made available by electronic means. A cost-sharing agreement achieved early in the case would help.

C. Obtaining Other Information to Use at the Estate Planner's Deposition

As shown with the trial themes discussed in Section III *supra*, a comprehensive estate planner's deposition involves enhancing (or weakening) evidence independent from the estate planner's work product. This means the taking attorney should consider implementing a discovery plan that allows for the generation and timing of useful discovery, so that key written discovery products and documents are available at key depositions. In the author's view, some of the best ancillary evidence used at the estate planner's deposition arises from two sources: (1) medical records, and (2) discovery that describes the testator's daily life (*e.g.*, witness statements, photographs of a hoarding home environment, etc.)

The processes to secure these additional discovery products strays more than a bit from the purpose of this paper and is not discussed in detail. Suffice it to say obtaining relevant medical records and discovery developing the testator's daily life in a will contest is so vital that it should probably be among the first project the contestant prioritizes. Identifying sources, weathering lengthy production periods and potential objections, and analyzing the records with the contestant's expert witness requires significant time. Smart contestants begin the task as early as possible.

V. DEALING WITH RELUCTANT ESTATE PLANNERS: OBJECTIONS AND PRIVILEGES

The world of estate planning brings to bear its own unique applications of the attorney-client privilege. Commonly, in will contests and other litigation involving challenges to estate planning documents, the estate planner is unwillingly thrust into the position of responding to demands to release and reveal information that heretofore was privileged between the planner and

[47] Tex. R. Civ. P. 192.6

[48] Tex. R. Civ. P. 176.6(e) (the rule does not prohibit production).

[49] Tex. R. Civ. P. 205.3(f).

[50] *See* Tex. Health & Safety Code § 241.154.

[51] *See In re Metro ROI, Inc*., 203 S.W.3d 400 (Tex. App. – El Paso 2006); *BASF Fina Petrochemicals Ltd. Partnership v. H.B. Zachary Co*., 168 S.W.3d 867 (Tex. App. – Houston [1st Dist.] 2004).

[52] Tex. R. Civ. P. 205.3(e).

the now deceased client.[53] A firm understanding of the foundation and application of the privilege rules in this context becomes very important.

A. The Privilege Rule

The attorney-client privilege is a rule of evidence. Generally, a client has a privilege to refuse to disclose (and to prevent others from disclosing) confidential communications made to facilitate the rendition of legal services to the client.[54] Unpacking this general rule requires some explanation and definition of its elements. Examine the source, the communication made, and the person who may claim the privilege.

The communication need not have been made by the client directly. To fall within the privilege, the communication can come from the client, the client's representative, the client's lawyer, or even the lawyer's representative.[55] The communication itself must be confidential, and not every communication made in the rendition of legal services fits this mold. Generally, a confidential communication is one that is not intended to be disclosed to a third person, other than those to whom communication is necessarily made to further the rendition of legal services.[56] The nondisclosure privilege may be asserted by the client, his guardian or conservator, or the deceased client's personal representative.[57] The client's lawyer (or his representative) at the time that the communication was made is presumed to also have the authority to claim the privilege on the client's behalf.[58]

As might be expected in the case of will contests, the client is deceased. She may or may not have a personal representative appointed to stand in her shoes, but typically does not at the point when litigation of this type begins to take shape. Thus, the only person left who remains in a presumptive position to claim the privilege on behalf of the client is the client's lawyer at the time that the communication was made – the estate planner.

Life (or death, as the case may be) comes fast at estate planners when their client passes away. In the wake of the testator's death, demands for information can come from all sides. For example, though it has become rarer for estate planners to retain original wills, the estate planner could be demanded and compelled to surrender the decedent's original will to the probate clerk.[59] Likewise, proponents and contestants alike might bombard the estate planner to release his or her file concerning the decedent, so that both sides can begin their campaigns in earnest to support or attack the subject document(s).

Some estate planners find that the path of least resistance works best, and they disclose everything that they know to both sides voluntarily. Others, however, rest upon their gut instinct to protect their client by, at least initially, asserting the decedent's attorney-client privilege on their behalf. With at least some frequency, these estate planners must be reminded of the limits of the attorney-client privilege, and the application of two critical exceptions to the rule, and one available exception that will be driven by the facts of the case.

1. Same Deceased Client Exception

No attorney-client privilege exists for communications relevant to an issue between parties who claim through the same deceased client.[60] More eloquently said:

> "In regard to the execution and drafting of wills the knowledge gained by the attorney is privileged during the lifetime of the testator. But the confidence reposed is temporary only and after the death of the testator, the attorney may testify as to any facts affecting the execution or contents of the will."[61]

This exception applies without regard to the means under which the parties might "claim" under the client – testacy, intestate succession or *inter vivos* transfer.[62]

2. Attested Document Exception

Similarly, no attorney-client privilege exists for communications relevant to an issue concerning an attested document to which the lawyer is an attesting witness.[63] The language of the exception raises an obvious circumstance that rears its head from time to time in an estate planning practice. With more than modest frequency, estate planners participate in the execution of their own documents as a signatory. To the extent that the estate planner serves as an attesting witness to a will, the attorney-client privilege between the planner and the testator is inapplicable. Moreover, some estate planners serve instead as the notary public

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[53] Notably, under new Estates Code Section 751.122, the scope of this privilege could, in the future, be expanded to the extent that an agent under a durable power of attorney has a duty to "preserve" their principal's estate plan and may thus be more involved in the creation of that estate plan.

[54] Tex. R. Evid. 503(b)(1).

[55] Tex. R. Evid. 503(b)(A)-(E).

[56] Tex. R. Evid. 503(a)(5).

[57] Tex. R. Evid. 503(c)(1)-(3).

[58] Tex. R. Evid. 503(c).

[59] Tex. Estates Code § 252.201(a).

[60] Tex. R. Evid. 503(d)(2).

[61] McCormick and Ray, Texas Laws of Evidence, Page 318, §227.

[62] *In re Texas A&M-Corpus Christi Found.*, 84 S.W.3d 358 (Tex. App. – Corpus Christi 2002); *Suddarth v. Poor*, 546 S.W.2d 138 (Tex. App. – Tyler 1977, writ ref'd); *Krumb v. Porter*, 152 S.W.2d 495 (Tex. App. – San Antonio 1941, writ ref'd.)

[63] Tex. R. Evid. 503(d)(4).

in the execution of a will. In the case of some failure to an attesting witness's signature, the notary's signature can then be used as a substitute – effectively making the notary (*i.e.*, the estate planner) an attesting witness to the will.[64]

3. Crime Fraud Exception

No attorney-client privilege exists when the estate planner's services were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.[65] The crime-fraud exception might arise in a will contest, but probably only under some narrow circumstances involving the deceptive procurement of the will by an alleged undue influencer. For example, an unduly-influencing beneficiary who seeks the assistance of an estate planner to procure a will that favors him or her might invite the exception to the privilege. Similar exceptions could be found in cases involving fraudulent inducement or outright forgery.

B. Responding to Privilege Assertions and Objections in Production

In some situations, the non-party estate planner, or more likely another party, will respond to a production request by objecting or asserting a privilege. The burden that must be met may be borne by the requesting or the resisting party depending on the action taken and the relief requested.

Generally, the burden is imposed upon the resisting party to:

- Plead an objection;[66]
- Assert a privilege;[67]
- Secure a hearing on the assertion of an objection or privilege;[68]
- Produce evidence at the hearing on an objection or privilege;[69]
- Ask for *in camera* inspection of potentially sensitive documents;[70] and
- Secure a ruling on any objection or privilege asserted.[71]

The burden is imposed upon the requesting party to:

- Request a privilege log;[72]
- Secure a hearing on the above, if necessary;[73] and
- Secure a ruling on the above.[74]

VI. KEY COMPONENTS OF THE ESTATE PLANNING FILE

The estate planning file itself often lays an objective foundation to support good defensive or offensive theories in every will contest. Quite simply, developed and well-kept estate planning files demonstrate and evidence an estate planning transaction that is challenging for the contestant to undercut. Alternatively, poorly kept or incomplete files can bolster a contestant's claims.

Some of the key components to look for when the estate planning file is ultimately produced include, but are not necessarily limited to:

- Standard intake forms and/or checklists;
- The estate planner's handwritten notes;
- Engagement and/or follow-up correspondence (to, from, and between the testator, the estate planner and any other person(s));
- Documents (*e.g.*, including family tree information or asset lists) provided by the testator (or others) to the estate planner;
- Prior key estate planning documents;
- Drafts, revisions, and copies of new key estate planning documents;
- Correspondence and communications accompanying drafts from the estate planner to the testator;
- Correspondence and communications from the testator (or others) to the estate planner containing questions, comments and/or proposed revisions;
- Notary logs and/or scripts or checklists used in the execution ceremony; and
- Time records and/or invoices.

A. Intake Forms and Correspondence

Intake forms and various forms of engagement correspondence (or their absence) can frequently set the stage for the development of persuasive themes in any will contest. Such documents can shed light on the earliest stages of the estate planner's representation and can form the foundation of a contestant's argument that the representation was incomplete or flawed from the very beginning.

In the absence of engagement correspondence, or a formal representation agreement, the unwary estate planner might leave unclear who the actual client is. Likewise, engagement correspondence, when present,

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[64] Tex. Estates Code § 251.105; *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966).
[65] Tex. R. Evid. 503(d)(1).
[66] *State v. Lowry*, 802 S.W.2d 669, 671 (Tex. 1991); Tex. R. Civ. P. 193.2(a).
[67] Tex. R. Civ. P. 193.3.
[68] Tex. R. Civ. P. 193.4(a).
[69] *Id.*
[70] *Id.*
[71] Tex. R. Civ. P. 193.4(b).
[72] Tex. R. Civ. P. 193.3(b).
[73] *Id.*
[74] *Id.*

frequently reflects that the person(s) through whom the estate planner "operates" is not the testator, but rather the person(s) accused of exerting undue influence. Both instances can create ample fodder for the contestant to undermine the entire estate plan's integrity.

Intake forms and questionnaires, or their absence, can also highlight potential problem areas for an estate planner looking to bolster her work. Virtually every estate planner would likely agree that intake forms and questionnaires are a quick, efficient, and economical way to gather important information that dictates the type of estate plan recommended for the testator. A good intake form or questionnaire could evidence (even in the testator's own handwriting) that the testator knew his property, knew his family, identified his intended beneficiaries, and understood the contemplated documents would operate to deliver assets to those beneficiaries at death. Despite the forms' usefulness, an alarming number of estate planners fail to use such simple forms. In the following example, the estate planner identified his estate planning questionnaire as a typical early component of his intake process. He had no explanation for the absence of so "typical" a component of his estate planning file at his deposition.

Q: When a new client approaches you to engage you for estate planning purposes, can you describe for me the general steps that you might take with that client in representing them?

A: Yeah. I mean, we – we'll obviously do a conflict search, you know, our – our estate planning questionnaire...

Q: Can you recall [the testator] ever completing for you any sort of a questionnaire?

A: Independently, no, I don't have any recollection.

Q: We talked a few minutes ago about the distinctions in the steps between new clients and recurring clients. I want to be clear on this because a completed questionnaire was something that you said you did for both new clients and recurring clients, correct?

A: Typically, yes.

Q: That's the typical practice?

A: Yes.

Q: But it may not have happened here?

A: It may not have happened here. It may not have happened in a number of cases.

PLANNER PRACTICE TIP: Form a routine and follow it. If, or when, you ever deviate from the routine, have a reason. Litigators are sure to pick up on unexplained deviations from the "typical practice" and exploit them as weaknesses in the representation and the integrity of the estate planning documents.

B. Notes

Nothing lights up a will contestant's eyes like the estate planner's handful of scribbled lines that "document" an estate planning consultation with the testator. Some notes are robust and complete, lending credibility to the estate planner's (and even the testator's) thoroughness. Others may be less so, and such notes may play directly into the themes that the contestant wishes to develop because:

- The notes identify the presence (and implicit or express influence) of a person other than the testator in the process;
- The notes do not evidence the scope and/or nature of the testator's estate, and often omit the testator's non-probate asset plans;
- The notes simply read like a grocery list, and operate solely to guide the estate planner in drafting, rather than capture the spoken intentions of the testator; and/or
- The notes do not match the final executed document(s).

Some estate planners fall into a dangerous third category – those who have no written notes at all. These estate planners often have a challenging time relying solely on their own memory of the planning meeting(s).

PLANNER PRACTICE TIP: Make your contemporaneous notes useful for the present and the future. Obviously, good notes will help make the drafting process smoother, but better notes make an estate plan resistant to attacks. Key decisions that may be litigated in the future, like the disinheritance of a child or spouse, should be documented and explained. For example, if a parent wants to disinherit a child, take the time to write down why.

C. Drafts and Executed Documents

Like questionnaires and contemporaneous notes, document drafts can help both the estate planner and the will contestant tell a story of the testator's decisions and their decision-making process. For example, multiple drafts might lend credibility to the testator's attention to detail, involvement in an ongoing process and ongoing testamentary capacity. At the same time, multiple drafts

could evidence the estate planner's *lack* of attention to detail, if, for example, the work needed to be corrected or revised multiple times to match the testator's instructions. Drafts (and their transmittal) might also reveal the ongoing inclusion of an alleged undue influencer in the production of the final document(s).

Some estate planners make the fatal mistake of assuming a draft review is only for the client's sake and not their own. In the author's opinion, these planners place far too much stock in the integrity of whatever product their software spits out after answering some basic questions. The ubiquity of forms renders active proofreading a dying art. What if a document needs to be revised to correct more than just a misspelled name? What if an error lies in the legal jargon most clients overlook? How would the client know to alert the planner?

For example, a married testator with no children allegedly signed a will leaving specific bequests to her two sisters. Redacted to eliminate specific information, the executed document read:

> *I give, devise and bequeath the [Bank Account] to my sisters, [Sister A] and [Sister B] in equal shares; provided, however, that if my sisters shall not survive me, but should leave issue then surviving me, such then surviving issue shall take, per stirpes, the share that such deceased child* [who is this?] *would have taken by surviving me, or if none is then living, then said share shall be distributed to my then living child or his issue, per stirpes, or if none of my descendants is then living, to my heirs at law.*

Let's break that down. First, the sisters take the Bank Account in equal shares. Second, if (both?) the sisters predecease the testator, and (both?) have children, the Bank Account passes to the sisters' children, per stirpes, and they receive the share that "such deceased child" (whose deceased child?) would have received by surviving the testator. Third, if none of those persons survive, then the Bank Account passes to the testator's issue, per stirpes. Fourth, in a complete contingency, the Bank Account passes to the testator's heirs at law.

This estate planner had a difficult time reconciling the language used in the will he prepared, and it only bolstered the contestant's theory that the drafting and review stages of the process were flawed, sloppy, or otherwise compromised. The language created, at best, an ambiguity in the instrument. Moreover, terms and phrases like "issue," "per stirpes," or even "heirs at law" are generally not words and phrases that the testator is reviewing for accuracy and correct usage. Generally, these are things that the testator assumes have been correctly incorporated by the planner to avoid – rather than create – ambiguity.

PLANNER PRACTICE TIP: Review your documents before the testator signs them. If the client is looking at all, they're looking to see that names are spelled correctly, and that the planner has the shares or percentages identified correctly. The client is not looking for patent or latent legal ambiguities, inconsistent terms, or inartful language inserted by the planner.

The same estate planner as in the previous example had a challenging time explaining revisions he made to a testator's will through a codicil. In the testator's existing will, she left any residence she occupied to her husband, subject to any debt. In the codicil, the estate planner added a provision that left any residence the testator occupied to her husband, subject to any debt. His testimony (*i.e.*, that the new language did nothing to change the old language) highlighted the lack of attention the estate planner paid to reviewing the existing will when he inserted duplicative language in a codicil. His explanation for the duplication was that he noted it, knew it wasn't necessary, didn't tell the testator that it wasn't necessary, drafted it anyway, and reasoned the duplication away simply by testifying that it was the testator's wish.

D. Invoices

Invoices are an often overlooked but important component of the file that the estate planner could produce in a will contest. Billing and time entry practices will vary from one planner to another. Some invoices, for example those demonstrating flat-fee work, often contain just the bare bones of information (*e.g.*, "For professional estate planning services rendered.") Others contain information that may prove very useful at the estate planner's deposition.

Consider the following example in which an estate planner appeared completely caught off-guard by his own invoice he produced just a few weeks before his deposition. In the planner's deposition, the following exchange occurred:

> Q: Did you communicate in any way with [the testator] before he came to your office to sign his will?
>
> A: No. My secretary must have taken his call, and she set an appointment on my calendar.
>
> Q: Is [Exhibit 1] a true and correct copy of your calendar for the day that [the testator] met with you?
>
> A: Yes.

Q: Was the day noted on [Exhibit 1] the only day you met with [the testator]?

A: Yes.

Q: Does [Exhibit 1] show that you blocked out one and a half hours to meet with [the testator]?

A: Yes. Well, my secretary did.

Q: Did your meeting with [the testator] last one and a half hours?

A: Probably between one and a half and two. Sometimes the meetings run a little long. Two sounds about right.

Q: Did you complete your work for [the testator] during the time that you met with him?

A: Yes. I was in and out of the conference room, you know, getting the documents drafted and then bringing them back for us to review and, you know, sign – the execution and everything.

Q: But everything that you did for [the testator] was accomplished during the two hours that he was in your office that day?

A: He left with the signed documents, if that's what you mean. We got everything done in about two hours.

An hour or so later…

Q: Earlier, you testified that [the testator] was in your office for maybe two hours, and you finished your work for him during that time. Is that testimony correct?

A: Man, I've slept since that day, but that sounds right as near as I can remember.

Q: Is [Exhibit 6] a true and correct copy of the invoice you delivered to [the testator] for the work you did for him?

A: Yes.

Q: [Exhibit 6] shows that you spent one hour meeting with [the testator], three hours preparing his will, two hours revising his will and a half hour executing his will, correct?

A: I think I -- these numbers are just --

Q: You just said you finished your work for [the testator] in about two hours and your invoice reflects that your work took six and a half hours. Isn't that what [Exhibit 6] shows?

A: I sometimes keep my time different for flat-fee cases and --

Q: Well which one is accurate -- your testimony or your invoice?

There is not (and was not) a good answer to the ultimate question. The planner had to quickly choose between calling his memory (and testimony) inaccurate or pointing out that his invoices are inaccurate records of his time (when they should be the *most* accurate record). Neither result leaves the planner looking like a stellar witness, and all he had to do to potentially avoid the trap was review the documents he produced before his deposition.

PLANNER PRACTICE TIP: Review the file contents that are ultimately produced to the contestant. Few things make an estate planner look more foolish, or give a litigator more ammunition, than a planner confronted at her deposition with a client file that he or she is looking at for the first time in months or years.

E. Execution Ceremony Evidence

The formality with which wills and other estate planning documents should be signed can never be overstated. The event is one of the most crucial stages in planning the estate. Done incorrectly, this step renders all the others utterly useless. Yet, some attorneys insist on casually free-wheeling their way through this ultimate step, and they do their client a tremendous disservice.

In a recent deposition, one defensive estate planner who wanted to quibble over the ceremonial nature of a will-signing offered a novel reason for doing so:

Q: I'm going to call the execution of the documents an execution ceremony. Can I use that phrase and you understand what it means?

A: It sounds a little formal to me, but, okay, I'll go with you.

Q: Okay. Do you think that the execution of wills, powers of attorney, and directives to physicians is not a formal event?

A: Well, to me, it sounds like a wedding ceremony, which, you know, I mean, I just kind of equate – I don't think – I wouldn't – I wouldn't equate a will signing with a wedding ceremony. And so that's, I guess, my – the difference that I have or maybe the concern or question that I may have. I just think of "ceremony" as something as sort of celebratory and I don't know that a will signing necessarily fits that description.

Imagine the furrowed brows of a juror trying to process that hot mess. A wedding is a ceremony. This was a will-signing, and not a wedding, so let's not call a will-signing a "ceremony." How much formality do you think this estate planner observed or imposed upon the event of the testator signing her will? Judge for yourself:

- The planner provided no instruction (even to the sister) for how to conduct the will-signing;
- The planner was not present for the eventual will signing; and
- The planner's file did not even contain copies of the will that was ultimately signed.

Formality matters. Whether you wish to call the event of signing a will a "ceremony" or not, the event is one that should leave an impression. Some estate planners follow a ritualistic approach to the event, even going so far as to utilize a script or checklist to provide structure and order to the task. Compare, for example, the following and consider which transaction is easier to defend:

Scenario A

Q: Are you aware of any clients of yours executing their wills, powers of attorney, directives to physicians at a UPS Store?

A: I mean, yeah, it has. I've had them sign them at Office Max and Office Depot as well. I've had them sign documents at the Stop N Go.

Scenario B

Q: Have you ever allowed a client to take a will that you prepared and execute it outside of your presence?

A: Not that I recall. I would not prefer – I would not advise that.

Q: Why would you not advise that?

A: I want to be sure that the execution is done correctly – that the will holds up. In my office – at my office, I can supervise things. I bring in the witnesses and notary to meet the client – to talk to them. They'll talk, maybe chat a while, and then I have the notary read through a script I've used forever. It's basically the self-proving affidavit. She reads aloud, and the client and witnesses answer out loud so that everyone can hear. She checks the checkboxes and then we start handing documents around for signatures.

F. A Few Words on Videotaping Document Executions

Most estate planners seem able to use only *one* word to discuss videotaping the execution of estate planning documents: Don't.

In the author's experience, this almost never works out well for the testator, the will's proponent, or the estate planner. The better practice, and the one that appears far more adopted by estate planners, is to leave cinematography to the professionals.

Here, the potential risks still seem to outweigh any potential benefits. Nevertheless, while there remains a reluctance among many estate planners to embrace technology, and practical reasons might dissuade the planner from videotaping the execution ceremony, the ease with which videos can be made today makes the future of the practice somewhat uncertain. For those looking to more fully explore the subject, Professor Gerry Beyer has compiled some amazing insights on the advantages and disadvantages of videotaping will and codicil executions.[75]

As Professor Beyer points out, some benefits of videotaping the execution ceremony include:

- Complete accuracy for the jury versus secondhand recollection of events; and/or

[75] Beyer, Videotaping the Will Execution Ceremony – Preventing Frustration of the Testator's Final Wishes, 15 St. Mary's L.J. 1 (1983).

- The "voice from the grave" of the testator herself, which may explain key decisions and even prevent a will contest.[76]

These advantages should be cautiously tempered with the following disadvantages:

- The testator's physical appearance on camera could be poor; and/or
- The testator's performance might take multiple "takes"; and/or
- The camera might well document precisely what the will's contestant *wants the jury to see*.

For example, in a recent case, an elderly gentleman died, and his grandson filed a will purportedly executed six months prior to the decedent's death. The decedent's only daughter quickly filed a general denial and a counterapplication to offer an earlier will for admission to probate.

Within days, the fateful call came from the grandson-proponent's attorney to the daughter-contestant's attorney. "There's video. Would you like to see it?" The proponent's attorney correctly assumed he had just dropped a bombshell.

All in all, the video wasn't bad. It probably did more to help the proponent's case than it did the contestant's theories. But even this video had its hiccups, misfires, and red flags (<u>none</u> of which would have been memorialized if the attorney had just kept the camera off in the first place):

- The video used just a cold open and the supervising estate planner did nothing to orient the viewer to the date, time, place, or identity of attendees visible in the frame;
- The alleged undue influencer was in the video sitting five feet from the testator (though the estate planner did later ask him to step outside the conference room);
- The testator himself barely spoke during the 30-minute video, and when he did, he frequently mumbled;
- In summarizing the documents, the estate planner himself incorrectly stated the operative effect of the will;
- The testator's performance was middle-of-the-road in terms of confidence, clarity, and verbalizing his understanding of the recorded events;
- When asked if he understood what the estate planner <u>just told him</u>, the testator asked him to repeat it and "go from the beginning";
- When the estate planner obliged, re-summarized the simple will, and asked if that made sense, the testator looked to each person in the room (and each person nodded at him) before answering that it did make sense;
- The estate planner called a "cut" to let the testator "look over the will," and there was no explanation for how much time lapsed while the testator reviewed the will for himself (if he even did); and
- The testator incorrectly stated that he had two grandchildren when, in fact, he had four of them.

VII. DEPOSITION FUNDAMENTALS

A. The Rules of the Game

Scope. The scope of the estate planner's deposition is limited by the scope of discovery for the given case. Rule 192.3 of the Texas Rules of Civil Procedure outlines the limits of that scope and confirms that the estate planner's deposition could be used to inquire into any unprivileged matter that is relevant to the lawsuit's subject matter, whether for offensive or defensive purposes.[77] Practically speaking, the scope of an estate planner's deposition is ordinarily pretty narrow and transaction-centric, inquiring into unprivileged matters that touch upon the estate planner's interaction with the testator, and the development and execution of the challenged document. However, this scope can become much broader in cases where the estate planner counseled with the testator over a longer period to craft and/or amend multiple documents. Thus, importantly, the scope of the estate planner's deposition is as limitless as the scope of discovery. This means that the information sought does not itself need to be admissible at trial, so long as the information sought is reasonably calculated to lead to the discovery of admissible evidence.[78]

Who's Invited? Under the Rules, the following persons are entitled to attend any oral deposition taken in a case:

- The witness;
- The parties;
- The parties' spouses;
- Counsel;
- Counsel's employees; and
- The deposition officer.[79]

Will contests, like most probate litigation, are notoriously family-centric affairs. The bad blood and infighting often comes bubbling to the surface between siblings, step-relatives, in-laws and outlaws. These dynamic relationships can sometimes spell trouble when

[76] *Id*. at 37.

[77] Tex. R. Civ. P. 192.3.

[78] Tex. R. Civ. P. 192.3(a).

[79] Tex. R. Civ. P. 199.5(b).

you try to place them all in the same small room at a deposition.

Sometimes the trouble worsens when an additional attendee is not one of the above "authorized persons". In the author's practice, it is not uncommon for a party to: (a) warn their attorney that the other side will seek to have someone else (*e.g.* a spouse or significant other) with them at the deposition to send a message to the party, or (b) "level the playing field" by seeking to bring their own "truth enforcer" to the deposition. In one instance, the author had a will contestant threaten to boycott his own deposition if his sister-in-law was in the room.

If any party intends to have a "non-authorized" person in attendance at a deposition, that party must give reasonable notice to all the other parties, either in the notice of deposition itself or by other means.[80] Note that Rule 199.5(a)(3) does not operate as broadly as Rule 267. Under Rule 267, or "The Rule," as it is more commonly known, several witnesses can be excluded from the courtroom and prohibited from talking about the case, to prevent these witnesses from shaping their own testimony based upon what they hear at trial, or what they discuss in the hallway. Experts – a class of witnesses frequently used in will contests – are frequently (not automatically) exempt from The Rule because the expert's presence is "essential to the presentation of the cause."[81] The same frequent exemption is not afforded at a deposition. If one of the parties wants their expert (*e.g.*, a medical doctor planning to testify about the testator's susceptibility to undue influence, or lack of capacity), the party must notify the other parties.[82]

LITIGATOR PRACTICE TIP: Know which fights are worth fighting. If the presence of one of the "authorized" persons is going to run the risk of a family melee, confer with opposing counsel ahead of time to address the risk conscientiously, and in keeping with the Rules, as well as the attorneys' creed to treat everyone courteously. Then, counsel your own client appropriately. If the likely presence of a "non-authorized" person at a deposition is going to derail the effort, or worse, consider limiting the deposition attendees to "authorized" persons.

Where is This Party? Traditionally, and as a matter of convenience and professionalism, the deposition of a party is noticed at the office of that party's attorney. In the case of a non-party estate planner deposition, the same tradition and courtesy is frequently extended, and the deposition is noticed to occur at the estate planner's office. There are, of course, occasions when such arrangements cannot be made. The planner's office might be too small for the event, or the planner might not actively practice any longer. The rules of procedure list five (5) permissible locations of an oral deposition. They include:

- The county of the witness's residence;
- The county where the witness is employed or regularly transacts business;
- The county of suit, but only if the witness is a party or a person designated as an entity's representative;
- The county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or
- Subject to the foregoing, at any other convenient place directed by the court in which the suit is pending.[83]

LITIGATOR PRACTICE TIP: Arrive early to plan for the most practical use of the deposition space. Typically, the reporter (and perhaps the videographer) will arrive first to set up their technology. If you aren't there to help set the stage, they'll take their best guess at where you want everyone to sit. Reshuffling the seating (and camera) arrangement wastes valuable time. Further, ask to see a test of the video. See what the witness will look like. For the price litigants pay to have professional videos produced, the least we attorneys can do is test the quality our clients are buying before we must show it to a jury.

B. Deposition Conduct

"You have a case of incipient verbal diarrhea." It may not be the saltiest epithet thrown at the legendary Joe Jamail by a witness during a deposition taken by the King of Torts, but thanks to the Internet, it lives in infamy as one of the funniest (or at least the most viewed – yep, there's a video) examples of deposition decorum sliding off the rails. Just Google "bad deposition," and you'll find more than enough similar examples. Thankfully, and notwithstanding the fact that tempers (or humors) may flare up at a deposition, the event is subject to some rules of conduct and professionalism.

The Rules treat depositions just like trial testimony, and the best rule of thumb (for all participants) is to act like the deposition is unfolding in front of the judge and/or jury. The attorneys are required to be cooperative, and courteous to each other and the

[80] Tex. R. Civ. P. 199.5(a)(3).

[81] Tex. R. Civ. P. 267(b).

[82] Tex. R. Civ. P. 199.5(a)(3); *But see Burrhus v. M&S Supply, Inc.*, 933 S.W.2d 635 (Tex. App. – San Antonio 1996) (holding that failure to provide notice of an additional expert witness attendee at deposition would not result in the exclusion of the expert witness's later testimony at trial)

[83] Tex. R. Civ. P. 199.2(b)(2).

witness.[84] Likewise, deponents are not permitted to be evasive or cause undue delay.[85] Exchanges like the following, which happened in the first five minutes of a deposition, aren't the best way for the deponent to present himself:

> Q: I am handing you what I have marked for the purpose of your deposition today as Exhibit Number 1. And before I ask you any questions about it, I'd like for you to take the time you need to get familiar with that document. And you let me know when you are ready.
>
> A: [Witness reviews document.] Okay.
>
> Q: Have you seen Exhibit Number 1 before?
>
> A: I don't know.
>
> Q: What does Exhibit Number 1 appear to you to be?
>
> A: What do you mean?
>
> Q: What are you holding? What is Exhibit Number 1?
>
> A: A [expletive] will.
>
> [Defending Attorney]: Can we take a break for just a second?

Private conferences during the deposition between the witness and the witness's attorney are improper, except as may be necessary to determine if a privilege should be asserted.[86] During a break in the deposition, private conferences are fine.[87]

LITIGATOR PRACTICE TIP: Evasive witnesses may ask for a break before answering a question that they think might hurt them. As a practical matter, when covering the "housekeeping" matters before the first question, many taking attorneys instruct and/or agree with the witness that breaks are fine, provided that they come after a response, rather than after a question.

C. Objections

1. The Permissible Objections

Three objections are permissible during a deposition. Two of the objections may be made to questions, while only one of the objections may be made to testimony. If these objections are not stated "as phrased" they are waived.[88] The objections are:

- Leading;
- Form; and
- Non-responsive.

LITIGATOR PRACTICE TIP: It is not uncommon for counsel in multi-party suits to try to agree that an objection made by one party shall constitute an objection made by everyone. Thus, if Counsel A asks a question, and Counsel B objects to "form," the parties may agree that Counsel C need not vocalize his objection to form to preserve any error in the question. Such an agreement can sometimes be problematic, and the author suggests its sparing use. Absent an agreement of this sort, failing to object to a question or response results in waiver.

Counsel for any party – not just the defending attorney – may object to the taking attorney's question as leading. One of the easiest (though not universally accepted) definitions of a leading question is one that admits of or suggests an answer. More often than not, the test of a question's leading nature lies in its phrasing or sentence structure.

At the estate planner's deposition, and in the author's experience, an objection to leading is generally improper when the *contestant's* attorney is taking the deposition, though sometimes asserted when the *proponent's* attorney is asking his or her questions.

The rules of evidence permit the usage of leading questions and give the trial court wide latitude to allow leading questions, (a) on cross-examination, and (b) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.[89] The will's contestant may (and often does) notice the deposition of the estate planner and thus does not technically conduct a cross examination. Nevertheless, to the will's contestant, the estate planner may appropriately be a witness identified with an adverse party – the will's proponent.[90] One might fairly assume that the will's scrivener naturally supports the authenticity and validity of his own work, and the estate planner is hardly neutral. Thus, leading the estate planner, for the will contestant,

[84] Tex. R. Civ. P. 199.5(d).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Tex. R. Civ. P. 199.5(e).
[89] Tex. R. Evid. 611(c).
[90] Arguably, the same principle would make any attesting witness(es) or the notary public a "witness identified with an adverse party."

should be permissible and a leading question should not be the basis for an objection. The issue, in some estate planner depositions, may need to be resolved by the trial court, as time-wasting exchanges like the following are bound to occur:

> Q: It appears [the testator] authorized you to copy [the alleged bad actor] on communications to her, right?
>
> A: Yes.
>
> [Proponent's Counsel]: Objection, form.
>
> Q: Did she also authorize you to just send communications to him for subsequent forwarding to her?
>
> A: Yes.
>
> Q: So that's two different types of authorities, wouldn't you agree?
>
> [Proponent's Counsel]: Objection, form. Objection, leading.
>
> [Contestant's Counsel]: Counsel, are you contending that this is not an adverse witness to me?
>
> [Proponent's Counsel]: I'm contending that this is *your* witness. You noticed him as your witness. You are not cross-examining my witness. You noticed him as *your* witness.
>
> [Contestant's Counsel]: And how does that impact –
>
> [Proponent's Counsel]: He is a fact – he is a fact witness and I do not believe you can ask him leading questions and I'm going to make those objections.

Objections to form are somewhat more difficult to distill down to bright-line rules. There could be many reasons why someone asserts a "form" objection to an attorney's question. The comments to Rule 199 suggest that a form objection could be asserted if a question:

- Calls for speculation;
- Calls for a narrative answer;
- Is vague;
- Is confusing; or
- Is ambiguous.[91]

Likewise, most litigators would agree that a form objection is properly asserted if a question:

- Is compound;
- Is argumentative;
- Is misleading;
- Has already been asked and answered;
- Lacks foundation;
- Mischaracterizes prior testimony or evidence; or
- Assumes facts in dispute or not in evidence.

A non-responsive objection might be asserted when the witness fails to respond to the question. It might also be asserted when the witness responds to the question but obscures his or her response with evasive or irrelevant information. Many witnesses – even good estate planners – often feel the need to explain or justify their answer to an otherwise very direct (even a "yes" or "no") question. For some interesting discussion on the limits and applicability of the "non-responsive" objection to "yes" or "no" questions, the author suggests reviewing *Smith v. State*, 763 S.W.2d 836 (Tex. App. – Dallas 1988).

LITIGATOR PRACTICE TIP: The legal point of the non-responsive objection is to strike the offending (*i.e.* non-responsive) part of the witness's answer. A more practical point of the objection is to plainly and clearly telegraph to the witness that he is wasting his own time by providing superfluous information. The objection has both substantive and practical uses but gauge the usage of the objection with the practical goal that more information might actually *help* your client. You might want to give the witness more freedom in responding.

PLANNER PRACTICE TIP: Any good woodshedding instruction will tell you to answer only the question that is asked. Volunteering information that you think the taking attorney will want to hear probably won't save time or resolve the case on the spot. In fact, the taking attorney will likely accept the volunteered information and craft a new series of questions that might have gone unasked but for the volunteering.

2. Objection Techniques

Obviously, there is typically not a judge in the deposition room to rule on objections asserted during the deposition. Thus, making the objection can suffice to preserve it and potentially strike the witness's response. However, this general rule has a very clear limit. The attorney stating an objection is required to provide a "clear and concise" explanation of the objection when the taking attorney asks for an

[91] Tex. R. Civ. P. 199 cmt. 4.

explanation.[92] If such an explanation is not provided, the objection is waived.[93] Similarly, if the objection is argumentative or suggestive (sometimes called the "talking objection") it is also waived.[94]

An instruction to a witness not to answer a question asked may be made in only the following four limited circumstances:

- To preserve a privilege;
- To comply with a court order or the rules of procedure;
- To protect a witness from an abusive question, or one for which any answer given would be misleading; or
- To secure a ruling pursuant to an objection raised to the question or testimony.[95]

Objections, just like the general conduct of attorneys during the deposition, are bounded by the rule of good faith.[96] Under the rule, an attorney may not ask a question for the sole purpose of harassing or misleading the witness, or for some other improper purpose.[97] Likewise, an attorney may not object to a question, instruct the witness not to answer or suspend the deposition without a good faith factual basis for doing so.[98] When a deposition exceeds the general 6-hour time limit, or is being conducted (or defended) in violation of Rule 199.5, any party (or even the witness) may suspend the deposition for the time required to obtain a ruling on the issue prompting the suspension.[99] Insisting that the deposition be conducted in good faith leads to fun and fiery exchanges like this, which, while taken from a will contest, was admittedly not the estate planner's deposition:

> A: …Thinking about it, she told all the neighbors that [John Doe – a party married to another person] and I were having an affair.
>
> Q: Were you?
>
> A: No.
>
> Q: Have you ever slept with him?
>
> A: No.
>
> Q: Ever spend the night at his house?
>
> A: No.
>
> [John Doe's Counsel]: Do you have a good faith basis to even ask these questions or are you just intentionally being rude, obnoxious and insulting?
>
> Q: Is that an objection?
>
> [John Doe's Counsel]: Yes.
>
> Q: Okay.
>
> [John Doe's Counsel]: To ask a question is – you need, as counsel, to have a good faith basis to ask a question.
>
> Q: Thank you. Noted.
>
> [John Doe's Counsel]: Do you have a good faith basis to ask your question?
>
> Q: Yes, I do.
>
> [John Doe's Counsel]: You know some facts that would support that insane question? I'm objecting because your behavior asking those questions is abusive, it's irresponsible, and it's unethical.

Many objections are frequently made not for the purpose of preserving an objection to the question or answer, but rather for the (sometimes not so subtle) purpose of coaching a witness, disrupting the taking attorneys' pace, or even just plain posturing. Some depositions, conducted by seasoned litigators, become almost conversational, and the helpful witness might nearly forget that the "conversation" with the taking attorney is testimonial evidence.

As a woodshedding technique, and to keep a witness alert, some defending attorneys will advise the witness that if they hear an objection to "form," the witness should take the cue and carefully consider what might otherwise seem like a harmless question before responding. Similarly, some defending or quasi-defending attorneys might telegraph to the witness that too much information is being offered, by making an objection to the non-responsiveness of the answer.

Finally, some attorneys (both taking and defending) will threaten to shut down or suspend the deposition if they believe the deposition is being conducted outside of the rules, when their real purpose (beyond highlighting their advocacy) is implying to the

[92] Tex. R. Civ. P. 199.5(e).
[93] Tex. R. Civ. P. 199.5(e).
[94] Tex. R. Civ. P. 199.5(e).
[95] Tex. R. Civ. P. 199.5(f).
[96] Tex. R. Civ. P. 199.5(h).
[97] Tex. R. Civ. P. 199.5(h).
[98] Tex. R. Civ. P. 199.5(h).
[99] Tex. R. Civ. P. 199.5(g).

witness that the current area of questions or testimony is highly sensitive and should be handled carefully.

LITIGATOR PRACTICE TIP: While objections are typically not ruled upon during the deposition, the Rules don't prohibit obtaining such a ruling without suspending the deposition. If the taking or defending attorney reasonably anticipates a critical argument at the deposition, it might make sense to alert the Court to the issue ahead of time. Depending on the judge, counsel may be able to arrange for an opportunity to "phone a friend" and secure some instruction from the Court on the spot.

3. Procedural Odds and Ends

The officer recording the questions, answers and other statements made at the deposition must provide the original deposition transcript to the witness, so that the witness may review and sign the transcript under oath.[100] Unless extended by agreement, this time to review and sign may not exceed 20 days, or the witness will be deemed to have waived the right to make changes.[101] On their review, the witness may make changes to her testimonial responses, and may explain the reason(s) for their changes on what is typically called an "errata sheet."[102]

Most changes appearing on the completed errata sheet probably fall under the category of honest mistakes or attempts to clarify and/or correct the record. For example, the witness might correct a spelling or numerical error in the transcription, or a flustered witness might misspeak and reference the year "2006" when she meant "1996." The errata sheet's usage, from the witness's perspective, has some practical and substantive limits. Witnesses are not permitted to make wholesale revisions to their deposition testimony such that the revised transcript reads like an entirely different deposition – or at least not without some potentially severe consequences.

At trial, *both* the original testimony and the revised or corrected testimony may be introduced, and the credibility of the witness may be impeached depending upon the inconsistency between the two.[103]

PLANNER PRACTICE TIP: Review, but don't rewrite, your deposition testimony. One errata sheet returned in a will contest revealed 82 changes to the witness's testimony, and the reasons ranged from the innocuous "typo" to the questionable "clarification," sometimes deleting (or adding) several entire lines of testimony. When the jury hears that you need to "clarify" something you've already said 82 different times, your credibility to testify truthfully in their eyes likely takes a hit.

LITIGATOR PRACTICE TIP: Impeachment with a prior inconsistent statement, or with a revised deposition, can be rewarding. But, attempting to impeach a witness on unimportant points or relatively minor inconsistencies can backfire. Some jurors might think you're just beating up an honest witness because their deposition was not error-free.

VIII. IDENTIFYING THE ULTIMATE GOAL(S) OF THE ESTATE PLANNER'S DEPOSITION

How great would it be for the contestant if the estate planner fell on top of his sword at his deposition – admitting that the subject document's execution was a total sham? When the estate planner admits the testator lacked mental capacity, that the execution ceremony was fatally flawed, or that the alleged undue influencer was the one in charge, the contestant's victory is clearly in sight. Such convincing annihilation is, of course, typically a fantasy. Most litigators would concede that those "Perry Mason" type moments never happen, and that achieving this moment at a deposition is an implausible goal.

The unlikelihood of such swift victory does not mean, however, that the goal of a deposition is minimized only to learning sterile, objective facts about the subject document's genesis and execution. Learning the facts is an obvious component of the estate planner's deposition, but the well-planned deposition can be so much more useful. While the "silver bullet" of that Perry Mason moment might not be realistic, "death by a thousand cuts" is far more achievable, and even the most rock-solid estate planner's armor can be stripped away a piece at a time. The utility of the estate planner's deposition is proven by counsel's ability to increasingly match relevant facts to an overall theory of the case that is adverse to the subject document's validity and ultimately favorable to their client. The case is built brick by brick, and not in one fell swoop. With this reality in mind, it is critically useful to identify the goals

[100] Tex. R. Civ. P. 203.1(a), (b).
[101] Tex. R. Civ. P. 203.1(b).
[102] *Id.*
[103] Tex. R. Evid. 613; *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 241-42 (Tex. App. – Eastland, 1975).

of the estate planner deposition long before you take it and in the earliest stages of the litigated case.

In many, if not most, cases, the deposing attorney should allow the estate planner's deposition to yield new and fruitful areas of exploration. But in every case, the deposing attorney should formulate a plan of attack well before the first question is asked, and this involves setting achievable goals for the deposition.

A. Key Goals for the Contestant to Accomplish at the Planner's Deposition

In his indispensable work, Winning at Deposition, D. Shane Read outlines eight advantages of a deposition:

1. Assess the witness's credibility;
2. Create inconsistent statements for use at trial;
3. Discover details of a party's claims or witness' knowledge;
4. Gather helpful admissions;
5. Learn bad facts about your case;
6. Narrow the trial issues;
7. Obtain settlement leverage; and
8. Preserve helpful testimony.[104]

These advantages, tempered with some disadvantages, can be distilled and modified somewhat for the will contest. Making the most of an estate planner's deposition (from the contestant's perspective) means balancing six overarching goals:

- Learn the facts (*i.e.* the who, what, when and where areas of inquiry concerning the estate planning engagement);
- Commit and contrast (*e.g.* commit the estate planner to best practices, and then contrast them to the practices followed, or not followed, in the specific engagement);
- Test the credibility, confidence, and self-advocacy of the estate planner (*e.g.* determine how the jury might perceive this estate planner's testimony as neutral, genuine, credible, defensive, or self-serving);
- Theory test on the disputed issues (*e.g.* inquire into the estate planner's perception of the testator's mental state, or the alleged undue influencer's role in the engagement);
- Invite honest hindsight (*i.e.* determine the estate planner's commitment to the subject document by testing whether that commitment could be shaken by unknown facts and the benefit of self-reflection); and
- Obtain a clear record that can be used: (a) at settlement, (b) in summary judgment practice, and/or (c) in front of the judge jury at trial.

1. Learn the Facts

In every case involving challenges to an estate planning document, the estate planner is going to know things that at least one side ordinarily does not. One of the primary goals, thus, is for the side that does not know some basic facts to learn them for analysis, evaluation and, ultimately, use in litigation.

For example, in the early stages of a will contest, a contestant often knows nothing more than the fact that a document they do not like exists in the world. Since the contestant often does not know the facts behind the genesis of the document, contestants often backfill this void of information with suspicion and surmise based on *other* facts that they *do* know. For example, "My sister never liked me and convinced mom to leave everything to her." This natural human response is frequently based upon the contestant's view of the people and relationships at issue, including: (1) the testator's age, health and infirmity; (2) the testator's prior estate planning efforts, if any; (3) how the testator and contestant historically behaved toward each other; (4) how the proponent and contestant historically behaved toward each other; and (5) how the proponent and the testator historically behaved toward one another.

To add or deduct the role that these facts and relationships played in the creation of the document from the litigant's trial theme, the contestant must learn objective facts about if (and how) these relationships manifested themselves during the planning and execution stages.

2. Commit and Contrast

Above all else, the deposing attorney should place supreme status upon efficiency as a goal. What's the point of taking the time to beat up an estate planner to make him look foolish if doing so serves no element of your burden of proof? Apart from making the contesting client feel vindicated, this limited approach rarely accomplishes anything.

Instead of the possibility of smug gratification, the estate planner's deposition should serve a much higher purpose. While the goals discussed in this paper sound far-reaching – and while the goals should be tailored – none may be more persuasively useful than committing and contrasting best practices with the events of the specific estate planning engagement.

Here, the inverted pyramid questioning technique (illustrated in Section IX *infra*) can really shine. This goal is aimed at establishing a consensus on the most

[104] Winning at Deposition, D. Shane Read, Westway Publishing 2013.

ideal estate planning engagement, gaining the estate planner's commitment to aspiring to the ideal and then examining the estate planning engagement at the heart of the matter to contrast ideals with reality.

A simple illustration helps prove the importance of the goal, and it borrows from one of the most (naturally skilled?) fictional advocates Hollywood has produced, Vincent Gambini of *My Cousin Vinny*.

> **Vinny**: The D.A.'s got to build a case. Building a case is like building a house. Each piece of evidence is just another building block. He wants to make a brick bunker of a building. He wants to use serious, solid-looking bricks. Let me show you something.
>
> *[he holds up a playing card, with the face toward Billy]*
> **Vinny**: He's going to show you the bricks. He'll show you they got straight sides. He'll show you how they got the right shape. He'll show them to you in a very special way, so that they appear to have everything a brick should have. But there's one thing he's not gonna show you.
>
> *[he turns the card, so that its edge is toward Billy]*
>
> **Vinny**: When you look at the bricks from the right angle, they're as thin as this playing card. His whole case is an illusion, a magic trick. It has to be an illusion, 'cause you're innocent.

From the will contestant's perspective, we want to talk about those cards. We want the estate planner to lay out the ideals of quality representation "like a brick bunker of a building." We want to give that estate planner every opportunity to describe his or her everyday practices as conforming to those strong high standards and ideals. Then, when we explore what actually happened in the subject case – when we really look at the cards – we want to turn each card on its side to show that they aren't strong like bricks, but rather thin and insupportable.

3. Weigh the Estate Planner's Credibility

To be of any significant use to either side in a will contest, the testimony of the estate planner must support the party's trial theme(s). The proponent of a challenged document wants the estate planner to prop up the legitimacy of the document and its creation and execution. The contestant wants the estate planner's testimony to further cultivate the seeds of doubt or suspicion. Both aims require a credible, and creditable, witness.

Despite myriad writings on the topics of witness preparation, effective communication and deposition performances guided by tons of rules, talented lawyers and scholars alike seem to have struggled with how to prepare a witness to be believable. The witness either is or is not, and humans generally seem to know which is the case quickly.

In many will contests, the estate planner's credibility is tied, in the jury's minds, to the conduct of the alleged bad actor. Put another way, if the alleged bad actor really did something bad, either the estate planner knew about it and was complicit or didn't know about it and should have taken steps to shelter the finished product from any bad conduct to begin with.

4. Theory Test the Disputed Issues

An estate planner's deposition allows both sides an opportunity to road-test the fact theories that they may ultimately present at trial.

For example, in a case involving testamentary capacity, the contestant will likely dive deep into the estate planner's sense (at the time) of the testator's medical condition. The contestant will want to learn, from the estate planner's perspective, how the testator looked, sounded and acted. Likewise, the contestant will want to learn what medical facts, if any, were provided to or kept from the estate planner.

In turn, the party defending the estate plan may choose to learn information that can bolster the theory that the estate planner's approach to the testator was careful, methodical, well-documented and therefore more resistant to attack.

5. Invite Honest Hindsight

In the rearview mirror of hindsight, everything gains clarity. "If you had known then what you know now" is a powerful preamble. When questioned, some estate planners demonstrate unshakable conviction in their prior work – even in the face of important facts they did not know at the time they completed it. Others evidence a more human characteristic – that nothing is ever perfect, and everything looks clearer and more obvious after the fact (*i.e.* snap decisions made in the trenches are easy to pick apart after the battle is over). Both approaches leave plenty of room for argument, and contestants and proponents alike will explore the estate planner's capacity for honest self-reflection at the deposition.

Contestants will frequently identify anything and everything that could have, and should have, been a red flag for the estate planner from the family dynamic and history, the testator's capacity and the potential for undue influence. Ultimately, these contestants will force the estate planner to a difficult choice: "If you had known [all the potentially bad stuff], would you have handled things the same way that you did?"

Proponents, at the same time, will often attempt to bolster the estate planner's work by dismissing or downplaying the importance of potentially bad facts "in

the moment" of the estate planning transaction. This approach and theme tend to highlight that estate planners can't work around facts (or allegations) that they don't know about and shouldn't pretend to be in the business of making medical judgments or passing judgment on the testator's estate planning choices.

IX. OUTLINING CONSIDERATIONS

From the perspective of the will contestant, planning for the estate planner's deposition often looks like a character assassination plot. When one of the central potential trial themes is that the estate planner performed lazy or sloppy work, counsel for the contestant will frequently hyper-focus on the minutiae to discredit any and every part of the estate planning transaction. Minor inconsistencies in good estate planning practices will be magnified. Small typographical errors will become the hallmarks of shoddy work. Anything short of absolute and ideal perfection will be characterized as a sham. In short, from the perspective of the contestant at the estate planner's deposition, there are no right answers and the estate planner is always on a hopeless crusade to defend work that the contestant will never accept as genuine.

A. It Helps to Have a Plan

If the attorney for the will contestant or proponent has no idea where the deposition will take them, the entire effort will likely be a waste of time and money. You'll learn a few things by accident, but you will invariably read the transcript a month later and wish you had a second chance to ask a really good question. Planning is paramount to accomplishing anything of value for the contestant.

In the section following this one, we examine the usefulness of outlining. A sample outline is provided, but the outline contained in this article is far from the only course that a taking or defending attorney might plot for the estate planner's deposition. Before we dive into the nuts and bolts of the sample outline, this section addresses two important outlining components – adopting a useful questioning technique and knowing the target of your questions before you ask the first one.

B. Use Open-Ended Questions and the Inverted Pyramid

One of the most useful questioning techniques in any deposition is the funneling method – often also referred to as an inverted pyramid. Truly gifted advocates have mastered the art of "boxing the witness in" by organizing their questions the same way that newspaper editors want their reporters to organize their stories. Think of an inverted pyramid or a funnel when crafting questions. The top layer consists of broad, general and open-ended inquiries. Below that is a layer of refined questions used to clarify the information volunteered by the estate planner. Below that layer is another level of refinement, until the taking attorney locks the estate planner in with very specific and closed-ended questions. In the example estate planner deposition outline provided in this article, we examine the utility of the funneling technique to invite the estate planner to (a) identify their standard practices in an estate planning engagement, (b) confirm the importance of each step in the process, and (c) compare their "best practices" to the actual engagement at issue in the case.

C. Know Your Target

Making the estate planner's deposition as productive as possible begins well in advance of asking the first question. A good and flexible outline is critical. Preparing that outline begins with learning as much about the witness as possible. In the time since its use has become ubiquitous and second nature, the Internet has proven time and again to be one of the most accessible and complete repositories of invaluable information. The Internet never forgets. And, in a society whose impulse to find immediate information can be satisfied at the push of a button, information is never more than a moment away.

Why then would counsel for the contestant ever overlook so powerful a way to "stalk" the estate planner in advance of their deposition? Imagine what gems counsel could unearth about the estate planner before even asking a single question. They might discover:

- A LinkedIn profile or other online resume identifying the estate planner's professional associations, other interests or connections;
- A firm website containing the estate planner's blog posts (including several on ethical estate planning practices and policies), or a "Contact Us" web-form that an undue influencer might use to initiate contact with the estate planner;

- A public disciplinary action that calls into question the estate planner's honesty and credibility[105]; or even
- A paper or article authored by the estate planner setting forth ethical concerns in estate planning, which, in turn they may have followed or ignored in the subject transaction.

X. OUTLINING THE DEPOSITION

Prepare an outline that works for you and fits the needs and circumstances of your case. An effective outline provides direction for the taking attorney. It gives him or her a sense of where they plan to go and how they intend to get there. Craft too minimal an outline and the estate planner's responses will dictate the direction of the deposition – likely leaving uncovered an area that the taking attorney intended to dive into. Make too expansive an outline and all you have is a script – leaving little room for deviation and heightening the chances that the taking attorney pays more attention to the questions than the answers. One useful method to prepare a deposition outline is to organize the goals the taking attorney hopes to attain.

That said, the following example estate planner deposition outline (each section is discussed in greater detail *infra*) has proven an organized, flexible and comprehensive starting point for some very effective estate planner depositions. First, we'll generally outline the skeletal deposition. Following sections of the article then elaborate on the goals and uses of each section.

A. A Basic Estate Planner Deposition Outline

This useful outline traces a familiar and somewhat chronological path. The deposition begins by addressing preliminary matters to ensure the integrity of the evidence adduced and quickly moves to discovering more detail about the estate planner's education and professional background.

Next, the taking attorney confirms the completeness of any responsive documents produced by the estate planner and explores the estate planner's preparation for the event to uncover any additional sources of information. Then, after identifying the typical red flags and warnings that every estate planner should be alert to the taking attorney moves into identifying the estate planner's routine in the typical estate planning engagement. That information is then funneled and distilled, so that the estate planner identifies the importance of each step that they have just identified.

Next, each of these steps is then addressed in the context of the specific estate planning engagement at the center of the dispute so that any variances or deviations can be further explored before every step of the event of execution is examined in isolation. Attention is then paid to any role that the alleged undue influencer may have played in the estate planner's engagement. Following that, the taking attorney can confront the estate planner with any information that the estate planner may not have known, including medical evidence favorable to the contestant's claim or inconsistent acts or words of the testator, to test whether the estate planner will admit the possibility that the engagement might have been compromised.

1. Preliminary Matters

a. Establish the rules of the deposition to preserve its integrity and to maximize the efficiency of the event.
b. Reinforce the meaning of the oath and commit the witness to truthful and *complete* responses.
c. Confirm the witness's competency to testify.

2. The Estate Planner's Educational and Professional Background

a. Confirm and establish the estate planner's level of skill.
b. Confirm and establish the estate planner's specialized knowledge of best practices.
c. Confirm and establish the integrity of the estate planner's body of work.
d. Explore available work produced by the estate planner in its context (*e.g.*, articles, blog posts, speeches or seminars that showcase the planner's knowledge and skills).

3. Subpoena Compliance and File Integrity

a. Confirm and establish that all responsive materials requested have been produced.
b. Confirm and establish that the estate planner reviewed his or her client file prior to deposition.

[105] In a recent case, the author defended a will that was prepared by an estate planner with a lengthy "rap sheet" of disciplinary actions ranging from neglect of a client matter to failure to return client funds. The estate planner's license was even suspended at the time he took the witness stand at trial. Thankfully, none of the specific disciplinary actions ultimately proved relevant to the case, and the jury never learned about them. Nevertheless, counsel for the contestant only needed moments to search the State Bar's public information and make a phone call to make this information a critical (and potentially decisive) part of the case.

c. Confirm and Confront regarding any missing elements of an estate planning file (*e.g.*, representation agreement, correspondence, notes, questionnaire, invoice, etc.).

4. Attorney-Client Privilege Issues and the Estate Planner's Deposition Preparation

a. Confirm and establish that all representation of the decedent was in the nature of estate planning services or learn what other services the estate planner performed for the decedent.
b. Discover whether the estate planner has ever represented anyone else connected to the case.
c. Discover what steps the estate planner took to prepare for her deposition (*e.g.*, a conference with the counsel representing the proponent – the "What should I expect at my deposition conversation").

5. Typical Red Flags and Warning Signs

a. Confirm and establish the circumstances, circumstances, conduct and behavior that alert the estate planner to potential problems with capacity or influence:

i. The testator's physical or mental infirmities;
ii. The influencer that answers questions for the testator and/or directs the conversation (*e.g.* "We want to make a change to dad's will");
iii. Dispositions that might appear unnatural (*e.g.* disinheritance of a spouse or child)

6. Standard Estate Planning Practices (Funnel Level 1 – Broad and Stage-Setting)

a. Discover the estate planner's typical steps (the below steps and questions are only a guide) undertaken in new and recurring client relationships.
b. Let the <u>estate planner</u> identify the steps that he or she typically takes. You can always confront them later with an important step they did not identify.
c. Gain the estate planner's commitment to the reason for each step.
d. Gain the estate planner's commitment to the importance of each step.
e. Gain the estate planner's commitment to taking each step for new <u>and</u> returning clients:

i. <u>Step 1: Marketing</u>

1. How do prospective clients find you?

ii. <u>Step 2: Conflict checks</u>

1. What policies and procedures do you employ to ensure that you can assume representation?

iii. <u>Step 3: Questionnaires and client intake forms</u>

1. How are they provided to new clients?
2. How are they returned to you?

iv. <u>Step 4: Initial phone calls and personal visits</u>

1. How does the initial contact with a new client typically occur?
2. What is the typical length of the initial contact?
3. How do you memorialize what you discuss with a client?
4. Do you attempt to verify the information that the client submits to you?

v. <u>Step 5: Preparation of drafts</u>

1. How are drafts prepared (*e.g.* blank page, form book, document software)?
2. How much time is typically spent preparing initial drafts of estate planning documents?

vi. <u>Step 6: Transmit estate planning document drafts to client</u>

1. How are they routinely delivered?
2. What follow-up instructions do you include when transmitting drafts?

vii. Step 7: Discussion / Review / Revision

1. How, when and where does any post-draft discussion typically happen?
2. How long does it generally last?
3. What level of review do you conduct regarding the documents (*e.g.* line-by-line, skip over the boilerplate, let the client ask the questions)?

viii. Step 8: Execution ceremony

1. How long do these typically last?
2. Do you use a script or outline to conduct each of them the same way?
3. Do you videotape will executions?

ix. Step 9: Scan / Save documents in the client file

1. What happens after documents are signed?
2. How do you retain the estate planning documents in your systems?
3. How and when do clients pay for the services provided?

x. Step 10: Send originals to client or instruct client to retain

1. How keeps the original documents?
2. What communications are given to a client with respect to where to keep original documents?

xi. Step 11: Follow-up / Closing letter

1. Do you close out estate planning files with a representation termination letter?

xii. Step 12: Routine check-up letter

1. Do you communicate with clients on a regular or recurring basis to review and perhaps consider revising their estate planning documents?

7. Best Estate Planning Practices (Funnel Level 2 – Distill, Narrow and Reinforce)

a. Goals:

i. Confirm and establish that each and every step in the process just identified is critical to effective representation.
ii. Gain the estate planner's commitment to extending only the highest level of care when dealing with his or her clients.
iii. Gain the estate planner's affirmation that no step can be overlooked.
iv. Avoid the temptation to backfill in any crucial steps in the process that the estate planner overlooked when narrating their own process, as that will come later.

1. Step 1: Marketing

a. Explore how particular marketing techniques may be aimed at different categories of potential clients.

2. Step 2: Conflict checks

a. Gain the estate planner's agreement that this step is important because engaging in work in the face of a conflict is:

i. Potentially fatal to the client's objectives.
ii. An ethical violation that the estate planner always wants to avoid.

3. Step 3: Questionnaires

a. Gain the estate planner's agreement that this step is important because it allows for the efficient transmission of critical

information from client to estate planner.

b. Gain the estate planner's agreement that this step is important because it helps ensure that the estate planner does not make a mistake in his/her own notes.
c. Gain the estate planner's agreement that this step is important because the failure to obtain relevant facts makes it impossible to draft an appropriate estate plan.
d. Gain the estate planner's agreement that this step is important because the client might not reveal material information simply because he or she was never asked by the estate planner.

4. Step 4: Initial phone calls and personal visits

    a. Gain the estate planner's agreement that this step is important because it ensures that the estate planner is working for a real client.
    b. Gain the estate planner's agreement that this step must happen in isolation with the client (*i.e.*, no beneficiary in the background).
    c. Gain the estate planner's agreement that this step is important because it gives the estate planner an opportunity to physically perceive the client (*i.e.* see them, hear them, etc.).

        i. This is critical to begin forming an opinion as to the client's mental capacity and freedom from undue influence.
        ii. This is critical because it is typically the first time that a "red flag" might arise regarding capacity and undue influence.

    d. Gain the estate planner's agreement that this step is important because it gives the estate planner an opportunity to interact with the client one-on-one.
    e. Gain the estate planner's agreement that this step is important because it is how the client communicates his or her estate planner objectives – it's how the estate planner knows what product to sell to the client.
    f. Gain the estate planner's agreement that this step is important because it helps the estate planner ensure that the information from the client can be verified (*i.e.*, that the estate planner isn't just taking the client's word for it re: marriages, children, assets, debts, etc.).

5. Step 5: Preparation of drafts

    a. Gain the estate planner's agreement that the use of forms, to at least some extent, is a natural part of the practice.

        i. Software saves time.
        ii. Drafting from scratch would take too long and cost too much.

6. Step 6: Transmitting estate planning document drafts to client

    a. Gain the estate planner's agreement that this step is important because it helps ensure that the work product received by the client is the same work

product produced by the estate planner.

b. Gain the estate planner's agreement that when a third-party intercepts the drafts, the chances for undue influence increase.

7. Step 7: Discussion / Review / Revision

    a. Gain the estate planner's agreement and affirmation that that time must be spent with the client and the document to review the plan, ask questions, gain feedback and make any appropriate changes.
    b. Gain the estate planner's agreement that this step ideally happens in isolation with the client (*i.e.*, no beneficiary or other person in the background).
    c. Reinforce the importance of the estate planner physically perceiving the client.

        i. It is important for the estate planner to ensure that the client is paying attention.
        ii. It is important for the estate planner to encourage the client to ask questions.
        iii. It is important for the estate planner to determine if the client appreciates the effect of what they're contemplating.

    d. Reinforce the importance of learning and ensuring that the drafted documents match the client's intentions.

        i. If the estate planning documents do not match the questionnaire, it is important that we note why.
        ii. If the estate planning documents do not match the estate planner's notes, it is important that we note why.
        iii. If the estate planning documents are significantly revised after they are drafted and discussed, it is important that we note why.

8. Step 8: Execution Ceremony

    a. Gain the estate planner's agreement that the integrity and seriousness of this step cannot be overstated.
    b. Gain the estate planner's agreement and affirmation that the estate planner (and not an office staff member) is the one that ideally supervises the meeting and leads the events.
    c. Gain the estate planner's agreement and affirmation that nobody but the client, the witnesses, the notary and the supervising attorney should be in the room when estate planning documents are executed.
    d. Confirm with the estate planner the importance of the "ceremonial" nature of the transaction.

        i. We want to create indelible memories.
        ii. We want the client to be fully engaged.
        iii. We want the witnesses to remember this event specifically.

    e. Gain the estate planner's confirmation on the importance of each

witness and the notary meeting with and speaking to the client, so that they may observe for themselves the client's capacity and freedom from undue influence.

i. The estate planner should acknowledge the importance that they engage in more than just chit chat.

f. Gain the estate planner's agreement that each step in the execution ceremony is important.

g. Confirm with the estate planner that a "best practice" is to use a script, outline or checklist to ensure that each step is completed in the execution ceremony.

9. Step 9: Scan / Save documents in the client file

a. Confirm the importance of retaining a complete client file.

i. The testator may lose his or her original documents – making photocopies critical evidence of the plan.
ii. The testator may look to the estate planner to make changes in the future based upon the older documents.
iii. The plan may come under attack in the future and the testator would want his or her attorney to have a full and complete record of how the engagement was carried out.

10. Step 10: Send originals to client or instruct client to retain

a. Obtain the estate planner's agreement that the plan is only worth something if it can be found when needed.

11. Step 11: Follow-up / Closing letter

a. Obtain the estate planner's agreement that it is important for a client to know when the estate planning engagement is concluded and when the attorney-client relationship has terminated for the particular transaction.

12. Step 12: Routine check-up letter

a. Obtain the estate planner's agreement that significant life events can necessitate changes to a plan and that estate plans should be routinely reviewed to ensure that the testator's intentions are current and properly documented.

8. Specific Estate Planning Practices (Funnel Level 3 – Specific to the Testator in the Subject Case)

a. Goals:

i. Compare and contrast standard and best practices to the representation that the estate planner gave to his or her deceased client.
ii. Walk through <u>each</u> of the steps that the estate planner has given to you to learn how this specific representation was performed.
iii. Remind them why they agreed each step is critical.
iv. Discover and explore any irregularities, missed steps, or steps that were not performed in their best and ideal manner.
v. For the contestant, start stockpiling flaws in the development, drafting and execution:

1. You testified earlier that this step was important. Why did you not take that step in this case?

9. Isolate Key Instances and Events (This Should Represent the Bulk of the Deposition)

a. Let every interaction and communication becomes its own chapter in the story.
b. Slow down time.

i. Take each event a single step at a time.

1. The taking attorney should dictate the pace of the events described.
2. Detail is important as this testimony often serves as the visual imagery that the jury attaches to the events of the estate planning engagement.[106]

10. Identify the Unknowns

a. Discover and explore medical history or medical events that the estate planner was or was not aware of.
b. Discover and explore family relationships that the estate planner was or was not aware of.

XI. CONCLUSION

In a study conducted in 2016, WealthCounsel discovered that 40% of Americans have a last will and testament, and about 17% of us have a trust. Those figures leave a lot of unfortunate room for intestacy, but an additional statistic drives home a potentially more concerning point. A whopping 53% of the respondents indicating that they had created an estate plan revealed that they created that plan *specifically* to reduce family conflict.

The conclusion? Conflict is coming and at least half of the estate plans in existence must contend with it. Estate planners spend significant time counseling with clients to plan for a variety of contingencies and should, for themselves, plan to have to defend their work.

Undoubtedly, the information possessed by an estate planner in a will contest ranks high among the that which will ultimately decide the outcome of a case.

If we think of the subject estate plan like a house, the contestant wants to show that the house is shoddy while the proponent wants to demonstrate that the home is a model of strength and durability.

When well-kept, the estate planner's file contains the foundation of the plan at the center of the dispute, and that file contains elements that (should) come straight from the deceased testator. The file is the blueprint for the house.

When poked and prodded, the estate planner's narrative memory provides the building materials. His or her recall of the key events describes to the jury how the house was built. Were any corners cut? Are there flaws in the construction? Or, was the transaction carried out to the letter? Proponents and contestants alike should take full advantage of the estate planner's deposition to build their version of the case they want the jury to see and hear and estate planners should approach their tasks with a mind toward the future when they may have to explain how the plan was built.

[106] For example, "They came into my office and we talked about the estate plan," provides almost nothing for the jury to "see" from the testimony. Whether representing a will's contestant or proponent, I prefer to slow things down to almost a micro-level. When a client comes to your office, where do they park? How far would they have to walk? Is there a security desk where they have to check-in? Who is the first person in your office that they would ordinarily see? While there is a risk of misusing time in isolating particular events down to their elements, the benefits can often be remarkable. The attorneys learn more discrete facts that they can argue to the jury and (sometimes) the estate planner's memory is enhanced by taking the process one step at a time.