Fiduciary Litigation Strategies[1]

William Conrad Trosch
Conrad Trosch & Kemmy, P.A.

301 South McDowell Street, Suite 1001
Charlotte, NC 28204
Phone: 704-553-8221
TroschBill@CTKLawyers.com

I. Scope Note

This manuscript explains to the transactional attorney trial strategy from the point of view of a litigator. The focus is on the types of litigation, including litigation by, against, or involving fiduciaries, that may result from work performed by Elder Law attorneys. The hope is that by understanding 'how a litigation attorney thinks,' as well as the claims, tactics, and procedures used in litigation, the transactional attorney and her clients may avoid litigation completely.

II. Why does a transactional attorney care about Litigation?

Sadly, many transactional attorneys are quite cavalier about their attitude towards avoiding thinking about litigation. I have heard countless times the transactional attorney who professes "I chose my area of law to avoid litigating." Yes, it is true that a transactional attorney does not need to possess a depth of knowledge about the Rules of Civil Procedure, the Rules of Evidence, and the Rules of Court. The 'Non-litigator,' however, ignores litigation knowledge at her clients (and her own) peril. I have litigated many holographic wills and form wills printed

[1] Permission has been obtained from Client(s) to use unredacted documents and forms for this manuscript and seminar. No privileged communications have been revealed. Some documents were already redacted and are provided in that format.

from the internet. You may be surprised, however, to know that most of the fiduciary litigation cases I have handled involved documents prepared by attorneys (many of the actions involved the attorneys themselves).

A. Keeping Your Client Away from Controversy and out of Court

How do you prevent litigation if you do not understand litigation? A transactional attorney tries to figure out how things may go wrong and draft or plan around it. The problem is that how things translate in court is vastly different than how they translate outside of court. For instance, if two brothers argue outside of court about who should get the family car when Dad and Mom have died, they may argue about what their parents promised them, who got more money from their parents, who was more loved by their parents, and a whole host of sibling bickering. In a courtroom, a judge may not let a jury hear any of those 'facts' due to evidentiary rules. And how a judge or jury interprets the facts that are presented will be very different than how an attorney (who spends a significant amount of time listening to other clients and their heirs fight in a law office environment) interprets those same facts.

A litigator will screen a case based on its chances of success in front of a judge and/or jury. Success in court is dependent on a litigator being able to forecast how a judge and/or a jury will view the evidence. Success for transactional attorney keeping a case out of court is dependent on the transactional attorney being able to forecast how a litigator will screen a case.

B. What You Draft May End up in Court

A transactional attorney should be able to find many (if not all) of the ways that a litigator may attack the transaction. One good motivator for creatively tearing apart early drafts of your documents is to imagine having to explain the documents, line by line, to a jury while they use life-size projected images of the documents to read along with you. Then you are cross-

examined on what the hell you meant when you wrote it, who told you to put it in there (or if you just shoved it in … because), and why you took Bobby's side over Betty.

C. You May End up in Court as a Witness, or even a Party

Even if your documents are perfectly drafted, if you do not look skeptically ahead at how your plan and actions may appear to a litigator, judge, and jury, then you increase your odds of meeting litigators, judges, and juries in person. The reality is families are primed to fight when a loved one is sick or dies. Most of us have issues from childhood that we carry into adulthood. When someone we love is in pain or dies, it hurts deeply. Add money and greed on top of that, and you have people at their lowest.

With these feelings as a backdrop, people look for someone to blame, and the attorney is a prime target. Look beyond the documents and think about how your actions will appear under the courthouse microscope. In the last year, I have litigated a situation where an attorney prepared unexecuted estate planning documents for a 'client' without ever having talked to the 'client' because the client's daughter handled everything for the 'client.' Of course, the daughter got almost everything in the Will. That was an extreme case, but I have encountered dozens of other situations where an innocently motivated attorney did not think about how their actions would look under a microscope and faced a courtroom because of it.

III. What does Litigation Look Like?

A. Litigation Process – Superior Court Generally

1. Gather Evidence Before Filing Suit

The best litigators do not wait until they are filing a lawsuit before they gather all available evidence. Much of what you will need to try a case will be available (though it may

take some work to obtain it) early in the dispute. Gathering the evidence early forces the litigator (and his client) to evaluate his case from the start. More importantly, attorneys must sign the Complaint (or similar pleading) and certify that "to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule 11, N.C. Rules of Civ. Pro.

2. File Suit

Filing a lawsuit involves taking the Summons and Complaint to the Clerk of Superior Court, then having someone from the Clerk's office issue (fill out there portion and sign) a Summons, receive the Summons and Complaint into a (newly opened) file, take the filing fees on behalf of the Clerk's cashier, file stamp the original and copies of the Summons and Complaint, (sometimes) deliver a copy of the Summons and Complaint to the Sheriff's department for service, and hand file stamped copies to the Plaintiff.

3. Pleadings

The courts have a specific rule that defines what they consider pleadings, though it differs from what practitioners call pleadings. Rule 7 of North Carolinas Rules of Civil Procedure defines pleadings as: "There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer."

As a practical matter, depending on what attorney you ask, the term 'pleadings' can mean everything from the precise list given by Rule 7 to every piece of paper filed with the court, and everything in between. I generally consider pleadings

4. Standard Scheduling Orders[2]

I have attached a Mecklenburg County Scheduling Order as an example of what to expect, though each jurisdiction deals with scheduling differently. I suggest that you look at the written local rules (which is probably more than the most local practitioners have done) as well as speaking with local litigators about the unwritten local rules.

5. Initial Motions

I consider initial motions as ones that are plead in or before the Answer. Rule 12 of North Carolina's Rules of Civil Procedure discusses most of them: Lack of jurisdiction over the subject matter, Lack of jurisdiction over the person, Improper venue or division, Insufficiency of process, Insufficiency of service of process, Failure to state a claim upon which relief can be granted, Failure to join a necessary party, Motion for judgment on the pleadings, Motion for more definite statement, and Motion to strike.

These motions can be looked at as Jurisdictional Motions, Claims Motions, and Motions to strike. Jurisdictional Motions attack the Court's jurisdiction of a party or subject matter. Jurisdictional Motions deal with all that stuff in law school that a transactional attorney (and some litigators as well) never wants to hear again (so I will just say, if it is an issue, call me). Claims Motions are what I call motions that say the claims were improperly pled or that all the proper parties are not before the Court. The most common initial claims are failure to state a

[2] See Exhibit Q, which is a Scheduling Order for a Mecklenburg County Trust Challenge case that later was consolidated with a Will Caveat; See Exhibit R which is a Peremptory Setting Request once the Trust/Caveat cases were consolidated.

claim upon which relief can be granted (or 'you did not plead all the elements of your claim") and Motion for judgment on the pleadings (where the factual allegations in the pleadings are sufficient for a judge to rule immediately – usually because the facts are not in dispute between the Complaint and Answer). Finally, there are Motions to Strike for "pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." Rule 12, N.C. Rules of Civ. Pro.

6. Discovery

a) Informal Discovery

When I first started practicing, one of my mentors taught me about his 'Open File' policy, meaning that all non-discoverable information was kept in a separate pocket (or box) of the file. My mentor would allow opposing counsel to come look at and/or copy the entire file of discoverable information. This was an extreme policy, but my mentor had a point: Civil trials are supposed to be about the facts and evidence and not about legal-technical tricks and 'hide the ball' games. Different versions of informal discovery are used depending on the attorneys involved and the degree of trust between parties and their attorneys, but all involve some degree of information sharing without direct use of Rules of Civil Procedure. Formal discovery is more expensive and many times unnecessary.

After a lawsuit is filed, however, informal discovery should morph into formal discovery to make sure that the information that was shared was complete. In other words, use discovery pursuant to the Rules of Civil Procedure to ensure that the opposing parties have shared everything you are entitled to.

b) Scope of Discovery under the Rules of Civil Procedure - Rule 26

Generally, Rule 26 states that if information sought in discovery is "reasonably calculated to lead to the discovery of admissible evidence" and not privileged, then a party can seek it though the discovery process. There are a number of exceptions to what must be provided, but the transactional attorney should assume that everything not protected by attorney-client privilege is discoverable (many times other privileges, such as doctor-patient privilege, are waived by asserting claims or defenses in a lawsuit). When drafting documents, including letters to people not your client, you should think about what each document would look like blown up on a poster and introduced as Exhibit A in your client's (or your) trial.

The discovery phase of litigation can start as soon as the Complaint is filed and continues up until the trial. Usually, after an Answer is filed to the Complaint

c) Interrogatories – Rule 33[3]

Interrogatories are simply written questions asked by one party to another that require a verified (under oath) written response. Each party can ask up to fifty (50) interrogatories to each other party (or more with approval by the Court). The answering party has thirty (30) days (45 if the interrogatories were served with the Complaint) to respond and can easily get a thirty (30) day extension, bringing the total response time to sixty (60) days (or 75 if served with the Complaint). In theory, any objections raised passed the deadline are waived, but it is the rare judge that enforces the waiver.

Lawyers usually give their client great assistance in answering the Interrogatories, so by the time they are verified, the answers rarely provide any earth-shattering evidence.

d) Requests for Production of Documents – Rule 34[4]

[3] See Exhibit S, which include Interrogatories that were responded to in a Caveat/Trust Challenge case.
[4] See Exhibit S, which include RFP that were responded to in a Caveat/Trust Challenge case.

The full name of Rule 34 is Requests for Production of Documents, Electronically Stored Information, and Things; Entry Upon Land for Inspection and Other Purposes. Rule 34 usually is used to request that discoverable documents be copied, though Rule 34 may be used to inspect, copy, or test any tangible things. The response times are the same as for interrogatories and usually Requests for Production of Documents are served with and in conjunction with interrogatories.

Rule 34 requires that production of documents must be provided "as they are kept in the usual course of business or must [be] organize[d] and labe[ed] to correspond to the categories in the request." A good judge should sanction those attorneys who still try to chunk thousands of disorganized documents in boxes when the one relevant (and damaging) document could have easily been provided in response to a request.

e) Requests for Admissions – Rule 36[5]

Requests for Admissions are many times the most powerful discovery tool a party has, but they are woefully underutilized. If you want to nail down the issues in dispute, force the other side to admit to damaging information (if they deny it, then the jury may see they lied and/or they may face attorneys fees being awarded when you have to prove it), or you want to authenticate evidence prior to trial so that you can have a more efficient and flowing evidence presentation, then Requests for Admissions are the way to go.

Rule 36 explains that "[e]ach matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is

[5] See Exhibit T, which are RFA that were responded to in a Caveat/Trust Challenge case.

directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney..." If only part of the admission is admitted, the response must admit that part and deny the rest. A party may give lack of information or knowledge as a reason for failure to admit or deny only if he certifies that "he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. Id.

f) Depositions – Rule 30[6]

Depositions are the best discovery tool, though they are underutilized because they can be expensive. Depositions are when an individual must appear and testify under oath before a court reporter. Depositions are used either to discover information or to obtain trial testimony (usually by video) for witnesses that cannot or will not testify in court. Either party, with proper notice can take the depositions of:

(1) Parties

(2) Witnesses

(3) Experts

(4) Rule 30(b)(6) Depositions of Entities[7]

(5) Records custodians[8]

[6] See Exhibit U, which is a Notice of Deposition of a treating doctor.

[7] A 30b6 deposition is a device whereby you submit issues to an organization and they send you who can answer questions about those issues. See Exhibit V, which is a Rule 30(b)(6) Notice of Deposition with a Request for Production of Documents.

[8] If other parties will not stipulate to the authenticity to business or other records, you may have to depose the records custodian to authenticate the documents produced, ensure their completeness, and to ask questions what they mean (abbreviations, organization, lingo, etc.).

g) *Subpoena Duces Tecum – Rule 45*[9]

7. Evidence

8. Mediation

9. Motions[10]

10. Trial

a) *Jury Trial*

b) *Judge Trial*

A judge trial is exponentially easier and less complicated than a jury trial. Judges ask questions when they do not understand; they speak legalese. Judges are more willing to hear witnesses out of order, if necessary, or recess to accommodate witnesses or attorneys. Many judges, for good or bad, are more apt to allow things into evidence than in front of a jury ('your objections will go towards the weight' – meaning they will let almost anything in, but will not take it as seriously given its questionable admissibility).

Other than jury selection ('Voir Dire'), a typical judge trial follows the same format as a jury trial, only everything seems to proceed much quicker and more smoothly (a 5 day judge trial may equate to a 20 to 25 day jury trial). Judges will often let all evidence in and reserve ruling on the admissibility of evidence until their final Order, where they overrule all objections (especially those made by the winning side).[11] Usually, in a judge trial, I will submit a

[9] A subpoena *duces tecum* allows you to obtain information from a person or entity with or without having them appear to testify in a deposition or trial. See Exhibit W, which is a Subpoena Duces Tecum in a Tortuous Interference with Expectancy of Inheritance case.

[10] See Exhibit X, which is a Brief on Motion to Dismiss for Failure to Join Necessary Party; Exhibit Y, which is Motion to Withdraw as Counsel for Defendant; Exhibit Z, which is a Notice of Hearing of Motion to Withdraw as Counsel.

[11] See Exhibit JJ, footnote 5, which is the Judgment/Order by Judge Diaz in a Caveat/Trust Challenge case.

memorandum of facts/law so the judge has our side's version of the facts. After the close of evidence, this memorandum is converted to a proposed order or proposed findings of fact.[12]

11. Post-Trial

a) Appeals from Trial Courts to Appellate Courts[13]

b) Appeals from Arbitrations (almost always lose)

B. Caveats

1. What is a Caveat?

a) Caveat

A Caveat is an *in rem* (where the *res* is the Will itself rather than the property devised by the Will) challenge to the validity of a Last Will and Testament. "The purpose of a caveat is to determine whether the paper-writing purporting to be a will is in fact the last will and testament of the person for whom it is propounded." Wilder v. Hill, 175 N.C. App. 769, 772 (2006). N.C. App. 417, 423 (1970). Once a Caveat is filed, only a complete family settlement stops a jury from deciding the issue of *devisavit vel non* (he devises or not). A Caveat proceeding may be about one purported Will, or many (if the most recent Will is invalid, is a prior Will valid, etc.). No collateral attacks on a Will is allowed, as a Caveat is the 'complete and adequate remedy' for deciding the validity of a Will. Mileski v. McConville, 199 N.C. App. 267, 273 (2009).

b) Grounds for a Caveat

The most common grounds for a Caveat are the closely related Lack of Capacity, Undue Influence, and Duress (all discussed below). The lack of any of the technical drafting or

[12] See Exhibit G, which is a comprehensive Proposed Findings of Fact in a Caveat/Trust Challenge case.
[13] See Exhibit OO, which is an Order by a Superior Court Judge dismissing appeal.

execution requirements (signed by person making Will, attested by at least two competent witnesses, etc.) or a subsequent revocation are also grounds for challenging a Will. Other, less common, grounds for challenges include fraud, forgery, or mistake (this list is not exhaustive).

c) How to File

Caveats are entered with the Clerk of Superior Court and filed in the decedent's Estate file. A filing fee of $200.00 must be paid upon filing. Upon motion by an interested party, the person filing the Caveat may be required to file a bond to secure payment of costs and damages if the Estate is ultimately found wrongfully enjoined or restrained by the Caveat. The amount of the bond will be set by the Court after considering relevant facts, including but not limited to: 1) Whether the estate may suffer irreparable injury, loss, or damage; 2) Whether the Caveat has substantial merit; and 3) Whether the Caveat was filed *in forma pauperis*.

A Caveat will be dismissed if not initiated with the Clerk of Superior Court. The person who files the Caveat and all other interested parties who align with him are called the 'Caveators.' All those aligned with the Executor in claiming the Will is valid are called 'Propounders.' If an interested person does not appear and align themselves as either a Propounder or Caveator, then the judge must dismiss them from the proceeding even though they will be bound by the result.

d) Time for Filing

A Caveat may be filed any time within three (3) years of the probate of a Will. If the Caveator is less than eighteen (18) years old or incompetent, then she may file within three (3) years of the removal of the disability (i.e. 21 years old or 3 years after becoming competent). A Caveat may be instituted as a response to a probate in solemn form (either by filing a Caveat prior to the Hearing or raising *visavit vel non* at the solemn form Hearing). Once a Will is

probated in solemn form, no properly served interested party (from the solemn form proceeding) may thereafter file a Caveat.

2. Who has Standing to File a Caveat?

Any party 'interested in the estate' can bring a Caveat proceeding. N.C.G.S. §31-32. 'Interested in the Estate' is defined as having "some pecuniary or beneficial interest in the estate that is detrimentally affected by the will." In re Will of Calhoun, 47 N.C. App. 472, 475 (1980). Interested parties include heirs at law (who might take if a Will is thrown out), next of kin, those who claim under another purported Will (even if the purported Will is only a copy).

3. Procedure for Caveat

The following is the life cycle of a Caveat Proceeding:

- Death of Testator
- Will submitted (by Propounder) to Clerk of Superior Court for Probate
- Caveator files Caveat with Clerk[14]
- Clerk transfers Caveat file to Superior Court Docket for trial by jury
- Clerk Suspends Some Estate Activity and Orders Protection of Estate Assets
- A Hearing is Held for Interested Parties to Align with the Propounder or Caveator[15]
- Parties May Respond within thirty (30) days of Alignment Hearing Order[16]
- Upon Motion of an Aligned Party, the Court may require Caveator to Provide a Bond
- Discovery Phase[17]

[14] See Exhibit M, which is a Caveat to a propounded holographic will.
[15] See Exhibit O, which is a Citation and Notice of Alignment Hearing; Exhibit P which is an Order of Alignment.
[16] See Exhibit N, which is an Answer/Response to a Caveat.
[17] See Exhibit S, Exhibit T, Exhibit U, and Exhibit V, and Exhibit W.

- Dispositive Motions (Motions to Dismiss, in rare cases Summary Judgment, etc.)[18]
- Jury Trial
- Judgment[19]
- Costs and Attorneys Fees[20]

4. Service on Necessary Parties (and Proper Parties)

All parties interested in the Estate should be served with the Caveat pursuant to Rule 4 of the North Carolina Rules of Civil Procedure. If the Will contains trust provisions naming a charity or if the Caveat is consolidated with an action involving a trust with a charitable bequest, be sure to give proper notice to the North Carolina Attorney General (who has in the past taken the position that if a charity may receive a bequest, then the North Carolina Attorney General must be served notice)[21]. If a person with standing is not properly served notice of a Caveat, then that person may bring another Caveat as long as it is timely filed. If during the pendency of a Caveat, the Court decides an interested party was not given proper notice, the Court is not required to suspend or dismiss the proceedings. The Court is within its discretion to stay, dismiss, or proceed when an interested party has not received proper notice.[22]

5. Settlement[23]

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[18] See Exhibit X, which is a Brief on Motion to Dismiss for Failure to Join Necessary Party.
[19] See Exhibit JJ, which is the Judgment/Order by Judge Diaz in a Caveat/Trust Challenge case.
[20] See Exhibit KK, which is my Petition for Attorneys Fees and Costs in a Caveat/Trust Challenge case; Exhibit LL, which is my Affidavit of William C. Trosch in support of Petition for Attorneys Fees; Exhibit MM, which is my Memorandum of Trustee/Administrator CTA Regarding Attorneys Fees and Costs; and Exhibit NN, which is Judge Diaz's Order regarding apportionment of attorneys' fees.
[21] See N.C.G.S. 36C-2-205; Exhibit II, which is a Notice of Filing containing the NC Attorney General's Office's waiver of participation in Caveat/Trust Challenge case with minor contingent beneficiary which was a misnamed charity.
[22] In re Will of Brock, 229 N.C. 482, 487–88 (1948); In re Will of Hester, 84 N.C. App. 585, 593, rev'd on other grounds, 320 N.C. 738 (1987); See Exhibit JJ, footnote 3, which is the Judgment/Order by Judge Diaz in a Caveat/Trust Challenge case.
[23] See Exhibit PP, which is an example of a family settlement agreement.

Until recently, there was no way to settle a Caveat without the approval of all interested parties, even if they only had a .0001% chance of getting a small specific bequest of $100.00. This was unworkable and led to unnecessary jury trials and small insignificant parties hijacking settlement negotiations (some would say extorting).

Now, only those who have appeared and aligned must be part of a settlement agreement. Once settled, a superior court judge must approve the settlement. The Clerk of Superior Court does NOT have the authority to "[modify] the terms of a last will and testament or resolving a caveat of a last will and testament." N.C.G.S. § 28A-2-10.

6. Dispositive Motions

Summary Judgment and Directed Verdicts are highly disfavored and, until recently, almost unheard of in Caveat proceedings. Courts may make Summary Judgment when no genuine issue of material fact exists in the Caveat, which, absent a total breakdown by one side or another, never happens. A Directed Verdict rarely may be granted only at the following times: 1) In favor of the Caveator after Propounder's evidence as to the issue of the formalities of a validly executed Will; 2) In favor of the Propounder after the close of all evidence on the issue of the formalities of a validly executed Will; and 3) In favor of the Propounder after the close of all evidence on issues the Caveator raises (capacity, undue influence, duress, etc.).

7. Trial

A Caveat trial is always by jury. The burden of proof is first on the Propounder to prove that the Will was executed with all the formalities required by law.[24] After the Propounder meets his burden, the burden of proof shifts to the Caveator to prove by the greater weight of the

[24] See Exhibit EE, which is my notes of my Direct Examination of the Propounder in a Caveat/Trust action. Though the Caveators admitted the formalities, I wanted to frame the trial by having my best witness go first. If it had been a jury trial, then I would have also been able to 'meet' the jury first in Voir Dire, also an advantage.

evidence the issues raised in the Caveat that would invalidate the Will.[25] In its discretion, the Court may bifurcate the trial if necessary for the orderly presentation of evidence and issues, but only with the same jury. There are pattern jury instructions for the issues of Lack of Testamentary Capacity,[26] Undue Influence,[27] Duress,[28] Devisavit Vel Non,[29] Attested Written Wills,[30] and Holographic Wills,[31] as well as an Introductory Statement for Wills.[32]

8. Judgment[33]

Once the jury returns a verdict as to *devisavit vel non*, the Court enters judgment reflecting the same. The Clerk then files the judgment in the estate file and enters it into the VCAP database, noting that final judgment has been entered either sustaining or setting aside the Will. The Clerk of Superior Court then resumes the administration of the Estate.

9. Costs and Attorneys Fees

"Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court: ... (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder . . ." N.C.G.S. § 6-21 Attorneys fees are allowable as costs in N.C.G.S. § 6-21 but "[i]n any caveat proceeding...the court shall allow attorneys' fees for the attorneys of the

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[25] See Exhibit FF, which is my notes for Cross-Examination of one of the Caveators in a Caveat/Trust Challenge; Exhibit BB, which is a Subpoena for a trial appearance; Exhibit CC, which is the Evidence Log we used for evidence presented by the Caveator; See Exhibit DD, which is an example of what I do for almost all Exhibits I know I will introduce in trial. Exhibit DD is my security blanket that I never read any more. No matter how many times I have done it, I feel more secure with it in case I blank out.
[26] See Exhibit B
[27] See Exhibit C
[28] See Exhibit D
[29] See Exhibit D-1
[30] See Exhibit E
[31] See Exhibit F
[32] See Exhibit A
[33] See Exhibit JJ, which is a final judgment in a Caveat/Trust Challenge case.

caveators only if it finds that the proceeding has substantial merit." Id. The Caveator does not have to succeed for the Court to find it had substantial merit. It is my experience that, unless it is a frivolous Will or Caveat, ALL of the attorneys get paid, usually by the Estate.[34]

10. What if the Assets were Transferred before Death by the Future Executor?

Certainly, it is one of the duties of the Personal Representative of an Estate to investigate the Estate's claims against others who might have unlawfully taken money from the deceased. The Personal Representative certainly should look at the activities of fiduciaries prior to the death, but what if the PR is the one that may have taken the money before death? In these circumstances, try and remove the PR, or file a claim for Tortuous Interference of an Expected Inheritance or Gift.

C. Before the Clerk

1. Jurisdiction of Clerk

a) Original and Exclusive Jurisdiction over Most Estate Proceedings

An "estate proceeding" is "a matter initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding." N.C.G.S. § 28A-1-1. It is important to note that there can be multiple estate proceedings within the administration of one decedent's estate. Original and Exclusive Jurisdiction means that for the following types of Estate Proceedings, the Case must start and stay (until ruling) before the Clerk of Superior Court:

- Probate of Wills;

[34] See Exhibit KK, which is my Petition for Attorneys Fees and Costs in a Caveat/Trust Challenge case; Exhibit LL, which is my Affidavit of William C. Trosch in support of Petition for Attorneys Fees; Exhibit MM, which is my Memorandum of Trustee/Administrator CTA Regarding Attorneys Fees and Costs; and Exhibit NN, which is Judge Diaz's Order regarding apportionment of attorneys' fees.

- Granting and revoking of letters testamentary and letters of administration, or other proper letters of authority for the administration of estates;
- Determination of the elective share for a surviving spouse;
- Petitions for probate of a will in solemn form; N.C.G.S. § 28A-2A-7;
- Determinations of a spouse's life estate in lieu of intestate share; N.C.G.S. § 29-30(f);
- Controversies arising under the Intestate Succession Act; N.C.G.S. § 29-12.1;
- Decisions of the clerk regarding preservation of assets during pendency of will caveats; N.C.G.S. § 31-36(c);
- Proceedings contesting the appointment of (issuance of letters to) a personal representative or collector; N.C.G.S. § 28A-6-4;
- Proceedings by a personal representative to enforce his or her rights, as set forth in N.C.G.S. § 28A-13-3(a);
- A personal representative's petition for examination of "any persons reasonably believed to be in possession of property of any kind belonging to the estate of the decedent." N.C.G.S. § 28A-15-12;
- Proceedings to reopen an Estate; and
- Proceedings to approve of a fee paid to an attorney hired to represent an Estate.

b) Special Proceedings – Original and Exclusive before Clerk

Though I was unable to find a nice statutory list of special proceedings, the list below is a partial list of those actions that the North Carolina Administrative Office of the Courts labels as Special Proceedings in its Special Proceedings Action Cover Sheet. You should take note that some of the 'special proceedings' listed could arguably be considered an 'Estate Proceeding'

given the statutory definition of Estate Proceeding (e.g. Controversies arising under the Intestate Succession Act are statutorily an Estate Proceeding, but listed by AOC as Special Proceeding).

- Adoption;
- Appointing Guardian Ad Litem;
- Boundary Settlement;
- Surplus Funds Determination;
- Selling Land/Property from Decedent's Estate;
- Foreclosure;
- Incompetency;
- Restoration to Competency;
- Torrens Act Land Registration;
- Legitimation;
- Lis Pendens;
- Disbursing funds from Minor's Estate;
- Motor Vehicle Lien;
- Name Change;
- Partition;
- Sterilization; and
- Many others.

c) Estate Proceedings - Original but not Exclusive Jurisdiction

There are some Estate Proceedings that may be transferred to Superior Court after originally filing before the Clerk. This means that the Clerk has Original Jurisdiction, but that

jurisdiction is not exclusive (i.e. the Superior Court also has the ability to hear these actions without already being heard by the Clerk). In these proceedings, "[a]ny party or the clerk of superior court may file a notice of transfer of a proceeding pursuant to this subdivision to the Superior Court Division of the General Court of Justice as provided in G.S. 28A-2-6(h)." N.C.G.S. § 28A-2-4(a)(4).

- Ascertain heirs or devisees;
- Approve settlement agreements for disputes within Clerks' Jurisdiction (NOT including modifying Wills nor Caveats);
- Construction of Wills;
- Priority among Creditors;
- Determine whether a person is in possession of property belonging to an estate;
- Order recovery of property of an estate in the possession of third parties; and
- Determine the existence of any immunity, power, privilege, duty, or right

d) Consolidation or Joinder with Matters Already in Superior Court

Matters before the Clerk of Superior Court that has a common issue of law or fact with a matter before superior court, the superior court may order the matters consolidated into the superior court case. If a case is already in superior court, then a party can join as many claims it wishes, even if the claims involve issues which otherwise would be in the Clerk of Superior Court's exclusive jurisdiction.

e) Clerk has NO Jurisdiction

- Actions by or against creditors or debtors of an estate, except as provided in N.C.G.S. § 28A, Article 19 (concerning claims against the estate);

- Actions involving claims for monetary damages, including breach of fiduciary duty, fraud, and negligence;
- Caveats;
- Proceedings to determine the proper county of venue; and
- Recovery of property transferred or conveyed by a decedent with intent to hinder, delay, or defraud creditors pursuant to 28A-15-10(b).

2. Litigation before the Clerk

a) Applicability of North Carolina Rules of Civil Procedure

When the North Carolina Rules of Civil Procedure apply, the term "Clerk" should be substituted for every instance of "Judge" (when written in the Rules).

(1) Rules

(a) Rules that always apply:

(i) Rule 4 – Summons and Service of Process

(ii) Rule 5 – Service of Pleadings and Papers

(iii) Rule 6 (a, d and e) – Time

(iv) Rule 18 – Joinder of Claims and Remedies

(v) Rule 19 – Necessary Joinder of Parties

(vi) Rule 20 – Permissive Joinder of Parties

(vii) Rule 21 – Procedure upon Misjoinder and Nonjoinder

(viii) Rule 24 – Intervention

(ix) Rule 45 – Subpoena

(x) Rule 56 – Summary Judgment

(xi) Rule 65 – Injunctions

(b) All other Rules – Ask the Clerk

(2) Reality

In my experience, before the 2011 changes to Estate Proceedings, even the most knowledgeable (of the law) Clerks were not sticklers for the rules. Practicing before less knowledgeable Clerks was like the Wild Wild West. Since the 2011 changes, I only will say that it seems rare to see Rules of Civil Procedure books at Hearings before Clerks. Though probate attorneys and the Clerks look at me sideways when I quote the Rules, I will say that few actually ignore completely the Rules of Civil Procedure when I bring them up.

b) Applicability of North Carolina Rules of Evidence

(1) Rules – YES

(2) Reality – NO

c) Procedure

(1) Filing the Petition

(a) Pleading Requirements for a Petition

An action in an Estate Proceeding starts with the filing of a Petition in the existing Estate Administration file. A Petition is less formal than a Complaint and more formal than a Motion. The averments in the Petition "should be simple, concise, and direct" and "[n]o technical forms of motions or responses are required." N.C.G.S. § 28A-2-6. A Petition should be signed by the Petitioner or her attorney and include a "short and plain statement of the claim that is sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions intended to be proved showing that the pleaders are entitled to relief" and a "demand

for judgment for the relief to which the pleader is entitled." Id. If preliminary injunctive relief is sought, it must be requested by separate motion after the Petition is filed. A preliminary injunction may only be ordered after the Petition and Notice of Injunction Hearing is served. Though Rule 11 of the Rules of Civil Procedure does not automatically apply to Estate Proceedings, N.C.G.S. § 28A-2-6 has a certification requirement similar to Rule 11 (without the enforcement and sanction provisions – which one would have to ask the Clerk to recognize Rule 11 before asking for sanctions).

(b) The Parties

The person who files the Petition is called the Petitioner. All parties to the Estate Administration who are not Petitioners are included in the action as Respondents. If there are people who are necessary to resolve the dispute raised in the Petition, the Clerk of Superior Court may order them to be joined as Respondents, even though they are not parties to the Estate Administration. If the Clerk does not add all interested parties, then said parties can intervene through Rule 24 of the North Carolina Rules of Civil Procedure.

(c) Service of the Summons

As required by Rule 4, the Clerk issues a Summons when the Petition is presented for filing. The Summons is NOT the same Summons issued when filing a Complaint. The AOC has created a form Estates Proceedings Summons that satisfies the statutory requirements for an Estate Proceedings Summons. Rule 4 service is required for the Petition and Summons, which means you must use one of the methods for service authorized in Rule 4. Just mailing a copy of the Summons and Petition is not enough (though subsequent pleadings and papers may be served via mail per Rule 5).

(2) Response

The Summons states that each respondent must answer the Petition within twenty (20) days of service. Like an Answer to a Complaint, the Response may set forth multiple defenses and/or denials.

(a) Extension of Time

(i) Before time has expired

The deadline for responding to a Petition may be extended by the Clerk for up to ten (10) days for (presumably any) "cause shown." The deadline may be extended by the Clerk for more than ten (10) days for "good cause shown" if "justice requires." N.C.G.S. § 28A-2-6.

(ii) After time has expired

"Upon motion made after the expiration of the specified period, the clerk of superior court may permit the act where the failure to act was the result of excusable neglect." N.C.G.S. § 28A-2-6.

(iii) With other Parties' Consent

"Notwithstanding any other provision of this subsection, the parties to a proceeding may enter into binding stipulations, without approval of the clerk of superior court, enlarging the time within which an act is required or permitted by this Article, by any applicable Rules of Civil Procedure or by order of the court, not to exceed 30 days." N.C.G.S. § 28A-2-6.

(b) No Default? Is it Optional then?

Apparently, there are no defaults for failure to respond in Estate Proceedings. If a timely response is not filed and the Clerk refuses to extend the time, the Clerk will still have a Hearing and receive evidence before ruling. If there is no written response filed, will the Clerk refuse to allow the delinquent respondents to appear and present their side at a Hearing? I cannot imagine

a Clerk not allowing all sides to present at a Hearing, but do not want to be the attorney who has to watch a Hearing and stay silent.

(3) Discovery

(a) Subpoenas allowed

Rule 45, Subpoenas, is one of the Rules of Civil Procedure always allowed in Estate Proceedings. Any party is allowed to issue subpoenas to obtain documents or force witnesses to the courthouse for testimony. Subpoenas for Deposition testimony, though referenced in Rule 45, are probably not allowed without Clerk approval, as Rule 30 does not apply to Estate Proceedings without approval of the Clerk.

(b) Other Discovery – Ask Clerk to Allow it

All discovery that is available to parties in Superior Court is available to parties in Estate Proceedings, but only with approval by the Clerk. In its discretion, the Clerk may allow, disallow, or pick and choose the types of discovery (and the sanctions for failure to produce discovery) discussed in Rule 26 through Rule 37 of the North Carolina Rules of Civil Procedure. The types of possible discovery are discussed in the Superior Court – Discovery section below.

(4) Hearing

An Estate Proceeding is a hearing before a judicial officer, but usually the hearings are far less formal than in the trial courts. To me, these hearings feel more like a trial court mediation than a hearing. Typically, you gather around a conference table, talk a bit before going on the record, then follow the Clerk's lead. More formal hearings (for the Clerk) feel like small claims court in that there is a Clerk sitting in front and witnesses are sworn in, but everything (that the Clerk decides is OK) goes.

(a) Record of Hearing

(i) Recording, or

(ii) Summary of Evidence Prepared by Clerk

(b) Don't Worry about Objecting for the Record

"It is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion." N.C.G.S. § 1-301.3.

(5) Appeal

(a) Procedure

After a Clerk makes an order or judgment (containing findings of fact and conclusions of law), parties have ten (10) days from the entry and service of the order or judgment to give written notice of appeal, which contains a short and plain statement of the basis for the appeal. In most instances, appeals from the Clerk are to the Superior Court. Appeals for Estate Proceedings are to Superior Court.

(b) Stay – with Bond

In most cases, a superior court judge or the Clerk may issue a stay of the order or judgment upon the appellant posting an appropriate bond.

(c) Clerk's Powers During Appeal

While the case is being appealed, the Clerk retains authority affecting the administration of the Estate, subject to said authority being limited by a Superior Court Judge.

(d) Standard of Review

Upon appeal from the Clerk, the Superior Court may review the Clerk's order as to: (1) Whether the findings are supported by the evidence; (2) Whether the conclusions of law are supported by the findings of facts; and (3) Whether the order or judgment is consistent with the conclusions of law and applicable law

(6) Settlement

Clerks of Superior Court can to consider and approve settlement agreements where (1) the controversy arose with respect to a matter over which the clerk has jurisdiction; and (2) the controversy arose in good faith. Clerks may not approve settlements of an estate proceeding if the matter is already before the Superior Court.

IV. Getting Inside the Litigator's Mind and "Thinking like a Litigator."

A litigator is simply an attorney that presents information on behalf of a client to person (or a panel of people) who make decisions or rulings that resolve issues or conflicts affecting the client. The person(s) issuing the decisions may be a jury, a judge, a panel of judges, the Clerk of Superior Court, an arbitrator (or panel of arbitrators), or a magistrate (I am sure there are others).

Like anyone presenting information, after considerable thought, a litigator must figure out the most effective way to communicate the information to his audience. What language should he use? How far into the details should he present? To what degree will he communicate orally versus in written form? How long should he speak? How many pages should he write?

A. Tailor your message to your audience

It never ceases to amaze me when people plan any type of presentation without first putting substantial thought about their audience. Framing your message so your audience more easily understands and is more willing to buy what you are selling seems obvious. Too many

times, however, a presenter prepares to write/speak as if the audience has common experiences with and thinks just like the presenter. 'Preaching to the choir' many times hinders the message from those in the pews.

When I agreed to write this manuscript and present this topic, I asked myself (and attorneys who practiced Elder Law) a few questions:

- Why do Elder Law attorneys need to know about litigation?
- What level of knowledge do most Elder Law attorneys have about litigation?
- What actual courtroom experience do most Elder Law attorneys have with litigation?
- How much depth of knowledge of litigation is necessary for Elder Law attorneys to represent their clients well?
- What time of day does the Presentation start? Do I have to keep them awake after lunch?
- What balance of substance vs. style and instruction vs. entertainment do they prefer?

B. Start at the End and work Backwards

When it is time for a new client to decide what their legal options are regarding a dispute, I always start at the end. In court, what am I going to have to prove? Even when there is not going to be a jury, I always start with the pattern jury instructions (if there are ones) or the short version of the elements of the cause of action from an appellate court FROM NORTH CAROLINA (almost all judges I have been before couldn't care less about what the Idaho courts say about Breach of Fiduciary Duty claims).

Once I have figured out what my client must prove for each cause of action, I work backwards from the jury instructions. Does my client already have sufficient evidence to make a *prima facie* case? In other words, for each element of a cause of action, do we have some (even if flimsy) admissible evidence to show each element? If we do not have even a *prima facie* case,

then we have work to do before we even think about filing a lawsuit. If we have a *prima facie* case, but one or more elements is weak, then we have work to do before we go to court. If we have a slam dunk on each element of a cause of action, then the defendant should be paying our client her damages without even filing a complaint.

After determining which causes of action are possible, we must decide which causes of action are plausible. Is your client's point of view believable? Better yet, is his story sympathetic? Listen carefully (and skeptically) to your client explain their 'side of the story." Look for themes and ways to best frame and communicate your client's story.

C. WWJD

OK, it is not my intention to bring religion into this presentation, but I know my audience of North Carolina attorneys have seen (or even possess) the bumper stickers, t-shirts, buttons, or even tattoos that say 'WWJD.' Acronyms are a great form of communicating in a way that is remembered, so I take the politically incorrect plunge, knowing full well of the chance I may rub one of you the wrong way with the 'What Would Jesus Do' analogy.

1. What would the Jury Do?

In every case that may see a jury, you should ask yourself 'What would the jury do?' Before you decide anything else, you should make sure you can look at the case the way a jury of your client's peers would see it. Your client may have a textbook case, but a jury is not a textbook. For instance, I had a client in a personal injury case with horrendous damages (lost a kidney) from a terrible wreck. The client had drug problems and it was obvious. Textbook: Great case! From the Jury's perspective: 'Don't give that Plaintiff one thin dime when she will just use it on drugs to ruin her last remaining kidney.' You should analyze everything you do

from start to finish by looking at it from a jury's perspective. Every letter. Every document. Every Will. Every Trust. Everything.

2. What would the Judge Do?

After you have considered the jury, you should ask yourself 'what would a judge do?' Judges generally look at cases less emotionally than juries (and hopefully with less bias), but they are still human (so what applies to juries applies with less effect for judges). Look at the case, as well as every piece of potential evidence, through the eyes of a judge. Determine if a judge will agree with your legal analysis of the issues. Is there simple appellate court law that makes sure you can make it through a summary judgment? If your case is not one of the usual causes of action (read breach of contract or auto accidents), make sure you have the ability to explain your legal theories to the judge and compel her to rule your way with the evidence you have. The wrong (for your case) judge dismisses what they are not familiar with.

3. Corollary: WWCD: What would the Clerk do?

If the Clerk is the factfinder in your case, then you should perform the same analysis, only try to step into your Clerk's (or their hearings officers') shoes. Tailor how you conduct yourself and how you look at each piece of possible evidence to what your Clerk responds to. The take away point is that you should STOP looking at things your way and START looking at things the way the juries, judges, and clerks look at things. A former North Carolina Clerk (that I will not name) used to take the attorneys together to the back. We would argue like hell without our clients around. This Clerk would tell us how she believed she would rule and asked us what we needed to get on the record. We would have a (what I always considered a show trial) hearing in front of the clients and witnesses where everybody (including the Clerk) looked perfectly organized in open court. Another local (now retired) Clerk made us have every

hearing, no matter how minor, in what looked like a courtroom for Superior Court. He sat up above us and made us comply with formal rules that I was sure he made up on the fly. After we all kissed his ring, that Clerk would grace us with his ruling. So WWCD? For the first Clerk, I would spend my time learning the facts and law backwards and forwards and be ready for a heated debate. For the second Clerk, I would put on my best most formal perfectly styled presentation for the King (full of as many 'your honor's as I could fit in).

V. Attacking the Fiduciary: It All Starts (and Usually Ends) with Constructive Fraud

A. Constructive Fraud[35] Versus Breach of Fiduciary Duty

1. Constructive Fraud Elements

a) Existence of a relationship of trust and confidence;

b) Defendant used his position to the detriment of Plaintiff; and

c) Defendant used his position for Defendant's benefit.

2. Breach of Fiduciary Duty Elements

a) Existence of a fiduciary relationship with fiduciary duty to Plaintiff;

b) Violation or breach of fiduciary duty; and

c) Breach proximately causes damages to Plaintiff.

3. Why Constructive Fraud is usually a better claim

[35] See Exhibit H

A fiduciary is someone in a relationship of confidence and trust by definition, but someone in a relationship of confidence and trust is not exclusive to fiduciaries. The list of possible defendants is much broader under Constructive Fraud.

More importantly, very little evidence need be presented to prove a Constructive Fraud case. When the fiduciary (or someone in a relationship of confidence and trust) benefits from a transaction, the victim is entitled to a rebuttable presumption that constructive fraud occurred. If there is a deal whereby the fiduciary benefits and the victim is hurt, the case gets to a jury. Now, the Defendant may present a defense that he acted openly, fairly, and honestly in the transaction,[36] but it is the rare transaction whereby the Defendant can (with the burden of proof) convince a jury that he came out ahead and the Victim came out behind without there being malfeasance. If the presumption is rebutted, the Plaintiff must prove actual evidence of fraud. When the Defendant did not benefit himself, then a Plaintiff must pursue the Breach of Fiduciary Duty claim.

4. Other Differences:

a) Statutes of Limitation

Breach of Fiduciary Duty claims must be brought within three (3) years of when the victim "knew, or by due diligence, should have known of the facts constituting the basis for the claim." N.C.G.S § 1-52. Constructive Fraud has a ten (10) year statute of limitations AND the statute does not begin to run until he discovers the fraud (unless he should have known or was willfully ignorant). You should note that the statute does not begin to run while the victim is incompetent (or a child).

[36] See Exhibit I

b) Fiduciaries have Duties that may not be related to Fraud

(1) Contractual Duties (see below)

(2) Duty of Loyalty

(3) Duty of Impartiality

(4) Duty of Good Faith

(5) Duty of Proper Management (for Trustees)

(6) Duty of Prudent Administration (for Trustees)

(7) Duty to Delegate

5. Breach of Trust

A Breach of Trust claim is basically a breach of a (fiduciary) trustee's contractual duties under the Trust and/or under applicable law. A Breach of Trust claim is not the same as a breach of the beneficiaries' trust, which is a Constructive Fraud claim (breach of the beneficiaries' trust and confidence to their detriment). If a Trustee has breached the trust, then a beneficiary has the following remedies: 1) Remove the Trustee; 2) Suspend the Trustee; 3) Adjust the Compensation of the Trustee; 4) Void the actions of the Trustee; 5) Enjoining the Trustee; 6) Money damages (restoring the Trust to the position it would have been absent the breach and seeking any unjust enrichment by the Trustee); 7) Compelling the Trustee to perform her duties. The statute of limitations on a Breach of Trust claim is practically forever (5 years after the first of removal, resignation, death of Trustee, the termination of the beneficiary's interest in the Trust, or the termination of the Trust.

B. Other Causes of Action in Fiduciary Litigation.

1. Aiding and Abetting in the Breach of Fiduciary Duty (not clearly decided by courts)[37]

2. Fraud[38]

3. Negligent Misrepresentation[39]

4. Unfair and Deceptive Trade Practices[40]

5. Conversion[41]

6. Unjust Enrichment[42]

7. Malpractice[43]

8. Declaratory Judgments[44]

9. Other actions against fiduciaries

   a) Accountings

   b) Removal

   c) Constructive Trusts

   d) Unrealized Gains

   e) Injunctive Relief

10. Defenses

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[37] Elements of Aiding and Abetting in the Breach of Fiduciary Duty: 1) violation of fiduciary duty by primary party; 2) knowledge of the violation by the aiding and abetting party; and 3) substantial assistance by the aider and abettor in achieving the violation.

[38] See Exhibit G

[39] See Exhibit J

[40] Elements of UDTP: 1) Unfair or deceptive act or practice; 2) in or affecting commerce; and 3) proximately caused injury to the Plaintiff. You should note that Professionals (attorneys, accountants, etc.) are excluded from the claim and that, if the Plaintiff wins, it can possibly recover treble damages and attorneys' fees.

[41] See Exhibit L

[42] Unjust Enrichment occurs when the fiduciary has enriched himself at the expense of the victim. Unjust Enrichment would usually also include a claim for Constructive Fraud. Unjust Enrichment claims have a three (3) year statute of limitations.

[43] See Exhibit K

[44] See Exhibit HH, which is my Brief in Response to a DJ action within a Caveat/Trust Contest action. A DJ action is filed to resolve a controversy about the validity or construction of documents, including, but not limited to, Wills and Trusts.

a) *Standing*[45]

b) *Equitable Estoppel*[46]

c) *Collateral Estoppel*[47]

d) *Statute of Limitations and Laches*[48]

e) *Unclean Hands*[49]

f) *Consent, Release, or Ratification*[50]

VI. Attacking the Original Instruments Validity

A. Was it executed properly?

A Will or Trust may be attacked by showing that the statutory requirements for drafting and/or executing the document were not followed. In the case of an attested written Will:[51] 1) Did the testator sign or direct someone to sign his name to the Will? 2) Were there two witnesses? 3) Did the witnesses sign the the Will? 4) Were all other requirements for a Will met? Similarly, a holographic Will must meet its formal requirements.[52]

B. Lack of Mental Capacity[53]

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[45] Only persons with 'Standing' can bring a cause of action. For instance, the victim's best friend's cousin does not have standing to bring a fraud action on behalf of a victim, unless the victim's best friend's cousin was acting as a fiduciary for the victim and suing on behalf of the victim. See above section on Standing in a Caveat proceeding.
[46] Equitable Estoppel is the defense that a party that accepts a transaction or benefit, he cannot take a position inconsistent with the prior acceptance
[47] Collateral Estoppel and Res Judicata keeps parties from re-litigating matters that were (or could have been) litigated in a previous action.
[48] Statute of Limitations is the set by statute time frame in which you can file a claim. Laches is a similar defense, whereby a claimant has waited to where the circumstances have changed so much that it would be inequitable and unjust to allow the case to go forward.
[49] Unclean hands means that a person cannot receive equity when that person's conduct has been contemptible.
[50] Release occurs if it is part of a settlement with consideration. In addition there may a consent defense if the beneficiary of a trust consent or went along with the (later complained about) conduct or ratified the transaction. These defenses do not apply when the consent, release, or ratification were procured by the improper conduct of the fiduciary or if the victim did not have knowledge of the facts or her rights relating to them.
[51] See Exhibit E
[52] See Exhibit F
[53] See Exhibit B

There is a low threshold for the mental capacity to execute a testamentary document. To have the capacity to execute a Will, a person only has to understand that he is making a Will, to know what property he has, to understand what the effect of making the Will would have on his property, to understand who would naturally be expected to receive his property at his death, and to know to whom he intends to give his property. The presumption is that a testator has the mental capacity to execute a Will. The mere fact that a testator is old, is feeble, is eccentric, is intellectually weak, is physically infirm, or makes what others might consider unwise, unreasonable or unjust decisions does not create a presumption of incapacity. An attempted or completed suicide, however, is considered in determining that a testator lacked sufficient capacity to execute a Will. A Lack of Capacity claim rarely wins on its own, but a testator's weakened capacity may play a major role in an Undue Influence claim.

C. Undue Influence[54]

Undue Influence claims can be considered 'lack of capacity – lite,' in that Undue Influence claims usually involve people with diminished capacity that still have the ability to get over the low bar that is capacity. It is considered Undue Influence when a person's acts are not really his own, but that person is actually performing the acts of another person who is exerting influence. 'Mere persuasion,' kindness, and affection, without more is not undue influence even if it persuades a person to make an unequal or unjust disposition of his property. Rather, undue influence causes a person to not act upon his free will. Undue influence may occur even in the absence of moral turpitude or improper motive.

"It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as

[54] See Exhibit C

the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty" (citation omitted.) See also In re Will of Andrews, 299 N.C. 52, 54-55, 261 S.E.2d 198, 200 (1980). With that in mind, the Courts will instruct a jury that all the relevant facts should be considered, including but not limited to: age, physical condition, dependence upon the person influencing, opportunity to have relationships with people other than the inducer, relationship by blood to the beneficiaries, failure to include in gift/bequest those persons who would naturally be expected to receive the property of the deceased, and the degree to which the person was influenced to execute the document by the inducer.

The elements of Undue Influence are: 1) a person who is subject to influence; 2) an opportunity to exert influence; 3) a disposition to exert influence; and 4) a result indicating undue influence. When the person exerting the influence is a fiduciary, the burden of proof may shift to the fiduciary[55] defendant as is the case with Constructive Fraud.

D. Duress[56]

When I think of duress, I think of a figurative (or literal) gun to the head, where the victim will get shot and killed if she does not do what the perpetrator wants her to do. Duress occurs when a wrongful act, threat or coercion is used to force a person to act in a way that she would not have otherwise have. Like Undue Influence, it is not really the will of the victim acting, but the will of the perpetrator. The conceptual difference with Undue Influence claims is that, with duress there must be wrongful acts, threats, or coercion.

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[55] Fiduciary for this purpose is defined as: "[T]here has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." Curl v. Key, 311 N.C. 258, 264, 316 S.E.2d 272, 275 (1984)

[56] See Exhibit D

The explicit factors that a jury is to consider in deciding if there was duress (a party can ask for other factors to be included in the instruction) include similar and different factors than Undue Influence claims. The Courts will instruct a jury that all the relevant facts should be considered, including but not limited to: age, physical condition, mental condition, access to or opportunity to have independent advice, the fairness of the dispositions made by victim, the relationship between the victim and the perpetrator, the degree to which the perpetrator sought or solicited the deceased to do an act, and the degree to which the deceased was already susceptible to pressure or coercion by reason of personal distress or family emergency.

E. Tortuous Interference with an Expected Inheritance

North Carolina has long recognized that "if the Plaintiff can recover against the Defendant for the malicious and wrongful interference with the making of a contract" then the Plaintiff can also recover "for the malicious and wrongful interference with the making of a will." *Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 685 (1936). A claim for Tortious Interference with the Plaintiff's Expectation of Inheritance not only allows for recovery for a Defendant's tortious interference with a Plaintiff's expectation of receiving probate assets, but also includes recovery for Plaintiff's expectation of "gifts" such as life insurance benefits. *Id.* (*See also* Reinstatement (Second) of Torts § 774B, "a substantial majority of the cases now grant recovery in tort for intentionally and tortuously interfering with the expectation of an inheritance or gift"). As contemplated under the claim, "'gift' is used to include in the broad sense any donation, gratuity, or benefaction that the other would have received from the third person. It includes, for example, the designation of the other as a beneficiary under an insurance policy, with which the actor interferes by tortious means." Restatement (Second) of Torts § 774B, cmt. b.

To adequately plead a claim for tortious interference with expectation of inheritance or gift, the Plaintiff must allege: (1) the existence of plaintiff's expectancy; (2) that the defendant knowingly and intentionally interfered with that expectancy; (3) that the conduct of the defendant, in and of itself, was tortious; (4) that there exists a reasonable certainty that the testator would have devised a particular gift had he or she not been persuaded by the defendant's tortious conduct; and (5) the existence of damages. (*See generally,* Restatement (Second) of Torts § 774B). Section 77B of the Restatement (Second) of Torts further provides that "one who by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."

VII. How does an Elder Law Attorney Draft and otherwise inoculate her Client (and herself) from future litigation?

A. Draft with Litigation on your mind

Draft your documents considering how they will be interpreted by the Court of Appeals (the law), Judges (the facts applied to the law), and a Jury (how things appear). Use a definitions section so that the other sections make sense. Remember that, for the most part a jury will decide what the language in the documents mean, not Roscoe Pound. Use crazy legalese only when needed for court of appeals (if the courts have over and over approved the same 18th century language, you might have to use it too), otherwise use simple plain language if possible

Be clear and have staff read and explain back to ensure it reads as you think it does. Similarly, have your clients read the documents and explain back so that they understand and agree with what the documents say.

B. Have Client speak to family members together

Sometimes, a family is going to litigate no matter what steps are taken to prevent it. For most families, however, if your client speaks to her family TOGETHER and follows up in writing or on video with what their intentions are and why, the family will stay intact and out of litigation.

C. Letters to family on why they did what they did

Letters in your client's own handwriting (or verifiable e-mail) can go a long way to showing why they did what they did. Be careful that your client knows how to avoid turning that letter or memorandum into a holographic will.[57]

D. Letter from treating family doctor

There are few better pieces of evidence than a letter from the family doctor about the capacity and willpower of your client. Be sure to tell your client that his kids should not be too pushy with the doctor, or the doctor will be witness #1 for the Caveators ("Joe, Jr. just would not leave me alone. He tried to tell me what I had to write. He seemed up to no good. I felt sorry for poor Joe, Sr.").

E. Remember who the client is

Remember who your client is. Your client's son may really be just driving his Mom to your office. Or it may be something more nefarious. Talk with your clients without their children around. Kick the children out of the office, if necessary.

F. Don't be stupid

[57] See Exhibit M

I know it is unbelievable, but I am telling you the truth when I say that there are attorneys out there that prepare blank wills at the request of beneficiaries without ever speaking to their purported 'client.' Of course, the blank will usually makes the partial beneficiary into the 100% beneficiary. If you want to see what happens to these attorneys, look at Exhibit K.

G. Memorandum of testator/fiduciary explaining reasons for actions

As discussed, above, have your client draft a memorandum explaining why she did what she did. Advise her, however, not to have a memorandum replace actually talking to her beneficiaries.

H. Keep good notes to refresh your recollection

It is important that the amount and quality of notes you keep should be in inverse proportion to the age and infirmity of your client. Having said that, do not prepare estate documents without notes. Even the most simple situations may make their way into court. After the family doctor, you may be the most important witness (or defendant if you really screwed up).

I. Preserve Evidence

1. Actual Documents
2. Memoranda
3. Ledgers and Bank Records
4. Witnesses (hopefully disinterested) – but remember the Dead Man's Statute

Rule 601(c) of the North Carolina Rules of Evidence does not allow a witness to testify "when it appears (1) that such a witness is a party, or interested in the event, (2) that his

testimony relates to … a communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest." In re Will of Lamparter, 348 N.C. 45, 51, 497 S.E.2d 692, 695 (1998) (quoting Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 528, 131 S.E.2d 456, 462 (1963)).

5. Audio/Video

6. Texts, Emails, and Letters

7. Records of Activity

VIII. Case Example Caveat, Trust Contest, & DJ Action All in One

A. Disclaimers

First, in order to be absolutely sure to comply with confidentiality and ethics rules, I contacted my client (who was an attorney fiduciary) and obtained full approval to use this case (in her words) "so that hopefully nobody has to go through this mess ever again."

Second, there were death threats made by one (or arguably more than one) of the beneficiaries against the attorneys in the case. After you have read the materials I have provided, you will be shocked to hear that I have kept out some of the most sensitive parts in the unlikely event that this manuscript makes its way back to some of the scarier players in this case.

Third, my documents are incomplete, so I have substituted redacted versions of other documents (that you may use as forms if you wish) to fill in the gaps. This case was happening years ago when not all documents were scanned and effectively organized, so I was unable to find every pleading.

B. The Case

I have attached all the major documents in the case that I had scanned (sadly, we did not scan everything back then). The case involved a deceased lady, who by all accounts was as sweet a human being there ever was. After her husband died, it seems as though everyone around her was aiming for her money. I represented the attorney Administrator CTA/Trustee, who was a Propounder and defender of the Trust. The nice lady's gardener (who stood to inherit the lions share of the Estate) was the main other Propounder. My successful legal theory: He (the gardener) was a jerk by all accounts, but he was her jerk. Everybody had attorneys and the legal costs were huge. There was strong evidence that the gardener was threatening witnesses and that (sending the Will that was already subject to the Caveat) he tried to get the closing title company for real estate sold in California to mail the closing proceeds directly to him instead of the Ancillary Estate in California.

The best way to get the facts is to read Exhibit JJ, which is the Judgment. From there, I would read Exhibit MM and Exhibit NN, which explain the Estate assets and costs of the proceeding. Finally, just peruse the rest of the Exhibits to fill in the story.