Basics of a Will Contest And How to Avoid One

Probate Mini Seminar CLE
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BASICS OF A WILL CONTEST
AND HOW TO AVOID ONE

1. Who can contest and who must be included?

    a. Any "person interested" in an estate can contest a matter in probate court. Texas Estates Code §55.001. To be interested you must be:

    "(1) an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered; or (2) anyone interested in the welfare of an incapacitated person, including a minor." Texas Estates Code § 22.018.

    However, caselaw provides an additional requirement to contest a will:

    "In this and other jurisdictions where will contests are limited to "persons interested in the estate of the testator," the term "person interested" has a well-defined but restricted meaning. The interest referred to must be a *pecuniary one,* held by the party either as an individual or in a representative capacity, *which will be affected by the probate or defeat of the will.* An interest resting on sentiment or sympathy, or any other basis other than gain or loss of money or its equivalent, is insufficient. Thus the burden is on every person contesting a will, and on every person offering one for probate, to allege, and, if required, to prove, that he has *some legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired or benefited, or in some manner materially affected, by the probate of the will."*

    Maurer v. Sayre, 833 S.W.2d 680, 682 (Tex. App. 1992)

    b. You do not have to serve all of the beneficiaries under a will; however, Texas Estates Code § 55.052 provides that an institution of higher education or a charitable organization that is a distributee under the will is a necessary party. Also, local rules may have additional notice provisions and some courts have required notice to named beneficiaries particularly before probate.

2. What Court do I file in?

    a. Statutory Probate Courts vs. Non-Statutory Probate Courts

        i. The big counties have statutory probate courts (some have several). In all, 10 counties in Texas have statutory probate courts. If you have a statutory probate court, anything related to probate should be filed there. They also have the power to reach out and grab matters in other courts and bring it to their court. For example, if there is litigation in district court that the decedent was a party to, the probate court can (but doesn't have to) reach out and grab that litigation and bring it to

probate court. This allows all matters affecting the estate to be in one court.

Dallas Note – We have 3 Statutory Probate Courts plus 1 associate judge, with another starting soon.

ii. Non-statutory probate courts may include county courts, county courts-at-law, and district courts. These courts may hear probate matters but also may be limited in the scope of what they can hear.

County courts – Hear basic probate matters – nothing contested. If a matter becomes contested, it is transferred as discussed below.

County Courts-At-Law – These have similar jurisdiction to probate courts and can hear contested matters.

District Courts – Have jurisdiction of contested probate matters in a county without a county-court-at-law or a statutory probate court, unless a statutory probate judge is requested first (see (iii) below). Check the Texas Government Code as some counties have their own rules on jurisdiction.

iii. Request for a Statutory Probate Judge

If a county does not have a statutory probate court or a county court-at-law, the county court may request the appointment of a statutory probate judge or transfer a contested matter to district court. If a party files a motion for a statutory probate court before the matter is transferred to district court, the county court must grant the motion. Texas Estates Code § 32.003.

3. What do I file?

a. Pre-probate

i. If you are contesting a will before it has been probated, you can simply file a general denial. *See In re Hudson*, 2011 WL 5433689 (Tex.App.-Dallas, 2011, no pet.) This essentially says to the other side "prove it". The proponent of the will has the burden of proof on capacity, formalities, and nonrevocation. This also means the proponent of the will gets to open first and close last at trial. Note – if you are alleging undue influence, that must be affirmatively pled at some point and the contestant has the burden of proof on that issue regardless of when filed.

In a pre-probate contest, you may need or want a temporary administrator pending will contest to take care of the estate during the contest. Typically, it will be a neutral third party. It is not unusual, particularly in smaller counties, for the named executor to try to get appointed, so you need to be prepared for that fight, whether for or against.

b. Post-probate

i. If you are contesting a will after probate, you must file a petition and set forth your allegations. These do not need to be very specific - just basics about capacity, undue influence, revocation, and/or execution. In these cases, the contestant opens first and closes last at trial.

ii. It would be unusual for a judge not to allow the appointed executor to serve during the contest after probate.

c. Other matters to contest

i. Trusts; Pay-on-death accounts and right-of-survivorship accounts. Often, the decedent will have signed these documents and these accounts and trusts pass outside of probate. If these exist, you may need to attack those documents as well, which should happen in the will contest.

d. Fees

i. Even if you are the contestant, if you are seeking the probate of a prior will, you may be entitled to attorneys fees. This is true even if you lose, but you must get a finding of good faith and just cause. Texas Estates Code 352.052. This provision also allows fees for the proponent of the will being contested.

ii. If you have a true declaratory judgment action (e.g. for beneficiary designations on a bank account), you may seek your attorneys fees, though the Court has wide latitude to grant the fees to anyone and from anywhere in declaratory judgment actions. Advise your client in writing before filing a suit where he/she may have to pay the other side's fees.

4. When do I file it?

a. Within 2 years from the time the will was admitted to probate. Texas Estates Code § 256.204. This is an in rem proceeding, so does not matter if the interested party had notice of the probate; constructive notice is imputed to everyone.

b. Note that the statute allows for the discovery rule where there is fraud or forgery. Statute of limitations is 2 years from the discovery of the fraud or forgery. Texas Estates Code § 256.204(a).

c. Also, if the interested party is incapacitated, the time runs two years after the disability is removed. Texas Estates Code § 256.204(b).

d. Time period to contest an inter vivos trust is 4 years. Tex. Civ. Pract. & Rem. Code § 16.004

5. What grounds do I have to contest?

    a. Improper execution/Fraud

        i. Will must be witnessed by two people unless wholly in the handwriting of the decedent.

            1. Holographic wills – Texas Estates Code 251.052. Need two witnesses to prove up the handwriting.

            2. Partial handwriting – Must be attested to just like a typed will.

        ii. Not all that common, but pay attention.

        iii. Check the self-proving affidavit – Do not assume the required formalities were actually met.

        iv. Check the dates

        v. Did the witnesses sign in the testator's presence?

        vi. Was it notarized and was the oath given?

        vii. Check the testator's signature/handwriting - Looking for forged signatures by testator or witnesses, or forged handwriting within the document.

        viii. New pages inserted to will.

        ix. Was will revoked?

            1. If original cannot be found and was last in the possession of the testator, the presumption is that the will was revoked. However, this presumption is weak.

b. Lack of testamentary capacity

i. Definition of testamentary capacity: Sufficient mental ability, at the time of the execution of the will:

1. To understand the business in which he is engaged;

2. To understand the effect of his act in making a will;

3. To understand the general nature and extent of his property;

4. To know his next of kin and the natural objects of his bounty and their claims upon him;

5. To have sufficient memory to collect in his mind the elements of the business to be transacted;

6. To be able to hold the elements long enough to perceive their obvious relation to each other; and

7. To be able to form a reasonable judgment as to them.

ii. Insane delusion

1. If you have evidence of an insane delusion, you may be able to add an extra statement to the "testamentary capacity" definition, as follows:

A person does not have testamentary capacity if he suffers from an "insane delusion" at the time he executes his will. An "insane delusion" is the belief of a state of supposed facts that do not exist and that no rational person would believe. The insane delusion, if any, must have caused the person to dispose of his property in a way that he would not have but for the insane delusion. A belief or decision, however illogical, if arrived at through a process of reasoning based on existing facts, is not an insane delusion.

c. Undue influence

i. Definition:

1. An influence existed and was exerted, and

2. The influence undermined or overpowered the mind of the decedent at the time he signed the documents, and

3. The decedent would not have signed the document but for the influence.

ii. Basically, "one may request, importune [demand], or entreat [beg] another to create a favorbable dispositive instrument, but unless the importunities or entreaties are shown to be so excessive as to subvert the will of the maker, they will not taint the validity of the instrument." *Guthrie v. Suiter*, 934 S.W.2d 820, 831 (Tex.App.-Houston [1st Dist.] 1996, no writ).

The mere influencing of a testator to benefit yourself in a will is not improper. For example, there is nothing illegal about begging someone to include you in their estate, but as the intensity of the beginning increases, it may cross an invisible line into undue influence. A major problem is that the location of the invisible line is disupted, and undue influence is generally a fact questions, decided on a case by case basis. *Furr v. Furr*, 403 S.W.2d 866 (Tex.App.-Fort Worth 1966, no writ).

iii. Example: If two people are stranded in a raft in the ocean for two weeks, and one begs the second person every day to be included in his will, and on the thirteenth day the second person voluntarily writes a handwritten will including the beggar in his will, there is no undue influence. But if the second person wrote the will just to get the beggar to shut up, then the case becomes one of undue influence. There can be a fine line between persuasion and badgering.

d. Mental Capacity

i. If contesting a trust or an account, you use a different standard for capacity. While it sounds like a lesser standard, you actually need more capacity to execute a trust than a will.

A person lacks sufficient mental capacity to create a trust if he lacks sufficient mind and memory to understand the nature and consequences of his acts and the business he is transacting.

ii. The insane delusion definition can also be added to the mental capacity instruction

6. How do I prove capacity/incapacity?

a. While the question is capacity at the time of execution, can look at time period leading up to execution and after. Most courts give wide latitude, but sometimes you have to keep pushing to widen the dates. Incapacity at another time is evidence of incapacity at the will execution if "the condition persists

and has some probability of being the same condition". *Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983).

b. The "lucid moment" argument. Yes, it is possible for a testator for have a lucid moment, but if the records show a pretty clear incapacity, it is hard to prove/argue that the testator had clarity at that time.

c. Circumstantial evidence

i. Often not direct evidence. You hope for good medical records, but not unusual for the testator not to go to the doctor much (either by choice or because wrongdoer doesn't want medical records showing incapacity). Therefore, circumstantial evidence is critical:

> A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

d. What kind of evidence?

i. Medical records – get all of them

ii. Banking records – get all of them, including checks.

iii. Personal records – check registers, contracts, calendars.

iv. Therapist, sitter, caregiver notes.

v. Attorney files – including time and billing records.

vi. Credit card statements.

vii. Letters and notes written by decedent.

viii. Deed records.

ix. Videos and recordings.

7. How do I prove undue influence?

a. Circumstantial evidence is even more critical. Rarely is there a witness to the influence because it often happens behind closed doors. Undue influence "hides its features behind masks and operates in dark and secret places and in

covert ways, and proof of it must usually be by circumstantial rather than by direct testimony." *Truelove v. Truelove*, 206 S.W.2d 491, 497 (Tex. Civ. App. – Amarillo 1953, writ ref'd).

b. *In re Estate of Graham*, 69 S.W.3d 598, 608-609 (Tex. App. – Corpus Christi 2001, no writ) provides a good laundry list of factors to consider in undue influence cases, though not all of these are required in an undue influence case:

   i. The nature and type of relationship existing between the testator, the contestants, and the party accused of exerting undue influence;

   ii. Opportunities existing for exertion of the type of influence or deception possessed or employed;

   iii. Circumstances surrounding the drafting and execution of testament;

   iv. Existence of fraudulent motive;

   v. Whether there has been an habitual subjection of the testator to the control of another;

   vi. State of testator's mind at the time of execution of testament;

   vii. Testator's mental or physical incapacity to resist or susceptibility of the testator's mind to the type and extent of influence exerted;

   viii. Words and acts of the testator;

   ix. Weakness of mind and body of testator, whether produced by infirmities of age or by disease or otherwise; and

   x. Whether the will is unnatural in its terms or disposition of property.

c. In *Granville v. Haskins*, 1997 W.L. 770173 (Tex. App. – Dallas 1997, no writ), the Dallas court provided yet another list:

> Factors to consider in determining the existence of an undue influence include: (1) the physical and mental condition of the testatrix, including her age and any weakness or infirmity; (2) an unnatural disposition of property; (3) the participation of the beneficiary in the preparation or execution of the will; (4) the relationship between the testatrix, the contest and the proponent of the will; (5) circumstances surrounding the execution of the will; (6) the interest and opportunity existing for the exertion of undue influence; and, (7) the testatrix's acceptability to influence.

Each of these cases suggested a slightly different list of factors to consider. We believe that all of them are relevant and should be pursued.

d. Unnatural disposition – This applies for testamentary capacity as well. There are no hard and fast rules about what is unnatural – it depends on the circumstances. For example, it may be natural to leave your estate to your spouse, but if you have children by another person, perhaps this is unnatural. Another example is leaving it to one child over another. There are cases on both sides of the issue. In the end, this is just one of many factors for a jury/court to consider.

e. Keep an eye out for control over the testator or reliance on the influencer by the testator. The influencer is often, though not always, making the phone calls, doing the driving, conveying information, etc.

8. Do I need to worry about the no contest clause?

    a. Texas Estates Code § 254.005 – enforceable unless establish good faith and just cause.

    b. These are strictly construed and not enforced all that often, in our experience.

    c. You have to consider what the person will lose by contesting. If they are already cut out, what is there to lose?

9. We want to settle – now what?

    a. Court will almost always require mediation and, of course, cases can settle any time outside of mediation as well.

    b. In a settlement, you need to consider whether all of the pertinent parties are included and/or whether anyone can come in later and contest. This is an issue where it has not been 2 years since probate of the will such that the statute of limitations has run.

    c. If pre-probate, have concerns of someone coming in to probate a different will.

Top Ten Mistakes of Estate Planners in Potential Will/Trust Contest Scenarios

1. Missing the Obvious Will/Trust Contest Situations.

a. Not recognizing the obvious land mines, e.g. disinheritance of a child; radical beneficiary changes; mixed families; all to charity, etc.

b. Failing to look at the prior estate plan. You may be implementing a huge change and not know it. A review of earlier plans may also allow you to identify those with standing to contest, and consider how to best address potential issues. This review may also alert you to the presence of undue influence.

i. If a child is being cut out, why? And does the testator intend that children of the out-of-favor child (the grandchildren) be punished for the sins of the parent?

ii. Don't assume that juries will just rubber-stamp large charitable bequests.

c. Recognizing potential problems but ignoring them or, worse, tossing kerosene on the fire with inflammatory language in the will.

d. Failing to warn clients of the potential for their estate plan to trigger litigation and failing to advise them of ways to mitigate the likelihood of litigation.

e. Does your client have any idea that a will or trust contest may make his or her private life a public spectacle?

2. Including Beneficiaries in the Drafting Process.

a. Taking marching orders from a beneficiary.

Estate of Seale – Mother tells lawyer she wants one of her sons (Mike) involved in the estate planning, which will disinherit the other son (Gary). Mike takes the lead in recommending changes, though lawyer is careful to always inform Mother of changes in writing. But lawyer writes a note after a phone call with Mike: "Make sure Gary gets zero".

b. Meeting with the client with a beneficiary present or, worse, meeting with the beneficiary outside the client's presence.

Estate of Obenchain – Prodigal son inherits everything under new will. Lawyer's time records showed extensive meetings between lawyer

and son, sometimes with, but mostly without, the testator. The jury invalidated the last will based upon undue influence, finding that it reflected the son's wishes instead of the testator's.

c. Having the beneficiary in the execution ceremony. Really?

3. <u>Ignoring the Significance of Heirlooms and Memorabilia.</u>

a. If all property is left to charity/stepmom/caregiver, family heirlooms are effectively abandoned. The family may not even get an opportunity to obtain a memento from the house and Grandma's prized silver may be sold and lost to the family.

Estate of Johnson – The San Antonio Court of Appeals noted the significance of King Ranch family heirlooms in this opinion: 3rd wife "(Laura) also retained the family scrapbooks and photo albums, claiming that B (Decedent) did not want Ceci and Sarah (daughters) to have them until after Patsy (daughters' mom) died; however, the evidence established that Laura did not return the family scrapbooks and photo albums even after Patsy died, but kept possession of them for the duration of the trial. Evidence also was presented that Laura refused to give B's granddaughter, Alice, a silver spoon set that B wanted her to have. Although Laura testified that the attorneys had told her not to give away any of the estate assets because of the pending litigation, evidence established that she gave items belonging to the estate to other non-family members." *In Re Estate of Johnson*, 240 S.W.3d 769, 781-782 (Tex.App.-San Antonio 2011, pet. denied).

Estate of Foster – Testator's estate was worth approximately $2 million. Cousin was the primary beneficiary under a 1986 will and sole beneficiary under a 1991 will. 1995 Will left nothing to cousin and all to a couple who recently befriended Testator. Testator then executed a will in 1997 leaving $100,000 in trust for her cats and everything else to charities, and named attorney as executor and trustee. Jury found that Testator lacked capacity on the 1995 and 1997 Wills, was unduly influenced on the 1995 Will, and upheld the 1991 Will to cousin. Jurors reported that one of the most important facts to them was that Testator had for decades promised that certain jewelry would be given to cousin's daughter. Under the 1997 will, the jewelry would have gone to the charities.

4. <u>Writing Yourself into the Document.</u>

a. As we all know, rarely can you write yourself into a will as a beneficiary.

Estates Code §254.003: Devises and Bequests that are void

(a) A devise or bequest of property in a will is void if the devise or bequest is made to: (1) an attorney who prepares or supervises the preparation of the will; (2) a parent, descendant of a parent, or employee of the attorney described by Subdivision (1) of this subsection; or (3) a spouse of an individual described by Subdivision (1) or (2) of this subsection. . . .

b. Writing yourself in as an executor/trustee/advisor/mandated attorney is almost always a bad idea, especially if a contest is anticipated.

i. This is ethically permissible provided the draftsman has done nothing to influence the client.

ii. But it makes exculpatory language for the fiduciary or advisor look even worse.

iii. Exculpatory language protecting a draftsman who serves as executor or trustee is probably unethical, unless the client has been advised by an independent attorney.

iv. In the jury's eyes, this makes it more believable that the attorney participated in undue influence.

v. Remember *Wiliford v. Foster, Lewis.* B. R. Wiliford had been represented in multiple matters by the Foster, Lewis firm. His will, drafted by Foster, Lewis, named his attorney and his accountant as executors and co-trustees. Foster, Lewis also represented the real estate development partnerships in which Wiliford was primarily invested. Mrs. Wiliford ultimately sued the lawyer and the firm. The jury found in favor of the widow and the court entered a $16.7 million judgment against Foster, Lewis. The judge ultimately granted a new trial, which erased the malpractice verdict, but Foster, Lewis reportedly settled for $4.3 million.

5. <u>Failing to Review or Tailor Your Boilerplate Language.</u>

a. "Boilerplate" often creates conflicting provisions.

i. No contest provision when there are no beneficiaries of the document who would contest.

Estate of Childs – Testator cut out his only daughter, from whom he was estranged, and left entire estate to his stockbroker. Will contained a no-contest provision, but it could only apply to the stockbroker who received everything; unless testator thought he had made provisions for daughter.

ii. No contest provisions which effectively reward a contest.

Example – Will cuts out one child entirely but no contest clause provides that anyone who contests receives $1,000.00. In that situation, child actually inherits only if she contests.

iii. Nonsensical Definitions

Estate of Childs – The Will included a statement that "all references in this will to my 'child or children' include any child or children born to adopted [sic] by me after date the date of execution of this will" but the will, which effectively disinherited his only child, had no other references to "children".

iv. Trust provisions when there is no trust (or a very remote contingent trust), or boilerplate relating to children when the children have been cut out.

Estate of Bishop – Testator dying of cancer was remarried, but had 3 kids from previous marriage. 2 oldest kids were in their 20s and had a poor relationship with Testator, but Testator had a great relationship with his 15 year old daughter. Will provision stated that oldest 2 kids were disinherited in favor of their stepmother, but the reality was that all 3 kids were disinherited. 9 pages (the majority) of the Will were devoted to a trust for the 15 year old, but the trust had virtually no chance of funding, since it only funded if 40 year old stepmother suddenly predeceased dying husband. The feeble testator could have easily believed he was providing a trust for his minor daughter.

v. Disinheriting a child or other relative but having an unintended contingency in the boilerplate that restores the child or relative as a recipient.

Example – Testatrix is supposedly adamant that she wants her daughter to get the estate and her son to get nothing. Will gives most of estate to daughter but does not mention son. But Will contains clause that if bequests fail, estate passes to the heirs at law. Son remains a potential beneficiary in spite of the Testatrix's instruction.

vi. Exculpatory and forfeiture clauses should never be boilerplate.

b. Facts like the above may be argued as evidence of incapacity or undue influence, e.g., Why didn't testator catch it? Did testator understand? Did testator know what was in the will?

6. Dangerous Use of Exculpating Clauses.

a. Often overly broad or misused.

b. Ignoring the conflict if you are (or represent) the fiduciary being exculpated.

c. Why would anyone ever exculpate a paid professional fiduciary?

7. What's in Your File? Too Little? Too Much?

a. Not recognizing that your file is likely to become "Exhibit A" in a contest.

b. Failing to maintain a file at all.

c. Failing to have documentation that shows who you are communicating with; if it is anyone other than the testator, failing to have a signed authorization or instruction; and failing to be able to show an innocent reason for dealing with someone else.

d. Documenting excessively derogatory comments about beneficiaries or parties, or contributing your own color commentary.

e. Getting too chummy with the testator or, worse, a beneficiary.

f. "Scheming" to undermine a contest versus planning for a potential contest, and writing it all down.

Estate of Robinson – Beneficiary of earlier wills was a charitable foundation. While formulating a radically different estate plan, Lawyer, paraphrasing the advice of his expert co-counsel, concluded that the only party with standing to contest the last will was the charitable foundation, which was in existence but barely funded (because it would be primarily funded on testatrix's death in the earlier will). Lawyer devised plan to terminate the foundation. A shrewd thought, but the jury was very troubled by Lawyer's handwritten note- "kill the foundation". It became clearer that this estate plan was probably Lawyer's and not the client's, and that Lawyer was worried that his plan would not stand up to scrutiny. In addition, Lawyer was plotting for the contest, including a memo that suggested avoiding a local jury by getting to a different county.

8. Becoming an Amateur Movie Producer or Screenwriter.

a. Poor planning – usually there seems to be no plan.

b. Poor execution – answering "yes" to every question is not very helpful to prove capacity and may be helpful in proving undue influence.

c. Poor quality – bad lighting, bad sound, inferior equipment, no attention to how the client appears on camera.

d. Allowing a beneficiary to be on camera or on tape.

e. Not thinking about the message you are sending by videotaping, audio taping, or deciding not to after documenting your interest in doing so.

9. <u>Representing Both Husband and Wife, Especially When There Are Stepchildren.</u>

a. This situation is much more likely to present a conflict for the lawyer.

b. Creates great ammunition for an undue influence claim.

i. Who was the lawyer really representing?

ii. Does the lawyer have a fiduciary obligation to the beneficiary/spouse to protect his/her interest, e.g. to make sure he or she gets more from the testator?

c. This also opens a closed door to estate planning malpractice claims.

Estate of Arlitt v. Paterson, 995 S.W.2d 713 (Tex.App.-San Antonio 1999, review denied). Appellate court held that wife was in privity with and could maintain a malpractice action against the estate planning attorneys if she could show that she was a joint client with her now-deceased husband.

10. <u>Thinking that Forfeiture Clauses No Longer Work, or that the Forfeiture Clause Should be Excessively Broad.</u>

After the enactment of statutes relating to forfeiture clauses and the good faith/ just cause exception, (Texas Estates Code §254.005 and Texas Property Code §112.038), many lawyers concluded that forfeiture clauses were no longer useful. Other lawyers started looking for ways to wire around the statutes. The former is wrong and the latter will likely create more trouble.

a. Forfeiture clauses still work to the same degree they have always worked. Contestants can still forfeit. The common law has simply been confirmed – a good faith challenge, based upon just cause, will still avoid forfeiture, but if those facts are not proven, the losing contestant forfeits.

b. You have to have a good carrot. The primary reason that most forfeiture clauses do not work is that the will does not include a meaningful bequest (the carrot). The contestant has to have something substantial to lose; otherwise, there is no disincentive to a contest.

c. A good forfeiture clause is a simple one.

i. The more you add to these provisions, the more questionable they become.

ii. You run the risk of inflaming the disgruntled beneficiary even more.

iii. Complicated, convoluted forfeiture provisions beg the questions – Did the testator really understand? Why would the testator do that? Who was really behind it?

d. A good forfeiture clause is not one that results in forfeiture; it is one that successfully deters the contest in the first place.

11. <u>If Called as a Witness, Stick to the Facts to Maintain Credibility.</u>

a. Almost every successful will contest involves a scrivener who believes he or she did nothing wrong.

b. Never try to be difficult or clever, because that will only reinforce negative stereotypes some jury members will already have about lawyers.

c. Do not fill in the blanks in your memory. It rarely helps and almost always undermines the case.

d. Advocate without being an advocate.

12. <u>Deciding to be the Litigator After Drafting the Will.</u>

a. **Rule 3.08 Lawyer as Witness**

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client unless:

(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.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as an advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Comment 4 to this Rule explains the difficulty with the scrivener serving as trial counsel:

4. In all other circumstances, the principal concern over allowing a lawyer to serve as both an advocate and witness for a client is the possible confusion that those dual roles could create for the finder of fact. Normally those dual roles are unlikely to create exceptional difficulties when the lawyer's testimony is limited to the areas set out in sub-paragraphs (a)(1)-(4) of this Rule. If, however, the lawyer's testimony concerns a controversial or contested matter, combining the roles of advocate and witness can unfairly prejudice the opposing party. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

However, courts have held that "this Rule should rarely be the basis for disqualification". *May v. Crofts,* 868 S.W.2d 397, 399 (Tex.App.-Texarkana 1993, no writ).

b. The scrivener's conduct will already be carefully scrutinized. Why give the jury more ammunition with which to question his or her credibility?

(a) When the scrivener testifies, is he or she being honest or is he/she being an advocate, saying whatever it takes to win?

(b) Doesn't the trial lawyer have an obligation to testify favorably for his/her client in the contest?

c. Why not just guarantee a successful result?

i. If your side loses, you are increasing the risk of getting sued, especially if some jurors report that they questioned your or your partner's credibility.