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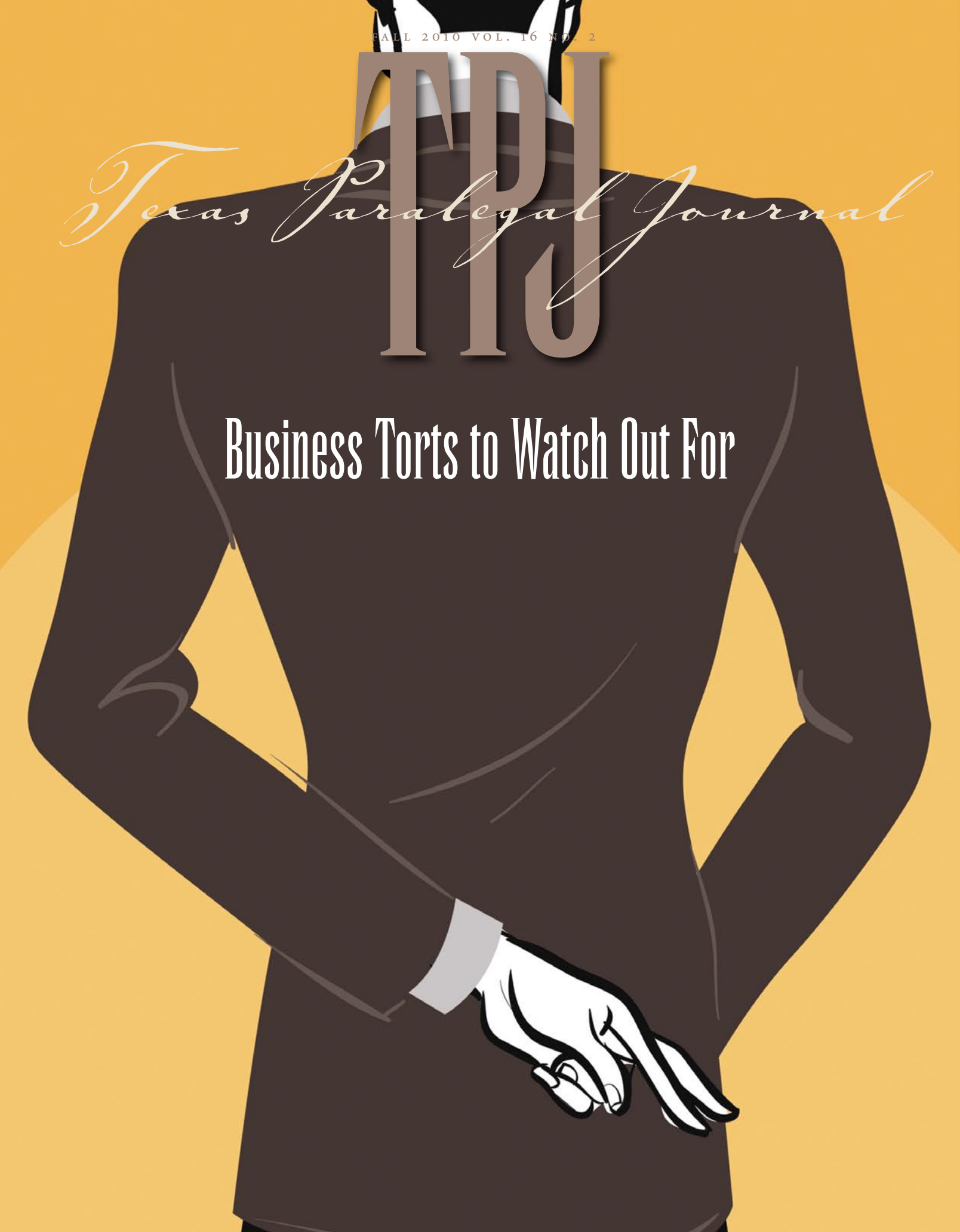
Texas Paralegal Journal

TPJ

Business Torts to Watch Out For



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PRESIDENT'S *Message*

by Debbie Oaks Guerra, President, Paralegal Division

"Everybody can be great because everybody can serve."—*Martin Luther King, Jr.*

This year, I have challenged the District Directors to organize one community service project with an agency of their choosing. While it is critical to note the continuing need for pro bono service in our communities, it is just as important to support community service initiatives as well. In these challenging economic times, there is a dire need for help and I am confident the members of the Paralegal Division will use the man-power of this great organization to make a difference!

As you may imagine, one of the most important aspects of organizing any great community service project is the recruitment of volunteers.

Perhaps the most important benefit people get from volunteering is the satisfaction of incorporating service into their lives and making a difference in their community. The intangible benefits alone – such as pride, satisfaction and accomplishment are worthwhile reasons to serve. In addition, volunteering connects you to others; is good for your mind and body; can advance your career; and brings fun and fulfillment to your life!

Volunteering connects you to others

One of the better known benefits of volunteering is the impact on the community. Unpaid volunteers are often the glue that holds a community together. Volunteering allows you to connect to your cause to make it better. However, volunteering is a two-way street, and it can benefit you as much as the cause you choose to help. Dedicating your time as a volunteer helps you make new friends, expand your network and boost your social skills.

Volunteering is good for your mind and body

Volunteering can provide a healthy boost to your self-confidence, self-esteem and life satisfaction. You are doing good for others and your profession, which provides a natural sense of accomplishment. Your role as a volunteer can also give you a sense of pride and identity. And the better you feel about yourself the more likely you are to have a positive view of your life and future goals.

Volunteering can advance your career

Volunteering gives you the opportunity to practice important skills such as teamwork, communication, problem solving, project planning, task management, and organization. Just because volunteer work is unpaid does not mean the skills you learn are basic.

Volunteering brings fulfillment to your life

Volunteering is a fun and easy way to explore your interests and passions. Doing volunteer work you find meaningful and interesting can be a relaxing, energizing escape from your day-to-day routine of work, school and family commitments.

Volunteering can also provide you with renewed creativity, motivation and vision that can carry over into your personal and professional life.

So, I ask, are you ready to make a difference in someone's life? If so, begin by making a difference in *yours*. Have you tapped into your natural resources yet? If not, what are you waiting for? Start creating your legacy now and believe me, once you do, we will all reap the benefits.

Have you been to a great CLE presentation lately?
Has your attorney given a CLE presentation lately?

Then the TPJ needs your help!!!

If you've been to a great seminar lately, or your attorney recently prepared a paper for a seminar, please ask the attorney/author if he would be willing to submit the paper for publication in the TPJ. It truly is as simple as that!

Articles need to be submitted in Word format, and the author needs to sign and return the Reprint Permission form found on the Paralegal Division website.

If you have any questions about submitting an article, please contact Editor Heidi Beginski at hbeginski@kempsmith.com.

PARALEGAL ETHICS HANDBOOK 2009 EDITION

BY ELLEN LOCKWOOD, LAURIE L. BORSKI, RHONDA J. BRASHEARS, DEBRA CROSBY, JAVAN JOHNSON, LISA SPRINKLE, AND OTHER MEMBERS OF THE PARALEGAL DIVISION OF THE STATE BAR OF TEXAS

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This handbook is an essential resource for experienced paralegals, those new to the profession, and attorneys working with them.

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Focus on. . .

Hot Cites

Columns

Et Al.

EDITOR'S *Note*

by Heidi Beginski, Board Certified Paralegal, Personal Injury Trial Law, Texas Board of Legal Specialization

More and more, there is news about big companies—and their officers—doing bad things. Now, there are new remedies in breach of fiduciary duty disputes and enforceability of a waiver-of-reliance provisions. Changes to pattern jury instructions and new developments in exemplary damages in business tort cases along with forum selection clauses are just some of the far-reaching effects of nefarious business dealings. Brian P. Lauten's article in this month's issue is a great update on latest court cases in these areas.

If you take anything away from Craig Haston's article (updated by Bret A. Bosker and Kate McConnico), it's got to be, "See the judge, know the judge, be ... the judge." You will find that, along with lots of other practial advice in their article on trying a property case in this month's issue. Even if you do not practice in the area of property law, there are a lot of great tips for any litigation paralegal in this well-written article.

Be sure to read up on this year's Board of Directors so you can get to know our new leaders. These ladies are all great examples of paralegals who go the extra mile in their profession as well as their personal lives. We are fortunate they will be directing our Division for the upcoming year!

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DEADLINE FOR SUBMISSION OF ARTICLES FOR THE FALL ISSUE IS JANUARY 2, 2011.

Focus on . . .

Business Torts to Watch Out For

By Brian P. Lauten

I. New remedies in breach of fiduciary duty disputes: the equitable forfeiture doctrine applies regardless of whether there are any actual damages proven. A look at *ERI Consulting Engineers, Inc. v. Swinnea,* No. 07-1042, 2010 WL 1818395 (Tex. May 7, 2010).

Since 1999, one of the remedies for breach of fiduciary duty was disgorgement where the plaintiff had been damaged. *Burrow v. Arce*, 997 S.W.2d 229, 237-245 (Tex. 1999). However, a recent Supreme Court decision in the area of fiduciary relationships holds that contractual consideration received in the sale of a business is subject to equitable forfeiture as a remedy for breach in addition to other damages that result from the tortious conduct. The Texas Supreme Court has held the equitable remedy of either forfeiture or disgorgement may apply regardless of whether actual damages are proven.

In *ERI Consulting Engineers, Inc. v. Swinnea*, No. 07-1042, 2010 WL 1818395 (Tex. May 7, 2010), Larry Snodgrass ("Snodgrass") and Mark Swinnea ("Swinnea") owned equal interests in two business entities, namely ERI Consulting Engineers, Inc. ("ERI") and Malmeba Company, Ltd. ("Malmeba"). *Id.* at *1. ERI is a consulting company that manages asbestos abatement projects for contractors. *Id.* ERI leased office space from Malmeba, a partnership that owned the building. *Id.* Snodgrass and ERI purchased Swinnea's interest for $497,500. *Id.* ERI agreed to employ Swinnea for six years; and, in turn, Swinnea agreed not to compete with ERI. *Id.*

Unknown to Snodgrass, Swinnea's wife created Air Quality Associates, an asbestos abatement company, one month before the buyout was executed. *Id.* The new company was not disclosed. *Id.* After the buyout, Swinnea's revenue production as an ERI employee dropped 30% to 50%. *Id.* Later Swinnea created a new company, Brady Environmental, which also performed asbestos abatement. *Id.* at *2. Snodgrass later fired Swinnea, released him from his non-compete, and filed suit. *Id.*

After a bench trial, the trial court found for Snodgrass and ERI awarding $1,020,700 in actual damages including forfeiture of the consideration paid for the buyout plus $1,000,000 in exemplary damages. *Id.* The Court of Appeals reversed and found there was no evidence of actual damages. *Id.* The issue before the Texas Supreme Court was whether forfeiture of the consideration paid by Swinnea was an appropriate measure of damages. *Id.* at *3.

Reversing the Court of Appeals, the Supreme Court held that "courts may disgorge *all* ill-gotten profits from a fiduciary when a fiduciary agent usurps an opportunity properly belonging to a principal, or competes with a principal." *Id.* (emphasis added) [citations omitted]. The Court further held that "where willful actions constituting a breach of fiduciary duty also amount to fraudulent inducement, the contractual consideration received by the fiduciary is recoverable in equity regardless of whether actual damages are proven . . .." *Id.* at *4. The Court analogized this scenario to fee forfeiture in the attorney-client breach of fiduciary duty context. *ERI* held:

> [A] fiduciary who breaches his duty should not be insulated from forfeiture if the party whom he fraudulently induced into contract is ignorant about the fraud, or fails to suffer harm. Likewise, the innocent party should not be put into a difficult choice regarding termination of the contract upon discovering the breach of duty.

Id. at *5.

ERI stated that courts should consider the following factors in deciding whether full compensation should be awarded: (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional, negligent, or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether the breach of trust occasioned any loss; and (5) whether the trustee's services were of value to the trust. *See id.* [citations omitted]. Thus, *ERI* holds that when a fiduciary fraudulently induces the formation of a contract such a breach may give rise to equitable forfeiture of the contractual consideration. *Id.* at * 12. The Supreme Court remanded the case for an analysis of the above principles and for a determination as to whether the appropriate remedy of forfeiture would further the goal of protecting relationships of trust in this scenario. *ERI* can be read broadly to mean that the Texas Supreme Court has expanded the holding in *Burrow v. Arce*, 997 S.W.2d 229, 237-245 (Tex. 1999), where that Court held an attorney who breaches his fiduciary duty to his client may be responsible for disgorging his fee.

II. Can parties contract away their own fraud? The enforceability of a waiver-of-reliance provision as conclusively negating a later raised claim for fraudulent inducement. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008)

In its most recent decision on the enforceability of a waiver-of-reliance provision in an agreement, the Texas Supreme Court has made it clear that it is trending toward barring fraud claims where parties previously agreed in writing that they are not relying upon one another in the transaction at issue. If the parties are operating at arms length through their own lawyers, and a waiver-of-reliance provision is included in the agreement, it is now increasingly difficult to maintain a claim for fraud even if there are fact issues to the contrary. *See Forest Oil Corp. v. McAllen,* 268 S.W.3d 51 (Tex. 2008).

The line of cases preceding *Forest Oil* starts with *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161-62 (Tex. 1995). In *Prudential*, Goldman purchased the Jefferson Building in Austin from The Prudential Insurance Company of America ("Prudential"). *Id.* at 159. Approximately two years later, Goldman discovered that the building contained asbestos fireproofing. *Id.* Goldman sued Prudential. *Id.* It was Goldman's contention that Prudential misrepresented the condition of the building and failed to disclose that it contained asbestos which undermined its value. *Id.* In response, Prudential argued that Goldman purchased the building "as is"; therefore, he could not recover damages. *Id.*

The Texas Supreme Court held that Goldman's agreement to purchase the Jefferson Building "as is" precluded any argument that Prudential proximately caused any alleged damages. *Id.* at 161. *Prudential* reasoned that, where, as here, there is an agreement to purchase something "as is", the buyer consents to making his own appraisal and accepts any risk that he may be incorrect. *Id.* [citations omitted]. Because Goldman acknowledged that he was not relying upon any representation with respect to the condition of the property, the "as is" agreement negated any claim that Prudential caused his injury. *Id.* But the Texas Supreme Court did hold that an "as is" agreement does not preclude a fraudulent inducement claim. *Id.* at 162. *Prudential* held:

> A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is', and then disavow the assurance which procured the 'as is' agreement. Also, a buyer is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. A seller cannot obstruct an inspection for defects in his property and still insist that the buyer take it 'as is'. In circumstances such as these an 'as is' agreement does not bar recovery against the seller.

Id. [citations omitted].

Prudential provided two noteworthy exceptions to the enforceability of as-is or a waiver-of-reliance provision in an agreement. *Id.* The first exception is the inducement of the injured party to execute an agreement by the concealment of information by the very party seeking to enforce the language in the agreement. *See id.* The second exception is that a purchaser is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired from doing so by the seller's conduct. *Id.* Thus, a seller cannot obstruct an inspection for defects in his property and still insist that the purchaser take it "as is". *Id.* In these two limited circumstances, an "as is" agreement does not bar recovery against the purchaser. *Id.*

Two years after *Prudential* was decided, the Texas Supreme Court issued its opinion in *Schlumberger Technology Corp. v. Swanson,* 959 S.W.2d 171, 179 (Tex. 1997). In *Schlumberger*, the Court reasoned that both exceptions carved out in *Prudential* are still legally enforceable, but held that under the fact pattern presented

in *Schlumberger,* fraudulent inducement did not prevent the court from enforcing the waiver-of-reliance language in the release executed by the Swanson's. *See id.* at 179-81.

The issue in *Schlumberger* and its progeny was whether a contractual disclaimer precluded, as a matter of law, a claim that a party was fraudulently induced into executing the agreement. *See id.* at 173 ("The question is whether this disclaimer precludes, as a matter of law, the Swanson's from recovering damages against Schlumberger for fraudulently inducing them to settle."). There, Schlumberger Technology Corporation ("Schlumberger") sought to purchase the Swanson's interest in an underwater diamond mining operation. *Id.* at 173-174. After becoming embroiled in a dispute over the value of their interests, the Swanson's agreed to a price and sold their interest to Schlumberger. *See id.* at 174. As part of the transaction, the Swanson's signed a release. In the release, the parties specifically noted the interest's value was in dispute, the release extinguished the Swanson's interest, and the agreement included a waiver-of-reliance provision. *See id.* at 180. The Swanson's later sued Schlumberger, asserting that Schlumberger fraudulently induced them to enter into this transaction. *See id.* at 174.

In discussing the enforceability of the waiver-of-reliance provision, the Texas Supreme Court began with a presumption that Schlumberger had fraudulently induced the Swanson's to enter into the transaction and sign the release. *See id.* at 174, 178. The Texas Supreme Court rejected Schlumberger's argument that, as long as the releasing party was represented by counsel in an arms-length transaction, a waiver-of-reliance provision in a release bars a claim that the releasing party was fraudulently induced to sign the release. *See id.* at 175, 178.

In *Schlumberger*, the Texas Supreme Court recognized that prior precedent had held that a release can be set aside upon proof of fraudulent inducement, even if the release contains a waiver-of reliance provision. *See id.* at 178. However, *Schlumberger* acknowledged that other cases reached the opposite result. *See id.* at 178-79. The court then stated that it resolved these two conflicting lines of authority in *Dallas Farm Machinery Co. v. Reaves,* a case decided four decades earlier, in which it adhered to the former line of cases that refuse to enforce fraudulently induced waiver-of-reliance provisions. *See id.* at 179 (discussing *Dallas Farm Machinery Co. v. Reaves,* 307 S.W.2d 233 (Tex. 1957)). *Schlumberger* recognized that the holding in *Dallas Farm Machinery* brought Texas law into compliance with the overwhelming weight of authority in other jurisdictions, the Restatement of Contracts, and the opinions of legal scholars. *See id.*

After appearing to follow *Dallas Farm Machinery Co.,* the *Schlumberger* court then stated that there was a previously unaddressed competing concern, which is the ability of the parties to resolve their disputes without further litigation. *See id.* Reasoning that parties should be able to release each other from further disputes, *Schlumberger* held that circumstances may exist under which a contracting party can disclaim reliance on misrepresentations so as to defeat a claim of fraudulent inducement as a matter of law. *See id.* According to *Schlumberger*, a disclaimer of reliance, under certain circumstances, may conclusively negate the element of reliance, which is a required element to maintain a fraudulent inducement claim.

In so illustrating, *Schlumberger* relied upon *Prudential Insurance Co.,* 896 S.W.2d 156, 161-62 (Tex. 1995) and *Estes v. Hartford Accident & Indemnity Co.,* 46 S.W.2d 413, 417-18 (Tex. Civ. App.—El Paso 1932, pet. ref'd). *Prudential* did enforce a waiver-of-reliance provision in an agreement. However, *Schlumberger* refers to *Dallas Farm Machinery Co.* and notes that the same language is unenforceable against a purchaser induced to enter into an agreement by the seller's misrepresentations. *See Prudential Ins. Co.,* 896 S.W.2d at 161-62. The other case cited by *Schlumberger*, *Estes v. Hartford Accident & Indemnity Co.,* held that there was no evidence of reliance on the alleged fraudulent misrepresentation that induced the party to execute a release. *See Estes,* 46 S.W.2d at 417-18. However, *Estes* does not say that the release contained a waiver-of-reliance clause, and the court states that the release would be unenforceable if the releasing party had proven fraud. *See id.* at 417.

Schlumberger elaborated upon the circumstances in which a waiver-of-reliance provision may negate proof of fraudulent inducement. The Court held:

> The contract and the circumstances surrounding its formation determine whether the disclaimer of reliance is binding. Because the parties were attempting to put an end to their deal, and had become embroiled in a dispute over the feasibility and value of the project, we conclude that the disclaimer of reliance the Swansons gave conclusively negates the element of reliance.

Schlumberger Tech. Corp., 959 S.W.2d at 179-80 [citations omitted]. It was significant in *Schlumberger* that during the negotiations that led to the execution of the release, the parties could not agree upon the value of the Swanson's interest. *See id.* at 180. Thus, the very purpose of the release was to conclude the dispute as to the value of Swanson's interest. *See id.* Because the Swanson's disclaimed any reliance upon Schlumberger about the value of their interest, the Swanson's intended to forego relying upon any representations about the value of the project. *See id.*

Schlumberger underscored the point that a waiver-of-reliance provision will

not necessarily preclude a fraudulent-inducement claim and observed that *Prudential* had identified some situations in which an as-is clause would not bar a similar claim. *See id.* (citing *Prudential Ins. Co.,* 896 S.W.2d at 162)). The language in *Prudential* relied upon in *Schlumberger* includes a citation to *Dallas Farm Machinery Co.* and recognizes that the purchaser would not have been bound by an as-is clause that contained similar waiver-of-reliance language if it had been induced to execute an agreement by a fraudulent representation. *See id; Prudential Ins. Co. of Am.,* 896 S.W.2d at 162. After recognizing that the exceptions from *Prudential* are still valid, *Schlumberger* opined, "We conclude *only* that on this record, the disclaimer of reliance conclusively negates as a matter of law the element of reliance on representations about the feasibility and value of the sea-diamond mining project needed to support the Swanson's claim of fraudulent inducement." *See id.* at 181 (emphasis added).

If *Schlumberger* is interpreted broadly, its holding could be applied in many situations where two common factors exist: (1) an arm's length transaction occurs between sophisticated parties that are represented by independent legal counsel and (2) waiver-of-reliance language that unequivocally applies to the very representations upon which the injured party makes its complaint is included in the contract. Moreover, a broad application of *Schlumberger* could have the practical effect of overruling the fraudulent-inducement exceptions established in *Prudential* and many other authorities indicate the case is still good law. *See Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.,* 161 S.W.3d 482, 487, 490 & n. 32 (Tex. 2005) (holding that quitclaim deed containing as-is provision did not violate Texas Securities Act but noting the two *Prudential* exceptions and observing that the reasoning would change if there were evidence of fraudulent inducement); *Schlumberger Tech. Corp.,* 959 S.W.2d at 181; *Kane v. Nxcess Motorcars, Inc.,* No. 01-04-00547-CV, 2005 WL 497484, at *6-7 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.) (reversing summary judgment based upon as-is clause because fact issues were raised as to fraudulent-inducement exception); *Bynum v. Prudential Residential Services, Ltd. P'ship,* 129 S.W.3d 781, 787-92 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (applying *Prudential* exceptions to an agreement containing waiver-of-reliance and as-is provisions and finding that summary-judgment evidence did not raise a fact issue as to those exceptions); *Nelson v. Najm,* 127 S.W.3d 170, 173, 175-76 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (applying *Prudential* to an agreement containing both waiver-of-reliance and as-is language and finding that fraud claims were not barred because there was evidence that the seller fraudulently concealed information from the purchaser).

The Texas Supreme Court continues to blaze this trail with its most recent decision in *Forest Oil Corp. v. McAllen,* 268 S.W.3d 51 (Tex. 2008). At issue in *Forest Oil* was whether an unambiguous waiver-of-reliance provision precluded a fraudulent inducement claim as a matter of law where sophisticated parties are represented by counsel in an arms-length transaction. *Id.* at 52. The Texas Supreme Court held the waiver-of-reliance provision conclusively negated the element of reliance; and, therefore, any claim for either fraud or fraudulent inducement was contractually barred. *Id.* at 52-53. In *Schlumberger supra*, the court held that a fraudulent inducement claim was precluded by the contractual disclaimer. This principle was re-affirmed in *Forest Oil. See id.* at 52-53 (unambiguous waiver-of-reliance provision precludes fraudulent inducement claim as matter of law). However, in *Forest Oil* and in *Schlumberger* the court expressly declined "to adopt a *per se* rule that a disclaimer of reliance automatically precludes a fraudulent-inducement claim...." *Id.* at 61; *Schlumberger,* 959 S.W.2d at 181 ("We emphasize that a disclaimer of reliance or merger clause will not always bar a fraudulent inducement claim."). Rather, it stated, "Courts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding." *Forest Oil,* 268 S.W.3d at 60.

The Court articulated several factors that are of paramount importance in making this determination: (i) whether the contract was negotiated or boilerplate, (ii) whether the complaining party was represented by counsel, (iii) whether the parties dealt with each other at arms length, (iv) whether the parties were knowledgeable in business matters, (v) and whether the release language was clear. *Forest Oil,* 268 S.W.3d at 60; *see Schlumberger,* 959 S.W.2d at 179-81. The Court also considered how the disclaimer provision impacted the plaintiffs' remaining claims for common-law and statutory fraud. *Schlumberger,* 959 S.W.2d at 181-82. Upon attempting to clarify *Schlumberger*, the Court observed that, "*Schlumberger* holds that when knowledgeable parties expressly discuss material issues during contract negotiations but nevertheless elect to include waiver-of-reliance and release-of-claims provisions, the Court will generally uphold the contract. An all-embracing disclaimer of any and all representations, as here, shows the parties' clear intent." *Forest Oil*, 268 S.W.3d at 58; *see also Jacuzzi, Inc. v. Franklin Elec. Co., Inc.*, 2008 WL 190319 at *4 (N.D. Tex. 2008) (Fitzwater, J.) (enforcing a "no reliance" disclaimer); *Whitney Nat. Bank v. Air Ambulance by B & C Flight Mgmt., Inc.*, 2007 WL 1256612 at *8-13 (S.D. Tex. 2007) (standard merger clauses barred fraudulent inducement claim); *Stark v. Benckenstein*, 156 S.W.3d 112, 122-123 (Tex. App.—Beaumont 2004, pet. denied) ("Here the release, as in *Schlumberger*, covers all claims, whether known or unknown and further disclaims reliance

on representations about the specific matter in dispute. The Parties here were represented by counsel, and bargained at arm's length over the Agreement's terms. The final Agreement contained releases of claims and a payment of cash.") [citations omitted].

Forest Oil holds that, under certain circumstances, parties can in fact contract away their own fraudulent misrepresentations. In light of *Forest Oil*, it is now prudent for the lawyer in all transactions to include waiver-of-reliance provisions in settlement agreements and other contracts. It is also prudent to place language in the agreement encouraging the other party to obtain independent counsel to review the contract and have the opposing party initial such a provision. It is in the best interests of the parties to include language in the agreement that the final version of the contract was revised based upon the negotiations between the parties. By providing such language in your clients' business agreements, your client will likely be protected from further litigation that could evolve from the transaction in question.

III. Can lawyers anticipate that the pattern jury instruction for proximate cause will change in commercial tort cases in light of the holdings in *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007) and *Wal-Mart Stores, Inc. v. Merrell*, No. 09-0224, 2010 WL 2431635 (Tex. June 18, 2010)?

In Texas, the overwhelming number of commercial and business torts require proof of proximate causation. *See e.g., Forbes Inc. v. Granada Biosciences, Inc.,* 124 S.W.3d 167, 170 (Tex. 2003) (business disparagement requires proof of proximate cause); *see also Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("to recover for breach of fiduciary duty, the jury was required to find the existence of a fiduciary duty, breach of the duty, *causation*, and damages.") [citations omitted]; *Gray v. Woodville Healthcare Center*, 225 S.W.3d 613, 617 (Tex. App.—El Paso 2006, pet. denied) ("As we have noted, this lawsuit alleged medical malpractice, gross negligence, and negligence *per se*. *Proximate cause* is an element for each of these causes of action.") [citations omitted]; *Larsen v. Carlene Langford & Assocs.,* 41 S.W.3d 245, 249 (Tex. App.—Waco 2001, pet. denied) (fraud and negligent misrepresentation require proof of proximate cause).

In *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007), a products liability decision, the Supreme Court held that the pattern jury instruction on a manufacturing defect and on producing cause was clearly erroneous and reversible error. In *Ledesma*, Ford argued that the trial court improperly instructed the jury on producing cause. The trial judge, following the pattern jury instruction, instructed the jury: "Producing cause means an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question. There may be more than one producing cause." *Id.* at 45. It was Ford's contention that the producing cause instruction was incorrect. According to Ford, the proper instruction should be that producing cause "means that cause which, in a natural sequence, was a substantial factor in bringing about an event, and without which the event would not have occurred. There may be more than one producing cause." *Id.* The Supreme Court held that the second part of the definition, that "there may be more than one producing cause," was legally correct. *Id.* But *Ledesma* also held that producing cause "is a *substantial factor* that brings about injury and without which the injury would not have occurred." *See id.* (emphasis added) [citations omitted]. The Court reasoned that "efficient" and "exciting" are adjectives foreign to the English language as a practical way of explaining causation. *Id.* at 46.

Although *Ledesma* was a products liability case, it should raise concerns for the commercial trial lawyer because the Texas Supreme Court indicated that it is not reluctant to find a trial court abuses its discretion and commits reversible error even if it submits a pattern jury instruction on causation. Additionally, *Ledesma* raises the question of whether the Supreme Court's logic in changing the definition of producing cause may also apply to changing the definition of proximate cause. It could certainly be argued that the pattern definition of proximate causation is flawed for the same reasons the Texas Supreme Court held that the definition of producing cause is flawed. This is true because, like producing cause, the pattern instruction on proximate cause is very similar. Moreover, if "substantial factor" is now the test for producing cause it begs the question as to whether similar language will now apply to proximate cause.

The Texas Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Merrell*, No. 09-0224, 2010 WL 2431635 (Tex. June 18, 2010) re-defines causation standards in tort cases contrary to the pattern instruction's definition that states there can be more than *one* proximate cause. In *Merrell*, Charles Merrell and Latosha Gibson (collectively, "Merrell") died from smoke inhalation while they slept in their rented home. *Id.* at * 1. The Fire Department found candles, melted wax, an ashtray, as well as smoking paraphernalia throughout the house including a bong and marijuana cigarette butts. *Id.* The fire marshal declared the fire accidental and of unknown origin. *Id.* Merrell's parents filed suit against Wal-Mart and alleged that a halogen lamp purchased from one of its stores caused the fire. *Id.*

Merrell's expert, Dr. Craig Beyler ("Dr. Beyler"), opined that the "nonpassive failure" of the lamp ignited the recliner. *Id.* It was Dr. Beyler's opinion that the halogen bulb exploded causing the fire. *Id.* The expert ruled out smoking materi-

als as a cause because none were found in the immediate area of origin. *Id.* In contrast, Wal-Mart's expert opined that the more likely cause of the fire was careless disposal of smoking materials. *Id.* The trial court granted summary judgment. The Court of Appeals reversed and held fact issues precluded summary judgment. The Supreme Court granted a petition for review and reversed the Court of Appeals. The Texas Supreme Court held that Dr. Beyler's causation opinion was no evidence. *Merrell* reasoned that Dr. Beyler did not explain "why a burning cigarette could not have caused the fire." *Id.* at *2. According to the Supreme Court, Dr. Beyler improperly dismissed the post-mortem toxicology report that stated the deceased were smoking on the night of the fire. *Id. Merrell* held:

> Beyler did undertake to eliminate one potential cause of the fire that might otherwise seem on a par with the lamp theory. He explained why the melted candle wax and location of the candles precluded the candles as the source of the fire. Yet he provided no explanation for why lit smoking materials could not have been the source. *An expert's failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory.* Most importantly, while Beyler laid a general foundation for the dangers of halogen lamps, his specific causation theory amounted to little more than speculation. Evidence that halogen lamps can cause fires generally does not establish that the lamp in question caused *this* fire.

Id. at *2-3 (emphasis added) [citations omitted]. *Merrell* could be read to mean that tort plaintiffs must eliminate and adequately disprove alternative theories of causation in all tort cases. Although *Merrell* does not cite *Ledesma*, the Texas Supreme Court seems to be moving away from the language in the pattern instruction that specifically states there can be more than one proximate cause. It can certainly be argued that *Merrell* stands for the proposition that a plaintiff must prove the defendant's negligence was "the" cause rather than "a" cause.

IV. *New developments in exemplary damages in business tort cases.* A look at *Bennett v. Reynolds*, No. 08-0074, 2010 WL 2541096 (Tex. June 25, 2010), which set aside a cap busting finding on exemplary damages and held that a ratio analysis between actual and exemplary damages applies under a constitutional analysis regardless of a cap busting finding.

It has long been settled law that if plead, submitted to the jury, and proven based upon a unanimous finding, certain criminal offenses may remove the statutory cap on exemplary damages in civil cases. *See* TEX. CIV. PRAC. & REM. CODE ANN. 6 41.008 (Vernon 2003); *see e.g., Signal Peak of Enterprises, Inc. v. Bettina Investments, Inc.*, 138 S.W.3d 915, 927 (Tex. App.—Dallas 2004, pet. stricken); *Poliner v. Texas Health Systems*, 239 F.R.D. 468, 477 (N.D. Tex. 2006) (Solis, J.) (rev'd on other grounds) 537 F.3d 368 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1002 (2009); *see also Myers v. Walker*, 61 S.W.3d 722, 732 (Tex. App.—Eastland 2001, pet. denied) (no cap on punitive damages and affirming award of exemplary damages where documents were executed by deception). For example, in a fraud dispute if the jury finds that the defendant secured the execution of documents by deception (a felony) there is no legislative cap on an award of exemplary damages that were found in excess of the cap. *See e.g.*, TEX. CIV. PRAC. & REM. CODE 6 41.008 (11) (Vernon 2003). Similarly, if a jury finds the defendant guilty of murder in a wrongful death case, there is no cap on exemplary damages. *See id.* at 6 41.008.

Until June 2010, Texas courts had held that both constitutional and cap limitations on exemplary damages were inapplicable when the jury makes a cap busting finding. *Compare Bennett v. Reynolds*, 242 S.W.3d 866, 901-905 (Tex. App.—Austin 2007, reversed) (exemplary damages award of $1,000,000 did not violate due process because the jury found felony theft, which is a cap buster, even though the actual damages awarded was only slightly more than $5,000.), with, 2010 WL 2541096 (Tex. June 25, 2010); *Myers*, 61 S.W.3d at 732-733 (where attorney secured the execution of a settlement agreement by deception the caps on exemplary damages did not apply following bench trial on the merits). Additionally, the legislature has voiced a policy intention to make certain crimes, such as executing documents by deception, murder, kidnapping, and sexual assault, to name a few, as worse offenses than others. However, Chapter 41 was effectively repealed by judicial fiat in *Bennett v. Reynolds*, 08-0074, 2010 WL 2541096 (Tex. June 25, 2010). In *Bennett*, Thomas Bennett ("Bennett") became embroiled in a cattle feud with his neighbor, Randy Reynolds ("Reynolds"). *Id.* at *1. After prevailing in a small claims dispute over re-constructing a fence the two parties shared, Reynolds mentioned in the courtroom to Bennett that he was missing some cattle and inquired as to whether Bennett had seen them. *Id.* Bennett immediately went to the Sheriff's office and accused Reynolds of stealing *his* cattle. *Id.* at *2. Bennett had stolen thirteen head of cattle while knowing those heads belonged to Reynolds. *Id.* Both of Bennett's ranch hands raised concerns that Bennett did not actually own the cattle.

One of Bennett's ranch hands, Larry Grant ("Grant"), told Reynolds that Bennett had stolen his cattle. *Id.* While driving to the auction, Grant photographed the cattle showing Reynolds registered brand. *Id.* When Bennett discovered Grant had incriminating evi-

dence, Bennett encouraged Grant to lie and Bennett later offered Grant a lucrative job. *Id.* at *6. When Grant refused, one of Bennett's ranch hands attempted to threaten Grant with bodily injury, but mistakenly made the threat to Grant's brother in law. *Id.* Bennett then filed a slander suit against Grant to intimidate him and attempted to register Reynolds' brand so that he could cover up the theft. *Id.* at *7. Grant alleged that Bennett tampered with the photographs to bolster his defense. *Id.* Bennett was indicted for cattle theft, but acquitted.

The civil trial proceeded to a jury verdict that resulted in an award of $5,327.11 in actual damages for the cattle and 1.25 million in combined uncapped exemplary damages for felony theft against Bennett and his corporation. The Court of Appeals affirmed the uncapped exemplary damages. The Texas Supreme Court reversed and held that uncapped exemplary damages are subject to a constitutional ratio analysis between actual and exemplary damages. *Bennett* held that any ratio above 4:1 "might be close to the line of constitutional impropriety." *Id.* at *8 [citations omitted]. In fact, the Supreme Court stated that an award of 4.33 times actual damages is constitutionally excessive, but cautioned that a rigid 4:1 ratio is not universally required.

In determining what ratio might apply, the Texas Supreme Court adopted five "reprehensibility" factors from the United States Supreme Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (Tex. 1996), which include the following:

1. the harm inflicted was physical rather than economic;
2. the tortious conduct showed an indifference to or a reckless disregard for the health or safety of others;
3. the target of the conduct had financial vulnerability;
4. the conduct involved repeated actions, not just an isolated incident; and
5. the harm resulted from intentional malice, trickery, or deceit, as opposed to mere accident.

See Bennett, 2010 WL 2541096 at *4 [citations omitted]. The Supreme Court remanded an appropriate exemplary damage award to the Court of Appeals, but stated that a 4:1 ratio in this case with no physical injury would be a stretch. *Id.* at *11. *Bennett* held:

> Our settled practice is not to remit unconstitutional awards ourselves or to prescribe a required ratio, though on this record, even 4:1 seems a stretch: 'Pushing exemplary damages to the absolute constitutional limit in a case like this leaves no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public . . . The Supreme Court is decidedly hands-on when scrutinizing high-dollar exemplary-damages awards, and we are confident the Court would conclude this award 'was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant.'

Id. at *11 [citations omitted].

In light of the standards set forth in *Bennett*, the cap busters on exemplary damages are now judicially limited to a 4:1 actual to exemplary damages ratio or less. Applying this new standard, Bennett, instead of receiving uncapped exemplary damages of 1.25 million, will now probably receive approximately $20,000 in exemplary damages on remand ($5,327.11 (actual damages) x. 4 (a stretch) = $21,308.44)). If the statutory cap on exemplary damages had been applied, Reynolds would have at least received the statutory minimum of $200,000. Thus, the Supreme Court's application of due process limitations lowers the exemplary damages to less than one-tenth of the legislative cap. *Bennett* now caps all exemplary damages regardless of the application of the unlimited caps and suggests to trial courts that the best ratio a plaintiff can ever obtain is 4:1.

V. *An update on forum selection clauses and forum non conveniens*: Are they becoming more closely scrutinized in the Supreme Court and is mandamus a remedy? *In re International Profit Associates, Inc.*, 274 S.W.3d 672 (Tex. 2009), *In re ADM Investor Services, Inc.*, 304 S.W.3d 371 (Tex. Feb. 19, 2010), and *Quixtar Inc. v. Signature Management Team*, LLC, No. 09-0345, 2010 WL 2635985 (Tex. July 2, 2010).

Forum-selection clauses are generally enforceable, and a party attempting to show that such a clause should not be enforced bears a heavy burden. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 232 (Tex. 2008) (per curiam) (citing *In re AIU Ins. Co.*, 148 S.W.3d 109, 113 (Tex. 2004)). A trial court abuses its discretion if it refuses to enforce a forum-selection clause unless the party opposing enforcement clearly shows that (1) the clause is invalid for reasons of fraud or is overreaching, (2) enforcement would be unreasonable or unjust, (3) enforcement would contravene a strong public policy of the forum where the suit was brought or (4) the selected forum would be seriously inconvenient for trial. *Id.* at 231-232; *AIU*, 148 S.W.3d at 112; *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-17 (1972). Mandamus relief is available to enforce forum-selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion in refusing to enforce a valid forum-selection clause that covers the dispute. *Lyon*, 257 S.W.3d at 231; *AIU*, 148 S.W.3d at 115-120.

In *in Re International Profit Associates*, 274 S.W.3d 672 (Tex. 2009), the Texas Supreme Court granted mandamus relief, reversed the Corpus Christi Court of Appeals, and held that a forum selection clause was enforceable. In *International Profit*, McAllen Tropicpak ("Tropicpak") entered into separate contracts with International Profit Associates, Inc. and three related management and tax consulting firms (collectively, "IPA"). *Id.* at 674. The contracts provided that IPA would provide, *inter alia*, general business consulting services to Tropicpak. *Id.* In each of the agreements, there was the following paragraph: "It is agreed that exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois law applying." *See id.* According to Tropicpak, IPA made business recommendations, including that Tropicpak hire David Salinas to help boost sales. *Id.* Tropicpak hired Salinas, who embezzled large sums of money from the company. *Id.* Tropicpak sued Salinas and IPA; the latter was sued for fraud, negligence, and negligent hiring and retention. *Id.* IPA moved to dismiss the suit based upon the forum-selection clause; thereafter, the trial court denied the motion and the Court of Appeals affirmed in an unpublished opinion.

Reversing the Court of Appeals, *International Profit* reasoned, in part, that forum selection clauses are analogous to arbitration provisions. *Id.* at 677. It was Tropicpak's contention, *inter alia*, that the claims being asserted were outside the scope of the contracts because none of the contracts called for IPA to make employment recommendations. *Id.* at 678. Rejecting this argument, *International Profit* held that "[b]y agreeing to the forum-selection clauses, Tropicpak represented to IPA that the agreed forum would not be so inconvenient that enforcing the clause would deprive Tropicpak of its day in court." *Id.* at 680 [citations omitted].

The Texas Supreme Court stated that Tropicpak failed to prove that special and unusual circumstances developed after the contracts were executed making litigation in Illinois so "gravely difficult and inconvenient" for Tropicpak that it would deprive it of its day in court. *Id.* [citations omitted]. Thus, Tropicpak failed to rebut the presumption that the clause was valid; and further, it failed to show that the claims fell within the scope of the clause. *Id.* Accordingly, the Supreme Court granted mandamus relief ordering the trial court to dismiss the case.

Similarly, in *re ADM Investor Services, Inc.*, No. 08-0570, 304 S.W.3d 371 (Tex. Feb. 19, 2010), Jetta Prescott ("Prescott") executed an agreement with ADM to trade commodities on Prescott's behalf. *Id.* at 373. When Prescott's balance reached a deficit in excess of $50,000, ADM was authorized to close her account and collect the deficit from Texas Trading. *Id.* Prescott's balance reached a deficit of $57,844.29. *Id.* ADM closed her account and collected the deficit from Texas Trading's CEO, Charles Dawson. *Id.* Dawson sued Prescott and obtained a judgment against her. Prescott then sued Texas Trading and ADM alleging fraud, negligence, and breach of fiduciary duty. *Id.* ADM moved to dismiss pursuant to a contractual forum selection clause. *Id.*

Prescott argued that ADM waived enforcement by waiting three months to seek dismissal. *Id.* at 373. The Supreme Court granted mandamus relief and dismissed the case against ADM. *ADM* reasoned that there is a strong presumption against waiver. *Id.* at 374 [citations omitted]. The Court noted that "merely participating in litigation does not categorically mean the party has invoked the judicial process so as to waive enforcement." *Id.* [citations omitted]. *ADM* held the burden of proof is "*heavy*" for the party challenging enforcement. *Id.* at 375. Prescott was nearing 80 years of age and presented proof that her health would prohibit her from pursuing litigation in two different states. The Texas Supreme Court rejected this argument. *ADM* held:

> We conclude that Prescott did not overcome the presumption against ADM's waiving its right to enforce the forum selection clause by showing that ADM substantially invoked the judicial process. We also conclude that Prescott failed to satisfy her burden to demonstrate that enforcement of the forum selection clause would be unjust and unreasonable. Accordingly, we hold that the trial court abused its discretion in denying ADM's motion to dismiss. There is no adequate remedy by appeal when a trial court refuses to enforce a forum selection clause.

Id. at 376 [citations omitted].

Parties whose agreements contain forum selection clauses can assume that the Texas Supreme Court will expect those contractual provisions to be enforced even when there is an independent tort that is being asserted outside the agreement itself and even if enforcement would result in multiple suits in different forums. It is also important to note that, akin to forum selection clauses, the Supreme Court has modified the forum non-conveniens analysis to provide the trial court with more flexibility and deference in dismissing cases that may or may not be inappropriately filed in Texas.

In *Quixtar Inc. v. Signature Management Team, LLC*, No. 09-0345, 2010 WL 2635985 (Tex. July 2, 2010), a dispute arose between Quixtar, Inc. ("Quixtar") and Signature Management Team, LLC ("Signature"). Quixtar is a Virginia corporation with its principal place of business in Michigan. *Id.* at *1. Signature is an LLC organized in Nevada with its principal place of business in Michigan. *Id.* Quixtar alleged that Signature taught its individual business owners improper and potentially illegal business building techniques that put Quixtar's entire business at risk. *Id.*

Signature filed suit in Collin County. The trial court dismissed the case based upon forum non-conveniens. The Court of Appeals reversed the trial court. And, the Texas Supreme Court reversed the Court of Appeals and held the trial court did not abuse its discretion in dismissing the case.

"A defendant seeking forum non-conveniens dismissal ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." *Id.* at *2 [citations omitted]. However, there is substantially less deference to a non-resident's choice of forum. *Id.* Signature argued that its individual business owner affiliates are located in Texas. *Id.* at *3. Nevertheless, the Supreme Court held that Signature was not a Texas resident; and, therefore, it was entitled to less deference than a Texas resident. *Id.* at *4. The Court followed *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), and noted the central focus of the analysis is convenience. *See Quixtar*, 2010 WL 2635985 at *2-3. *Id.* Private considerations under *Gulf Oil* include the following: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses; (3) the possibility to view the premises if view would be appropriate; (4) the enforceability of a judgment; (5) all other practical problems that make trial of a case easy, expeditious, and inexpensive. *Id.* [citations omitted]. Public considerations include the following: (1) administrative difficulties … for courts when litigation in congested centers, rather than being handled at its origin; (2) the burden of jury duty upon a community that may have no relation to the litigation; (3) local interest in having local controversies decided at home; and (4) avoiding conflicts of law issues. *Id.* [citations omitted].

Upon applying these factors, the Supreme Court held there was no abuse of discretion in dismissing the case on the basis of forum non-conveniens. The Court stated that forum non-conveniens dismissals are within the sound discretion of the trial court and involve weighing various factors that may be difficult to quantify. Accordingly, the Court held the dismissal was appropriate and refused to employ a formulaic standard for evaluating the trial court's ruling.

VI. *A new tort of conversion and the remedy of disgorgement*: What happens to attorneys and parties who fail to honor subrogation and worker's compensation liens? *Texas Mutual Insurance Co. v. Ledbetter*, 251 S.W.3d 31 (Tex. 2008)

A recent case from the Texas Supreme Court in the area of worker's compensation liens creates, or at least better defines, a new business tort against attorneys for conversion and disgorgement of settlement funds where the settlement is designed to circumvent either an insurance carrier's lien or its right to subrogation.

In *Texas Mutual Insurance Co. v. Ledbetter*, 251 S.W.3d 31 (Tex. 2008), Charles Ledbetter ("Ledbetter") was electrocuted during the course and scope of his employment. *Id.* at 34. Ledbetter's worker's compensation carrier, Texas Mutual Insurance Company ("Texas Mutual"), paid funeral expenses and began paying monthly death benefits to his widow and minor son. *Id.* at 34. Ledbetter's widow, his minor son, and his adult daughters filed a third party liability claim against the parties that were responsible for his death. *Id.* The case settled for $4.5 million. *Id.* An ad litem was appointed to approve the settlement. *Id.* Before the minor prove up, Texas Mutual intervened. *Id.* At the start of the hearing, the plaintiff's attorney non-suited all claims except those of the estate. *Id.* The trial court over Texas Mutual's objection granted the non-suit. *Id.* The plaintiffs then announced that the settlement would be allocated to Ledbetter's estate, to the plaintiff's attorney, and there would be no proceeds to the widow, minor child, or the adult daughters. *Id.* The trial court approved the settlement. *Id.*

The Texas Supreme Court held that a worker's compensation carrier has a mandatory right to first money and a plaintiff cannot non-suit a claim that would prejudice the carrier's rights to either a lien or subrogation. *See id.* at 38 ("Rule 162 is not limited to affirmative claims against the nonsuiter; it prohibits dismissal if the effect would be to prejudice any pending claim for affirmative relief, period."). Of import here, *Ledbetter* specifically held that the worker's compensation insurance carrier had a cause of action for conversion against the plaintiffs, the plaintiff's attorney, and the defendants and that the remedy against the plaintiffs and the plaintiff's attorney is disgorgement. *Id.* at 38-39. *Ledbetter* held:

> When an injured worker settles a case without reimbursing a compensation carrier, everyone involved is liable to the carrier for conversion – the plaintiffs, the plaintiffs' attorney, and the defendants. As between those parties, we have held that generally those who received the funds unlawfully (the plaintiffs and their attorney) should disgorge them rather than making the tortfeasors pay twice.

Id. [citations omitted].

Ledbetter is one of the most aggressive opinions nationwide in protecting a worker's compensation insurance carrier's lien against a personal injury settlement. In light of *Ledbetter*, the plaintiff's attorney cannot non-suit claims anymore without the consent of the carrier; and, furthermore, because the carrier is entitled to first money under all circumstances, the plaintiff's attorney effectively becomes a lawyer for the carrier as much as his own client. But the question remains, if the plaintiff's lawyer is retained only to represent the estate's

claim, can the compensation carrier nevertheless intervene to claim first money or will the carrier be forced to expend its own proceeds and file a separate claim for subrogation against the same third parties?

VII. *Can insurance carriers now avoid statutory penalties and extra-contractual damages for interpleading funds in first party insurance cases? State Farm Life Insurance Co. v. Martinez*, 216 S.W.3d 799 (Tex. 2007).

In interpreting the 1991 changes to the Insurance Code, the Texas Supreme Court recently held that an insurer who interpleads policy proceeds cannot be subject to statutory penalties for delayed payments after interpleader occurs. In *State Farm Life Insurance Co. v. Martinez*, 216 S.W.3d 799 (Tex. 2007), Ed and Linda Martinez divorced and Ed agreed to pay Linda contractual alimony for a period of ten years, with his estate to continue paying if he died earlier. *Id.* at 800. Ed also agreed to name Linda as an irrevocable beneficiary on three life insurance policies, providing that he could drop those policies as long as the total amount of unpaid alimony was recovered. *Id.*

At issue in this case is a $500,000 policy issued by State Farm. *Id.* In 1994, Ed listed his ex-wife as the beneficiary per the divorce decree. *Id.* However, shortly before his death Ed signed a change of beneficiary form designating his current wife as the beneficiary. *Id.* State Farm refused to process the request requiring proof that the change complied with the divorce agreement. *Id.* Ed died days after signing the request and before he could act on State Farm's response. *Id.* Upon death, State Farm receiving conflicting claims from Ed's daughter, Linda, and his current wife. *Id.* Two days later, State Farm filed an interpleader and deposited $506,061 (the policy proceeds plus interest) in the court's registry. *Id.* The trial court granted summary judgment in Ed's current wife's favor and ordered State Farm to pay all of the proceeds to her save and except the unpaid alimony to Linda. *Id.* at 801. But Ed's current wife also claimed that State Farm violated the Texas prompt payment of claims statute by failing to pay her within sixty days; thus, entitling her to penalty interest of 18 percent and attorney's fees. *Id.*

One of the issues before the Texas Supreme Court was whether State Farm owed statutory penalties after the interpleader was filed. *Id.* at 805-806. The Texas Insurance Code provides no exception from statutory penalties when an interpleader is filed. *Id.* Nevertheless, in *Martinez* the Texas Supreme Court held that State Farm could not be assessed statutory penalties after the date the interpleader was filed. *Martinez* held:

> Assessing penalty interest and attorney's fees after an interpleader is filed would punish insurers for doing exactly what Texas law encourages. Indeed, the more difficult and protracted the dispute between rival claimants (and thus the more justified the interpleader), the larger those penalties would grow. We must avoid construing the prompt payment statute to reach such an absurd result.

Id. at 806 [citations omitted].

Thus, under *Martinez* an insurance company cannot be held liable for statutory penalties after an interpleader is filed and after the funds have been placed in the court's registry.

VIII. *Recovering attorney's fees in a mixed tort/contract case*: New and ever changing rules on prevailing parties, recovery, proof, and segregation of fees.

It is axiomatic that attorney's fees are recoverable only if authorized by a specific statute or if the party seeking relief recovers on a breach of contract claim. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006); *Travelers Indem. Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 594 (Tex. 1996); *Wm. Cameron & Co. v. Am. Surety Co. of N.Y.*, 55 S.W.2d 1032, 1035 (Tex. Comm'n App.1932, holding approved). Stated differently, attorney's fees are not recoverable in a tort action. *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 803-04 (Tex. 1974). Issues as to whether an agreement or statute authorizes recovery of attorney's fees present questions of contract or statutory construction, and these generally are questions of law. *Coker v. Coker*, 650 S.W.2d 391, 394-95 (Tex. 1983) (explaining that courts construe unambiguous contracts and determine the existence of ambiguity as matters of law); *New Amsterdam Cas. Co. v. Tex. Indus., Inc.*, 414 S.W.2d 914, 914-15 (Tex. 1967) (construing contract and statute as a matter of law to determine whether recovery of attorney's fees was authorized).

From 1991 to 2006, the exception to the fee-segregation rule applied "when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are intertwined to the point of being inseparable." *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11-12 (Tex. 1991) (quoting *Gill Sav. Ass'n v. Chair King, Inc.*, 783 S.W.2d 674, 680 (Tex. App.—Houston [14th Dist.] 1989), *modified*, 797 S.W.2d 31 (Tex.1990) (per curiam)). In light of the Texas Supreme Court's recent decision in *Chapa*, the factors that determine whether the fee-segregation exception rule applies changed. *See Chapa*, 212 S.W.3d at 311. After *Chapa*, the determination focuses upon the legal work performed that pertains solely to causes of action for which attorney's fees are not recoverable. *See id.* Under *Chapa*, the jury does not examine the work product in its entirety, but must parse the work into separate tasks allocated to recoverable claims. *See id.* at 313 ("But when Chapa's attorneys were drafting her pleadings or *the jury charge relating*

to fraud, there is no question [that] those fees were not recoverable."). If any of the tasks at issue pertain solely to a claim for which legal fees are unrecoverable, the claimant must segregate the fees. *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys.,* 245 S.W.3d 488, 509 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). As articulated in *Chapa,* the question of the extent to which the exception to the fee segregation rule would apply presents a mixed question of law and fact:

> [T]he fees *necessary to prove particular claims* often turn on such facts-how hard something was to discover and prove, how strongly it supported particular inferences or conclusions, how much difference it might make to the verdict, and a host of other details that include judgment and credibility questions about who had to do what *and what it was worth.*

Tony Gullo Motors, 212 S.W.3d at 313 (emphasis added). Thus, *Chapa* requires the party seeking to recover attorney's fees "to segregate fees between claims for which they are recoverable and claims for which they are not." *See id.* at 311 [citations omitted]. However, the opposing party must preserve the contention that the party seeking affirmative relief failed to segregate the fees sought. *See Green Int'l, Inc. v. Solis,* 951 S.W.2d 384, 389 (Tex. 1997). An exception exists to this general duty to segregate if the claims are inextricably intertwined. *Id.* To establish that attorney's fees are inextricably intertwined, the party seeking the recovery of attorney's fees must establish that discrete legal services advanced both a recoverable and an unrecoverable claim. *Id.* at 313-14.

Since *Chapa* was decided, there have been some new developments in the area of recovering attorney's fees. First, it is noteworthy that the Texas Supreme Court in *Medical City Dallas, LTD. v. Carlisle Corporation,* 251 S.W.3d 55, 63 (Tex. 2008) held that attorney's fees could be recovered for a breach of an express warranty. *See id.* at 63 ("Because Texas Civil Practice and Remedies Code section 38.001(8) permits an award of attorney's fees for a suit based on a written or oral contract, and because we conclude that breach of an express warranty in such a claim, the court of appeals erred in reversing Medical City's attorney's fees award in connection with its successful claim for breach of an express warranty."). Second, in *Varner v. Cardenas,* 218 S.W.3d 68 (Tex. 2007) the Texas Supreme Court held that in a breach of contract claim the prevailing party could also recover attorney's fees in defending a counterclaim because the claimant had to respond to the counterclaim to prove their breach of contract case. *See id.* at 69 ("But we disagree that fees defending against the Cardenases' counterclaim must be segregated too. By asserting a shortfall in acreage as a defense and counterclaim, the Cardenases sought to reduce the amount collected on the note; to collect the full amount the Varners had to overcome this defense. As their attorney's fees to that effect were necessary to recover on their contract, they are recoverable.") [citations omitted]. Third, in *AMX Enterprises, LLP v. Master Realty Corp.,* 283 S.W.3d 506 (Tex. App.—Fort Worth 2009, no pet. h.) the Court of Appeals, in an issue of first impression, held that in house counsel could recover attorney's fees under a "market value" method. *See id.* at 517-519. Thus, in house counsel can recover attorney's fees calculated at the market rate for outside counsel, even though the in house lawyers are salaried employees of the party appearing in the case. *Id.*

Third, as recently as August 2009 the Texas Supreme Court decided two more companion cases that directly impact an award of attorney's fees. In *Intercontinental Group P'ship v. KB Homes Lone State L.P.,* 295 S.W.3d 650 (Tex. 2009), the issue before the Texas Supreme Court was whether a stand-alone finding of breach of contract with no award of actual damages made the non-breaching party a "prevailing party" that would trigger an award of attorney's fees under a mandatory provision in a contract. *Id.* at 653. In *Intercontinental,* the contract contained the following provision:

> ***Attorney's fees.*** If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the court.

Id. at 652. Of note, "prevailing party" was not defined in the agreement. *See id.*

At trial, KB Home Lone Star, L.P. ("KB Home") received a jury finding at trial that Intercontinental Group Partnership ("Intercontinental") breached the contract. Although the jury awarded no actual damages stemming from that breach, the jury did award KB Homes $66,000 in attorney's fees. *Id.* Meanwhile, the jury rejected Intercontinental's counter-claim. *Id.* Both parties claimed victory on the other's claims and argued that each were "prevailing parties" under the contract.

In an issue of first impression, the Texas Supreme Court adopted a "no-harm/no-fee" rule. *Id.* at 662. Rejecting the attorney fee claim, the Supreme Court held that "a stand-alone finding of breach unaccompanied by any tangible recovery (either monetary or equitable relief) cannot bestow 'prevailing party' status." *Id.* Thus, *Intercontinental* holds that to be a "prevailing party" under a mandatory attorney's fees provision the party must be awarded actual damages or some form of equitable relief such as specific performance, a declaratory judgment, or injunctive relief. In so far as K.B. Homes' attorney's fees claim is concerned, the Texas Supreme Court held that error was

waived because K.B. Homes did not submit an attorney's fees claim to the jury. It is important to note that *Intercontinental* also holds that the parties could have defined "prevailing party" in terms that are either narrower or stricter than the law provides for the recovery of attorney's fees.

On the same day the Texas Supreme Court issued its opinion in *Intercontinental*, it also decided a similar attorney's fees claim in *MBM Financial Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660 (Tex. 2009). In *MBM*, the Woodlands Operating Company ("Woodlands") leased 19 copiers from MBM Financial Corporation ("MBM") and each copier was covered by a separate four year lease. *Id.* at 663. According to the leases, the agreements automatically renewed unless there was written notice provided between 90 and 180 days before the expiration of the lease term. *Id.* The Woodlands opted not to renew the leases and requested from MBM end-of-term dates and instructions for return. *Id.* MBM provided the dates and approved a draft termination letter provided by the Woodlands. *Id.* However, when the actual termination letter arrived MBM's president unilaterally changed the dates so the notice would be untimely and demanded rent for another year. *Id.* To bolster MBM's position, the president then signed the leases and inserted commencement dates for the first time after the Woodland's filed suit. *Id.* Until suit was filed, MBM refused to designate a return location for the copiers. *Id.*

The Woodlands sought declaratory relief and brought claims for breach of contract and fraud. *Id.* MBM counterclaimed and sought additional rent of $160,000. *Id.* After a two day bench trial, the trial court awarded the Woodlands $1,000 in damages and over $145,000 in attorney's fees through trial. The Court of Appeals affirmed. The Texas Supreme Court reversed. Justice Brister opined that the Woodlands requested only nominal damages; and, furthermore, there was no evidence to support the award of $1,000 in actual damages. *Id.* Because there was no evidence of actual damages, the Court held that an award of attorney's fees could not be affirmed on that basis. *Id.*

The Woodlands countered and argued that the trial court granted declaratory relief; and, therefore, attorney's fees are appropriate under the Declaratory Judgment Act (Tex. Civ. Prac. & Rem. Code 6 37.009 (Vernon Supp. 1986)). The Texas Supreme Court held that allowing the Woodlands to recover attorney's fees under the Declaratory Judgments Act (Chapter 37) when it could not have recovered attorney's fees under the Attorney's Fees Statute (Chapter 38) would frustrate the provisions and limitations of the neighboring chapter in the same code. *Id.* at 670. The Woodland's argued that there were five separate issues that it prevailed upon in its application for a declaratory judgment. However, Justice Brister opined that these same points of relief were part and parcel of the Woodland's breach of contract claim upon which there was no evidence of damages. Accordingly, the Court held that attorney's fees were inappropriate under either statute.

Finally, in *Midland Western Building L.L.C. v. First Service Air Conditioning Contractors, Inc.*, 300 S.W.3d 738 (Tex. Nov. 20, 2009), First Service Air Conditioning Contractors, Inc. ("First Service") sued Midland Western Building, LLC ("Midland") on a $21,693.56 sworn account for failing to pay under a services agreement and sought to recover its attorney's fees. *Id.* at 739. At trial, First Service's attorney testified that between $24,000 and $26,000 would be a reasonable attorney's fee. The jury awarded First Service $14,645.10 in damages, but awarded no attorney's fees. *Id.* The Court of Appeals reversed and awarded attorney's fees because there was no controverting evidence offered and First Service was entitled to fees. The Texas Supreme Court reversed the Court of Appeals.

Midland reasoned that First Service's attorney admitted that some of the fees sought involved claims against parties other than the defendant. Thus, fees could not be awarded as a matter of law. But the Court held that an award of zero fees was improper. *Id.* While the jury could have concluded that a lesser fee was appropriate, an award of zero fees was inappropriate because fees were necessary to prove the claim. *Id.* Thus, the Supreme Court remanded for a new trial on attorney's fees.

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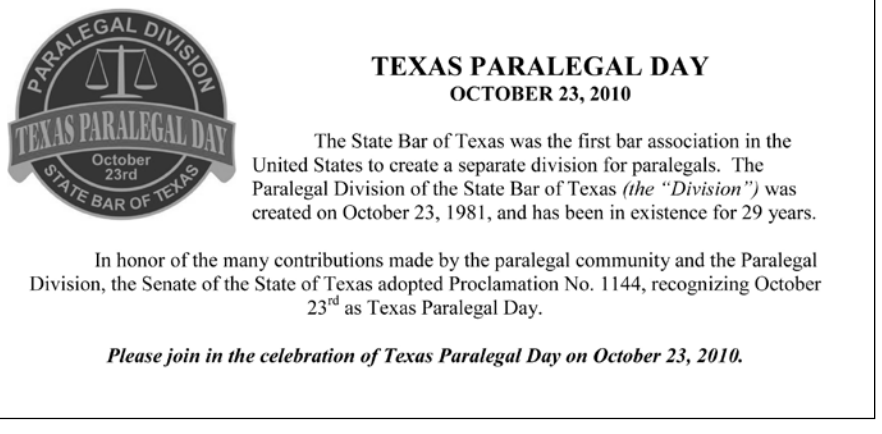

Software You Can't Live Without

By Nicole Pratt, ACP

Software. We all use it daily and we simply take it for granted. What software could you use in your profession that would increase productivity and therefore profits? This was the question proposed to a committee I was on as part of my firm's Profit Opportunities Assessment. No matter the size of the office or the areas of practice, we all use software daily and can't live without it. In considering this vast topic I went to my peers on the Paralegal Division e-group forum. The response was extraordinary. Here are some specific standouts:

- The most appreciated software, according to the forum, is Adobe Acrobat Professional. We all know that Adobe reads and opens pdf files; however Adobe Acrobat Professional goes way beyond that. It can bates-number, redact, hyperlink, OCR, assist with metadata removal, form management, remotely collaborate, and convert email to pdf. The list goes on and on.
- ProDoc is an automated document assembly system. ProDoc remains current by updating for legislation, case law, and agency rule changes. ProDoc also aids users by saving time and reducing errors. Gone are the days of researching to see whether a form is up-to-date.
- Finally, there is Microsoft Office, including Excel, Power Point, Publisher, Outlook and Word. Excel is practical in creating spreadsheets, calculations and analyzing data visually. Power Point can generate slide show presentations to be used in client meetings, at trial, in arbitration, etc. Publisher is used to produce brochures, flyers, websites and newsletters. Not only is Outlook useful for email, but it is also fantastic for organizing your contacts, tasks and calendar. You can grant permission to others to access or view your calendar for ease in coordinating deadlines, client conferences, and court dates and appearances. And we can't forget Word. It is a staple for most professionals. Simply put, Word is not just word processing software, but is so much more.

At this time, we as legal professionals have so many options to make our work easier and more efficient. We are tasked to help our office be more profitable and to better serve our clients. It doesn't matter what area of law you are in, if you work in private practice, in-house or governmental arenas. It is important to not only have the software available to you, but to **USE** it effectively. Take advantage of tutorials, on-line seminars, in-house training, and the expertise of your peers. Software is always changing and becoming more efficient. It is essential to our profession to stay current. If not, you could find yourself left behind.

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Effectively Trying Your Property Case (A Paralegal's Perspective)

Original Paper as Prepared by Craig Haston with Revisions made by Bret A. Bosker and Kate McConnico

This article is for the paralegal of the general practitioner handling a divorce case in which the division of property is involved ("property cases"). The majority of property cases, if tried, are heard by the judge or the associate judge. Juries are used in the rare cases where there are enough assets to warrant jury issues. However, the focus of this paper is on the "one-day" divorce trial with one or two fact witnesses and perhaps an expert for valuation. This paper's goal is to give you insights, tips and methods for successfully assisting your attorney in trying such a case in the courts of Harris and surrounding counties. Remember, there is not a true "win" in a divorce case. Therefore, success is measured by what your side expects to gain by trying the case in relation to the judge's final ruling. Thus, it is of critical importance that you and your attorney do all in your respective power to make it easy for the judge to rule in your favor.

I. SEE THE JUDGE, KNOW THE JUDGE, BE.....THE JUDGE

While analyzing your issues prior to trial, your attorney should always put himself/herself in the judge's position. They should ask, "What would I need to see in order to grant the relief that is being requested?" Another truth about our court system is that occasionally, you may have a judge that doesn't seem to have a firm grasp on the law in general or the specifics of family law. Therefore, it is imperative that you talk to other attorneys and the paralegals of those attorneys that frequently practice in the court where you will be trying your case. To be fair, the majority of family court judges are

competent. Find out the judge's level of experience, knowledge, and competence. This will tell you the extent to which your attorney will have to provide case law, statutory law, evidentiary law, and procedural law to support your position.

Your attorney should not be afraid to have the associate judge hear the case. Although it is likely that your attorney will waive his or her right to appeal the associate judge's ruling to the District judge, he or she *will* have a court reporter and may still appeal the case as if it had been tried to the judge of that Court. It has been my experience that every associate judge sitting in Harris County family, courts as of the writing of this paper, is a jurist who is intelligent, knowledgeable and well qualified. Absent tactical reasons, your attorney should not hesitate to try any property suit to one of the associate judges.

MORE FLIES WITH HONEY....

Your attorney should never blatantly fawn over a judge. However, it can never hurt to know something about a particular judge and conform to that person's likes and dislikes. For example, your attorney may know that a judge personally went through a painful divorce and was personally attacked during trial. Therefore, he or she should avoid destroying the opposing party on cross examination even though you could make mincemeat of them. Judge Frank Sullivan in his article entitled "The Art of Persuading the Judge" from the 1997 Advanced Family Law Conference described how best to address the judge in a property trial:

> "Seasoned trial judges are not swayed by swagger. They are impressed by preparation to detail (without being tedious), logical presentation of the evidence, and honesty. They are not impressed with discovery abuse, badgering or bullying witnesses, or being treated as if they are too stupid to comprehend the issues. We may *not* fully understand all of the formulas applied to a particular business valuation, or the legal significance of incentive clauses in a sports contract, but we will *try*. In such cases, the advocate who does the best job of educating the judge, without being condescending, will likely prevail."

Know When Enough is Enough

Often, a judge will say, "I'm ready to rule" while an attorney is still questioning a witness and the attorney may still have other witnesses to put on the stand. At this point, the attorney should ask himself or herself, "do these next witnesses add anything to my case?" If the witnesses have little of substance to add, he or she should ignore the desire for overkill and rest the case. When the judge tells us that he or she is ready to rule, it usually means one of two things; first, it could mean that the judge has heard more than enough to rule in your favor, or two, "no matter how many more witnesses you put on, you'll never get me to rule for you." Either way, the attorney is simply wasting time by continuing.

Another way to find out when "enough is enough" is to ask the bailiff or court reporter. Because of the quantity of time they spend in the courtroom and around the judge, they, more than anyone else can tell when that point has been reached.

The Attorney's Secret Weapon—Court Personnel

Practicing in Harris County family courts can be easy if attorneys and paralegals will treat the court personnel as human beings. Attorneys often talk down to the court clerks, coordinators and bailiffs because they are not "attorneys." First, if a lawyer doesn't have the decency to treat court personnel in a respectful manner, he or she deserves whatever befalls them in that court. Second, using a little common courtesy can result in untold benefits. Your attorney will find that the coordinator often has the power to set and reset cases. The clerks will cover for your attorney if he or she is running late. The court reporters will be willing to do very short "turn arounds" on hearing transcripts. These are only a few of the benefits your attorney will receive if the will merely follow the Golden Rule of "Do unto others as you would have them do unto you." The same holds true for paralegals. When contacting the court personnel for your attorneys, it is wise to "go the extra mile" and be as pleasant as possible to these folks. In my experience, all of the court staffs regularly communicate with their judges and other personnel. If you or your attorney have a problem and are rude to them, you had better believe that not only will that court know about it, but other courts and personnel as well. It simply makes sense to treat these people with the respect that we all deserve, whether you have a fancy diploma in our office or not.

II. BEFORE DEADLINES EXPIRE

During the last few years, the majority of the family courts have implemented scheduling orders. Some courts impose the deadlines on you while others allow you to choose the dates yourself. Whichever method the court uses, meeting deadlines plays an enormous role in the outcome of a property trial. The family courts use several forms of scheduling orders but they generally address the same stages in a family case:

A. ALTERNATIVE DISPUTE RESOLUTION

In Harris and surrounding counties, this generally means "mediation." Whether by the particular rules of a court or by the local rules of that county, most courts require the parties to attend some form of ADR prior to trial.

The practice in Harris County courts is that failure to attend some form of ADR prior to trial, may result in dismissal for want of prosecution, and intentional failure

by one party could result in other penalties such as stricken pleadings. Although parties use several forms of ADR in divorce cases, mediation is the prevalent form. To satisfy the requirements of the court in an uncomplicated property case, a half-day session will usually suffice, as long as the parties negotiate in good faith.

I often find that scheduling mediation can end up taking more time than it should. It is a more efficient use of everyone's time if the paralegal, or other office personnel, if available, assist in contacting the mediator, the other attorney, the client and scheduling the mediation. Coordinating the schedules and available dates for the attorneys, mediators and parties is often a time consuming job, but one that as a busy attorney, I truly appreciate.

What is the Benefit of ADR/Mediation?

I have heard many lawyers say, "Why should we attend mediation? Let's just try it and get it over with." It is true that if the case does not settle in mediation, your client's costs may increase by then having to try the case. However, there are many benefits which come from mediation which will aid you and your attorney prior to, and at trial.

(a) Free discovery

Although information that you receive in mediation is not per se admissible in trial because you received it under the auspices of "settlement negotiations," knowledge of this information may help you focus your issues, or think of other areas of discovery that you have not considered in your case. Your side may also find another source for the information that is discovered in the mediation. An added benefit is that it will help your side to evaluate your opponent's case and his or her level of preparation. It will also give your side an idea of what the other side wants or what the other side may be alleging, thus giving you the opportunity to avoid traps in trial.

(b) The Court Appreciates the Effort

When your attorney approaches the Court at the pretrial conference, and tells them "We have spent several hours mediating this case, and although we don't have an agreement, we have reached some minor agreements and stipulations," the judge will appreciate the fact that both parties mediated in good faith and at least tried to work out their problems.

(c) Preparation for Trial

There have been many good articles during the last few years on preparing for mediation. Although it is not the focus of this paper, be aware that parties should not approach mediation as "just a formality." They should prepare for and approach it as they would for trial. Being adequately prepared for mediation will help your side focus the issues for trial and will reduce your over all trial preparation time, as much of the work will already have been done for mediation.

In preparing for mediation, you should assist your attorney, and at the very least, have an updated inventory and appraisement and a "proposed property division for mediation purposes." You should also be able to identify and support the claims that your attorney intends to present at trial. Although your side may not have all of your tracing schedules, etc. done at this time, you should generally be able to point to the evidence that will support your claims. If you can't identify this evidence by mediation, the chances are that you will not be able to do it at trial.

B. JOINDER OF PARTIES

In most property cases, this deadline is a non-issue because only your client and your client's spouse are involved. However, spend a few minutes considering whether all parties have been joined. Do you have any discovery that needs to be done after this deadline that may require joining a third party? Did you consider joining a party early on in the case, but it slipped through the cracks? Question your attorneys on these matters. Talk it through with them.

DISCOVERY DEADLINES

If the parties do not agree otherwise, the Harris County courts generally follow the Texas Rules of Civil Procedure on this issue. Therefore, all discovery must be supplemented no later than thirty days prior to trial or you will be subject to the harsh penalty of not being able to call witnesses, produce evidence, etc. Unless you have good cause to supplement late, the courts are hesitant to allow it.

PLEADING DEADLINES

Pleading deadlines are as crucial as discovery deadlines. Again, the Harris County courts generally set this deadline by the Texas Rules of Civil Procedure. Therefore, your pleadings must be in order seven days prior to trial, unless the Scheduling Order states otherwise. It is wise to encourage your attorney to review all pleadings at least ninety days prior to trial so that if you need to add a cause of action or request additional relief, you will have time to conduct further discovery on that issue.

Plead for Attorneys Fees

In the early stages of a case, a party may not want to plead for attorney's fees as a tactical decision, while the case is in a settlement posture. However, when it becomes evident that the case is going to trial, a property case should always have a pleading for attorney's fees. Failure to request attorney's fees has led to parties being prevented from putting on any evidence of their fees incurred. Another problem faced at trial by many attorneys is when they have taken the case over from another attorney. At trial, the new attorney calls himself or herself to testify to his or her attorney's fees and is precluded from doing so, because he or she has failed to amend their pleadings and failed put his or her name in the section where fees are plead for. Some may argue that this is

not necessary. Rest assured that in the Harris County courts, it is.

Solidify Claims

A property case often has a claim for reimbursement included in it. At the beginning of the case, the attorney has not yet identified each claim and simply pleads, "Petitioner asserts a claim for reimbursement to the community estate" or "Petitioner asserts a claim for reimbursement to his separate estate." In the beginning this may be enough. However, once discovery has been done the better practice is to use the following pleadings in your petition:

(a) "Petitioner requests the Court to reimburse the community estate for funds or assets expended by the community estate to benefit or enhance Respondent's separate estate."

(b) "Petitioner requests the Court to reimburse the community estate for the value of community time and effort expended to enhance Respondent's separate estate."

(c) "Petitioner requests the Court to reimburse Petitioner's separate estate for separate funds or assets that Petitioner expended to benefit or enhance the community estate."

(d) "Petitioner requests the Court to reimburse Petitioner's separate estate for separate funds or assets that Petitioner expended to benefit or enhance Respondent's separate estate."

A still better method of pleading reimbursement is, "Petitioner asserts a claim for reimbursement to the community estate against Respondent's separate estate for moneys expended by the community estate for the payment of taxes and the mortgage from January 1, 2001, through and including October 31, 2002, on Respondent's home located at _____." There is no harm in this type of pleading close to trial. First, as your attorney tries the case, the attorney will follow the pleadings to ensure that your side has addressed all of your requests for relief, and will lead to the next issue on the agenda. It will also give the trial judge a short but solid description of the exact claim that your side is making. Further, it will avoid an objection by opposing counsel that your side has failed to properly plead for reimbursement. This type of pleading gives nothing away because by the time that this is added to the pleadings, the parties should have done sufficient discovery to know that this is in issue. If at all possible, please discuss this issue with your attorney and, if necessary, amend your pleadings accordingly.

Likewise, if you have a claim for confirmation of separate property, your side should always clearly set out the major items that you believe are separate property and ask the court to confirm them as such. Failure to do this could result in the court finding a failure to adequately plead, and thus preclude testimony about the separate property nature of a particular piece of property.

III. PRIOR TO TRIAL

The entire process leading up to the trial itself should be seen as trial preparation. Thus, there is a purpose for everything you do. Your discovery will be done for the purpose of eliciting information that your side can use at trial, instead of blindly doing discovery for its own sake. From the very beginning of the case, you and your attorney should begin building a trial notebook, making copies of important cases, filing important legal articles in the file, etc. Regardless of whether the case is ever tried, the attorney will be able pick up the file at any time and within a short period of time, refresh his or her memory on the details of the case.

A. HAVE A TRIAL NOTEBOOK

Even a family law property case should have one. The bare minimum, for a trial notebook in a property bench trial includes:

1. "To-do list" and who is doing each item;
2. Chronology of the case;
3. Your client's financial information sheet—most courts have a form for this available in the courtroom;
5. Your inventory and appraisement (all that you have filed—be able to explain the changes);
6. Every inventory and appraisement filed by the other side, kept in chronological order with the most recent on top;
7. A comparative inventory—this is an optional item that compiles both your client's inventory and that of the opposing party so that the judge can see the proposed values side by side;
8. Proposed property division—spreadsheet based on your inventory and appraisement that adds columns for your client's proposed division—a sample is attached as;
9. Proposed court ruling—this should be a brief description covering the relief that you are requesting and should NOT contain argument. It is merely and aid to the court;
10. Witness list with brief description of each witness—this is the same list that you have provided to the court;
11. Live pleadings of both parties;
12. Pre-trial motions and orders—this includes scheduling orders, temporary orders, court appointed expert orders, pretrial conference order, etc;
13. Important interrogatory answers—these should include both your client's and those of the opposing party;
14. An exhibit checklist, with a brief description of each proposed exhibit; and
15. Summary sheets for all claims that require tracing—these sheets should briefly and logically summarize all documents which underlie them that will be used to prove tracing requirements. Your attorney should realize that if you produce these documents, it is likely that the

judge will spend very little time in reviewing the actual documents.

Many of the things listed above are generic items that should be included in any trial notebook in any civil case. However, the financial information sheet, proposed property division form and each parties' inventories are unique to family law property matters and are of exceptional importance in such cases. Make certain that your attorney has them.

B. PREPARE YOUR WITNESSES

Fact Witnesses

Sometime prior to trial, your attorney should know what your fact witnesses will say about the case. The best method to discover this is to meet with them and discuss the case and their testimony prior to trial. Another method is for you to send the witness a witness questionnaire asking relevant questions about their knowledge of facts in the case. This is easier to anticipate in custody disputes because your side will know the areas that the dispute will involve. The witness questionnaire in a property case will need to be tailored for the particular witness. Prior to trial, you should also provide the witness with a brief list of "do's and don'ts" for trial. Always be careful not to tell the client what to say at trial. However, by meeting with them, you can help them understand what you will be asking and how you would like them to respond. If the witness is a crucial one, you should also meet with him or her immediately before trial to focus on the facts and presentation of the testimony.

During trial your attorney should focus the witnesses' testimony on the relevant issues in the case and not allow them to ramble. To achieve this, it is important that prior to trial you identify no more than five major points that the attorney should want to address and develop through the witness. The narrowing of the focus will improve the impact of the witness' testimony and will help keep the case moving. During visits with the witness your attorney will recognize his or her weaknesses. In their effort to helpful, on cross examination and sometimes direct, witnesses may ramble, may be evasive, stubborn, etc. It is imperative that your attorney work with the witnesses beforehand and find these weaknesses before trial. Each case and each lawyer is different, but all should work with the witness to reduce these weaknesses. This way, you can improve your chances that the message will get through to the judge and he or she won't be distracted with giving witness instructions during trial, or ignoring the testimony altogether.

Client

Nothing is more surprising than when during cross-examination, a party is asked what they are claiming reimbursement for and they respond, "I don't know." The underlying message is, "My attorney just told me to be here. I haven't seen him in three months, and I don't have a clue what we've plead for." Even though dividing community property seems to be a simple and mundane task, you should encourage your attorney to ALWAYS meet with the client a few days prior to trial and give him or her some common sense explanations of exactly what the attorney will be asking for. The witness may know that he or she wants to be paid back for some money that was spent, but the witness does not necessarily know what its legal term is and that to prove it the witness has to first show that the money was their separate property and that is was spent to benefit or enhance the community estate. The attorney's failure to explain the process makes everyone look ignorant and makes the attorney look even worse. Always have your attorney go over the pleadings with the client and ensure that he or she understands their meaning.

Preparing the client for trial is much like dealing with a witness only more in depth. The client's appearance, facial expression, body language, vocal tone and other mannerisms may be as important as the evidence that will be developed through the witness. If the judge is put off or distracted by any of the things previously mentioned, it will dull the impact of the evidence that the attorney is presenting and the court may give more credence to the testimony of the opposing party. Therefore, encourage your attorney to try some of the following to prepare your client for trial:

- Tape a direct and cross examination of your client, then watch it with him or her and describe the positive and negative aspects interview;
- Discuss each item that has been pled. Make certain that the client has a good understanding of his or her claims. Have him or her explain each issue back to you and give the support for it;
- Discuss with the client how the court will go about dividing the property. Make sure that he or she understands the reasons why they are asking for a larger portion of the estate;
- Give the client the witness "do's and don'ts" sheet and discuss it with the client. Explain the "two-second rule" for cross examination. This rule tells the client to silently count "one-thousand one, one-thousand two" in their head before answering the attorney's question. This will give the witness time to listen to and understand the question and will give his or her attorney a chance to make an objection to the question if needed;
- Thoroughly discuss the client's inventory and appraisement and the opposing party's and discuss why your client disagrees with the values given by the opposing party;
- Stress the importance of the client reviewing his or her deposition testimony so that the possibility of impeachment is reduced. Additionally, the attorney should review his client's deposition prior to the client meeting so that the attorney can discuss with the client ways to diffuse deposition testimony that may be harmful at trial.

Experts

Experts in property cases will primarily be used to value a business, personalty,

financial assets, retirement benefits or real estate that is a community asset. Experts may be used to detail reimbursement issues and tracing for separate property claims. Often, these experts consist of CPA's or attorneys, although the qualifications needed for tracing do not require a college degree or certification as a public accountant.

Your Expert Witness

To provide the most credibility, your side must choose an expert for the particular issue that is involved. If you are valuing real estate, real property appraisers, brokers, or real estate salespersons will be appropriate. If financial asset values are at issue, stock brokers, CPAs and bankers are needed. For retirement benefits, you should consult a pension evaluator, actuary, or CPA. It is best to use an expert that you know has had experience testifying in the court that you will be trying your case and that you know the judge respects the opinion of. Again, the easiest way to find out who meets these criteria is to ask other attorneys and paralegals in your area. If you cannot find an expert that has this experience, then encourage your attorney to thoroughly interview the expert before hiring them to make sure that they are presentable as well as knowledgeable.

In trying a property case, your attorney should meet with your expert several times during the progress of your case. Prior to trial, your attorney should meet and make sure that everyone understands what he or she will be testifying to. Because an effective direct should seem like a conversation between the attorney and the witness, your attorney should spend some time prior to trial asking the expert questions and resolving any areas of misunderstanding between the two of you. The result is that your case will be able to present clear, concise testimony which will increase your expert's credibility and the chance that the judge will understand all that your side has tried to convey.

The Opposing Expert Witness

If your client can afford it, always take the opposing expert's deposition. The chances are that the attorney does not know everything about the area that the Expert will be testifying on. Therefore, to "fly by the seat of your pants" at trial is dangerous. The chances are high that the cross examination will not be effective and that the attorney will show his or her ignorance of the subject matter.

When your side takes the expert's deposition, your attorney will need to know the following information at the very minimum:

i. The Expert's educational background and other qualifications;
ii. The assumptions or presumptions relied upon by the expert;
iii. The expert's opinion on the ultimate issue of fact;
iv. The bases of the expert's opinion and testimony including personal knowledge, underlying facts and data and other evidence relied upon;

Have the expert explain in detail each step in reaching his or her opinion; and
vi. Have the expert commit to his or her opinion.

If your attorney has this basic information, your side can take it to your expert and have him or her help you prepare to effective cross-examination. Therefore, it is clear that an effective cross examination at trial is based on good discovery prior to trial. While cross-examining the expert at trial, use only leading questions or questions that you know the witness' answer to. For example, it is very effective if your attorney asks an open ended question in the same form that was done in the deposition and have the expert give a different answer. This opens the door to impeach the expert's testimony with his or her deposition. The goal in a property case is to not necessarily attack the witness' qualifications and background unless he or she is clearly unqualified. The goal should be to attack the process or basis of his valuation. Attacking the expert witness at trial is dealt with below more fully below.

Rebuttal Witnesses

Rebuttal witnesses should only be used if the attorney sees that the other party has introduced testimony that is truly erroneous and harmful to his case. If you pursue a misstatement merely for the purpose of correcting it, you will dilute the other evidence presented in the case.

C. PREPARE EXHIBITS

As discussed above, the attorney's trial notebook should include an exhibit list. At the time trial commences, your attorney should also hand a copy of the exhibit list to the judge so that he or she can easily track which documents have been entered. Prior to trial, with your assistance, the attorney should organize his exhibits and exhibit list in a logical fashion. Each exhibit should already have an exhibit sticker on it and the attorney should have at least three copies of each exhibit; one for opposing counsel, one for himself, and an extra copy.

Anticipate Problem Exhibits

While preparing the exhibits and exhibit list, the attorney should briefly consider the foundation and authentication needed for each exhibit and anticipate any objections that may arise. If a particular piece of evidence will pose such a problem, the attorney should write down the questions he intends to ask to authenticate and lay the foundation for the document, as well as prepare a response to the anticipated objection.

D. MEET/TALK WITH OPPOSING COUNSEL PRIOR TO TRIAL IF POSSIBLE

In a book by Larry McMurtry entitled, "Dead Man's Walk" the commander of the Texas Expeditionary Force invited his nemesis, the Indian leader Buffalo Hump, into his camp for a meeting. The Texas forces were flabbergasted and were sure that their leader had taken leave of his senses. However, it became clear that although these men were opponents, they were both interested in "sizing up" their opposition. The same should hold true in property cases. If possible your attorney should attempt to hold a meeting or settlement conference. This can

be accomplished either in person or over the telephone, with your opposing counsel at some time prior to trial. During this meeting your side may find out that you all can come to an agreement on such issues as leading witnesses, the level and depth of authenticating and laying foundations for evidence, how long he or she anticipates their case to take. Your side may also be able to get a sense of how prepared your opponent is and how strong his or her evidence is.

E. ANTICIPATE PROBLEM ISSUES

In preparing your case for trial, you will inevitably encounter issues that are guaranteed to arise at trial. Some of the problems include admissibility of certain types of documentary evidence, testimony by witnesses, burdens of proof, etc. It is impossible to make a sound argument on one of these issues without anticipating the problem in advance. Therefore, it is important that when an attorney identifies these problems while preparing for trial, he or she also prepare to defend their position. The best practice is to make multiple copies of needed case law, statutes, treatises and CLE articles prior to trial, with relevant sections highlighted and to be prepared to present these to the judge and opposing counsel as support for your position. In addition to the documentary support, the attorney should maintain a sheet that has each anticipated problem issue on it, and a brief synopsis and supporting the position.

F. CREATE PROPOSED COURT RULING

A proposed court ruling is another arrow in the quiver that will help the attorney stay on target with his or her case. Although the proposed ruling is not evidentiary in nature, it will give the court a clear idea of exactly what it is that your client wants. However, your attorney should not risk offending the court's sense of fair play by including evidence in the proposed ruling. This document is intended to be the judge's template for rendition at the end of the case. If your attorney has presented your case effectively, followed your pleadings, followed your witness list and exhibit list, it should lead the court naturally to the proposed ruling. The proposal should be handed to the court at the beginning of trial with the exhibit list, and the evidence checklist as an aid to the court, and not as evidence.

G. PUT INVENTORY ON CD or USB DRIVE WITH PROPOSED PROPERTY DIVISION ON IT

As mentioned earlier, each judge has a computer and many of them make good use of the machines. They also have access to the Internet. Several judges are also very good with spreadsheets. If you have one of these judges, save a copy of your inventory and your proposed property division onto a CD or USB drive, in Microsoft Excel, Quattro Pro and Lotus 123. I guarantee that the judge will appreciate your attention to detail and preparation.

H. STIPULATE TO ALL POSSIBLE EXHIBITS, FACTS, PROPERTY DIVISION

Often, as part of the meeting with opposing counsel, mediation, or pretrial conference, the opposing attorneys will be able to come to agreement on some issues prior to trial. To avoid any confusion and requiring the court reporter to read the agreement back from the record, one attorney should prepare a written stipulation of the parties in a Rule 11 agreement format, showing what they have agreed to and what is still in issue for the Court to decide. This document can agree to admissibility of documents, testimony, may stipulate to certain incontrovertible issues, and ultimately will help clarify the issues for the judge.

I. PRE-SELECT DEPOSITIONS, AUDIOTAPES AND VIDEOS

In cases dealing with property, audio and video recordings are not as prevalent as in conservatorship litigation. However, in the case where you may desire to show the Court a "walk through" of the house or a particular piece of personal or real property, make sure that the TV and DVD are available beforehand, and have your video pre-cued so that all your attorney has to do is hit the start button. It is also best to edit the video down to just what you want the judge to see and not spend time jumping around the video. In the case of audiotape, remember that not all counters move at the same speed, so use the same one at trial that you premarked the tape with or transfer the tape over to a digital audio file.

IV. AT TRIAL

The goal in a property case is to provide the court with as much pertinent information as possible. Your attorney should think of themselves as a Special Forces Unit. Your attorney wants to deliver a swift, sure, surgical strike. In other words, he or she should get in and get out as quickly and as efficiently as possible.

A. OPENING STATEMENT IS NO PLACE FOR SHAKESPEARE

This is a time waster. Instead, your attorney should present the Court with a brief chronology of the background of the case, preferably in writing, along with your exhibit and witness lists, and proposed Court's ruling. The judge can then review this and use it as a check list during the trial. If your attorney feels the need to speak, first he or she should ask the judge if he or she would like to hear an opening statement. If the answer is "No," your attorney should suppress the urge.

B. KNOW YOUR ISSUES

If your attorney doesn't know your issues before you have conducted discovery and after the first few meetings with your client, your side has a serious problem. Generally, after you have conducted discovery, your attorney should write down the issues on a piece of paper and keep it in a special place in the file. You should then organize all of the documents that your attorney intends to use as evidence by the issues that are enumerated. All of the issues must be in your pleadings if your side wants the Court to address and rule on them. The common issues in divorce relating to property are: grounds for divorce, basis for disproportionate property distribution, separate property

claims, premarital agreement, reimbursement issues, attorney's fees and court costs. Failure to recognize the issues and plead them properly is inexcusable.

C. USE FLAGS

Your attorney should follow your proposed court ruling in trial. As your attorney begins to address a new topic, he or she should make it clear that your side is now moving to that topic (e.g. "Now, Mr. Jones turning to the issue of your claims of separate property..."). This flag should also appear on the exhibit list, by grouping the evidence under headings that address the issues.

D. KNOW COMMON OBJECTIONS AND HOW TO DEAL WITH THEM

In property cases, many objections arise time after time. Although not all of the objections are listed here, several of the most-used are addressed below.

Have a Firm Understanding of the Hearsay Rule—TRCE 801 & 802

One of the most common and misunderstood objections in a property case is "hearsay". Hearsay is testimony concerning what a person said outside of this courtroom in this case, and is offered as proof of the matter asserted. It is excluded because it cannot be tested by cross-examination. In property cases, hearsay is the most used objection. This is because property cases are based heavily on documentation, the testimony of expert witnesses whose opinion of value may be partially based on hearsay, and on testimony of witnesses who will be testifying to what they were told about their spouse or particular pieces of property. One way to test your opponent's grasp on this crucial rule is to ask a witness a couple of questions early on in trial that you know will elicit a response based on what the person was told, but that you know is clearly an exception to the hearsay rule. If the other attorney pops up and shouts, "Hearsay" then your attorney will know he or she doesn't have a real clue what the rule is about.

Your sides best defense to the hearsay objection is to thoroughly know the exceptions to the hearsay rule and if you have particular documents or testimony that are crucial and may be subject to a hearsay objection, plan your sides' responses in advance so that your attorney can articulate for the judge why your opposing counsel is incorrect in his or her objection.

The standard exceptions to the hearsay rule used in a property case are as follows:

h. The statement is not offered to prove the truth of the matter asserted—this means that your attorney is offering the statement to merely show that the words were, in fact, spoken. This may be used to prove the state of mind of the declarant, or to establish justification for the conduct of a third person (often your client);

i. The statement is an Admission by a Party Opponent—this generally means that your attorney is offering a statement made by the opposing party or his or her agent TRCE 801(e)(2);

j. Records of Regularly Conducted Business Activity—this is the business records rule. The records must be authenticated as described above, or you must have a person that has personal knowledge of the records testify TRCE 803(6);

k. The document is a public record or report—this would include property and school tax records TRCE 803(8);

l. The document is a Record of Documents Affecting an Interest in Property TRCE 803(14);

m. The document contains a Statement Affecting an Interest in Property TRCE 803(15).

n. The statement is a Statement against Interest TRCE 803(24);

Other Common Objections and Responses

(a) Leading—this is a common objection. As discussed elsewhere herein, within certain boundaries, your attorney should lead the client as much as possible. The response to this should be that your attorney is eliciting background or basic information that the judge will need to make his or her ruling in an effort to speed up the time the trial is taking.

(b) Multifarious—this objection is still heard a lot in family courts. The modern form of the objection is "Compound." If your attorney's question is compound, his or her response should be that he or she will "rephrase the question."

(c) Calls for Speculation—this objection is used in many contexts. Encourage your attorney to avoid having a witness speculate. Be aware that some attorneys do not know the difference between an opinion and speculation. Your attorney should always remember that a lay witness can testify to his or her opinion or inference which is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact issue. TRCE 701. An expert may give his opinion if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. TRCE 702. Your attorney must be ready to quote these sections to the judge when an unscrupulous lawyer attempts to discredit your sides witness in this manner.

(d) Witness not competent to testify to certain matter – your attorney should respond that he or she has not finished establishing the witness' foundation for this testimony, or through the judge invite your opposing counsel to "take the witness on voir dire."

(e) Repetitive—if your attorney is being repetitive, he or she should stop. This is addressed more fully below.

(f) Failure to lay predicate for attorney

to testify to fees—this matter is discussed elsewhere herein. Although it is debatable that this is a proper objection, if the attorney will follow the steps described, your attorney should rarely, if ever, hear this objection.

(g) Failure to lay proper foundation (for a document)—often family attorneys get so used to introducing the same type of documents time and again, they tend to relax the rules and often do not lay the proper foundation for a particular piece of evidence. In most cases the courts appreciate this because it makes the trial move more quickly. However, if a particular document is damaging to a party, the attorney may object to an improper foundation. If it has been awhile since you have reviewed the "standard list" of questions for laying the foundation, it can become quite frustrating at this point. The better practice is for your attorney to know the trouble documents ahead of time and pre-prepare your authentication and foundation questions so that he or she will avoid this trouble spot.

E. TAKE ADVANTAGE OF TIME INCREMENTS

If it is 4:45 and your attorney knows the Court breaks at 5:00, your attorney should consider asking to recess instead of putting on a new witness that will only have to resume the stand the next day. The same applies during cross examination. If your attorney thinks the other lawyer will finish crossing your client today, he or she should agree to stay later to "finish" so that he or she won't have an evening to prepare to "finish your witness off." On the other hand, if your side is thirty minutes from resting your case, and your attorney knows the judge will not be able to finish hearing the case for two weeks, your attorney should consider asking the judge to let your side finish to maintain continuity in the case.

F. LAY PROPER FOUNDATION FOR ATTORNEY'S FEES

As discussed herein, unless your attorney has good tactical reasons, your side should always plead for attorneys fees. Assuming that you have properly pled for fees, your attorney still must go through the "proof" stage. Be aware that many judges will prevent the attorney from testifying to the reasonableness of his fees and the amount of the fees without first going through the following line of questioning with the client during his direct (where no response is indicated, assume that the client responded affirmatively):

Attorney: "Sir you are asking that your wife be ordered to pay your attorney's fees and court costs in this case aren't you?"

Attorney: "You had to hire an attorney to represent your interests in this case did you not?"

Attorney: "You hired me to represent you didn't you?"

Attorney: "You agreed to pay me an hourly rate of $____ per hour and as of _____, 1998 have paid me a total of $___ which represents $____ for court costs and expenses and $_____ for attorneys fees, correct?"

Attorney: "Do you think that the fees charged you have been necessary and reasonable under the circumstances of this case?"

Attorney: "Have you tried to settle this case with your spouse by making her an offer to settle on _____, 2005?"

Attorney: "I'm showing you what is marked Petitioner's exhibit 3 for the purposes of identification. Do you recognize it as the formal settlement offer that you authorized me to send and that I did send on ____, 2005?"

Attorney: "Did your spouse respond?"

Client: "Yes, she told me to go to hell."

Attorney: "Did she make any counter-offers?"

Client: "I believe that WAS her counter-offer."

Attorney's Testimony

Several of these questions may be necessary as they are questions only the client has the ability to answer. However, most of them can and should be attested by the attorney who will testify as both a fact and expert witness on this issue. If the attorney will generally follow the above set of questions in asking for attorneys fees, he or she will avoid the following objection at the time he testifies, "Objection. Failure to lay a predicate for the attorney to testify to his fees." At this point, many attorneys will give up and wonder how much this mistake will raise their premiums. Instead of giving up, or arguing the point, your attorney should ask the judge to be allowed to to recall the client; he or she will usually allow it, and then the attorney can lay the brief predicate above before moving back to presenting testimony on fees.

Your attorney should then call himself or herself to testify. Most family courts prefer to hear the attorney testify in narrative fashion. An outside expert to testify to the reasonableness of the fees is rarely needed unless the fees are astronomical. Testimony usually addresses the attorney's qualifications, the complexity of the issues involved, the work done, and the fee charged. Your attorney should then testify that his fees are reasonable and necessary and follow this by introducing copies of the fee agreement and billing records. Your attorney should consider offering summary documents listing all written discovery, depositions, court hearings etc. As an aid to streamlining the attorney's fees issue, your attorney should use the "Reasonableness" affidavit found in section 18.001 of the Texas Civil Practice and Remedies Code which permits a litigant to establish the reasonableness of his or her services by affidavit. Once filed the opposing party has 30 days to contest it by filing a counter-affidavit of unreasonableness, or the issue is conceded.

Common Pitfalls

While testifying to fees, your attorney should take caution to redact any descriptions in his billing records discussing the contents of any client communications. This could obviously breach the attor-

ney-client privilege when you enter your records into evidence. Further, claiming to have reviewed your entire file prior to testifying on this issue will allow the opposing counsel to demand to see your entire file. Your attorney's next consideration should be when to schedule their grievance hearing. Therefore, your attorney should never claim to have reviewed the entire file.

Another hazard encountered in family courts occurs when the attorney testifies to the total amount of the fees and then submits his billing records. Although most opposing attorneys will not contest this, a few will object to the records as hearsay. The attorney will then have to explain to the judge that the fees were made at or near the time of the incident by someone with knowledge, namely you, etc. This is fine if you are the only person who has billed on the case or if you are the record keeper. However, the best way to save yourself much explanation, is to have your record keeper execute a Business Records Affidavit as set out in TRCE 902(10) which will satisfy the business records exception to the hearsay rule in TRCE 803(7). Your attorney should be aware that the affidavit has specific requirements and must be filed and served on all parties at least 14 days prior to trial to be effective.

G. LEAD AS MUCH AS POSSIBLE

In short property trials, the attorneys will generally let each other lead witnesses. The judge has heard most of this before and, absent a good reason to do so, following the formality of asking open ended direct questions slows down the process. Slowing down to ask the occasional open ended question will also have more impact on the judge.

H. KNOW AND FOLLOW THE RULES OF YOUR COURT

Know the particular rules of each court. Try checking online for that court's webpage, or go to the courtroom where a copy is also available. Of course, all of the family law courts in Harris County have a set of rules that they follow called, "local rules" to which most of the courts adhere. As a final follow-up and "if in doubt," call the court clerk or court coordinator and ask them any questions you may have on that court's policies. Several months prior to trial you should also find out what you must have completed prior to and at the time of the pretrial conference. Often, failure to follow these local rules can result in a DWOP or other sanctions.

I. SHORT AND SIMPLE ON PROPERTY

Although this caveat may seem impossible in some cases, it is imperative that the attorney attempt to simplify his property issues as much as possible. As discussed elsewhere herein, this is done by providing summary sheets, spreadsheets, exhibit lists and proposed rulings. When discussing property values, have the client address his or her Inventory and Appraisement and discuss any incongruities with prior versions. Also, your attorney should point out to the court the values that the parties *do* agree upon so that there will be no issue. Finally, remember that the judge can only find values based on the evidence that is presented to him or her. A few days ago, an associate judge told me that he had recently heard a divorce case where the wife had a small home sewing business that could not have been worth more than a few thousand dollars. However, the husband's Inventory and Appraisement listed the value of the business as $300,000.00. The Wife's Inventory and Appraisement stated, "Value unknown." The wife's attorney failed to cross examine the husband on his valuation and failed to have his client testify to any value. Further, the wife and husband agreed that the wife should have the business. Thus, the wife ended up getting less than 50% of the real value of the community estate because she failed to present any evidence regarding the value of the home business.

J. DISTRIBUTE PROPERTIES TO REDUCE PROBLEMS IN SEPARATING

This is to be considered prior to trial in creating your proposed court's ruling. At trial, through your client, your attorney should address why you proposed dividing the property as you did. Try to bring common sense to this. Generally, the trial judge tries to seek the path of least resistance in dividing property. Therefore, he or she may want to avoid dividing both parties' retirement plans when he could award each party their own and divide other assets to reach an equitable distribution. In preparing the proposed division, in addition to considering your client's wishes, you should also consider the tax consequences of your proposal. If there are stocks, retirement plans, houses, etc. involved, a short visit with the CPA to review your proposal will benefit your client at trial and should result in fewer tax consequences for the parties down the road

K. DON'T BE REPETITIVE AND TRY TO BE CREATIVE

Judges hate repetition. Efficient lawyers hate repetition. It wastes time and money. Although it may not appear so, the judge probably heard you the first time and if your attorney did their job right in eliciting the evidence, he or she does not have to pound the judge over the head with it. In fact, your case is the same song, different verse. The judge has heard cases like yours before and therefore, he or she has the ability to quickly sort through the evidence presented. However, even this can be repetitive and boring. Therefore, it is important to try to bring some creativity to your case. This can be done in many ways, some of which are listed below.

Use Visual Aids, Summaries, Charts

Even property cases involving relatively straight forward reimbursement claims or valuations can be confusing. It is always best to prepare a visual aid or summary to help the judge focus on the issues. For example, if a party has a reimbursement claim for money spent by the estate on the other spouse's separate real estate on which no rent was received, the community has a reimbursement claim for money spent on the mortgage note and on taxes as well as any improvements to the property that enhanced its value. In this situation your attorney should have a

summary document that lists all attached supporting documents, references them and totals them to give the judge a sum total of claimed reimbursement. Hopefully, your attorney has stipulated with your opposing counsel regarding the introduction of the supporting documents and can enter them with the summary in a lump sum exhibit. Obviously, this drastically reduces trial time, judge fatigue and provides a focus on the bottom line number. Why would the judge want to recalculate all of your numbers when you've done it for him? Instead, he or she will leave any incongruities in your claim to the opposing party on cross examination.

Put Inventories and Schedules on CD or USB drive

As discussed above, all Harris County judges and associate judges are provided with computers. Several of them are computer buffs. If your attorney is in a court where you know that the judge likes to use a computer, consider putting your inventory, supporting schedules and proposed property division on a CD or USB drive in either Microsoft Excel or Lotus 123 format and submit it to the judge when you introduce your inventory. This will reduce the Court's time in rendering a decision and will also put you in the position of the judge starting with your numbers when he or she is moving them around to fit the division he or she is trying to achieve. It is also convenient when the ruling comes back and you need to show your client the judge's award versus your proposed division. This can be done by adding a column to your spreadsheet which will have the court's values as opposed to those of your client. At the bottom, create a calculation that will total each column and will also show the dollar and percentage difference.

L. DON'T OBJECT TO EVERYTHING

This rule applies to all areas of litigation. Your attorney should only object to documents that have a basis for objection AND are detrimental to your side's position. Otherwise, it doesn't matter if they come in. Your attorney should not object to leading questions unless it is clear that the witness doesn't have a clue and is being spoon fed. In this situation, the leading objection makes sense because it will thoroughly upset your opposing counsel's flow.

M. USE SHORTHAND RENDITIONS AS MUCH AS POSSIBLE

Shorthand renditions are like candy to most judges. A shorthand rendition may be any document which summarizes a witness' testimony and is generally subject to cross-examination. Often, attorneys in family cases will even agree to allow secondary witnesses to testify by affidavits, without the opportunity of cross-examination, if the opposing counsel has seen the affidavit and accepts the testimony. At trial, your attorney will introduce your client's financial information statement which shows his current monthly expenses vs. income. The client's inventory and appraisement is also introduced in this manner. The shorthand rendition is introduced as follows (assume the witness answers each question in the affirmative):

> Attorney: "Sir, I'm showing you a document marked exhibit P6 for identification. Do you recognize it to be your Financial Information Statement?"
>
> Attorney: "Does it list the majority if not all of your monthly reasonable and necessary living expenses?"
>
> Attorney: "Does it also list your currently monthly gross income, all withholdings from that income, and the net monthly income, as well as your employer, your position and how often you are paid?"
>
> Attorney: "Did you personally fill out this FIS with my assistance and does it truthfully to the best of your knowledge represent all of your income and expenses accurately?"
>
> Attorney: "Please sign and date it."
>
> Attorney: "If you were to testify to each of these expenses and income and sources of other assets as stated in this document, would your testimony be the same as the information reflected in this document?"
>
> Attorney: "I offer P6, Petitioner's FIS as a shorthand rendition."

Your attorney has just saved at least thirty minutes of testimony and your client is subject to cross-examination on the FIS.

Shorthand renditions also save time in presenting background facts and other information you want to give to the judge in succinct form instead of dragging through hours of testimony to establish the same information.

N. TREAT ASSOCIATE JUDGE AS YOU WOULD THE JUDGE

Pursuant to Chapter 201 of the Texas Family Code, associate judges have virtually the same powers as the district judge in property cases, with the ability to sign many types of orders such as Temporary Orders, Final Default Orders and Agreed Final Orders. I find that all of the associate judges at the Harris County Family Law Center know the law, particularly the section of the Code setting out their powers.

O. DEALING WITH OPPOSING EXPERTS AT TRIAL

Be Prepared to Attack Opposing Expert

If your attorney doesn't have a point to make, then he or she shouldn't cross examine, and if the opposing counsel asks to take an expert out of order, your attorney should do it unless they believe it could seriously harm your side of the case. Your attorney may never know when they may want to take a witness out of order in the future. If your attorney does choose to cross examine, they should conduct any corroborative cross before destructive cross. Your attorney should save the maximum impact questions for last when attacking an expert. They can use many of the same methods of crossing experts as in any area of law, including attacking the relationship between lawyer and expert, fee relationship, credentials, etc.

Consult with Your Expert and Review Opposing Expert Opinion Before Trial

If the other side has an expert, it is likely that your side should also have one. Even if you don't, it is advisable to invest some of your client's money to consult with an expert to review the opposing expert's opinion and to have him or her explain the opposing expert's opinion and how to dissect it.

Know What They Will Say before They Say it

Always send interrogatories and a production request asking the opposing party to designate their experts, state their opinions, and provide their reports. They must supplement all such discovery responses as soon as practical but in no event less than thirty days prior to trial (TRCP 166b(6)(b)), absent agreement otherwise.

Know the Expert's Language

Your attorney should be sure to read up on the particular area of expertise prior to trial. This should have been done prior to taking the expert's deposition earlier in the case. There have been several good articles on business valuation as well as on experts and tracing issues (list one). They need to at least know the basics. This will not only help your side in presenting an effective cross examination, but it will also cut down on time, which the judge will appreciate.

P. DON'T ASK FOR MORE THAN 70% OF THE ESTATE

Although the judge has wide discretion to divide the parties' estate, it is limited by the abuse of discretion standard. Therefore, unless your case has extremely aggravating circumstances, or you know the judge has strong feelings on issues that will benefit your client, it will be ineffective for you side to ask for 70 percent or more of the community estate. Generally, the Court can consider many factors in dividing the estate. Section 7.001 of the Texas Family Code provides that "In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." In fact, the rule of thumb used by most courts is that if the parties have relatively equal economic positions upon their exit from the marriage, the division will be close to 50/50. However, this ratio will change depending on the specific issues in the case, including incomes of the parties, future earning capacity, ages of the parties, which party is primarily responsible for the children, adultery, etc.

Q. CLOSING ARGUMENT

Much like opening statement, your attorney should suppress the urge to make a lengthy closing argument. First, he or she should ask the judge if he or she would like to hear one. If the judge allows it, your attorney should be succinct and tie it to your proposed court's ruling.

R. IS IT OVER WHEN IT'S OVER?

Occasionally, the judge will make a ruling that makes your side think he or she had earplugs in while you presented your case, or he may have forgotten to award a particular piece of property to either side. Other similar situations may occur after the parties have rested and the judge has rendered. Although it never pays to be rude, your attorney should not sit idly by because they are afraid to anger the judge. If the judge has ruled inequitably in the division, it is not improper to verify that the judge intended to make the award as he or she did. If a piece of property is left out completely, your attorney should speak up and remind the judge about it. I believe that every judge in the family courthouse would rather deal with the issue at the end of the trial rather than at entry of the decree, when he or she has moved on to other things, or later in a post-divorce division of property. Worse yet, if your opposing counsel drafts the papers, he or she might award the property to his client, or put in this phrase "It is Ordered and Decreed that all property not divided herein is hereby awarded to the party not in possession of the property". What if your client is not in possession of the property? You guessed it—notify your carrier!

V. CONCLUSION

Although not every issue in a property case can be addressed here, your attorney should always remember to thoroughly prepare his or her case for trial, provide a roadmap for the judge to follow, and present the evidence in the most efficient manner possible. If the attorney strives for these three accomplishments, he or she will gain the admiration of the judge, impress his client, and make it easy for the judge to rule in his or her favor. If this is done, not only does the attorney look good, but so do his or her paralegals.

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Scruples

The Ethics of Social Media

by Ellen Lockwood, ACP, RP

Facebook, MySpace, Twitter, FourSquare, Linkedin, blogs, websites, egroups – the list of social media and opportunities to get involved online appear to be almost endless. Most of us use social media for personal as well as professional reasons. However, like most areas of life, there are ethical issues to consider.

Professional Social Media Use
Social media is an effective way to not only network, but gain valuable knowledge related to your daily work. Many people even develop very friendly relationships with those with whom they interact on these sites. Unfortunately there is a risk of revealing confidential or privileged information, either on the sites or to someone whom you have gotten to know through a site. Just as you shouldn't reveal confidential or privileged information to family, friends, or coworkers, you should not reveal that type of information to anyone else. It can be easy to get caught up in a discussion and without intending to do so, let details slip. You cannot even be certain that everyone with whom you interact on the Internet is who he appears to be. Despite how clever you think you are at camouflaging identifying details of work matters, others may easily determine to which case you are referring and glean information that should not be disclosed.

Personal Social Media Use
Of course, the same rules apply to the use of social media in your personal life as in your professional life. There is no excuse for letting confidential information slip into your postings.

Deleting Accounts
If you think you may have revealed too much information (whether confidential or personal) on a social media site, you may consider deleting your profile and postings. However, profiles may not be immediately deleted. For example, it takes two weeks for Facebook to actually close your account and you may inadvertently reactivate it if you try to log into Facebook or use particular websites that are linked to Facebook during that time. Even after your online presence has been removed, others may have previously copied or forwarded your postings, allowing them to live on in cyberspace.

Use of Social Media for Investigative Purposes
Most in the legal field are including social media sites in their investigations. Postings and profile information may now even be requested during discovery. It can be very enlightening to discover someone who claims to be suffering from a back injury has posted videos of herself rock climbing and barrel racing. If you are researching an opposing party's online presence, be sure to understand how this information needs to be gathered to be admissible. While posing as someone else to gain access to a party's private online profile may be relatively easy to do, such methods may not result in admissible information.

Many paralegals are now being asked to do online searches of potential jurors during voir dire. While this can provide important information, there is also some case law that says it violates the jurors' right of privacy. There is also some question as to whether it is appropriate to use information from online searches as a basis to strike a potential juror for cause when, without that information, the potential juror would have been chosen for the jury. Be sure you know the judge's policy regarding this practice as some judges prohibit it.

Social Media Policies
More and more firms and companies are instituting social media policies. Many of those policies restrict or prohibit access to social networking sites on work computers. These policies often prohibit mention of any firm or company related information or photos by employees on social media sites. Take the time to familiarize yourself with your employer's policy and any updates to that policy.

Your online presence is often the only image others have of you. In many ways, it has replaced your resumé and CV and has the added benefit (or detriment) of connecting what others have said about you. Social media has changed and in many ways, enriched our lives. Just keep in mind that everyone, including current and potential future employers, as well as opposing parties, can see everything you post.

Ellen Lockwood, ACP, RP, is the Chair of the Professional Ethics Committee of the Paralegal Division and a past President of the Division. She is a frequent speaker on paralegal ethics and intellectual property and the lead author of the Division's Paralegal Ethics Handbook *published by West Legalworks. You may follow her on Twitter @paralegalethics and her blog at http://paralegal-ethics.blogspot.com. She may be contacted at ethics@txpd.org.*

Seated from left to right: Michele Flowers Brooks, Debbie Oaks Guerra, Susan Wilen, Michele Rayburn. Standing from left to right: Kristy Ritchie, Lynda Camacho, Joncilee M. Davis, Sheila Veach, Nan Gibson, Kim Hennessy, Cynthia Powell, Misti Janes, Shannon Watts

Debbie Oaks Guerra

Debbie Oaks Guerra is the 2010–2011 President of the State Bar of Texas, Paralegal Division (**PD**). Prior to her Presidency, Debbie served the PD as President-Elect (2009–2010), District 12 Director (2006–2008), Parliamentarian (2008) and Vendor Liaison (2006-2010). In 1996, she simultaneously served as the President of the Dallas Area Paralegal Association (**DAPA**) and District 2 Director on the PD Board of Directors. From 2004-2007, she served as the Executive Director of DAPA and has most recently served as the NFPA Primary Representative on the DAPA Board of Directors. She was named DAPA Paralegal of the Year in 2005, DAPA Volunteer of the Year in 2005 and was honored with the DAPA President's Award in 2007. In 2009, she was honored with the Paralegal Division's Award of Excellence. She currently serves as the Board Advisor on the 2010 Texas Advanced Paralegal Seminar (**TAPS**) Planning Committee and will serve as Chair of the 2011 Texas Advanced Paralegal Seminar in Fort Worth.

She serves on the Educational Advisory Boards of both Southeastern Career Institute (ABA approved paralegal program) and Everest College-Dallas and is a proud member in good standing of both the Paralegal Division and the Dallas Area Paralegal Association.

Debbie currently works in-house as a paralegal with Natural Gas Partners, a multi-billion dollar private equity firm headquartered in Irving (Las Colinas). Prior to joining Natural Gas Partners, she worked as a commercial real estate paralegal for the Trammell Crow Company and Dmyterko & Wright, LLC, a commercial real estate firm headquartered in Chicago, IL.

Susan Wilen, R.N.

President-Elect, Paralegal Division

Susan Wilen is a Nurse Paralegal for Brin & Brin, LP in San Antonio and has been involved in healthcare litigation since 1992. She graduated in 1970 from Kings County Hospital School of Nursing in Brooklyn, New York and received a B.A. degree in Philosophy from Trinity University in 1983.

Susan has been a member of the Paralegal Division since 2004. She was appointed as Director of District 5 for the 2007-2009 term and elected for a second term in 2009. She has served on several Paralegal Division Ad Hoc Committees and was a past Board Advisor to the Membership and Elections Committee. In San Antonio, Susan has served as the chair of Paralegal Day activities from 2006 through 2008.

She currently serves as the Paralegal Division's Board Liaison to the American Association of Legal Nurse Consultants for 2010-2011 and as an advisor to the Pro Bono Ad Hoc Committee; she is the Annual Meeting Committee Chair for 2011 in San Antonio. She will also serve as the 2010–2011 Vendor Liaison of the Paralegal Division.

Volunteer and pro bono activities have been a major source of personal growth and a vehicle for community involvement with children at risk and adults with special needs. She recently provided testimony to the Public Health Committee of the the Texas House of Representatives supp orting legislation for harm reduction and needle exchange programs in the State.

As President Elect, her goals include expanding membership and promoting new skill development and opportunities for existing members.

Cheryl Bryan, CP

Texas Board of Legal Specialization Board Certified Paralegal—Personal Injury Law

Treasurer, Paralegal Division

Cheryl is pleased to serve the Paralegal Division of the State Bar of Texas in her third year as its Treasurer and, also, as Director of District 10. Cheryl is a paralegal with the law firm of Orgain Bell & Tucker, LLP (OB&T) in Beaumont.

She attended Northern Illinois University in DeKalb, Illinois for two years. She has been employed with OB&T for just over 28 years. She began working as a paralegal in the late 1980s. In 1992, she took and passed the CLA exam sponsored by NALA. In 1997, she took and passed the board certification exam in personal injury trial law sponsored by the Texas Board of Legal Specialization.

Cheryl has been a member of the PD since 1993. She actively pursued CLE through the seminars sponsored annually by the Division, and in 1998 or 1999, she met Nancy McLaughlin at a PD seminar. Nancy McLaughlin was a great supporter of the profession and the Division, and it was after her untimely death that Cheryl considered becoming more active in the Division. She began by volunteering at TAPS, and now she is Director of District 10 as well as the PD Treasurer.

Cheryl is also actively involved in her local association, the Southeast Texas Association of Paralegals. Over the last several years, she has served on event planning committees (including the TAPA 2010 Planning Committee), and has been elected to serve her second term as SETAP's NALA Liaison for 2009–2010.

Michele Rayburn, CP, PLS

Texas Board of Legal Specialization Board Certified Paralegal—Personal Injury Law
Secretary, Paralegal Division

Michele received her Associates in Applied Science from Tarrant County College, graduating summa cum laude, and is a member of Phi Theta Kappa. She received certification as a Certified Professional Legal Secretary in October 1986 from the National Association of Legal Secretaries. In 1994, Michele received the honor of Legal Secretary of the Year of Fort Worth, and was one of three finalists for the Legal Secretary of the Year for the State of Texas.

Michele received certification as a Certified Paralegal from the National Association of Legal Assistants/Paralegals in May 1991 and has been re-certified in 1995, 2000, 2005, and 2010. In June 1995, she became a Board Certified Paralegal in Personal Injury Trial Law by the Texas Board of Legal Specialization, being among the first paralegals in Texas to attain this certification. She was re-certified in 2000, 2005, and 2010. She has authored the following articles: "Responding to Interrogatories and Requests for Production of Documents," "Trial Preparation," and "Assistance at Trial."

Michele is the 2010-2011 Secretary of the Paralegal Division of the State Bar of Texas. She also served as Secretary for 2009–2010 and serve in 2008–2009 as Parliamentarian. Michele is a past Paralegal Division Membership Chair as well as a District 3 Public Relations SubChair and a District 3 Continuing Legal Education Sub-chair. She has been the District 3 Director for the Paralegal Division of the State Bar of Texas since 2007and was re-elected to serve as District 3 Director for the 2009–2011 term. Michele has been a member of the Paralegal Division since 1994. Additionally, she is the Paralegal Division of the State Bar of Texas' Liaison to the Fort Worth Paralegal Association (FWPA) and past First Vice President of FWPA.

Michele began her career with Wynn, Brown, Mack, Renfro & Thompson in 1974, moving to Shannon, Gracey, Ratliff & Miller in 1979. While there, she began working for Michael Wallach in 1985 and left Shannon, Gracey with Mr. Wallach when he formed Wallach, Jones & Moore, P.C., in 1991, now known as Wallach & Andrews, P.C. She is also an Associate Member of the Tarrant County Bar Association.

Michele Flowers Brooks

Parliamentarian, Paralegal Division

Michele is serving her second term as Director for District 4 of the Paralegal Division (PD), after becoming a member of the Paralegal Division in 2001. Over the years, she has volunteered for the PD at the Texas Advanced Paralegal Seminar (TAPS), served on the TAPS Planning Committee in 2005 and 2010, served as Membership Sub-Chair for District 4, and served as Co-Chair of the Membership Audit Committee.

Michele graduated in 1996 with an AAS in Legal Assistant from Tarrant County College in Hurst. She moved to Austin following graduation and, immediately joined the local association, Capital Area Paralegal Association (CAPA). Her service to CAPA includes volunteering as the Programs Chair, Membership Chair, Treasurer, Web Team, and two years as President.

For most of her paralegal career, she has worked in insurance defense, specializing in workers' compensation at the DWC and in the trial courts. She worked with solo attorney Christopher Ameel, assisting him in representing political subdivisions, insurance carriers, third-party administrators, and self-insured in workers' compensation and other employment related matters. She now works as Senior Paralegal for the Texas Municipal League Intergovernmental Risk Pool in its subrogation section of the Legal Department.

First and foremost, however, she is a wife and mother. She has been with her husband, David, for 18 years and they have four children at home and three others living away from home. Their oldest child, Zach is serving as an MP in the Air Force; and next oldest, Brandon, will be leaving for college at Henderson State University in August 2010.

2010 Exceptional Pro Bono Award Recipient

By Debbie Oaks Guerra

Lyla Malolepszy, Sherman, was recognized at the 2010 Paralegal Division's Annual Meeting as the winner of this year's Paralegal Division Exceptional Pro Bono Service Award.

Stephanie Hawkes, 2009–2010 President and Lyla Malolepszy, 2010 Pro Bono Award Recipient

Pro bono, loosely translated, means "*for the public good*". To say that Lyla exceeds the expectations of pro bono service would be an understatement. Volunteering for public service has been a part of her life for more than a decade. Even before graduating from Grayson County College with her Associates Degree in Paralegal Studies in 2003, she began volunteering with Legal Aid of NorthWest Texas ("**LANWT**"). In fact, she has consistently logged more than 50 hours annually including assisting with pro bono cases within her firm and for the attorney she presently works for. She also assists LANWT in the recruiting and training of new volunteers for their programs. Fittingly, in 2005, LANWT recognized these extraordinary efforts by presenting her with the Grayson County Paralegal of the Year Award.

In 2004, Lyla joined the State Bar of Texas Pro Bono College and has met the 50+ hour annual requirement to maintain her membership to present. In 2007, in addition to the many hours of pro bono and community service, she completed her Bachelor Degree in Paralegal Studies and began pursuing a Masters Degree in Business Administration, which she completed in 2009. Yet still, despite numerous time commitments, she once again logged more than 50 hours of pro bono service in 2009.

Inspiring others to join with her in providing support to those in need

In addition to her work with LANWT, Lyla also volunteers her time on the Professional Development Committee and Pro Bono Ad Hoc Committee of the Paralegal Division, is the Executive Coordinator of the Grayson County Bar Association and works full time as a paralegal for a Donald Johnston, a sole practitioner in Sherman. She has been a member of the Paralegal Division of the State Bar of Texas since 2004 and is a Past President and officer of the North Texas Legal Association ("**NTLA**"). She was selected as NTLA's Paralegal of the Year in 2008.

In 2009, after learning of a Grayson County attorney in need of an organ transplant, Lyla volunteered her time to organize the planning of a major fund raising event, the ***Americana Music Festival and Silent Auction to benefit the NTAF South-Central Liver Transplant Fund (http://www.ntafund.org) in honor of R.J. Hagood*** held on November 21, 2009. She recruited and assembled more than 50 volunteers and the volunteer schedules, solicited nearly 100 silent auction items from local businesses and conducted the silent auction during the event. Donations from the event exceeded $29,000. In addition, she made arrangements for all the remaining food to be donated to the Samaritan Inn in McKinney, the only homeless shelter in Collin County. Sadly, Mr. Hagood passed away on March 28, 2010. However, in typical fashion, Lyla, once again, took immediate action, using her volunteer network to reach out to help his family during that difficult time.

Maintaining excellent relations with the legal community

Because of her efforts, many attorneys and paralegals in Grayson County have been provided the necessary information and resources to get involved in pro bono opportunities and as a result, have volunteered their time and skills to those less fortunate.

Lyla is the epitome of pro bono service. She inspires everyone around her with her dedication and caring. Her pro bono volunteerism is making a real difference in her community and should serve as an example to others in the profession of what can be achieved when we use our special skills as paralegals for those less fortunate than ourselves. On behalf of everyone who has benefitted from her phenomenal ethic and service, it is my honor to congratulate her on this most deserving recognition.

2010 Paralegal Division Annual Meeting

By Susan Wilen

The Annual Meeting of the Paralegal Division of the State Bar of Texas was held on June 11, 2010 at the Convention Center in Fort Worth, Texas. This event was ably co-chaired by Linda Eichhorn Burke, CP and Janice Piggott. The day's activities included four CLE presentations and a luncheon with more than one hundred attendees.

The first CLE presentation was "*Identity Theft,*" presented by Susan Pruett, an attorney with the Tarrant County District Attorney's office. She explained the legal parameters of identity theft, the types of identifiers and data that are frequently targeted by identity thieves, and the organizational structure of identity theft rings. She emphasized that the elderly are frequently victims of identity theft by family members or caretakers. She also described the many ways the internet is used to steal personal information, including the technique of "phishing." Lastly, she identified several ways that we, as individuals, can protect ourselves from identity theft and what to do if we are victims of identity theft.

The second CLE presentation on the "*Rules of Civil Procedure*" was given by attorney J. Wade Birdwell; his focus was on Rule 21A, Methods of Service. He emphasized the need for timely service of materials to preserve the legal rights of the client and gave numerous examples what constitutes timely service. He discussed service by hand delivery, facsimile and electronic filing, with special emphasis that service is determined not when a document is sent, but when it is received. He also reinforced that it is better to file something late than not to file it at all.

The third CLE presentation on "*Technology and Demonstrative Evidence*" was given by Wendi Rogers, CP, past President of the Paralegal Division. She explained how information can be transformed into powerful evidence in trial or mediation, and gave examples of how that evidence can serve the attorneys and the client. She demonstrated how graphics can be created using digital "layers" and blowouts in Power Point to highlight specific information from medical records, for example, or how to use video clips for rebuttal purposes. She also offered strategies for organizing information using notebooks, CDs and computer programs for use in trial.

The last CLE presentation was given by Jonathan Smaby, the Executive Director of Texas Center for Legal Ethics and Professionalism. His hour of ethics titled "*The Road to Hell: How Lawyers Find Trouble and How Paralegals Get Them Out*" explained the nature of legal ethics in the State of Texas and how the rules of conduct by the Texas Disciplinary Rules of Professional Conduct (TDRCP) apply to lawyers and paralegals. Of the 7,108 grievances filed in 2009, the majority resulted from missed deadlines, documentation failures, and conflicts of interest. He encouraged paralegals to keep meticulous calendars to avoid missed deadlines, to respect client confidentiality, to safeguard data, and to use the utmost care in communicating with clients and other legal entities.

Left to right: Linda Gibson, Sr. IP Legal Assistant, Marshal Green, IP Paralegal, Laura Tapper, Sr. IP Paralegal, Laura DaConceicao, IP Paralegal and Cynthia Minchillo, Sr. Litigation Paralegal all of Chalker Flores, LLP

Stephanie Hawkes and Wendi Rogers

Stephanie Hawkes and Sheila Milbrandt

Left to right: Gloria Porter, Debbie Oaks Guerra, 2010–2011 President, and Lyla Malolepszy

This year's Annual Meeting luncheon was called to order by Stephanie Hawkes, outgoing President of the Paralegal Division. There were more than 100 attendees at the luncheon, including past PD Presidents Michele Boerder, CP and Wendi Rogers, CP, current Dallas Area Paralegal Association President, Cindy Welch, and current Metroplex Association of Corporate Paralegals President, Leticia Martin. After sharing a meal together, the attendees engaged in roundtable discussions about "*The State of the Paralegal Profession.*" The topics of discussion included the most significant changes in the profession recently, the scope of software/ work tools used in offices throughout the state, the biggest professional challenges faced by paralegals presently, and the hopes for professional growth in the next 10 years.

The following deserving recipients were recognized for their contributions to the Paralegal Division:

- The Exceptional Pro Bono Service Award: Lyla Malolepszy
- The Outstanding Committee Chairs: Sheila Milbrandt, Continuing Education Committee Chair and Wendi Rogers, Ambassadors Ad Hoc Committee Chair
- Special Recognition Award: Rhonda Brashears, CP for her work as Chair of TAPS 2009 and as Chair of the Online CLE Committee
- Special Recognition Award: Lori Winter and Debbie Spencer for their work as Co-Chairs of the 2009 Annual Meeting
- Special Recognition Award: Mark Curry for his assistance with the PD Quickbooks Conversion

The officers of the 2010–2011 Board of Directors were installed. They are:

President: Debbie Oaks Guerra
President-Elect: Susan Wilen, RN
Secretary: Michele Rayburn, PLS, CP
Treasurer: Cheryl Bryan, CP
Parliamentarian: Michele Flowers Brooks

The Incoming District Directors were installed and are:

District 1:	Nan Gibson
District 2:	Joncilee Miller Davis, ACP
District 3:	Michele Rayburn, CP, PLS
District 4:	Michele Flowers Brooks
District 5:	Kristy Ritchie
District 6:	Sheila M. Veach, CP
District 7:	Misti Janes
District 8:	Carole Jean Trevino
District 10:	Cheryl A. Bryan, CP
District 11:	Kimberly D. Hennessy, CP
District 12:	vacant
District 13:	Cynthia Powell
District 14:	Shannon Watts, CP
District 15:	Cindy Curry, ACP
District 16:	Linda Gonzales, CP

Outgoing Directors Connie Nims, District 2, Gloria Porter, District 12, Clara Buckland, CP, District 16, were also recognized for their service to the Board of Directors.

Last, but certainly not least, the Paralegal Division would like to extend its sincere appreciation to our wonderful event sponsors:

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This Annual Meeting was a wonderful opportunity to make new friends, rekindle old friendships, and to expand our understanding of our profession and the law. We hope to see you next year at the Annual Meeting in San Antonio. Mark your calendars for June 24, 2011!

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