

SUMMER 2011 VOL. 17 NO. 1

# TPJ

*Texas Paralegal Journal*



CHAPTER 33: JURY CHARGE SUBMISSIONS  
AND OTHER THORNY ISSUES

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# PRESIDENT'S *Message*

by Debbie Oaks Guerra, President, Paralegal Division

It is hard to believe that we are at the end of another Paralegal Division fiscal year, with a new slate of officers and directors about to be sworn in, membership renewals in full swing, another annual meeting upon us in San Antonio, and of course, TAPS planning in the works for October in Fort Worth.



This year's Annual Meeting should be another great event for the Division. The Annual Meeting Committee has been very busy putting together a great group of speakers. During the PD Annual Meeting and luncheon, we will kick off the celebration of the Division's 30th Anniversary. Our luncheon keynote speaker, Jeanne C. "Cezy" Collins, Member of the Access to Justice Commission, will present *Practicing Accessible Justice*.

The TAPS Planning Committee is actively engaged in planning this year's seminar. Make plans now to join us October 5-7, 2011 at the Marriott Hotel & Golf Club in Fort Worth. Our theme this year is TAPS 2011 – Pearls of Wisdom – Celebrating 30 Years of Excellence. In addition to the 14 hours of advanced CLE, we will be hosting a 30th anniversary celebration, *Time After Time – A 30 Year Celebration* at the beautiful Speedway Club at the Texas Motor Speedway. We will conclude the seminar at the Friday luncheon, with keynote speaker, Immediate Past

President of the State Bar of Texas, Roland Johnson, who will present "*Where You Are Now Is Nowhere Compared To Where You Can Go!*" - Pearls of Wisdom and Reflection from a Past President. This is going to be an event you will not want to miss! On-line registration will go live in June. More details may be found at <http://txpd.org/taps/default.asp>.

As I write this, my last President's Message, I'd like to acknowledge all of the wonderful PD volunteers who help keep this organization going. To our Standing Committee Chairs, Ad Hoc Committee Chairs, District Subcommittee Chairs, TAPS Volunteers and PD members who have volunteered at the numerous community service and pro bono projects held this year throughout the state, we could not do this without you.

Life is short. As a volunteer you give time. Time, truly the most precious resource in our lives! As a volunteer, you bring much to the Division. Skills, advice, experience, friendship, vision, leadership and inspiration – these things you *bring*, but time you *give*. You choose to donate the most precious commodity in the known universe. While some may count time in numbers or in cash value, we will all be poorer if we don't realize that the giving of our time is simply and utterly priceless. So today, I would like to take a moment to thank you for the amazing gift you have given to the Division.

I'd also like to acknowledge my Board of Directors. Thank you for your hard work and dedication to the profession. I am infinitely proud of each of you and it has been my great privilege serving by your side.

Finally, to Susan Wilen, Incoming President and Norma Hackler, PD Coordinator, without you, my Presidency would have not been possible. Your motivation and support has been invaluable. I will never be able to repay you for all that you have done for me, personally and professionally. Thank you both from the bottom of my heart.

While it is the end of my term, it is the beginning of the term of Susan Wilen. I am certain I leave you, and the Paralegal Division, in very capable hands. And after all, isn't that the point? To do your best to leave everything you touch a bit better and then pass it on to someone who will continue to strive towards greatness? This experience has touched my life in ways I could have never imagined. It has been an honor and a privilege serving as your President. Carry on, my friends. There is still much left to be accomplished.

A handwritten signature in dark ink, appearing to read "Debbie Oaks Guerra".

Debbie Oaks Guerra  
2010-2011 President

# PARALEGAL ETHICS HANDBOOK

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

The product focuses on providing paralegals with the information, guidelines and tools necessary to assure they are always performing in an ethical manner. Paralegals must always take care to be sure they are not crossing any ethical lines. Ethical guidelines for paralegals and attorneys, vary from state to state, however, the professional paralegal needs to be familiar with them.

## TOPICS INCLUDE

- Defining ethics and ethical obligations
- Remaining ethical considerations for a variety of functional areas including corporations, freelance, and as administrative, governmental, regulatory law paralegals, and alternative dispute resolution
- State Information

## HIGHLIGHTS

- Contains rules and regulations for all 50 states and Washington, D.C.
- Addresses ethical considerations in 17 practice areas
- Explains how to determine whether an action may be an ethical violation
- Provides guidelines for defining ethics and ethical obligations
- Includes paralegal association ethics canons and related information

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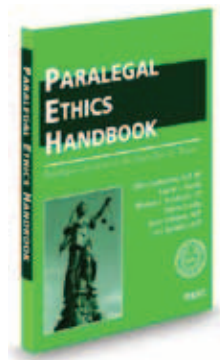
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# TPIJ

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# EDITOR'S *Note*

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

**A** friend recently proudly proclaimed that she was dutifully getting her car washed every week (whether it needed it or not, I suppose) in an effort to tempt/taunt Mother Nature to drop some precious rainfall on our drought-ridden city. It paid off - after 117 days of no measurable precipitation, we received just that - a measurable amount of precipitation. Not enough to quench our extreme wildfire danger, though.

A national magazine recently ran an article about people longing for the summer days of 85 degree weather. Unfortunately, where I live, once the mercury reaches 85 degrees it keeps heading toward those triple digits. Give me a boardwalk, some saltwater taffy, sand, surf and the smell of Coppertone, and it's summer time! Give me 100-plus degree weather, and it's time for refrigerated air!

Whether you are headed out into the sun or retreating to a cooled spot indoors, be sure to take this issue of the *TPJ* with you, because it is loaded with interesting and informative articles that will make it a page-turning summer must read! It's strictly bring-your-own-margarita, though.

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**SCHOLARSHIP**

The Paralegal Division of the State Bar of Texas will award up to two (2) scholarships for the three-day registration to attend TAPS 2011. **Important:** scholarship applications must be received by Friday, July 29, 2011. To download and print an application, go to [www.txpd.org/taps](http://www.txpd.org/taps).

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## DEADLINE FOR SUBMISSION OF ARTICLES FOR THE FALL ISSUE IS AUGUST 1, 2011.

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# Chapter 33: Jury Charge Submissions And Other Thorny Issues

By Jane M.N. Webre



## A. Scope of Article

Chapter 33 of the Texas Civil Practice and Remedies Code is a comprehensive scheme to apportion responsibility between various parties for tort damages. The various parties could include claimants, defendants, settling defendants, or responsible third parties. Procedures under Chapter 33 can help account for contributory negligence by the claimant, joint and several liability issues, contribution among defendants, and allocation of responsibility to non-party responsible third parties (who may be unnamed John Does). Chapter 33 has so many moving parts, however, and deals with so many complex concepts, that it is often the source of confusion for litigants. Moreover, it is deceptive: its application for simple cases is so straight-forward, while its application in complex litigation is sometimes near impossible to parse through.

This paper will not attempt to answer every question regarding how Chapter 33 applies in every case. It will attempt, modestly, to set out the general rule on jury submissions, calculation of damages, and designation of responsible third parties, before attempting to identify those tricky areas where unanswered questions and inequitable results may lurk.

## B. What sorts of cases does it apply to?

Chapter 33 applies to any “cause of action based on tort” and any action under the DTPA. Tex. Civ. Prac. & Rem. Code 6 33.002(a). There has been some dispute whether it applies to certain statutory causes of action; after all, if it automatically applies to all statutory causes of action that are “tort-like,” why the need to specify that it applies to DTPA claims, which are very tort-like? The Court has generally applied it to statutory causes of action, notwithstanding the express reference to the DTPA. See *JCW Electronics, Inc. v. Garza*, 257 S.W.3d 701 (Tex. 2008) (holding that Chapter 33 applies to claims for breach of UCC implied warranty of fitness); *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 689-90 (Tex. 2007) (applying Chapter 33 to dram-shop cases).

## C. Application of proportionate responsibility provisions in general.

Chapter 33 outlines procedures for allocating responsibility between potentially-responsible parties. The basic steps are:

- Submit list of claimants, defendants, settling parties, and responsible third parties to jury for jury to allocate 100% responsibility between those on the list.
- Use those percentage allocations to calculate maximum amount plaintiff can recover.



- Use those same percentages to calculate what portion of damages each defendant owes to the plaintiff (not necessarily the same thing as maximum amount plaintiff can recover).

There are distinct three steps involved, and they are discussed below:

#### **Step One: submitting proportionate responsibility question to the jury**

The jury is asked to allocate responsibility for each person's "causing or contributing to cause in any way the harm for which recovery of damages is sought." The total responsibility allocated is 100%. List of persons submitted to the jury for allocation includes: (1) each claimant; (2) each defendant; (3) each settling person; and (4) each responsible third party. 6 33.003(a). A defendant will typically want as many blanks as possible to spread out the percentages of responsibility in the hopes that specific percentage allocated to it will be low.

May not submit any person for proportionate responsibility without evidence to support the submission. 6 33.003(b). Can't just pack the list with random names in order to dilute the percentage allocated to each, to reduce percentage allocated to the remaining defendants. Though this requirement was probably intended to guard against abuse of the expanded responsible third party designation, the statute is not limited to that. Section 33.003(b) requires evidence regarding responsibility of any person to get that person on the list.

The requirement that there be evidence of responsibility by a person in order to include them in the proportionate responsibility submission has been held to preclude submission of the plaintiff's contributory negligence where the alleged negligence did not contribute to the original incident but rather aggravated damages after the fact. *Young v. Thota*, 271 S.W.3d 822, 829-30 (Tex. App.—Fort Worth 2008, pet. denied) (distinguishing between contributory negligence, which must be premised on conduct that proximately causes the

original incident, and post-incident failure to mitigate, which "requires an injured party to 'exercise reasonable care to minimize its damages. . .").

It has also been held to preclude submission of a plaintiff whose actions did not contribute to an automobile accident but rather exacerbated damages caused by the accident itself (as opposed to post-accident failure to mitigate). *Block v. Mora*, 314 S.W.3d 440 (Tex. App.—Amarillo 2009, pet. dismissed) (analyzing plaintiff's failure to secure a tire in the back of a truck that exacerbated damages from accident involving the truck). The *Block* court gave this explanation of the distinction between "occurrence-causing" conduct and "injury-enhancing" conduct:

Further, to the extent the Committee on Pattern Jury Charges intended the terms "occurrence-causing" to describe a contributory negligence defense and "injury-enhancing" to represent a mitigation defense, we agree with the use of these terms in the comment to PJC 4.1. However, we find no Texas cases recognizing the use of proportionate responsibility questions where a defendant is the sole cause of an accident or occurrence but asserts the plaintiff caused his injuries, i.e., "injury-causation." If, but for the plaintiff's negligence, the accident would not have occurred then, depending upon the jury's findings, the plaintiff either partially or wholly caused the accident and the injuries attendant thereto. Stated conversely, if the accident would have occurred regardless of the plaintiff's negligence then the plaintiff is not proportionately responsible for the accident.

This requirement also bars submission of any party who did not owe a cognizable legal duty, because duty is a component part of tort liability. *Texas Specialty Trailers, Inc. v. Jackson & Simmen Drilling*

*Co.*, 2009 WL 2462530 (Tex. App.—Fort Worth Aug. 13, 2009, pet. denied) (mem. opin.) (holding that plaintiff's contributory negligence should not have been included in proportionate responsibility submission because plaintiff owed no duty as a matter of law).

#### **Step Two: Calculate maximum plaintiff can recover**

If plaintiff's allocated percentage of responsibility is *greater than* 50%, that is a total bar to recovery. 6 33.001. 50/50 is not a total bar; Plaintiff's percentage has to be 51% or greater. If there are multiple plaintiffs, their individual percentages are not stacked but rather are applied specifically to each plaintiff's own recovery. *Salinas v. Kristensen*, 2009 WL 4263107 (Tex. App.—Corpus Christi Nov. 25, 2009, pet. filed) (mem. opin.).

If plaintiff is not totally barred from recovery, then to calculate maximum recovery, subtract from damages awarded by jury: (1) the amount of damages reflecting percentage of plaintiff's responsibility; then (2) in cases other than health care liability, if there have been any settlements, subtract the sum of all dollar amounts of all settlements. 6 33.012(a), (b).

In health care liability cases, if there are settlements, defendant can elect to subtract either sum of dollar amounts of all settlements or a percentage equal to each settling person's percentage of responsibility as found by the trier of fact. Have to make calculation in writing before submission, so you have to guess what percentage allocated to settling person might be. First election is binding on all defendants. If no timely election made, then default to dollar for dollar credit. 633.012(c).

This calculation is a cap on plaintiff's recovery, not a calculation of any defendant's liability. The maximum amount plaintiff may recover is not necessarily the same thing as amount defendant is liable for. (See Table 1)



Table 1: Examples assuming \$100 awarded in damages:

P 60% D 30% SP 10%  Plaintiff recovery is zero because more than 50% responsible.	Assume settled with SP for \$75 P 10% D 85% SP 5%  P recovery is \$15: $\$100 - \$10 - \$75 = \$15$ .
Assume settled with SP for \$10 P 10% D 40% SP 50%  P recovery is \$80; $\$100 - \$10 - \$10 = \$80$	Assume settled with SP for \$10 P 10% D 60% SP 30%  P recovery is \$80: $\$100 - \$10 - \$10 = \$80$

### Step Three: calculate what each defendant owes on the judgment

If defendant is found more than 50% responsible or committed one of the named enhancing criminal acts, then that defendant is jointly and severally liable for the entire amount recoverable by plaintiff. 6 33.013(b). The joint and several liability provisions apply even if there is only one defendant. *Bay Rock Operating Co. v. St. Paul Surplus Lines Ins. Co.*, 298 S.W.3d 216 (Tex. App.—San Antonio 2009, pet. denied).

If the defendant is less than 50% responsible, then liable only for percentage of the damages the jury found that defendant responsible for. **NOTE:** calculate defendant's portion of judgment by multiplying percentage of responsibility against *damages found by jury*, not against

total amount recoverable calculated under 6 33.012 in Step Two (i.e., with plaintiff's percentage and settlement sums subtracted out).

Depending on the particular numbers (amount of damages awarded, percentage allocation of responsibility, and dollar amounts of settlements) the plaintiff can end up recovering much less than the amount of damages awarded by jury, and the judgment can even be calculated without regard to settlements. Settlement credits are discussed below.

If there are multiple defendants, each defendant's liability is calculated as its own percentage of damages awarded by jury. If total exceeds maximum recoverable by plaintiff, do not reduce them, but rather plaintiff can recover up to its maximum from assorted choice of defendants, against

each up to its level of liability. Because no single defendant is being required to pay more than its own allocated portion of responsibility (i.e., no joint and several), there are no contribution rights as between the defendants, even if one pays 100% of its own liability and another pays only 15% of its own liability. (See Table 2)

### D. Calculating settlement credits

#### 1. Plain-vanilla scenario

As outlined above, the basic method to calculate settlement credits goes like this: subtract the sum of dollar amounts of settlement from damages awarded, along with plaintiff's own percentage of liability, to calculate maximum amount recoverable by plaintiff. 6 33.012(a), (b). Then multiply the remaining defendant's percentage of responsibility by damages awarded by

Table 2: Examples for Step Three assuming \$100 awarded:

Assume settlement for \$10  P 15% D 40% SP 45%  P recovery \$75 ( $\$100 - \$15 - \$10 = \$75$ ) D liability \$40 ( $40\% \times \$100 = \$40$ )	Assume settlement for \$75  P 15% D 40% SP 45%  P recovery \$10 ( $\$100 - \$15 - \$75 = \$10$ ) D liability \$10 (capped by P maximum recovery, even though higher percentage)
---	--



<p>Assume settlement for \$10</p> <p>P 10% D1 20% D2 30% D3 15% SP 25%</p> <p>P recovery \$80 (\$100 - \$10 - \$10 = \$80)</p> <p>Liability totals \$65: D1 \$20 (20% x \$100 = \$20) D2 \$30 D3 \$15</p>	<p>Assume settlement for \$10</p> <p>P 10% D1 55% D2 20% D3 10% SP 5%</p> <p>P recovery \$80 (\$100 - \$10 - \$10 = \$80)</p> <p>Liability of Ds: D1 \$80 (joint and several) D2 \$20 (20% x \$100 = \$20) D3 \$10</p> <p><small>**But if D1 pays entire \$80, has contribution rights against D2 and D3 for their levels of liability until D1's contribution reduced down to \$55, which is his percentage of responsibility.</small></p>
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jury to calculate amount of liability. If the first calculation is higher than the second, then defendant pays only lower, second sum, even though: (1) plaintiff recovers much less than actual damages minus own responsibility, minus money received in settlement; and (2) amount defendant pays does not include direct credit for settlement dollars paid.

This was exact holding in *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003). In that case, settlements totaled \$468,750, jury awarded damages of \$2,935,000. Thus, maximum recovery by plaintiff would be \$2,466,250 (damages minus settlement dollars). 15% responsibility was allocated to remaining defendant, Roberts. Court held that Roberts was liable for \$440,250, which is 15% of total amount of damages awarded, and liability would not be further reduced for settlement credit. The Court reached that conclusion because that is what the plain language of Chapter 33 provides.

Defendant gets an indirect benefit from settlements by having settling persons submitted in the proportionate responsibility list for the jury to shift some blame to. Gets direct benefit from settlements depending on particular numbers: what was the amount of the settlement, what percentage

responsibility was allocated to defendant, how much was awarded in damages.

## 2. Potential for abuse has been curbed in cases of multiple plaintiffs

Pre-2003 there was some attempted abuse of settlement credit system through collusive settlements that gave settlement dollars disproportionately to some plaintiffs, who would then drop out of the cases. When the case later went to trial, the plaintiff who recovered substantial sums in settlement but had non-suited would not have settlement funds included in settlement credits because the settlement plaintiff was no longer in the case and the plaintiffs remaining in the case had not settled. At the time, the Court cured that problem by allowing remaining defendant to prove that remaining plaintiffs had in fact gotten benefit of settlements paid to non-suiting plaintiffs, so should get credit for that. *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002).

2003 amendments to Chapter 33 changed the definition of "claimant" to expressly include "any person who is seeking, has sought, or could seek" recovery of damages. Before, claimant was defined as a person "seeking recovery."

## E. How many proportionate responsibility questions should be submitted?

Section 33.003 includes the following provision regarding submission of the proportionate responsibility question:

The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way *the harm for which recovery of damages is sought*, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:

§ 33.003(a) (emphasis added). Construing that language, should there be a single proportionate responsibility question for the entire case, or should there be multiple questions to account for different legal theories and different measures of damages?

The Supreme Court injected a fair amount of uncertainty into the issue through *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005). That case did not involve the issue of multiple submissions versus one submission, per se,





but it did condemn lumping all causes of action together into a single proportionate responsibility question under certain circumstances.

*Romero* involved medical malpractice by a doctor who had strong history of substance abuse. The trial court submitted the case to jury on negligence against doctor, nurse, and hospital, and also for malicious credentialing against the hospital. Jury found liability on all claims, then answered a single proportionate responsibility question where jury allocated 40% to hospital. The proportionate responsibility question did not distinguish in any way between negligence and credentialing claims against hospital, and there was only a single measure of damages (i.e., the plaintiff's medical injuries).

The Supreme Court determined that no evidence supported the claim for negligent credentialing and rendered a take-nothing judgment on that claim. The Court then held that a new trial was required as to the negligence claim because there was no way to review on appeal whether the 40% allocated to the hospital in the proportionate responsibility question was appropriate because there was no way to know whether the jury allocated some responsibility based on the credentialing facts and not just the negligence facts. The Court thus decided the issue on a theory like *Crown Life v. Casteel* or *Harris County v. Smith*, and not on an analysis of Chapter 33 per se.

Supreme Court rejected the argument that a party would have to submit 172 permutations of questions to wire around the uncertainty and avoid remand. Instead, the Court said no, you just have to ask one question less (i.e., do not submit credentialing question to the jury if it will not stand up on appeal). This response puts plaintiff's lawyer to a hard choice, particularly where "no evidence" challenges are very much in the eye of the beholder. More significant for purposes of this paper, it does not shed any light on the inquiry of when, if ever, are multiple proportionate responsibility questions appropriate.

At least one court has held that there may need to be multiple proportionate responsibility questions where there are different claims against different parties with different measures of damages. *Isaacs v. Bishop*, 249 S.W.3d 100, 108-109 (Tex. App.—Texarkana 2008, pet. denied).<sup>1</sup> In that case the plaintiff Bishop pled different claims against defendants Isaacs and Schleier, with distinct measures of damages. "The jury determined the percentages of responsibility for Bishop and Isaacs for fraud. Separate questions asked about other damages caused by Schleier and assessing a percentage of responsibility between Schleier and Bishop on those." Isaacs complained that there should have been just one submission:

Isaacs complains because attorney Schleier was not part of the percentage of responsibility determination made by the jury. Isaacs asserts that the charge should have directed the jury to determine the percentage of responsibility for all parties (including Schleier) in a single, global finding. He argues that all possible recoveries, on whatever basis, must be combined for a gross determination by the jury.

Stated another way, the issue on appeal was "whether the statute requires a single jury question to be used to allocate percentage responsibility for all damages alleged in the lawsuit, regardless of whether multiple causes of action or theories of liability are involved."

The court of appeals noted that broad-form submission is favored, but it is not always feasible depending on the particular facts at hand, and it was not feasible where there were distinct claims with distinct damages against different defendants:

The record shows that the trial court attempted to separate the causes of action and their resultant damages and allocate them against the different parties to assure that each sec-

tion could be separately addressed on appeal. The court's decision is defensible. Damage awards from different causes of action should be separated rather than lumped into a single whole—especially where different, but related, causes of action against different, but related, defendants are involved. Failing to do so, in fact, has been held to be reversible error. Although related, the actions Bishop brought against Schleier were not the same ones brought against Isaacs. Isaacs does not argue now, and did not argue then, that either Isaacs or Schleier would be liable for the damages caused by the other in those alternative causes of action. The trial court carefully separated the damages to avoid overlap, and each defendant was found liable for damages for the particular causes of action asserted against that party.

249 S.W.3d at 108-109 (citations omitted). The court went on to hold: "We find unfounded Isaacs' argument that [633.003] absolutely requires a lump submission. The statutory mandate is described as not being discretionary; failing to correctly apply the law is an abuse of discretion. The statute does not, as Isaacs argues, require damages for all causes of action to be combined in a single unified recovery. The statute explicitly requires proportionate responsibility to be determined as to each cause of action." The court then gave this very quotable explanation of when there should be multiple proportionate responsibility submissions:

While a single submission would be simpler, if it can be done fairly and accurately, here such a submission would not be fair or accurate. Merging damages from different causes of action and then requiring percentages be derived for damages not attributable to all defendants would actively create error.

249 S.W.3d at 109.



If you have a case with different claims against different parties with different measures of damages, therefore, different proportionate responsibility question may be necessary.

#### F. Responsible third parties

A defendant may designate responsible third parties, who are persons “alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought.” §§ 33.004; 33.011(\$). The responsible third party, or RTP, is then included in the proportionate responsibility submission and the jury can allocate some percentage of responsibility if the evidence supports the submission. § 33.003(a)(4) (including RTP in list of persons to be submitted in proportionate responsibility question).

The defendant must file motion for leave to designate RTP. If the motion for leave is filed more than 60 days before trial, trial court must grant leave unless objecting party establishes: (1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure; and (2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure. § 33.004(a), (g). In other words, all that is required to designate RTP is to meet standard of Tex.R.Civ.P. to plead sufficient facts concerning alleged responsibility of party. And the defendant gets two bites at the apple to meet that standard. And the designation can even be of a “John Doe” if the alleged conduct is criminal. § 33.004(k). If defendant files the motion for leave to designate an RTP closer than 60 days before trial, defendant must show good cause for allowing motion for leave to be late-filed. § 33.004(a).

Being designated an RTP (if not later added as a party) cannot give rise to liability on the party, nor can it be used for res judicata, estoppel, or other such preclusion

purposes. § 33.004(i). Therefore, other than reputation or other such concerns, there is no reason for designated RTP to appear or defend himself in any way.

There is a limitations avoidance provision relating to RTPs that has given rise to mischief:

If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third party.

§ 33.004(e).

Under that provision, a person’s valid limitations defense can be wholly washed out if a defendant validly designates the person as an RTP and the claimant joins that RTP as a party defendant within 60 days of the designation.

The provision has been held to wash out limitations defenses that are otherwise iron-clad, even where the designation was made as part of a collusive settlement. *Flack v. Hanke*, \_\_\_ S.W.3d \_\_\_, 2010 WL 3993941 (Tex. App.—San Antonio Oct. 13, 2010, pet. filed)<sup>2</sup>; *Villarreal v. Wells Fargo Brokerage Services, LLC*, 315 S.W.3d 109 (Tex. App.—Houston [1st Dist.] March 11, 2010, no pet.). See also *Kimbrell v. Molinet*, 288 S.W.3d 464 (Tex. App.—San Antonio 2008, pet. granted) (holding that RTP provisions of Chapter 33 cannot wash out limitations provisions for health care claims under Chapter 74 and discussing manipulation that could result if limitations could be washed out in health care claims).

Just like the Supreme Court construed the settlement credit provisions of Chapter 33 in such a way as to forestall attempts to game the system and shield settlement proceeds from being applied as credits, the Court may yet construe the RTP limitations provision in such a way that it does not reward collusive settlements. A collu-

sive settlement that washes out otherwise-valid limitations defenses presents exactly the sort of collusion and subversion of the litigation process that the Courts have rejected in numerous contexts. See *State Farm Fire and Casualty Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996) (invalidating collusive settlement as between insured and insurer that was not the product of full adversarial proceeding); *Elbaor v. Smith*, 845 S.W.2d 240, 249-250 (Tex. 1992) (voiding “Mary Carter” agreements because they skew the adversarial process by collusion between settling parties); *Utts v. Short*, 81 S.W.3d 822, 829 (Tex. 2002) (holding that a non-settling defendant entitled to credit for benefits actually received by other parties from a settlement, even though settlement was structured such that proceeds not paid to a “claimant” as that term was defined in Chapter 33).

Where two parties to a lawsuit agree, under the guise of a settlement of claims between them, to set up a third party, the Court may well strike down the collusive agreement for both the protection of the third party and the integrity of the courts. As of this writing, however, the Court has not answered that question.

#### G. Conclusion

Chapter 33 is often difficult to apply, but it is omnipresent in complex commercial litigation, which frequently includes business torts that come within its scope. One practice tip to appellate lawyers who are called on to provide litigation support to the trial lawyers: try not to become your firm’s resident expert on Chapter 33. You will end up with fewer grey hairs that way.

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<sup>1</sup> As an aside, *Isaacs v. Bishop* may include the single best opening sentence of any case I have ever read: “Using their wildest imagination, John and Susan Isaacs and Charles Bishop could not have predicted the unfortunate events which began when Isaacs contracted to sell the Hallsville Dragway to Bishop.”

<sup>2</sup> The author is appellate counsel for some of the defendants in the *Flack v. Hanke* case.

# Navigating Through the Texas Secretary of State's World

By Marilyn Simpson

Contemporary wisdom says that in the current uncertain economic climate, smart businessmen "hunker down" and wait for conditions to improve. However, entrepreneurial wisdom says that now can be an opportune time to start a new business.

History certainly supports the entrepreneurial spirit and the urge to start new businesses – even during financially turbulent times. Previous economic downturns did not dissuade unknown innovators from founding companies that are still known today: Proctor & Gamble (Panic of 1837); General Electric (Panic of 1873); IBM, Johnson & Johnson and Alcoa (The Long Depression 1873–1896); General Motors (Panic of 1907). During the Great Depression (1929–1940) numerous successful businesses were launched: Colonel Sanders, Hewlett Packard, Motorola, Ryder Trucks, Texas Instruments, Revlon, Fortune Magazine, United Technologies Corp. and La-Z-Boy.

Regardless of whether a business launches in the prosperous or unstable part of a business cycle, one thing all businesses have in common is that they must file formation or registration certificates, amendments and other transactional documents in the jurisdictions where they form and transact business. This article explains how to work effectively with the Texas Secretary of State to file such documents and avoid making costly mistakes. The information presented here is not exhaustive but it does include discussions of the most common questions I have been asked in my 30 years of corporate paralegal experience, how to proactively prevent errors and suggestions for resolving issues. A fundamental knowledge of business entities is assumed. This article does not discuss how to use SOSDirect or UCC, trademark and certain other types of Secretary of State filings.

## NAMING THE ENTITY

Perhaps the most difficult task of forming a new business entity is finding a name that the Secretary of State will accept. The first step is to propose a name that complies with the naming rules.

**Acceptable Print Characters.** The basic rule is that the name must be composed of letters of the Roman alphabet, Arabic numerals, symbols capable of being reproduced on a standard English language keyboard, and other symbols

permitted by the Secretary of State's database and those posted on the Secretary of State's website. A partial list of acceptable characters for use in an entity name are:<sup>1</sup>

- a. Arabic numerals include: 0, 1, 2, 3, 4, 5, 6, 7, 8, 9
- c. Symbols include: !, ", \$, %, ', ( ), \*, ?, #, =, @, [ ], /, +, &, -.
- d. Subscript ( $H_2O$ ) and superscript ( $e = mc^2$ ) characters cannot be entered into the computer records so such characters will not appear above or below the other characters in the entity name.
- e. Use of either upper or lower case letters in the name is acceptable.
- f. Call the Secretary of State to determine the rules regarding use of other symbols such as: ~, ^, < >, etc.

**Entity Type Identifiers.** Entity names must contain a word or words that identify the entity type. However, entity type identifiers are not required to be located at the end of the entity name as the following examples of formerly active corporations demonstrate.

*Example 1* – Corporation Youngblood Enterprises located its entity type identifier as the first word of its name.

*Example 2* – Business Corporation Group located its entity type identifier in the middle of the name.

Other rules pertaining to entity type identifiers include:

- a. **Corporations.** The name of a domestic or foreign business corporation and a domestic or foreign professional corporation must contain the word "Company," "Corporation," "Incorporated," or "Limited" or an abbreviation of one of those words (e.g., Co. Corp., Ltd.). A domestic or foreign nonprofit corporation is not required to have any entity type identifier in its name.<sup>2</sup> Please note that the word "Limited," or its abbreviation, can be used as an entity type identifier for both a corporation and a limited partnership.
- b. **Limited Partnerships.** The name of a domestic or foreign limited partnership must contain the word "Limited" or the phrase "Limited Partnership" or an abbreviation thereof (e.g., Ltd., LP



or L.P.).<sup>3</sup> Please note that the word "Limited," or its abbreviation, can be used as an entity type identifier for both a corporation and a limited partnership.

When determining which entity type identifier to use for a limited partnership, the applicant should consider whether the limited partnership will be registered in a foreign jurisdiction. Abbreviations that are allowed in other jurisdictions vary by jurisdiction. While Texas allows abbreviations such as Ltd., LP and L.P., at least half of the jurisdictions in the United States do not allow the abbreviation "Ltd." to be used at all. At least six jurisdictions do not allow abbreviations at all. Two jurisdictions provide that the new entity name may not contain the name of a limited partner unless the name is also the name of a general partner or the business of the limited partnership was carried on under the name before the admission of the limited partner. The best practice is to research the naming requirements of each jurisdiction where the limited partnership will be registered and then form the entity in Texas using an entity type identifier that will be acceptable in such foreign jurisdiction. This will minimize the use of fictitious names.

- c. *Limited Liability Companies.* The name of a domestic or foreign limited liability company must contain the phrase "Limited Liability Company" or "Limited Company" or an abbreviation thereof (e.g., LLC, L.L.C., etc.). An exception exists for a limited liability company formed before September 1, 1993, when the entity name complied with the laws in effect on that date.<sup>4</sup>

**Check Name Availability.** Once the applicant has settled on a proposed name, the applicant should check the Secretary of State's website SOSDirect (Name Availability) to make an initial determination as to whether a conflict exists between the proposed name and the name of any existing entity or name reservation. However, SOSDirect will only show the entity names that may potentially conflict with the proposed name. While this information is very helpful because it allows the applicant to locate name issues at an early stage when the name can be revised, SOSDirect does not indicate whether the proposed name is available. To obtain a preliminary determination of name availability, the applicant should call the Secretary of State's Corporations Section at 512-463-5555 to ask a service representative for a name availability opinion. Such opinions are preliminary since the final determination as to whether the name will be accepted for filing is made only when the document is submitted for filing.<sup>5</sup> If the name does not appear to be available, it is likely that it violates one or more of the following rules.

**Name Similarity Rules.** Compared to other states, the Texas Secretary of State has extremely complicated entity naming requirements. The basic rules are that a domestic or foreign entity qualifying to do business in Texas may not register under a name that is the same as or deceptively similar to (1) the name of a domestic or foreign entity that is actively registered in Texas,

(2) a name that is reserved by another entity or (3) a name that is otherwise registered in Texas.<sup>6</sup>

- a. *Same Name.* A proposed name is considered to be the same as the name of a currently registered entity if a comparison of the names reveals no difference.<sup>7</sup> A proposed name that is the same as the name of an existing entity is not allowed to register under any circumstance.
- b. *Deceptively Similar Name.* A proposed name is considered to be deceptively similar if on comparison of the names, there is an apparent difference but the difference is so slight that the names are likely to be confused.<sup>8</sup> A name that is deemed to be deceptively similar to an entity name on file cannot be filed even if the existing entity grants a letter of consent.<sup>9</sup>

What makes two names deceptively similar?<sup>10</sup>

- 1. Rule: If the only difference in the names consists of different words used for the entity type identifier, the name will be rejected.  
*Example:* The name Sampson, Inc. is deceptively similar to Sampson Corporation.
- 2. Rule: If the only difference is the use of articles, prepositions or conjunctions, the name is not acceptable.  
*Example:* The Slaughter Co. is deceptively similar to Slaughter Co.
- 3. Rule: If the only difference is the use of periods, spaces or other spacing symbols that do not readily distinguish the name, the name will be rejected.  
*Example 1:* All of the following are deceptively similar: AGX Corp.; A G X Corp.; A.G.X. Corp.; AG\*X\* Corp.; A/G/X Corp.; AG-X Corp.  
*Example 2:* The following names are deceptively similar: Fair View Rest Home, Inc. and Fairview Rest Home, Inc.

However,

- Example 1 – Not Deceptive:* A and B Trucking, Inc. is not deceptively similar to AB Trucking, LLC.
- Example 2 – Not Deceptive:* Double X Tire Company is not deceptively similar to XX Tires, Inc. Also, Double X Tire Company and XX Tires, Inc. are not deceptively similar to 2X Tires, Incorporated.

- 4. Rule: Adding or deleting letters that do not adequately alter the name does not make the name acceptable. This includes the use of singular, plural or possessive words.  
*Example 1:* Exxon, Exxonn, Exxons or Exxon's are deceptively similar to Exxon.



*Example 2:* Centennial Alarm Systems Corp. is deceptively similar to Centennial Alarm System Company.

5. Rule: Names that are spelled differently or use alternative symbols but sound alike when spoken are deceptively similar since the names are phonetic equivalents and difficult to distinguish upon hearing.

*Example 1:* Chemtech Corporation is deceptively similar to Kemtek Incorporated.

*Example 2:* A and A Trucking, Inc. is deceptively similar to A & A Trucking Company.

*Example 3:* Four Winds, Inc. is deceptively similar to 4 Winds Corp. and IV Winds Ltd.

6. Rule: If the only difference in the names is a commonly used abbreviation or acronym for the same term, the name is not acceptable.

*Example 1:* Johnson Bros. Company is deceptively similar to Johnson Brothers Company.

*Example 2:* The Commons Northwest, Inc. is deceptively similar to The Commons NW, Company.

*Example 3:* Central Texas Hideaways, LLC is deceptively similar to CenTex Hideaways, Inc.

*Example 4:* DFW Carpet Cleaning, Inc. is deceptively similar to Dallas-Fort Worth Carpet Cleaning Company.

- c. *Names Similar But Acceptable With Letter of Consent.* A proposed entity name may be too similar to the name of an existing entity if the Secretary of State determines that, while the two names are not the same as or deceptively similar to one another, the names tend to be misleading as to the identity or affiliation of the new entity. Such names may be filed with the Secretary of State only when accompanied by a letter of consent signed by the existing entity.<sup>11</sup>

There is perhaps no more complicated part of the entity naming process than determining whether a name is too similar to be acceptable without a letter of consent. The Secretary of State has wide discretion in determining when a letter of consent is required. Some rules are found in the Texas Administrative Code but additional rules are known only to the Secretary of State and can surprise even the most experienced paralegal.

The following are guidelines for determining when the Secretary of State may require a letter of consent.<sup>12</sup>

1. **First Two Words Rule.** If the first two or more words of a proposed entity name are the same as, or deceptively similar to, the first two words of the name of an active entity and those first two words are not frequently used in combination, a letter of consent will be required.

*Example 1 – Consent Letter Needed:* Houston Service and Supply, Inc. would need a letter of consent from Houston Service, Inc.

*Example 2 – Consent Letter Needed:* Sunset Oil Co. would need a letter of consent from Sunset Oil and Gas, Inc.

*Example 3 – Consent Letter Needed:* First Texas Mortgage and Title Company would need a letter of consent from First Texas Mortgage Company.

*Example 4 – No Consent Letter Needed:* Hot Dog Publications, Inc. would not need a letter of consent from Hot Dog Enterprises Corp. The words "Hot Dog" are commonly used in combination so no letter of consent is necessary.

2. **Geographical Designation Rule:** A letter of consent will be required if the proposed name is the same as, or deceptively similar to, an entity name on file except for a geographical designation at the end of the name. The term geographical designation includes the recognized name or abbreviation of a city, county, state, country, lake or ocean, a region (e.g., Permian Basin, Metroplex, Central Texas, etc.), a recognized subdivision within the state, a continent, or a compass point of reference. Geographical designations do not include street names or non-specific location terms such as "International," "Gulf," or "Central."

*Example 1 – Consent Letter Needed:* Bull and Bear Club of San Antonio, Inc. would need a letter of consent from Bull and Bear Club, Inc.

*Example 2 – No Consent Letter Needed:* However, the proposed entity name San Antonio Bull and Bear Club, Inc. would not need a letter of consent from Bull and Bear Club, Inc.

*Example 3 – Consent Letter Needed:* Acme, Ltd. would need a letter of consent from Acme Southwest, Inc.

*Example 4 – No Consent Letter Needed:* Exhibits International, LLC would not need a letter of consent from Exhibits, Inc.

The basic idea behind this rule is that when a geographical designation (e.g., "of San Antonio") is located behind the root name of the entity (e.g., "Bull and Bear Club"), it is likely to make the public incorrectly think that the new entity is the existing entity's affiliate that is merely located in a different city. The letter of consent requirement allows the currently registered entity to determine whether it wants to permit this possible confusion. The reverse is also true. If the current entity includes a geographical designation behind its root name and the new entity wants to use only the root name, a letter of consent will be required.

3. One Word Rule. If the name of a current entity has only one significant word and the proposed entity name consists of the same word followed by some other significant word, the proposed entity name is not similar and no letter of consent is required.

*Example – No Consent Letter Needed:* If the existing entity name is United Company, no letter of consent would be required for filing any of the following entities – regardless of the entity type identifier added behind the name:

United Products	United International
United Supply	United Service
United Systems	United Sales

4. Certain Numerical Expressions. A letter of consent will be required if the proposed name is the same as, or deceptively similar to, an entity name on file if the only difference is a numerical expression that implies that the proposed entity is an affiliate of or in a series with the existing entity.

*Example – Consent Letter Needed:* A letter of consent from an existing entity named United Company would be required in order to file any of the following named entities – regardless of the entity type identifier added behind the name:

United No. 7    United Phase Two    United 2011

5. Inverted Words Rule. If the proposed entity name contains the same words as an existing entity name but the words are inverted, a letter of consent will be required.

*Example 1 – Consent Letter Needed:* Energy Ventures, Inc. would need a letter of consent from Ventures Energy Corp.

*Example 2 – Consent Letter Needed:* Austin Auto Parts, Inc. would need a letter of consent from Auto Parts of Austin, Incorporated.

6. Internet Locator Designation Rule. A letter of consent will be required if the proposed entity name is the same as, or deceptively similar to, that of an existing entity name except for an Internet locator designation at the end or at the beginning of the name.

*Example 1 – Consent Letter Needed:* BusinessWorks.com, Inc. would need a letter of consent from Business Works, L.P.

*Example 2 – Consent Letter Needed:* WWW.ARTBEAT Company would need a letter of consent from ArtBeats, LLC.

7. Same Root Words Rule. If the difference between the current entity name and the proposed name

consists only of words or contractions of words that are derived from the same root word and there is no other distinguishing word in the name, a letter of consent will be required.

*Example 1 – Consent Letter Needed:* Magic Show, Inc. would need a letter of consent from Magical Show, Ltd.

*Example 2 – Consent Letter Needed:* Management Education Incorporated would need a letter of consent from Management.edu L.P.

*Example 3 – No Consent Letter Needed:* Acme Electrical Products Incorporated would not need a letter of consent from Acme Electric Company.

8. Use of the Word "Companies." If the difference in the names consists only of the use of the term "Companies," a letter of consent will be required.

*Example – Consent Letter Needed:* Satterwhite Companies, Ltd. would need a letter of consent from Satterwhite Corporation.

- d. *Alphabet Names.* When a name consists of initials only or letters of the alphabet, the combination of initials or letters will be considered as one word for the purpose of applying the name availability rules.<sup>13</sup>

*Example 1 – Different "words":* The following are different "words" and are not considered to be similar:

A & A	ABA
AA	AAB

*Example 2 – Not Similar:* A & B Supply, LLC is not considered similar when compared to A & B, Inc.

*Example 3 – Similar:* A + A Car Rental, Inc. is deceptively similar to A & A Car Rental Corp.

*Example 4 – Not Similar:* A and B Trucking, Inc. is not similar when compared to AB Trucking, LLC.

- e. *Surname in Entity Name.* A surname is considered to be a "word." The use of surnames is very common in entity names however, care should be given to the placement of the surname and other words or letters used in connection with the surname. The following examples demonstrate how to use and how not to use a surname in an entity name.<sup>14</sup>

1. *Surname Plus Initials.* When an existing entity and a proposed entity name both have the same surname as their second "word" but the proposed entity name has a different given (or first) name or initials as its first "word," the proposed entity name will not be considered similar.

*Example 1 – Not Similar:* E.G. Williams Electric Company is not similar when compared to Williams Electric Company.

*Example 2 – Not Similar:* Jim Smith, Inc. is not similar when compared to Smith, Inc.

*Example 3 – Not Similar:* Ralph A. Johnson, Inc. is not similar when compared to Ralph Johnson, Inc.

2. Surname Plus Other Words. The use of a surname as part of a proposed entity name is not similar to an existing entity if there is some other sufficient basis for distinction between the two entity names.

*Example 1 – Not Similar:* Davis & Davis, PC is not similar when compared to Davis & Davis Publication, Inc.

*Example 2 – Similar:* Brown Manufacturing Company is deceptively similar to Brown's Manufacturing, Ltd.

*Example 3 – Not Similar:* John Brown Manufacturing Company is not similar when compared to John Brown Sales, Inc.

*Example 4 – Not Similar:* Flores Family Company is not similar when compared to Flores Family Foundation.

*Example 5 – Consent Letter Needed:* Parson & Parson Company would need a letter of consent from Parson & Parson – Dallas, Inc.

- f. *Foreign Words Not Translated.* The following provides guidelines for obtaining approval for entity names with foreign words that are not translated into English.<sup>15</sup>

1. No Translation for Determining Name Availability. If a proposed entity name consists in whole or in part of words in a foreign language that uses the Roman alphabet, such words will not be translated for purposes of determining the availability of the name.

*Example 1 – Not Similar:* Tejas Enterprises, Inc. is not similar when compared to Texas Enterprises, Inc.

*Example 2 – Not Similar:* Casa Blanca Productions, Inc. is not similar when compared to White House Productions, Inc.

2. Particles of Speech. Where the only difference in the names being compared is the use or omission of different particles of speech expressed in a foreign language, the names will be considered deceptively similar.

*Example 1 – Similar:* Las Brisas Corp. is deceptively similar when compared to Brisas, Inc.

*Example 2 – Similar:* La Boutique, Inc. is deceptively similar when compared to Le Boutique Co.

- g. *Professional Entities.* Names of professional entities, such as professional corporations, professional limited liability companies and professional associations, are governed both by the rules followed by the Secretary of State and by the

laws and ethics regulating the practice of the professional service rendered by the professional entity.

1. Names Distinguishable. Names of professional entities will not be considered similar if there is sufficient basis for distinguishing the proposed name from the name of an existing professional entity.<sup>16</sup>

*Example – Not Similar:* Oncology Associates of Houston, P.L.L.C. is not similar to Oncology Associates of Dallas, P.A.

2. Licensed Professional Requirements. The use of certain words in a name may require that a licensed professional be associated with the entity.

- i. Entities using the words "Engineer," "Engineering," "Engineering Services," "Professional Engineers," "Licensed Engineer," "Engineered" or similar words in their name should be engaged in the practice of engineering and its engineering services should be performed by an individual licensed by the Texas Board of Professional Engineers.<sup>17</sup>

- ii. Entities using the words "Architect," "Architecture," "Landscape Architect," "Landscape Architectural," "Landscape Architecture" or similar words in their name should determine from the Texas Board of Architectural Examiners whether use of such word in the name complies with statutes applicable to architects.<sup>18</sup>

- iii. An entity engaged in professional surveying should determine from the Texas Board of Professional Land Surveyors whether its name complies with statutes applicable to surveyors. As well, entities may not offer professional surveying services unless the entity is registered with the Board and a registered professional land surveyor is employed full-time.<sup>19</sup>

- h. *Names Requiring Official Letter of No Objection.* Entities are prohibited from using certain words in their names without an official letter of no objection from the related governmental agency.

1. Banks. Domestic or foreign entity names are prohibited from containing certain words related to banks and banking.<sup>20</sup> Examples of words used in entity names that require a letter of no objection are "Bank," "Banc," "Bank and Trust" and "Trust."

When an entity wishes to use a prohibited name, the Texas Banking Commissioner has the authority to issue a letter of no objection allowing the use of

certain names or phonetically similar derivatives. Applicants desiring to obtain a letter of no objection must submit a letter to the Banking Commissioner addressing the following:<sup>21</sup>

- i. The exact proposed name and the primary business activity of the entity in Texas.
- ii. The reason why the use of the word "bank," "banc," etc. is important to use in the name and why the word is not deceptive to the public.
- iii. Whether the entity must obtain any license to do business in Texas and, if so, which license.
- iv. A commitment to the Banking Commissioner from the management of the entity, or an agent authorized to bind the entity, that the entity will not advertise or hold itself out to the public that it is a state or national bank or trust company.
- v. If applicable, a full explanation of any affiliation with a bank, bank holding company, trust company or other financial institution.
- vi. If applicable, evidence of any qualification to do business in other states.
- vii. If the entity owns or operates a website that contains the words "bank," "banc," etc., management of the entity, or an agent authorized to bind the entity, must submit a comment that the entity will prominently display the following disclaimer on its homepage: "(Name of entity) is not a chartered bank or trust company, or depository institution. It is not authorized to accept deposits or trust accounts and is not licensed or regulated by any state or federal banking authority."
- viii. A \$100 filing fee must accompany the request. Send the request to:  
Corporate Activities Division  
Texas Department of Banking  
2601 North Lamar Boulevard  
Austin, TX 78705-4294

If the Banking Commissioner approves the request, a letter of no objection will be issued and this letter must be attached to the Certificate of Formation or foreign registration when it is filed with the Secretary of State.

2. School or Education Related Names. The Texas Education Code prohibits the use of the terms "College," "University," "Seminary," "School of Medicine," "Medical School," "Health Science Center," "School of Law," "Law School" or "Law Center" in an entity name.<sup>22</sup> If a proposed name includes any of these terms, or terms of similar meaning, whether in English or another language, the entity must obtain the prior approval of the

Texas Higher Education Coordinating Board (the "THECB"). For authorization to use any of these terms in an entity name, a request letter should be submitted to the THECB stating the following:<sup>23</sup>

- i. Proposed name of the entity.
- ii. A brief statement of the exact business of the entity. Do not use the standard language found in the Certificate of Formation.
- iii. The following disclaimer, providing it is true: "The entity is not now nor will be a private institution of higher education or an educational or training establishment."

The request letter must contain the address and telephone number of the entity or person requesting the authorization (business letterhead is acceptable). The letter should be mailed or faxed to:

Academic Affairs and Research Division  
Texas Higher Education Coordinating Board  
P.O. Box 12788  
Austin, TX 78711  
512-427-6168 (fax)

A copy of the approval letter from the THECB should be submitted along with the Certificate of Formation or foreign registration to the Secretary of State.

3. Implication of Veterans Organization. Words like "Veteran," "Legion," "Foreign," "Spanish," "Disabled," "War," or "World War" are not allowed when they imply that the entity is a Veteran's organization. Before such names will be accepted by the Secretary of State, the applicant should obtain written approval from a Congressionally recognized Veteran's organization.<sup>24</sup>

- i. *False Implication of Purpose.* The entity name may not imply a purpose that would be unlawful for the entity to conduct.<sup>25</sup>

Insurance Company. The words "Insurance" or "Surety" must be accompanied by other words that remove the implication that the entity's purpose is to be an insurer. Acceptable names may include a phrase such as "Insurance Agency," "Insurance Agent," "Surety Agency" or "Surety Agent."

*Example 1* – John Hancock Insurance Company or A-1 Surety Company would not be filed.

*Example 2* – John Hancock Insurance Agency, Inc. or A-1 Surety Agents Company would be filed.



**Letter of Consent From Existing Entity.** Oral consents to use a name are not accepted. The letter of consent must not state conditions; it must give unequivocal consent.<sup>26</sup> The Secretary of State's Form 509 (Consent to Use of Similar Name) may be used by an existing entity to grant consent to use a name. However, the Secretary of State does not require that this specific form be used so long as the required information is listed on the form that is submitted.

a. *Multiple Name Conflicts.* If a proposed entity name conflicts with more than one entity name, the Secretary of State will require that a letter of consent be submitted from the entity with the longest continuous use of the entity name as determined by the records of the Secretary of State.<sup>27</sup>

b. **EXCEPTION TO LETTER OF CONSENT RULE.** When two or more related entities with similar names that would usually require a letter of consent are submitted simultaneously, consent to the use of the name is implied and no letter of consent is required.<sup>28</sup>

*Example – No Consent Letter Needed:* ABC Ventures, Ltd. and its general partner ABC Ventures GP, LLC.

A letter from the applicant to the Secretary of State explaining the relationship of the entities with similar names should be sufficient to avoid rejection.

**Capital Letters Used for Name.** When an applicant completes the entity name portion of the Certificate of Formation using all capital letters, that entity's official name is spelled with all capital letters and the entity should always use capital letters whenever its name is printed. Therefore, unless an applicant intends to use all capital letters for the entity name, the entity name portion of the Certificate of Formation should be completed using capital and lower case letters for the entity name.<sup>29</sup>

## HOW TO OBTAIN APPROVAL OF A REJECTED NAME

If a proposed name has been rejected by the Corporations Section or if a letter of consent is required but such letter cannot be obtained, there may still be a way to obtain approval of a proposed name. In certain cases, the following solutions have been effective.

**Add a Word(s).** Perhaps the easiest way to make a proposed name acceptable or no longer subject to the letter of consent requirement is to change the name by adding a word or words as the first or second word. Once a new proposed name is chosen, the applicant should re-check name availability for the new name to make sure that it is available.

a. *Common Word Added.* Add a common word as the first word, second word or anywhere it is needed to change the name enough to make it comply with the naming rules. Examples of over 160 common words that may be added to a rejected name are listed at the end of this article.

b. *Created Word Added.* Make up a new word that is added to the rejected name as the first or second word or replaces one of the problem words in the name. Examples of created words are: "TekSys," "WebCo," "TexNet," "AppQuest," "Anchap," "CompuQuest," and "AppTek."

c. *Geographical Designation.* If the first two words of the proposed name conflict with the name of an existing entity, perhaps the addition of a geographical designation as the *first word* of the new entity name will make the proposed name acceptable. When determining which geographical designation to use, consider that locations with two words – like San Antonio – are considered as one word since they are always used together. Do not add the geographical designation word at the end of the name unless the geographical location identifier poses no problems with the existing entity name. Geographical locations added to the end of the name may trigger the requirement of a letter of consent from an entity with a similar name. Remember that geographical designations do not include street names or non-specific location terms such as "International," "Gulf" or "Central."

## Appeal the Name Rejection or Consent Letter

**Requirement.** If the applicant believes that the Secretary of State's Corporations Section made a mistake in ruling that the proposed name is not acceptable or disagrees that a letter of consent should be required, the decision can be appealed to the Secretary of State's attorneys. These attorneys provide the final decision as to whether a name is acceptable or if other adjustments or filings are required to make it acceptable.

Before appealing a rejection or additional filing requirement, the applicant should prepare convincing written arguments for the acceptance of the proposed name and collect adequate evidence to support those arguments. Be sure to consult the section below "Matters Not Considered in Approving a Name" to ensure that none of the arguments include irrelevant matters. While each case will be different, the following are some examples of arguments and evidence that may prove effective in obtaining the approval of the Secretary of State's attorney.

a. *Name Similarity Rules.* Be sure to check to make sure that the Secretary of State has not rejected the name when the previously discussed name similarity rules indicate that the name should have been approved.

b. *First Two Words Should Be Treated As One Word.*

**Argument:** the first two words in the entity name have acquired a singular meaning and they are commonly used together. Once the first two words are considered to be one word, the names being compared are not similar so the proposed name should be approved. While the example given by the Texas Administrative Code is the two words "Hot Dog," there are many other words and geographical locations that should be treated as one word. Examples: "White House," "El Paso," "Real Estate," "Big Red," "Round Top," "Tip Top," "Avant Garde" and "High Tide."

c. *The First Words Are a Surname.* **Argument:** The first words are a surname so the surname rules apply. This may be a useful argument in certain circumstances, especially when the first words are an uncommon foreign surname that may not be known to the examiners.

d. *There Is No Confusion of the Public.* **Argument:** Even though the first two words of the existing and proposed entity names are similar, they are not exactly the same and both names contain other words that are quite different so the public will not be confused by the proposed name. If possible, this argument should be used in combination with another argument.

d. *Obtaining Evidence.* It may be helpful to search SOSDirect to see if the Secretary of State previously approved the same or similar first two words of a name. If there are a large number of similar names that the Secretary of State approved, this evidence can support several arguments, such as the argument that there will be no public confusion. This evidence has been helpful in certain previous appeals. However, the Secretary of State may simply admit that made a mistake in approving the other names and argue that it does not consider such mistake to constitute a precedence. Google is a good universal research source to locate evidence, especially to prove that the first two words should be considered as one word. Wikipedia often provides useful information about geographical locations, surnames and for words and phrases that are not commonly known. Books like dictionaries, thesaurus and telephone directories can also be useful. Be sure to copy and/or print the evidence and note the source so that such information can be included in the argument.

e. *Presenting the Argument and Evidence.* The best way to request reconsideration of a Corporation Section determination is to send the request to a Secretary of State attorney by e-mail (corphelp@sos.state.tx.us). The attorneys are generally quick to respond to e-mail requests. It is not recommended that the matter be discussed over the phone, especially when the argument must be supported by printed evidence. Be sure to provide as many arguments as possible and attach the supporting evidence to the e-mail.

Be clear and concise with the arguments and state the relief desired. Provide the source for all evidence and citations for legal arguments. If the attorney agrees that the proposed name should be approved, he/she will respond by e-mail and instruct the applicant to include a copy of the attorney's opinion e-mail with the documents that are submitted so that the Secretary of State's examiners will know that the name has been approved.

## MATTERS NOT CONSIDERED IN APPROVING A NAME

The Secretary of State only considers the proposed name, the current names of active (not revoked, cancelled, merged, dissolved, withdrawn, terminated, or forfeited) entities, name reservation and name registrations for entities on file. Examples of matters not considered are:<sup>30</sup>

- a. whether the purpose of a proposed entity is the same as or similar to the purpose of an existing entity;
- b. whether the entities will be carrying out activities in the same or nearby locations;
- c. whether an analogous situation has previously been acted upon by the Secretary of State;
- d. whether an "opinion" as opposed to a final determination has previously been expressed by an employee of the Secretary of State in response to an oral or written request;
- e. whether an existing entity is actively engaged in business, or has a telephone listing, or a location of a place of business;
- f. whether an existing entity is about to change its name, or be terminated, or merge out of existence;
- g. whether a response to an inquiry can be obtained from an existing entity;
- h. whether the applicant for the new entity has ordered stationery, opened a bank account, signed a contract, or otherwise altered his position in the expectation, hope or belief that the proposed name would be available;
- i. whether the applicant is claiming a prior or superior right to use the name apart from what might be shown on inspection of the names of active entities on file in the records of the Secretary of State;
- j. whether infringement or unfair trade practice has occurred or might occur; or
- k. whether the existing entity has filed for or intends to file for bankruptcy protection.

## FOREIGN OR OUT-OF-STATE ENTITIES

Entities formed or organized in jurisdictions other than Texas, including non-U.S. entities, that transact business in Texas must file an Application for Registration with the Secretary of State.<sup>31</sup> The term "transact business" is hard to define and has been the subject of much controversy.

**When is an Entity "Transacting Business" in Texas?** Whether an entity is "transacting business" in Texas requires a fact based

analysis and each situation must be considered separately. General rules are hard to find and, when asked, the Secretary of State is reluctant to issue an opinion as to whether a certain activity constitutes "transacting business." However, the Secretary of State sends enforcement letters to entities it believes are transacting business in Texas in violation of state law. Heavy fines and penalties may be imposed by the Secretary of State for non-compliance. Therefore it is important to understand this issue.

a. *Statutory Provisions.* Texas statutes do not define the term "transacting business" but instead, a non-exhaustive list of activities that are not considered transacting business is provided.<sup>32</sup>

1. Maintaining or defending an action or suit or an administrative or arbitration proceeding or effecting certain settlements.
2. Holding a meeting of the entity's managerial officials, owners, or members or carrying on another activity concerning the entity's internal affairs.
3. Maintaining a bank account.
4. Maintaining an office or agency for (a) transferring, exchanging or registering securities the entity issues or (b) appointing or maintaining a trustee or depository related to the entity's securities.
5. Voting the interest of an entity the foreign entity has acquired.
6. Effecting a sale through an independent contractor.
7. Creating, as a borrower or lender, or acquiring indebtedness or a mortgage or other security interest in real or personal property.
8. Securing or collecting a debt due the entity or enforcing a right in property that secures a debt due the entity.
9. Transacting business in interstate commerce.
10. Conducting an isolated transaction that (a) is completed within 30 days and (b) is not in the course of a number of repeated, similar transactions.
11. In a case that does not involve an activity that would constitute the transaction of business in this state if the activity were one of a foreign entity acting in its own right (a) exercising a power of executor or administrator of the estate of a nonresident decedent under ancillary letters issued by a court of this state or (b) exercising a power of a trustee under the will of a nonresident decedent, or under a trust created by one or more nonresidents of this state, or by one or more foreign entities.
12. Certain actions regarding a debt secured by a mortgage or lien on real or personal property in this state (see the Texas Business Organizations Code for details).
13. Investing in or acquiring, in a transaction outside of this state, a royalty or other non-operating mineral interest.

14. Executing a division order, contract of sale, or other instrument incidental to ownership of a non-operating mineral interest.
15. Owning, without more, real or personal property in this state.

b. *Attorney General Opinions.*

1. General Partner of Limited Partnership. Any corporation that is acting as a general partner of a Texas partnership transacting business in Texas is itself transacting in the state and, thus, it is required to obtain a Certificate of Authority from the Secretary of State. Citing several court rulings, the Attorney General stated that if "the partnership business is carried on in Texas, each partner is also transacting business in this state, because every partner is an agent of the partnership for the purpose of partnership business, and every partner has an equal right in the management and conduct of the business."<sup>33</sup> This opinion has since been expanded to include all types of entities serving as general partners of limited partnerships.
2. Limited Partners. A foreign corporation which has entered into a Texas limited partnership as a limited partner must take out a Certificate of Authority to transact business in this State if the actions of the partnership or of the foreign corporation constitute the transacting of business in the State under (state law), if done directly or alone by the foreign corporation.<sup>34</sup>
3. Bidding on State Agency Contracts. Bidding on a contract is not included in the meaning of "transacting business" and thus a state agency may not restrict bidding on contracts to persons licensed to do business in Texas.<sup>35</sup>

c. *Texas Secretary of State.* In 2009, the Texas Secretary of State requested an opinion from the Attorney General to clarify certain circumstances when, as a matter of law, a foreign entity is transacting business in Texas. The Secretary of State said that in order to facilitate compliance, its office notifies foreign entities that they are not registered to do business in the State of Texas as required under Chapter 9 of the Texas Business Organization Code. In response to these notices, some foreign entities claim that they were not transacting business in Texas even though they maintained some presence in Texas. Therefore, the Secretary of State requested clarification of some common issues.<sup>36</sup>

While the Attorney General responded that no general opinion, as a matter of law, could be given because each case rests on the facts and circumstances unique to each

individual situation,<sup>37</sup> the request provides clues as to when the Secretary of State believes that a foreign entity is transacting business in Texas.

Careful attention should be paid to the following issues raised by the Secretary of State and the arguments made to the Attorney General.<sup>38</sup>

1. **Principal Office in Texas.** Is a foreign business entity, which maintains no employees in Texas and performs the majority of its services outside of Texas, considered to be transacting business in Texas for purposes of registering with the Secretary of State's office when its principal office or principal place of business is located in Texas?

**Argument:** The entity's designation of Texas as the location of its principal office or principal place of business is arguably an admission that: (1) the entity directs its day to day activities from an office located in Texas; (2) the entity's governing body is making day to day management decisions from Texas, or (3) the location of the entity's physical operations is in Texas. Federal courts, for purposes of diversity jurisdiction, apply three tests to determine the principal office or principal place of business of an entity: "nerve center" test; "center of corporate activity" test; or "locus of operation" test. If the entity designates Texas as its principal office or principal place of business because Texas is the nerve center, the center of its corporate activity or the location of its physical operations, it suggests that the entity is transacting business in Texas and should register with the Secretary of State. However, entities argue that irrespective of the designation of Texas as the principal office or principal place of business, the entity is not required to register unless condition (3) is met and Texas is the location of its physical operations.

2. **Directors/Officers/Managers Located in Texas.** Is a foreign business entity, which maintains no employees in Texas and performs most of its services outside of Texas, considered to be transacting business in Texas for purposes of registering with the Secretary of State's office when one or more of its directors/officers/managers is located in Texas?

**Argument:** The location of officers, directors or other governing persons in Texas raises the inference that Texas is the nerve center where business decisions are made so the entity should register with the Secretary's office even if the physical operations of the business are spread across numerous states.

3. **Holding Company.** Is a foreign business entity that is

a holding company transacting business for purposes of registering with the Secretary of State when its principal place of business is located in Texas and the entity manages its subsidiaries from inside Texas?

**Argument:** It would appear that the office location of a holding company would be the nerve center for the holding company from which it directs the ownership, management, and support of its subsidiaries. Thus, if the location of the holding company is in Texas, the holding company would arguably be transacting business in Texas even when the physical operations of the subsidiaries managed by the holding company occur outside the state.

- d. **Case Law.** Texas courts have provided some guidance in determining when a foreign entity must register with the Texas Secretary of State. These cases generally involve issues of whether an entity may sue in Texas courts without registering with the Secretary of State, whether an entity is subject to jurisdiction in Texas under the long-arm statute, whether specific actions constitute a transaction in interstate commerce (not requiring registration in Texas) or intrastate commerce (requiring registration), whether a specific transaction is an "isolated transaction" that does not require registration in Texas, and the like. A review of these cases is outside the scope of this article, however applicants with "gray area" situations may wish to consult applicable court rulings.
- e. **Texas Comptroller of Public Accounts.** Since statutory law, Attorney General opinions, the Secretary of State's enforcement action arguments and court rulings are helpful only to a certain point, some applicants look to the Comptroller's requirements for the payment of Texas franchise tax as an indication of when registration in Texas is required. Unfortunately, this approach may not be valid since the level of foreign entity activity in Texas that triggers the payment of franchise taxes is lower than the level of activity that requires registration with the Secretary of State. In other words, while a foreign entity may not be "transacting business" under Texas law, it may still be liable to the state for franchise taxes for "doing business" in Texas.<sup>39</sup>

**Registration of a Foreign Entity – Name Conflicts.** It is not uncommon for the official name under which a foreign entity is registered in its domestic jurisdiction to conflict with the name of an existing Texas entity. Since the foreign entity usually does not wish to change its official name in its home state, the entity must assume a name that complies with the entity naming rules in Texas. Such a fictitious name is also known as a "forced d/b/a." When choosing a fictitious name, consult the rules for naming Texas entities. By registering in Texas under a fictitious name, the foreign



entity is stating that it will transact business in Texas under that name.<sup>40</sup> Since the fictitious name used in Texas is also an assumed name under Texas law, the entity must file the necessary assumed name certificates with the Secretary of State and the appropriate county or counties.

**Failure to Register.** If a foreign entity transacts business in Texas without registering, there are several types of penalties that can be imposed.

a. *Penalties Affecting Business Transactions or Court Proceedings.*<sup>41</sup>

1. **Attorney General.** On application by the Attorney General, a court may enjoin a foreign entity or the entity's agent from transacting business in Texas if the entity is not registered in Texas or the entity's registration is obtained on the basis of a false or misleading representation.
2. **Court Proceedings.** The foreign entity that is transacting business in Texas without registering cannot maintain an action, suit or proceeding in a Texas court until it registers.

b. *Civil Penalties.* The foreign entity has ninety (90) days to register to do business in Texas without incurring civil penalties. The following penalties apply for failure to register within the ninety day period.<sup>42</sup>

1. **Regular Penalty.** The foreign entity is subject to a civil penalty equal to all fees and taxes that would have been imposed if the entity had registered when it was first required to do so.
2. **Late Filing Fee.** If the foreign entity has transacted business in Texas for more than ninety days, the Secretary of State will impose a late fee for an Application for Registration equal to the registration fee for each calendar year, or part of a calendar year, of delinquency. The period begins on the date that the foreign entity begins transacting business in Texas and ends on the date the entity files for registration.
3. **How to Calculate Late Filing Fees.** The Secretary of State's website has a calculator to assist in determining late filing fees.<sup>43</sup>  
*Example* – If a foreign for-profit corporation was transacting business in Texas from June 1, 2007 until it registered on December 1, 2010, it would owe its regular registration fee of \$750 plus \$3,000 in late filing fees for a total registration fee of \$3,750.
4. **Limitation on Late Fees.**<sup>44</sup> For those foreign entities that have transacted business in Texas for many years

without registering, there may be a way to limit late fees. Under certain circumstances, the Secretary of State will limit the assessment of late fees to five years. However, it should be noted that these capped late fees are in addition to the standard filing fees for the Application for Registration filed by the foreign entity. To qualify for this cap on penalties, the entity must submit (i) a valid Certificate of Account Status evidencing good standing with the Comptroller and (ii) certify to the truth of the following statements:

- The entity has satisfied all of its franchise, sales and other tax obligations with the Texas Comptroller of Public Accounts.
- The entity does not owe any other taxes, fees or assessments that are administered by any other Texas state agency.
- The entity has not received a letter from the Secretary of State regarding the need to submit an application for registration, or if it has received such a letter, it has responded to the Secretary of State within 45 days.

A form that may be filed with the Application for Registration to request that the Secretary of State limit collection of late filing fees is attached at the end of this article. This form is not on the Secretary of State's website.

Approval of requests to limit collection of late filing fees is not automatic and such requests are reviewed by an attorney in the Secretary of State's office who makes the final determination. Matters considered in connection with the request to cap or reduce late fees include:<sup>45</sup>

- Whether additional time beyond the grace-period granted was needed in order to correct or address the reasons for rejection or to obtain the execution of an application for registration;
- Whether additional time was needed due to the occurrence of a natural disaster affecting the entity's ability to timely file or re-submit the application for registration;
- Whether a filing error was made (e.g., the entity formed a domestic entity rather than registering the foreign filing entity) at the time the entity began to transact business in Texas; or
- Whether other extenuating circumstances exist that warrant a reduction to the late fees imposed.

## REGISTERED AGENTS

All entities formed or registered in Texas, with few exceptions, are required to maintain an active registered agent. Registered agents

must be either an individual resident of Texas or a domestic or foreign entity that is registered to do business in Texas. An entity cannot act as its own registered agent but officers, directors, employees and other individuals affiliated with the entity may serve as registered agents for the entity. While the registered office address does not need to be the business office address of the entity, it must be the business office address of the registered agent. The address of a commercial business that provides "private mail box" services or telephone answering services is not sufficient as a registered office address, unless the commercial enterprise is the business of the designated registered agent. As well, post office box addresses are not sufficient since the registered office address must be located at a street address where process may be personally served on the registered agent during normal business hours.<sup>46</sup>

**Consent to Serve as Registered Agent.** Effective January 1, 2010, when a filing is made by an organizer or managerial official involving the designation or appointment of a person or entity as registered agent, such filing is an affirmation by such individual that the person or entity named as registered agent has consented to serve in that capacity.<sup>47</sup> The Secretary of State does not require that a written consent to serve as registered agent be submitted with such filings but it is advisable that consents that are not filed with the Secretary be maintained with the books and records of the entity.<sup>48</sup> The Secretary of State promulgated Form 401-A (Acceptance of Appointment and Consent to Serve as Registered Agent) that may be used by a registered agent to consent to serve.

**Change of Registered Agent and/or Office.** An entity may change its registered agent and/or the business office address of the registered agent by filing a change of registered agent statement.<sup>49</sup> A limited partnership may also change its registered agent by filing a supplemental Periodic Report.<sup>50</sup> If the registered agent has changed his/her name (e.g., by marriage) and/or the registered agent's business office address has changed, the registered agent may file a statement of change under the registered agent's signature. The registered agent must recite in its filing that it gave the represented entity at least 10 days notice of the change.<sup>51</sup>

## ASSUMED NAMES

**When Filing Is Required.** While the Texas Business Organizations Code authorizes entities transacting business in Texas to use an assumed name,<sup>52</sup> the rules pertaining to assumed name filings are found in the Texas Business & Commerce Code.<sup>53</sup> A domestic or foreign entity is required to file an assumed name certificate if it regularly conducts business or renders services in Texas under an assumed name. A foreign entity is also required to file such a certificate if it is required by law to use a fictitious name in Texas. This means that an entity that conducts business under any name other than the name listed on its formation or registration document must file an assumed name certificate. Such certificate must be filed even if the assumed name is only slightly different from the official name. For example, if ABC Business Solutions,

LLC uses ABC Business Solutions to conduct its business, the company must file an assumed name certificate for ABC Business Solutions. The Secretary of State does not check the assumed name to ensure that it does not conflict with the name of an existing entity or other active assumed name so filing assumed name certificates is only an administrative process.

**Where to File.** The following information does not apply to unincorporated businesses. Entities that have formed or registered with the Secretary of State and conduct business under an assumed name should file assumed name certificates as follows.<sup>54</sup>

- a. *Secretary of State.* Domestic and foreign entities are required to file the assumed name certificate with the Secretary of State.
- b. *County Clerk.* Domestic and foreign entities who are required to file an assumed name certificate with the Secretary of State are also required to file a certificate as follows:
  1. In the office of the county clerk of the county in which the principal office is located, if the principal office is located in Texas, or
  2. In the office of the county clerk of the county in which the registered office is located, if the principal office is not located in Texas.

**Forms.** The Secretary of State promulgated Form 503 (Assumed Name Certificate) that may be used for filing assumed name certificates; however, use of this form is not mandatory. Before filing an assumed name in a county, be sure to check with the appropriate county clerk to obtain the proper form to use for that county since local filing requirements differ. For example, Williamson County requires that the applicant state on the certificate that it conducted a search of the indexes of the Assumed Names of Williamson County and did not find that the assumed name is currently in use. Be careful to obtain the form for an *incorporated* business since some county clerks (e.g., Travis County) only have forms in their office or on their website for unincorporated businesses. This is not the correct form to use for recording assumed name certificates for an entity that is registered with the Secretary of State. If the county clerk does not have a form for an incorporated business, ask if the form used for filing with the Secretary of State will be acceptable. Remember that the form filed for recording with a county clerk also must include a notarized acknowledgment.

**Duration.** Assumed name certificates are effective for the term stated on the document – not to exceed 10 years from the date the certificate is filed. The certificate may be renewed within the six months preceding the certificate's expiration date.<sup>55</sup> Please note that if an entity is terminated either involuntarily by the Secretary of State or voluntarily by the entity, the Secretary of State often cancels all assumed name certificates on file for the inactive entity and does not automatically revive the certificates even if the entity reinstates. Therefore it is an important part of reinstatement to check the status of all assumed name certificates since a new assumed name certificate will need to be filed if the old certificate was cancelled following termination of the entity.

**New Certificate Filing Requirement.**<sup>56</sup> A new assumed name certificate must be filed not later than 60 days after an event occurs that causes the information in the certificate to become materially misleading. The following events are considered to make the assumed name certificate materially misleading.

- a. a change in the name, identity, entity, form of business, or location of a registrant; or
- b. for a partnership, the admittance of a new partner or the end of a general partner's association with the partnership.

## TERMINATION AND REINSTATEMENT

**Failure to File Franchise Tax Reports and/or Pay Fees.** When the Secretary of State receives certification from the Comptroller that an entity has failed to file franchise tax reports and/or pay franchise tax fees, the Secretary of State may involuntarily forfeit the entity's charter, certificate or registration.<sup>57</sup>

**Failure to Name or Maintain a Registered Agent.** The Secretary of State may involuntarily terminate an entity's existence if the entity fails to maintain a registered agent.<sup>58</sup>

**Failure to File Periodic Report.** The Secretary of State may involuntarily terminate an entity's existence if the entity fails to file a report that is required by law.<sup>59</sup>

**Voluntary Termination.** A domestic entity may voluntarily terminate its existence.<sup>60</sup>

### Reinstatement Time Periods.

- a. *Tax Forfeiture.* If an entity is terminated by the Secretary of State under the Tax Code for failure to file a franchise tax report and/or pay franchise taxes, it may reinstate at any time provided it complies with the franchise tax report

filing and payment requirements and files the necessary documents with the Secretary of State.<sup>61</sup>

- b. *Non-Tax Involuntary Forfeiture.* If an entity is involuntarily terminated by the Secretary of State for a non-tax reason, it may reinstate at anytime. However a domestic entity will only be considered to have continued in existence without interruption if it is reinstated before the third anniversary of the date of involuntary termination. The reinstatement shall have no effect on any issue of personal liability of the governing persons during the period between termination and reinstatement.<sup>62</sup>

If a foreign entity is involuntarily terminated by the Secretary of State it must complete the requirements for reinstatement not later than the third anniversary of the date the revocation took effect.<sup>63</sup>

- c. *Voluntary Termination.* If a domestic entity voluntarily terminates its existence, it has 36 months to reinstate.<sup>64</sup> A voluntarily terminated entity may only reinstate under certain circumstances.<sup>65</sup>

**How to Reinstate.** The reinstatement process depends upon the reason for the termination since forms and requirements differ.

- a. *Non-Tax Forfeiture, Excluding Failure to File a Periodic Report.* The terminated entity should first determine if the name the entity was registered under prior to its termination is still available. If not, the entity must file a name change amendment to its formation or registration document along with the reinstatement. To reinstate, the entity must file a Certificate of Reinstatement together with a tax clearance letter from the Comptroller and pay any applicable fees.<sup>66</sup> The Secretary of State has promulgated Form 811 (Certificate of Reinstatement) that may be used for this purpose.
- b. *Failure to File a Periodic Report.* Limited partnerships and nonprofit corporations file Periodic Reports. To reinstate after termination for failure to file a Periodic Report, a limited partnership or nonprofit corporation should first confirm that its name prior to the termination is still available. If not, the limited partnership or nonprofit corporation must amend its Certificate of Formation or registration to provide a new name. To reinstate, a limited partnership must file the delinquent report(s) along with a tax clearance letter from the Comptroller and pay any applicable fees.<sup>67</sup> Nonprofit corporations reinstate using the same procedure except that a nonprofit corporation is not required to file a tax clearance letter.<sup>68</sup>
- c. *Tax Forfeiture.* A domestic or foreign entity should first determine that its name prior to the termination is still available. If not, the entity must amend its Certificate

of Formation or registration to provide a new name. To reinstate, the entity must file an Application for Reinstatement and Request to Set Aside Tax Forfeiture along with a tax clearance letter from the Comptroller and pay any applicable fees.<sup>69</sup> The Secretary of State has promulgated Form 801 (Application for Reinstatement and Request to Set Aside Tax Forfeiture) that can be used for this purpose.

**How to Obtain a Tax Clearance Letter.** Be careful. The Certificate of Account Status (commonly called a "good standing" certificate) found on the Comptroller's website is NOT a tax clearance letter. An entity that must provide a tax clearance letter for reinstatement after termination for a non-tax reason may be tempted to use this document but the reinstatement application documents will be rejected. If the entity is in good standing with the Comptroller, a representative of the entity may go in person to the local Comptroller field office and request a tax clearance letter for reinstatement or the entity may complete Form 05-391 (Tax Clearance Letter Request for Reinstatement) and mail it to the Comptroller requesting the tax clearance letter for reinstatement.

After termination by the Secretary of State for a tax forfeiture, an entity must also obtain a tax clearance letter for reinstatement. To obtain the tax clearance letter, the entity should first determine from the Comptroller the reason for the tax forfeiture. This will likely include a list of the franchise tax reports, including the Public Information Reports and/or Ownership Information Reports, that are delinquent as well as any payments, penalties and interest that have not been made. All of the missing reports must be filed and the taxes paid before the Comptroller will issue a tax clearance letter for reinstatement.

If the reinstatement is needed quickly, it is recommended that the reports and payments be filed in person at the closest Comptroller field office so that the reports and payment will be processed and the tax clearance letter issued while the person waits. Otherwise, processing the reports and payments as well as issuing the tax clearance letter may be delayed for weeks due to the large volume of filings received by the Comptroller.

Check the expiration date on the tax clearance letter since the letter is only effective until the due date of the next franchise tax reports. The entity should make sure that the reinstatement forms, including the tax clearance letter, are filed with the Secretary of State prior to the expiration date of the tax clearance letter.

## WHO CAN SIGN DOCUMENTS?

Documents filed with the Secretary of State that are signed by a person whose title does not permit him/her to sign the document run the risk of being rejected. The rules for signing are specific to the type of document and type of entity involved.

## Signature Requirements.

### a. *Certificate of Formation.*<sup>70</sup>

1. All Entities Except Limited Partnerships. The organizer must sign.
2. Limited Partnerships. Each general partner must sign.

### b. *Application for Foreign Registration and Filings by Foreign Entities.* Authorized signers are determined in accordance with the law of the jurisdiction of formation of the foreign entity.<sup>71</sup>

### c. *Amendment, Change of Registered Agent (by the entity), Merger, Conversion, Termination or Reinstatement.* The signature requirements for these filing documents vary based on the type of entity to which they pertain.

1. Corporation (for-profit or nonprofit). An officer must sign.<sup>72</sup> Regarding Amendments or Restated Certificates of Formation, if shares of the for-profit corporation have not been issued and the Certificate of Amendment is adopted by the board of directors, a majority of the directors may sign the Certificate of Amendment on behalf of the for-profit corporation.<sup>73</sup>
2. Limited Liability Company. An authorized officer, manager or member must sign.<sup>74</sup>
3. Limited Partnership:
  - Certificate of Amendment or Restated Certificate of Formation must be signed by at least one general partner and by each newly admitted general partner. The Certificate does not need to be signed by a withdrawing general partner.<sup>75</sup>
  - A Certificate of Termination must be signed by all general partners participating in the winding up of the partnership or by a liquidator if one has been appointed. If the limited partners are winding up the limited partnership's business, the Certificate must be signed by a majority-in-interest of the limited partners.<sup>76</sup>
  - A Certificate of Merger or Conversion must be signed on behalf of the limited partnership by an officer or other authorized representative of the general partner.<sup>77</sup>

### d. *Correction of a Filing.* A Certificate of Correction must be signed by the person authorized to sign the document being corrected.<sup>78</sup> If the correction relates to a Certificate of Formation, the Certificate of Correction would be signed by a person authorized to sign the Certificate of Formation. If the correction relates to a merger or conversion, the Certificate of Correction need not be signed on behalf of each entity named in the filing instrument being corrected. In the case of a merger, the Certificate of Correction must



be signed by a person authorized to act in regard to a surviving entity in the merger. In the case of a conversion, the Certificate of Correction must be signed on behalf of the converted entity.<sup>79</sup>

- e. *Change of Registered Agent's Name or Registered Address (by Registered Agent).* If a registered agent changes its name (e.g., by marriage) or if the registered agent moves its registered office address, the registered agent may sign the notice filed with the Secretary of State.<sup>80</sup>

## CHANGING INCORRECT INFORMATION ON SOSDIRECT

When an entity finds that information listed on the SOSDirect website is out-of-date or incorrect, the procedure to change the information depends upon the information to be changed.

**How to Change Incorrect Website Information That Is SOSDirect's Mistake.** Occasionally an entity will find that, while certain information was correctly stated on the instrument filed with the Secretary of State, this information is incorrectly listed on SOSDirect. If the information on the filed document is correct, call SOSDirect to report the information mistake at: (512) 475-2755 for business entity filings; (512) 475-2705 for the Reports Unit where annual statements and periodic reports are filed; or (512) 475-2740 for UCC filings. Revisions are usually made quickly as an administrative revision.

**How to Change Management or Principal Office/Principal Place of Business Information.** The following pertains only to corporations and limited liability companies. If there has been a change of management or principal office information and the entity wishes to update the SOSDirect website, the following can be done.<sup>81</sup>

- a. *Public Information Report ("PIR").* The easiest and least expensive way for an entity to change the information pertaining to its management or principal office listed on the SOSDirect website is to make the change on the annual PIR filed with the Comptroller. The information on the PIR is relayed to the Secretary of State and the Secretary of State updates SOSDirect. There is no fee for filing a PIR but the PIR can only be filed with the Comptroller on an annual basis along with the franchise tax report. Supplemental PIR filings are not accepted by the Comptroller and the Secretary of State will not accept a PIR filing.
- b. *Amendment to Formation or Registration Certificate.* If the change is needed prior to filing the next PIR, a foreign or domestic entity may file an amendment to its formation or registration document. There is a fee for filing the amendment.

**How Limited Partnerships Change Information.** Limited partnerships file Ownership Information Reports ("OIR") with

the Comptroller instead of PIRs. Since OIRs are not public information, the information is not passed along to the Secretary of State for publication on its website. Therefore, limited partnerships must change the information listed on SOSDirect in slightly different ways from corporations and limited liability companies.

- a. *Supplemental Periodic Report.* While the Secretary of State may require that a domestic or foreign limited partnership file a Periodic Report not more than once every four years,<sup>82</sup> the limited partnership may need to change certain information before the next Periodic Report is requested. If the limited partnership wishes to change the name of the registered agent, the registered address of the registered agent, the address of the principal office where records are kept or the address of a general partner, the limited partnership may file a supplemental Periodic Report with the Secretary of State. However, the supplemental Periodic Report may not be used to change the name of the limited partnership, the name of a general partner or to add or delete a general partner.<sup>83</sup> While there is a fee for filing a supplemental Periodic Report, such fee is less than the fee for filing an amendment to the formation certificate or registration.
- b. *Amendment.* To change the name of the limited partnership and/or the name of a general partner and/or to add or delete a general partner, the limited partnership must file an amendment to its formation certificate.<sup>84</sup>

*Marilyn Simpson is a paralegal with Graves, Dougherty, Hearon and Moody PC in Austin.*

## Add a Word List of Common Words

Acceptance	Factors	Preferred
Accountability	Family	Prime/Primary
Acquisition	Finance/Financial	Private
Administrators	Firm	Pro
Admitted	First	Process
Advisers/Advisory	Fuels	Production/Products
Affiliated	Fund	Professional
Agent/Agency	Future	Program
Alliance	Global	Progressive
Alpha	GP	Project
Analytical	Group	Promotion
Applications	Hedeco	Properties
Applied	Holdings	Publications
Area	Image/Imaging	Quality
Asset	Improvement	Quest
Assistance	Independent	Realistic
Associates	Industrial/Industries	Realty
Bio	Information	Regional
Brokers	Innovation	Relations
Capital/Capital	Insights	Renaissance
Center/Center	Instruments	Research
Coalition	Intelligent	Resources
Commercial	Interactive	Results
Commodities	International	Sales
Communications	Investment/Investors	Scientific
Computer/Computing	Labs	Security/Securities
Concepts	Liquidating	Services
Connection	Logic	Shop
Consolidated	Logistics	Software
Construction/Constructive	Management	Solutions
Consultants/Consulting	Manufacturing	Specialty
Consumer	Market/Marketing	Spectrum
Continental	Measurement	Store
Contractors	Mechanical	Strategies
Creative	Media	Style
Custom	Mineral	Subs
Data	Mobile	Supply
Design	Network	Support
Detail	New	Systems
Development	Newco	Team
Devices	Onco	Technical/Technology
Direct	Omega	Trading
Distributions/Distributors	Online	Transport
Diversified	Operating/Operations	Trends
Dynamic	Opportunities	United
Eco	Options	Unlimited
Economic	Organic	Vending
Elite	Organization	Venture
Energy	Partners	Virtual
Enhancement	Performance	Vision
Enterprise	Personal	Vita
Equipment	Petro/Petroleum	Visual
Equity	Planning	Voyager
Escapes	Plus	Works
Exploration	Power	Worldwide
Exports	Powerhouse	

# Request to Limit Late Filing Fees

1. Entity's legal name: \_\_\_\_\_.
2. Entity's jurisdiction of formation: \_\_\_\_\_.
3. The entity requests the Texas Secretary of State to limit collection of late filing fees under Tex. Bus. Orgs. Code 6 9.054 to 5 years of late filing fees, which equals \$3,750 for a for-profit entity and \$125 for a nonprofit corporation or a cooperative association. The entity understands that these late filing fees are *in addition* to the standard filing fees for the Application for Registration.
4. The undersigned certifies that the following statements are true:
  - The entity has satisfied all of its franchise, sales, and other tax obligations with the Texas Comptroller of Public Accounts. A true and correct Certificate of Account Status is attached showing that the entity is in good standing with the Texas Comptroller of Public Accounts
  - The entity does not owe any other taxes, fees, or assessments that are administered by any other Texas state agency.
  - The undersigned further certifies that it has not received a letter from the Office of the Secretary of State regarding this filing, or if it has received such a letter, it has responded to the Secretary of State within forty-five (45) days of the receipt thereof.

\_\_\_\_\_  
Submitter's Signature

\_\_\_\_\_  
Submitter's telephone number

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

## IMPORTANT!

### Attach a Certificate of Account Status

For information, contact the Texas Comptroller of Public Accounts at  
[www.cpa.state.tx.us](http://www.cpa.state.tx.us), 512-463-4600, or  
[tax.help@sos.cpa.state.tx.us](mailto:tax.help@sos.cpa.state.tx.us).

- 1 1 Tex. Admin. Code 679.31 (2011).
- 2 Tex. Bus. Org. Code 6 5.054 (2010).
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- 4 *Id.* 6 5.056.
- 5 1 Tex. Admin. Code 679.49 (2011).
- 6 Tex. Bus. Org. Code 65.053 (2010).
- 7 1 Tex. Admin. Code 679.36 (2011).
- 8 *Id.* 679.37.
- 9 *Id.* 679.38.
- 10 *Id.* 679.39.
- 11 *Id.* 679.40.
- 12 *Id.* 679.43.
- 13 *Id.* 679.44.
- 14 *Id.* 679.45.
- 15 *Id.* 679.47.
- 16 *Id.* 679.50.
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- 18 *Id.* 61052.151.
- 19 *Id.* 661071.251, 1071.352.
- 20 Tex. Fin. Code 6631.005, 181.004(a) (2010).
- 21 Tex. Dept of Banking, "How to Obtain a Letter of No Objection From the Banking Commissioner in Order to Use Certain Words in a Proposed Business Title" (2011), <http://www.banking.state.tx.us/forms/noobjection.htm>
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- 27 *Id.* 679.41.
- 28 *Id.*
- 29 1 Tex. Admin. Code 679.31 (2011).
- 30 *Id.* 679.48.
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- 37 Op. Tex. Att'y. Gen., No. GA-0726 (July 9, 2009).
- 38 Letter by Hope Andrade, Texas Secretary of State, Requesting Attorney General Opinion (January 7, 2009) (on file with the Attorney General).
- 39 *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991).
- 40 Tex. Bus. Org. Code 6 9.004 (2010).
- 41 *d.* 6 9.051.
- 42 *Id.* 6 9.054.
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- 45 Lorna Wassdorf and Carmen Flores, *The View from the Secretary of State's Office* 15 (2010 LLCs and Partnerships) (July 22-23, 2010).
- 46 Tex. Bus. Org. Code 6 5.201.
- 47 Tex. Bus. Org. Code 6 5.2011 (2010).
- 48 Texas Secretary of State, "Registered Agents FAQs" (2011), <http://www.sos.state.tx.us/corp/registeredagentfaqs.shtml>.
- 49 Tex. Bus. Org. Code 6 5.202 (2010).
- 50 *Id.* 6 153.302.
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- 56 *Id.* 6 71.152.
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- 58 Tex. Bus. Org. Code 6 11.251 (2010).
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- 60 *Id.* 6 11.101.
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- 62 Tex. Bus. Org. Code 6 11.253 (2010).
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- 64 *Id.* 6 11.202.
- 65 *Id.* 6 11.201.
- 66 *Id.* 6 11.253.
- 67 Texas Secretary of State, "Terminations and Reinstatements FAQs" (2011), <http://www.sos.state.tx.us/corp/termreinfaqs.shtml>.
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- 73 *Id.* 6 3.054.
- 74 *Id.* 6 101.0515.
- 75 *Id.* 6 153.553.
- 76 *Id.*
- 77 *Id.* 6 10.151 et seq.
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# Handling Market Volatility

Craig Hackler, Financial Advisor, Raymond James Financial Services, Inc., Member FINRA/SIPC

**C**onventional wisdom says that what goes up, must come down. But even if you view market volatility as a normal occurrence, it can be tough to handle when it's your money at stake. Though there's no foolproof way to handle the ups and downs of the stock market, the following common sense tips can help.

## Don't put your eggs all in one basket

Diversifying your investment portfolio is one of the key ways you can handle market volatility. Because asset classes often perform differently under different market conditions, spreading your assets across a variety of investments such as stocks, bonds, and cash alternatives (e.g., money market funds, CDs, and other short-term instruments), has the potential to help reduce your overall risk. Ideally, a decline in one type of asset will be balanced out by a gain in another, but diversification can't eliminate the possibility of market loss.

One way to diversify your portfolio is through asset allocation. Asset allocation involves identifying the asset classes that are appropriate for you and allocating a certain percentage of your investment dollars to each class (e.g., 70 percent to stocks, 20 percent to bonds, 10 percent to cash alternatives). An easy way to decide on an appropriate mix of investments is to use a worksheet or an interactive tool that suggests a model or sample allocation based on your investment objectives, risk tolerance level, and investment time horizon.

## Focus on the forest, not on the trees

As the market goes up and down, it's easy to become too focused on day-to-day returns. Instead, keep your eyes on your long-term investing goals and your overall portfolio. Although only you can decide how much investment risk you can handle, if you still have years to invest, don't overestimate the effect of short-term price



fluctuations on your portfolio.

## Look before you leap

When the market goes down and investment losses pile up, you may be tempted to pull out of the stock market altogether and look for less volatile investments. The small returns that typically accompany low-risk investments may seem attractive when more risky investments are posting negative returns.

But before you leap into a different investment strategy, make sure you're doing it for the right reasons. How you choose to invest your money should be consistent with your goals and time horizon.

For instance, putting a larger percentage of your investment dollars into vehicles that offer safety of principal and liquidity (the opportunity to easily access your funds) may be the right strategy for you if your investment goals are short-term (e.g., you'll need the money soon to buy a house) or if you're growing close to reaching a long-term goal such as retirement. But if you still have years to invest, keep in mind that stocks have historically outperformed stable value investments over time, although past performance is no guarantee of future results. If you move most or all of your investment dollars into conservative investments, you've not only locked in any losses you might have, but you've also sacrificed the potential for higher returns.

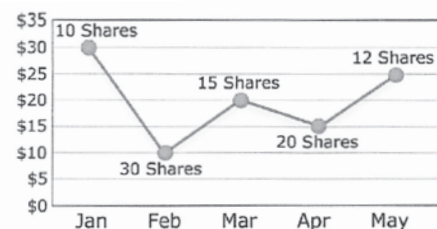
## Look for the silver lining

A down market, like every cloud, has a silver lining. The silver lining of a down market is the opportunity you have to buy shares of stock at lower prices.

One of the ways you can do this is by using dollar cost averaging. With dollar cost averaging, you don't try to "time the market" by buying shares at the moment when the price is lowest. In fact, you don't worry about price at all. Instead, you invest a specific amount of money at regular intervals over time.

When the price is higher, your investment dollars buy fewer shares of stock, but when the price is lower, the same dollar amount will buy you more shares.

For example, let's say that you decided to invest \$300 each month towards your child's college education. As the illustration shows, your regular monthly investment of \$300 bought more shares when the price was low and fewer shares when the price was high:



Although dollar cost averaging can't guarantee you a profit or avoid a loss, a regular fixed dollar investment may result in a lower average price per share over time, assuming you continue to invest through all types of markets. You should consider your financial and emotional ability to make ongoing purchases, regardless of price fluctuations, however.

(This hypothetical example is for illustrative purposes only and does not represent the performance of any particular investment. Actual results will vary.)

### Don't stick your head in the sand

While focusing too much on short-term gains or losses is unwise, so is ignoring your investments. You should check up on your portfolio at least once a year, more frequently if the market is particularly volatile or when there have been significant changes in your life. You may need to rebalance your portfolio to bring it back in line with your investment goals and risk tolerance. A financial professional can help you decide which investment options are right for you.

### Don't count your chickens before they hatch

As the market recovers from a down cycle, elation quickly sets in. If the upswing lasts long enough, it's easy to believe that investing in the stock market is a sure thing. But, of course, it never is. As many investors have learned the hard way, becoming overly optimistic about investing during the good times can be as detrimental

as worrying too much during the bad times. The right approach during all kinds of markets is to be realistic. Have a plan, stick with it, and strike a comfortable balance between risk and return.

### Making dollar cost averaging work for you

- Get started as soon as possible. The longer you have to ride out the ups and downs of the market, the more opportunity you have to build a sizeable investment account over time.
- Stick with it. Dollar cost averaging is a long-term investment strategy. Make sure that you have the financial resources and the discipline to invest continuously through all types of markets, regardless of price fluctuations.
- Take advantage of automatic deductions. Having your investment contributions deducted from your paycheck or bank account is an easy and convenient way to invest, and can help you get in the habit of investing regularly.

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## The Sandwich Generation

By Bridget O'Toole Purdie

**B**y now, we have all heard the catchy phrase – SANDWICH GENERATION – a moniker coined in the 1990s to describe individuals sandwiched between caring for and supporting their own children and at the same time caring for and sometimes supporting or helping support their aging parents.

Whether you are a baby boomer, a Generation X'er or a member of Generation Y – in all probability someday you will also get to call yourself a member of the Sandwich Generation. Why?

Because it is a fact that because of advances in medicine and better health care, our parents are living longer – often into their 90s. In 25 years, experts predict there will be 60 million Americans between the ages of 66 and 84. Add to the mix the fact that couples are having their children later in life. Finally, American families are more and more dispersed. Which means that,

because aging parents can live hundreds of miles away, long distance support systems for families are no longer comprised of grandparents helping care for and raise their grandchildren. Rather, adult children find themselves juggling the demands of caring for aging parents and yet also caring for their own children.

The demands placed on the Sandwich Generation can be financial, emotional, legal and physical. This article will focus on some of the legal issues that need to be addressed in caring for our aging parents. In addition, the article will address the legal steps parents need to take to insure their own children are properly provided for. Finally, the article sets out the legal documents young adults should execute and the reasons why these documents have become critical.

### Elder Law Issues

Because we are living longer, the likelihood of either mental incapacity or physical incapacity is increasing. In order to be prepared should incapacity arise, it is imperative that our aging parents meet with an estate planning attorney and execute both financial and medical powers of attorney. The financial power of attorney authorizes a trusted individual, ordinarily a spouse or a trusted child, to manage an individual's financial affairs should issues of physical or mental incapacity ever arise. Here is a recent real life example of why a financial power of attorney is critical. A school teacher collapsed at work, was rushed to the hospital and now lies in a coma completely unable to communicate with her family or her doctors. The school district, her employer, offers long-term disability coverage, but only the school teacher herself or her agent designated pursuant to a financial power of attorney can elect to begin paying for and receiving the coverage. The cost of the attorney's time in preparing the financial power of attorney would be far outweighed by the financial loss of long



term disability coverage. In most states, if not all, the only alternative available to the family members of the school teacher would be a costly and very cumbersome guardianship proceeding wherein a guardian would be appointed and authorized to, among other things, elect to receive long term disability coverage for the school teacher.

The second legal document that is a must is a medical power of attorney. This document names the individual that will make all medical decisions if an individual is unable to effectively communicate with his or her doctor either because of physical issues (such as an intubated patient who is unable to speak) or because of mental issues such as a patient with advanced Alzheimer's.

Again, another real life example. Mom is in the hospital receiving treatment for her aggressive cancer. Mom is in and out of consciousness and unable to communicate with her doctors. Daughter has been appointed Mom's agent pursuant to a medical power of attorney and consults with Mom's doctors. Because Mom and daughter have discussed Mom's desires regarding her medical treatment and, specifically, her medical treatment for her cancer, daughter authorizes an experimental cancer treatment. Son arrives on the scene and disagrees with daughter's decision. Without the medical power of attorney being in place, it is possible that Mom's desires regarding her medical treatment would not have been followed.

We all remember watching the Terry Schiavo situation unfold in such a public way on the television and in the print media. No matter which side of the legal battle you identified with, it is critical that you make your wishes known should you ever find yourself suffering from a terminal or incurable medical condition. Every individual, especially the elderly, need to execute a third legal document known as a living will. This document ensures that medical his or her end-of-life decisions are known and respected by family members and medical providers.

The final document every one of our moms and dads should have is a HIPAA authorization. Recent changes to federal laws prohibit doctors and hospitals from releasing protected health information unless HIPAA authorizations have been exe-

cuted. There is an exception under HIPAA that allows covered entities to speak to family members without an authorization in place. However, this practice will vary from one provider to the next.

From a practical standpoint, unless your parent has executed a HIPAA authorization naming you as an individual authorized to receive protected health information, your parent's doctor and/or hospital is prohibited from speaking to you or releasing any medical information to you. Gone are the days of picking up the telephone and calling Mom's long time doctor or nurse and checking on Mom's condition. This becomes especially problematic for parents that live long distances away, because the ability to participate in the actual doctor visits becomes very difficult. Make sure Mom and Dad both execute HIPAA authorizations naming each individual who is authorized to receive their personal medical information.

#### **Legal Issues for Minor Children and Young Adults**

As an estate planning attorney, the issue that gives parents the greatest amount of angst is the decision about whom to name as guardian of their children should both parents die. While this is clearly a very emotional and important decision, thankfully, in my 18 years of practice, I have yet to have the situation arise in real life. If both parents die and the parents have not executed a legal instrument naming their desired guardian, the courts will be called upon to make the decision. The courts are always charged with the legal standard of appointing as guardian the individual who would be in the best interests of the child.

A far more important document for parents of minor children to have is a will. Why? Because minor children cannot own property. So, without a will in place creating trusts for minor children, most states require the creation of a guardianship or a court created trust if a parent dies leaving property to a minor child.

Once children reach the age of 18, the law no longer considers them minors and, as parents, the law no longer considers us their natural guardians. Most young adults do not own any property of real significance – that's right an I-pod, 6 pairs of Converse tennis shoes, a messenger bag and a lap top computer do not add up to

an estate. But, that being said, because so many of the younger generation are delaying marriage, it may be that a young adult could have 10, 12 to 15 years where he or she is out in the work world accumulating assets and contributing to retirement plans. A young adult would be wise to execute both a financial power of attorney and a medical power of attorney for the same reasons listed for the older generation. Should a young adult become physically or mentally incapacitated, even for a short period of time, there needs to be someone legally designated to act on his or her behalf with respect to both the financial and medical issues that can arise. In most situations, the most logical choice to name as a young adult's agent is his or her parents.

Finally, last year's shootings at Virginia Tech underscored, all too tragically, why even young adults need to execute HIPAA authorizations. When parents living many miles from the school called local hospitals to find out if their child was a patient and, of course, to check on his or her status, hospitals were unable to provide parents with any information. Imagine the fear and the anguish these parents went through. Again the cost involved in having these legal documents drawn up pales in comparison to the emotional cost to these parents. Make sure your young adult executes all of the same documents your aging parents need:

- a. Financial power of attorney;
- b. Medical power of attorney;
- c. Living will/advance directive; and
- d. HIPAA authorizations.

#### **Conclusion**

Being prepared is always the best practice. When it comes to our aging parents, do not wait until the opportunity to be prepared has passed when our parents no longer have the legal capacity to execute the necessary documents. Likewise, while it is easy to assume our children do not need to worry about such adult concerns, the reality is that today's world demands that even the youngest generation have their legal affairs in order.

*Bridget O'Toole Purdie is a partner at Bracewell & Giuliani LLP in Houston.*

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## Florida Bill Seeks to Regulate Paralegals

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

**O**n March 3, 2011, Senate Bill 1612 was introduced into the Florida Senate and could pave the way to make Florida the first state in the country to require licensure for paralegals. A companion bill, HB 1149, was introduced in the Florida House on March 14, 2011. Both bills were currently referred to the judiciary and budgeting committees.

The bills require the Florida Supreme Court to develop a licensing and continuing education scheme and make it a felony for unlicensed paralegals to identify themselves as paralegals. They were written by the Florida Alliance of Paralegal Associations, a consortium of

paralegal associations that has been talking about enacting some kind of mandatory licensing since 1996. The group wants to prevent legal secretaries and others from using the title of paralegal to market themselves and to formally define what is a paralegal.

The bills would create a committee to promulgate rules, but the basic premise is anyone calling themselves a paralegal would have to pass a test and become licensed.

The Alliance does not feel that voluntary certification is enough. The Alliance has even hired a lobbyist, but did scale back the scope of its bill before it was filed.

Other states have started voluntary programs (such as Texas), but several state bar associations – including Hawaii, Illinois, Indiana and New Jersey – have been blocked from moving to mandatory programs by their state supreme courts.

Both Senate Bill 1612 and House Bill 1149 proposing mandatory paralegal regulation under the oversight of the Florida Supreme Court died in committee at the end of the 2011 regular legislative session. The Florida Bar appointed a

Special Committee to Study Mandatory Regulation of Paralegals (Special Committee) as part of its three year evaluation of the FRP Program by the Program Evaluation Committee (PEC). Although a report recommending mandatory regulation was approved by a majority of the Special Committee, the PEC recommend opposing mandatory paralegal regulation on May 26, 2011 to The Florida Bar's Board of Governors. The results of the survey conducted by the PEC regarding the FRP program is cited as the main reason for opposing the Special Committee's recommendation - even though a direct question regarding mandatory paralegal regulation was not included in the survey questions. The PEC Chair as well as president of The Florida Bar have both stated since only 40 FRPs happened to mention mandatory paralegal regulation in the "comment" sections of the survey, it is a clear indication to them that mandatory paralegal regulation is not important. FAPA, however, remains cautiously optimistic.

*Heidi Beginski is a paralegal at Lovett Law Firm in El Paso.*

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# Scruples

## The Ethics of Gifts from Vendors

Ellen Lockwood, ACP, RP

**W**hat would we do without our legal vendors? From local

process servers and national record retrieval companies, to Lexis, Westlaw, and outside or local counsel, paralegals have the opportunity to interact with many vendors. Whether it is determining which e-discovery vendor to use, or from which caterer to order lunch, paralegals are often the ones who recommend and in many cases, choose which vendor to use. Attorneys rely on paralegals to research vendors and often to be the primary contact with vendors. There are many benefits to working closely with vendors including developing trust, having a vendor who already knows and understands your specific requirements, and perhaps having the opportunity to obtain special pricing.

While paralegals appreciate legal vendors, the vendors also value the business paralegals provide. Many vendors make the effort to express their gratitude by offering a gift for giving them their business. With direct, and sometimes the exclusive, access to vendors used by the supervising attorney, such gifts may be given to the paralegal. However, before accepting a gift, paralegals should consider the following:

- Does your firm, corporation, or agency have a policy on gifts from vendors? Such policies often restrict the monetary worth of gifts, require gifts be

disclosed or reported, and may require advance permission before gifts over a certain amount may be accepted.



- Even if your employer doesn't have a policy regarding gifts from vendors, is the monetary worth of the gift large enough to make you uncomfortable, or might it make your employer uncomfortable?
- Is the gift something that cannot be retained, such as a meal with the vendor? Policies regarding gifts from vendors often make an exception for meals with the vendor.
- Is the gift a "thank you" to a regular client, such as an annual holiday gift, or is it a gift that is earned by placing a particular number of orders with the vendor? If the latter, there may be a question as to whether a particular vendor is being used just to earn the reward rather than considering whether use of a particular vendor is in the best interest of the assignment and the client.
- If more than one non-attorney is working on the case, which one should receive the gift? And since the attorney, firm, agency, or corporation is actually the vendor's client, should someone else, such as the attorney, receive the gift?

The National Court Reporters Association

has addressed the issue of the possible appearance of favoritism by a reporter by including the following provision in its Code of Professional Ethics stating its members shall:

Refrain from giving, directly or indirectly, any gift, incentive, reward, or anything of value to attorneys, clients, or their representatives or agents, except for items that do not exceed \$100 in the aggregate per recipient each year.

Canon 9 of the Paralegal Division's Code of Ethics and Professional Responsibility states that paralegals shall "maintain a high standard of ethical conduct." While it is always wonderful to receive a gift, it would be wise to discuss with the supervising attorney or office manager whether the organization has a gift policy and if not, whether one should be put in place. No gift is worth compromising your, or your employer's, ethics.

*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 @paralegaethics. She may be contacted at [ethics@txpdp.org](mailto:ethics@txpdp.org).*



# A Day in the Life while Traveling in Germany

We began the 4th day of our trip to Germany excited about a day trip to Salzburg, a small city in Austria populated with 150,000 residents, home to the Salzburg Cathedral, the famous Salzburg Festival, birth home of Wolfgang Amadeus Mozart, and the Hohensalzburg Fortress, just to name a few. Everyone gathered early on Wednesday, April 27, for breakfast in the hotel dining room where we were served a delicious and sumptuous meal. Bus call was at 8:00 am in order for the group to arrive at 10:00 am in Salzburg, our appointed time of a guided tour. Driving to Salzburg, we were taken back by the beautiful mountains, the majestic Swiss Alps.

Upon arrival, we were met by a local tour guide, Myra Hansford. Myra is a sprite Austrian, smartly dressed, full of life and small in stature. Myra guided us through beautiful gardens, pointing out historical buildings, all the while filling our heads with historical facts. Although Salzburg is the city where the movie, *The Sound of Music*, was filmed, the focus of the city tour was historical, in nature. Salzburg is the oldest city in Austria, set in a valley of the Swiss Alps. One of the unique attractions of Salzburg is the beauty of the Baroque Jewel of the old town center.

Salzburg is a land of intensive cultural tradition; Wolfgang Amadeus Mozart, the city's most famous son, represents the high point of the classical musical tradition. As the group toured the house where Mozart was born and raised, Myra treated us to all of its history. Wolfgang, call Wolferi, was born on January 27, 1756. The home is a three bedroom apartment in the Getreidegasse and is now a museum. "Wolferi" and his sister, Maria Anna, were instructed by their father, Leopold Mozart. Wolfgang began performing for the public at the young age of six, playing his own compositions. After his early debut, he and his family toured Western Europe for three years. You can imagine what a treat this was to see the home and its artifacts from



the 18th Century.

This small town is host to one of the largest and best musical festivals in the world. The world-renowned Salzburg Festival (founded in 1920) is held annually and attracts thousands of art and culture lovers from all over the world. It was begun by conductor Hans Richter to honor Mozart and classical music. The towns people wanted "opera and drama,

and of both the best!" Music is the main attraction of the festival, but each year, the performance of the mystery play "Jedermann (Every Man)" is performed in the Cathedral Square against the overwhelming background of the Salzburg Cathedral.

The Salzburg Cathedral is the largest cathedral in Austria and is home to five enormous musical organs (all five organs are played at the same time during the Festival--don't you wish you could be there to hear the sound). The first cathedral was built by Bishop Virgil who came to Salzburg in 767. It was consecrated on September 24, 774 to St. Virgil and St. Rupert. The Cathedral was burned and destroyed in 1167 by the Counts of Plain and was rebuilt ten years later. 400 years later, in 1598, fire raged and destroyed large sections of the Cathedral. It was rebuilt in early Baroque style (no gold in the church as seen in other Cathedrals) and consecrated in 1628. Sitting inside the Cathedral looking up to the massive dome in the ceiling is an amazing experience.

After the tour of the Cathedral, the group ventured through the Petersfriedhof, or St. Peter's Cemetery, the oldest Christian graveyard in Salzburg, dating back to 1627. It is a worthy attraction in itself, but many visitors come here to see the place where







the Von Trapp family hid out in *The Sound of Music*. It is enclosed by elegant wrought-iron fences and consists primarily of Baroque porticoes housing chapels of Salzburg's old wealthy families. Many of the aristocratic families of Salzburg lie buried here, along with many other notable figures. The graves are lovingly tended by Salzburg families, decorated with candles, fir branches, and flowers. Pansies are the most popular flower, because their name means "thoughts." You can see the fascinating Christian catacombs carved in the rockface above the church cemetery.

At the conclusion of the walking tour of Salzburg, the group gathered for lunch at the Stiftskeller St. Peter Restaurant, the oldest restaurant in Salzburg, and enjoyed a truly memorable dining experience. We dined on roasted chicken, vegetables and a wonderful chocolate dessert. What a grand culinary experience.

Before departing Salzburg, everyone



had a few hours on their own. Some shopped while others continued to discover other sites of Salzburg. For those who shopped, we discovered the Austrian crystal jewelry. I believe a few ascended (by funicular) to the Hohensalzburg Fortress, built in 1077 (you can see the Fortress from anywhere in the city).

After a long adventurous day, we loaded the bus and began our travels back to Munich (home to the 7-day trip). We were driven back through the Alps and gazed

upon Eagle's Nest (the infamous home of Hitler) sitting high upon a mountain top. The scenery was absolutely gorgeous and it was a great day enjoyed by all.

[Other interesting sites visited during the trip to Germany by the PD travelers were City Tour of Munich, Day trip to two of King Ludwig's castles (Neuschwanstein, that inspired Walt Disney's Magic Kingdom, and Linderhof), City Tour of Nuremberg, with a guided tour of Museum and Courtroom 600, the courtroom of the famous Nurem-

berg Trials, and, of course, lots of German food, good memories, and great travel companions!! To view extensive photos of this trip, go to [www.txpd.org](http://www.txpd.org).]

Make plans to join the Paralegal Division on its 2012 trip scheduled April 21-28, 2012 to Italy (Sorrento, Capri, and Rome). Register by June 30 and receive a \$100 discount. Trip details at [www.txpd.org](http://www.txpd.org).

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