



# STATE BAR LITIGATION SECTION NEWS for the BAR

Winter 2009



## CHAIR'S UPDATE: Heroes of the Law

by Elizabeth E. Mack

### I GREW UP SURROUNDED BY LAWYERS.

My father is a lawyer. My grandfather was a lawyer. My great-grandfather and great-great-grandfather, they were lawyers too. Five generations of lawyers practicing law over a span of 121 years (and counting). All in Fort Worth, Texas (except for me - I made my way east on I-30, to Dallas). And these Mack lawyers all taught me that it wasn't enough to simply go to the office every day and return home. Each of them also used his legal know-how to better the community.

You know the same types of lawyers. They are heroes in the courtroom and heroes in the community. Lawyers who inspire us and who make us aware of the value of service to the community. We wish we could be like them; they are our role models.

Each year, the Litigation Section gives the Luther (Luke) Soules III Award to recognize a Texas lawyer who demonstrates outstanding professionalism and community impact. The criteria for the award include demonstrated commitment to equal justice under law, outstanding professionalism, community impact, and significant contributions as a result of legal representation. The award recipient receives an all-expenses-paid trip to the State Bar Convention in Dallas, a \$1,000 honorarium to donate to the Texas legal cause of his or her choosing, and of course, the honor of the award.

Please nominate your hero-lawyer by March 31st. You can get a nomination form and more information about the award at the Litigation Section website, [www.litigationsection.com](http://www.litigationsection.com). Click on Nomination Information under "Spotlight."

And of course, if you have ideas for the Section or if there is anything we can do to assist you, please contact me at [emack@lockelord.com](mailto:emack@lockelord.com). ■



## FEDERAL UPDATE

by Jason Fulton

**I**N THE FALL 2008 EDITION, THIS NEWSLETTER discussed the Fifth Circuit decision in *Cadles of Grassy Meadows II, LLC v. Goldner*, 542 F.3d 437 (5th Cir. 2008), in which the Fifth Circuit affirmed the dismissal of a suit as time-barred after holding that a Texas statute tolling the statute of limitations against out-of-state defendants violates the Commerce Clause of the United States Constitution. On November 14, 2008, the Fifth Circuit withdrew its opinion and remanded for further proceedings in light of *Kerlin v. Saucedo*, 263 S.W.3d 920 (Tex. 2008). *Cadles of Grassy Meadows II, LLC v. Goldner*, 549 F.3d 348 (5th Cir. 2008) (per curiam). In *Kerlin*, the Texas Supreme Court held that a defendant that is subject to personal jurisdiction in Texas because the defendant "does business in the state" as defined by the Texas Long-Arm Statute, TEX. CIV. PRAC. & REM. CODE § 17.042, is considered within the state even if physically absent and therefore the tolling provisions of § 16.063 of the Texas Civil Practice and Remedies Code do not apply.

In the Fall 2008 edition, we also discussed the Fifth Circuit decision in *United States v. James Ford Seale*, 542 F.3d 1033 (5th Cir. 2008), in which a three-judge panel of the Fifth Circuit reversed the 2007 kidnaping conviction of KKK member James Ford Seale for his alleged involvement in the 1964 kidnaping of Henry Dee and Charles Moore. The original panel reversed because Seale's conviction forty-three years after the alleged offense exceeded the applicable five-year limitations period. On November 14, 2008, a majority of the Fifth Circuit voted in favor of rehearing en banc. *United States v. James Ford Seale*, 550 F.3d 377 (5th Cir. 2008).

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**A forum-selection clause providing for venue in a particular county includes a federal courthouse sitting in that county**

*Alliance Health Group, LLC v. Bridging Health Options, LLC*, 553 F.3d 397 (5th Cir. 2008).

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The Fifth Circuit affirmed a district court ruling that a forum-selection clause providing for venue in a particular county allowed a federal court sitting in that county to hear a dispute arising under the contract with the clause and rejected the argument that the clause limited venue to the courts of the state of Mississippi located in that county.

Alliance and BHO entered into an agreement that stated “exclusive venue for any litigation related hereto shall occur in Harrison County, Mississippi.” *Id.* at 399. A dispute arose and Alliance filed a diversity action in the United States District Court for the Southern District of Mississippi, whose courthouse was located in Harrison County. BHO moved to dismiss for improper venue, asserting the forum-selection clause included only courts of the state of Mississippi and not the federal court. The case was reassigned and the second judge certified the ruling for appeal.

The Fifth Circuit distinguished several cases construing identical clauses in situations in which the federal courthouse was not located **in** the designated county but the federal court’s district **included** that county. The Court carefully noted that in this case the applicable federal court had a courthouse physically located in Harrison County, rather than merely including Harrison County within its district. The Court held that when a forum-selection clause requires litigation to occur in a specified county and there is a federal courthouse located in that county, litigation may properly be brought in either the federal court or in a state court located in that county.

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**The earmarking doctrine is a defense to a preference action in bankruptcy only when the debtor has no control over the funds.**

*In re Entringer Bakeries Inc.*, 548 F.3d 344 (5th Cir. 2008).

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In this bankruptcy appeal, the Fifth Circuit reaffirmed the earmarking doctrine as a defense to a preference action but emphasized that it only applied in situations in which the debtor did not have the ability to affect the distribution or transfer of the funds.

Entringer borrowed money on a short-term basis from First Bank and Trust, intending to repay it after only a few months and replace it with long-term financing from Whitney National Bank. Delays in closing Whitney’s loan to Entringer caused Entringer to miss the maturity of the loan from First Bank. But First Bank did not issue a notice of default because it was aware of Entringer’s efforts to secure replacement financing. A few months after the original maturity of the debt to First Bank, Entringer closed the loan with Whitney,

and Entringer received the proceeds into its general account. Entringer immediately delivered a check to First Bank for the full amount of its debt to First Bank.

Six weeks later, Entringer filed for bankruptcy. The trustee sought to recover the payment to First Bank as an impermissible preference under 11 U.S.C. § 547(b). The bankruptcy court applied the earmarking doctrine and held that payments to First Bank were not transfers of Entringer’s interest in property.

The Fifth Circuit explained the earmarking doctrine: “If all that occurs in a ‘transfer’ is the substitution of one creditor for another, no preference is created because the debtor has not transferred property of his estate; he still owes the same sum to a creditor, only the identity of the creditor has changed.” 548 F.3d. at 348 (quoting *Coral Petroleum v. Banque Paribas – London*, 797 F.2d 1351, 1355-56 (5th Cir. 1986)). The Court emphasized that the most salient point from *Coral Petroleum* was that “at no time did [the debtor] have general control over the funds whereby it could independently designate to whom the money would go.” *Id.* (quoting *Coral Petroleum*, 797 F.2d at 1356). The Court explained that if “the debtor controlled the funds and could have paid them to anyone, the money is treated as having belonged to her for purposes of preference law whether or not she actually owns it.” *Id.* at 350 (quoting *In re Southmark Corp.*, 49 F.3d 1111, 1116 n.17 (5th Cir. 1995)).

Entringer had control over the loan proceeds from Whitney and the money was Entringer’s property as soon as it entered its general account. Because Entringer could have then done anything it wanted with the money, the money was not “earmarked” to repay the debt to First Bank. *Id.* The Fifth Circuit affirmed the judgment for the Trustee but vacated the award and rendered a new award in the full amount of the repayment to First Bank.

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**The Federal Circuit applies recent Fifth Circuit precedent to transfer a patent infringement action from the Eastern District of Texas to Ohio.**

*In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir., 2008).

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The Federal Circuit granted a petition for writ of mandamus and directed the United States District Court for the Eastern District of Texas to transfer a patent infringement case to the United States District Court for the Southern District of Ohio.

Lear Corporation sued TS Tech for patent infringement in the Eastern District of Texas. TS Tech moved to transfer venue to the Southern District of Ohio on the grounds that it was a more convenient venue because all the physical and documentary evidence along with some key witnesses lived in Ohio with others nearby. TS Tech argued there was no meaningful connection to the Eastern District of Texas because none of the parties were incorporated in Texas or had offices in the Eastern District. Lear opposed transfer mainly on the basis that several Honda vehicles including the allegedly infringing product had been sold in Texas. *Id.* at 1318. The district court

rejected the transfer on the strength of the deference to Lear's choice of forum and on the basis that residents of the Eastern District had a substantial interest in having the case tried locally because cars containing the infringing product had been sold in the district. *Id.*

In considering the petition, the Federal Circuit relied heavily on the recent Fifth Circuit decision in *In re Volkswagen of Am., Inc.*, 545 F.3d 304 (5th Cir. 2008) (*Volkswagen II*), in which the en banc Fifth Circuit found a district judge in the Eastern District abused his discretion in refusing to transfer a car wreck case to the Northern District of Texas. The Federal Circuit observed that when deciding a § 1404(a) venue transfer, the Fifth Circuit applies the "public" and "private" factors for determining forum *non conveniens*. *Id.* at 1319.

The Federal Circuit reviewed the district court's application of those factors and found several key errors. First, the district court incorrectly treated Lear's choice of forum as a separate factor under § 1404(a) analysis and so gave it too much weight. The Court held this was error. *Id.* at 1320. Second, the district court "ignored Fifth Circuit precedent in assessing the cost of attendance for witnesses," particularly the "100-mile rule, which requires that [w]hen the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." *Id.* (quoting *In re Volkswagen AG*, 371 F.3d 201, 204-05 (5th Cir. 2004) (*Volkswagen I*)). The Federal Circuit found the district court's decision not to give much weight to this factor was error because the key witnesses located in Ohio, Michigan, and Canada would have to travel "approximately 900 more miles to attend trial in Texas than in Ohio." *Id.* at \*4. Third, the district court erroneously ignored the relative ease of access to proof even though the vast majority of such evidence was located in Ohio, Michigan, and Canada and none was located in Texas. *Id.* The Federal Circuit again pointed to

*Volkswagen II*, where the Fifth Circuit held: "that access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous." *Id.* at 1321. (quoting *Volkswagen II*, 545 F.3d at 316). This factor also weighed in favor of transfer.

Finally, the Federal Circuit found "the district court disregarded Fifth Circuit precedent in analyzing the public interest in having localized interests decided at home." *Id.* The district court's conclusion that the Eastern District had a substantial interest because several cars with allegedly infringing products were sold in the district was error and specifically rejected by the Fifth Circuit in *Volkswagen II*. Vehicles containing the allegedly infringing part were sold throughout the United States, giving the Eastern District no more interest than any other venue. In comparison, the "vast majority of identified witnesses, evidence, and events leading to this case involve Ohio or its neighboring state of Michigan." *Id.*

Aligning with the Fifth Circuit's decision in *Volkswagen II*, the Federal Circuit found that:

[T]he court's denial of transfer was a clear abuse of discretion because it (1) applied too strict of a standard to demonstrate transfer, (2) misconstrued the weight of the plaintiff's choice of venue, (3) treated choice of venue as a § 1404 factor, (4) misapplied the forum non conveniens factors, (5) disregarded Fifth Circuit precedent, including the 100-mile rule, and (6) glossed over the fact that not a single relevant factor favored the plaintiff's chosen venue.

*Id.* at 1321-22 (citing *Volkswagen II*, 545 F.3d at 310). On this basis, the Court granted the writ and ordered the case transferred to the Southern District of Ohio. ■

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# APPELLATE UPDATE

by Kirsten Castañeda

A number of interesting opinions issued as 2008 drew to a close and 2009 began. Here are some of the more notable cases:

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## State Appellate Courts

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### Accomplice Status

**A witness remains an accomplice as a matter of law even if the indictment against the witness is dismissed, where the witness testifies pursuant to a plea agreement and the record does not show another reason for dismissal of the indictment.** A witness was charged with the same offense as the defendant, but the indictment was later dismissed under a plea agreement in which the witness agreed to testify against the defendant. *Smith v. State*, --- S.W.3d ---, No. 13-05-00714-CR, 2008 WL 4882863, at \*6 (Tex. App.—Corpus Christi-Edinburg Nov. 13, 2008, no pet. h.). At the defendants' trial, the jury charge included an instruction on accomplice as a matter of fact. *Id.* at \*7. That instruction informs the jury that, *if it found from the evidence* that the witness was an accomplice witness, the jury could not convict the defendant based on the witness's testimony unless additional standards were satisfied. *Id.* The defendant had objected to the instruction and requested an instruction that the witness was an accomplice as a matter of law. *Id.* It is well-established that, when a witness is charged with the same offense as the defendant, but the indictment is dismissed pursuant to a plea agreement under which the witness agrees to testify against the defendant, the witness remains an accomplice as a matter of law. *Id.* at \*9. In this case, the State argued that the charges against the witness were dismissed for insufficient evidence, and that there was no evidence that the witness was testifying under a plea agreement whereby his charges had been reduced in exchange for his testimony. *Id.* The court of appeals noted that the record did not support a conclusion that the charges were dropped for insufficient evidence. *Id.* at \*10. The court further noted that the record indicated the witness *had* testified pursuant to a plea agreement. *Id.* Therefore, the trial court erred by including the accomplice-as-a-matter-of-fact instruction. *Id.* The court concluded that, excluding the accomplice witness testimony, there was insufficient evidence tending to connect the defendant to the crime. *Id.* at \*26. Justice Vela dissented based on her analysis that the record contains more than some non-accomplice evidence tending to connect the defendant to the crime. *Id.*

### Agency

**The single business enterprise liability theory set out in *Paramount Enterprises* will not support the imposition of one corporation's obligations on another.** For the first time, the Texas Supreme Court addressed the viability of the "single business enterprise" theory first set forth in *Paramount Petroleum Corp. v. Taylor Rental Ctr.*, 712 S.W.2d 534 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). *SSP Partners v. Gladstrong Invs. (USA) Corp.*, --- S.W.3d ---, 52 Tex. Sup. Ct. J. 95, 2008 WL 4891733, at \*4 (Nov. 14, 2008, reh'g filed). The "single business enterprise" theory does not entail the level of agreement required for joint enterprise liability or the abuse required before the law disregards the corporate structure to impose liability. *Id.* After discussing *Paramount Petroleum* and its progeny, and examining the Court's previous litany of abuses that provide a basis to disregard the corporate structure, the Court concluded that the "single business enterprise" theory does not support the imposition of one corporation's obligations on another. *Id.* at \*8. A motion for rehearing was filed on December 11, 2008.

### Annexation

**A municipality's annexation that exceeds its annexation authority in part may be upheld in part under certain circumstances.** The municipalities of McKinney and Fairview disputed the validity of several of each other's annexation ordinances in *Town of Fairview v. City of McKinney*, 271 S.W.3d 461, 463-64 (Tex. App.—Dallas 2008, rule 53.7(f) motion granted). One city has no authority to annex the territory of another. *Id.* at 469. With regard to one of the ordinances, McKinney had annexed property that included a 600-foot strip already contained within Fairview's city limits. *Id.* at 468-69. Less than two months later, McKinney adopted another ordinance that described the 600-foot strip by metes and bounds, and stated that the strip was disannexed from McKinney. *Id.* at 469. To the extent the initial ordinance sought to annex the 600-foot strip, it was void *ab initio*. *Id.* The question of first impression facing the court of appeals was whether this circumstance rendered the entire ordinance void. *Id.* Based on the Texas Supreme Court's holding in *City of West Lake Hills v. State*, 466 S.W.2d 722 (Tex. 1971), the court of appeals concluded that, if a portion of a municipality's annexation exceeds its annexation authority in part, the portion of the annexation within the municipality's annexation authority may be upheld if: (1) the facts warrant it; and (2) the court can do so without usurping the legislative authority of a home-rule city to draw its boundaries. *Id.* at

474. Under the circumstances of the case, the court of appeals concluded that the annexation was void *ab initio* only to the extent it sought to annex territory located within Fairview's then-existing city limits. *Id.* at 476. The Texas Supreme Court granted an extension to February 2, 2009, for Fairview to file a petition for review.

## Appellate Procedure

**Error in an interlocutory order is not necessarily waived if the interlocutory order is not expressly mentioned in the notice of appeal or the issues in the court of appeals that challenge the final order.** The Texas Supreme Court addressed this issue in the context of an interlocutory order sustaining special exceptions and the final order dismissing the suit. *Perry v. Cohen*, --- S.W.3d, 52 Tex. Sup. Ct. J. 105, 2008 WL 4891677, at \*3 (Nov. 14, 2008). The appellants filed a notice of appeal that expressly mentioned the order dismissing the suit, but not the earlier order sustaining the special exceptions. *Id.* In their brief, appellants included an issue challenging the dismissal of their suit. *Id.* The body of the brief addressed the merits of the interlocutory order sustaining the special exceptions. *Id.* However, the appellee contended that the omission of the special exceptions order from the notice of appeal, and the absence of a separate issue challenging the special exceptions order, waived any challenge to the special exceptions order. *Id.* The appellee argued that, because the appellants were required to challenge both the dismissal order and the special exceptions order, their appeal must fail. *Id.* The court of appeals agreed and, without addressing the merits, affirmed the trial court's dismissal. *Id.* at \*1. The Texas Supreme Court agreed with the court of appeals that the appellants were required to challenge both orders, but disagreed with how the court of appeals applied that rule. *Id.* at \*3. The Court concluded that the appellants were not required to expressly name the interlocutory order in their notice of appeal, and that the appellants had challenged the interlocutory special exceptions order through the issue challenging the dismissal, combined with the briefing challenging the special exceptions order. *Id.* Accordingly, the Court remanded the case to the court of appeals for further proceedings. *Id.*

## Arbitration

**A non-signatory annuity insurer and obligor's interest in a structured settlement agreement does not fall within any of the six theories by which a nonsignatory may be bound by an arbitration agreement.** In the course of performance of a structured settlement agreement, the parties entered into a transfer agreement containing an arbitration clause. *Transamerica Occidental Life Ins. Co. v. Rapid Settlements, Ltd.*, --- S.W.3d ---, No. 01-07-00137-CV, 2008 WL 5263265, at \*1 (Tex. App.—Houston [1st Dist.] Dec. 18, 2008, no pet. h.). Transamerica was not a party to either agreement, but was the annuity insurer and obligor with regard to the structured settlement. *Id.* The parties arbitrated a dispute, and the arbitrator's award ordered

Transamerica to change the designated payee and to send notice of the transfer of the structured settlement payment rights within seven days after a judgment confirming the award. *Id.* Transamerica had not participated in the arbitration proceedings. *Id.* Nonetheless, the district court confirmed the arbitration award and made orders in its judgment as to Transamerica. *Id.* at \*1-2. Transamerica pursued a timely restricted appeal. *Id.* at \*2. In determining whether Transamerica as a nonsignatory could be bound by the arbitration agreement, the court of appeals examined the purposes and policies involved in structured settlement protection acts. *Id.* at \*4-5. These acts include, among other provisions, procedures that courts must follow for adjudicating authority to transfer structured settlement payment rights. *Id.* at \*5. The court of appeals noted that the arbitration award and trial court confirmation failed to protect the interest in insuring compliance with those statutory requirements, and potentially exposed Transamerica to conflicting payment demands and the consequences of violating the acts. *Id.* The court also rejected the argument that state structured settlement acts were irrelevant in the context of the confirmation of an FAA-governed clause, such as here. *Id.* Thus, the court of appeals concluded that Transamerica's role in the structured settlement transaction did not subject it to the arbitration clause. *Id.* at \*6.

## Civil Procedure

**A trial court should rule on motions to strike interventions before considering other matters such as severance.** After a motion to strike an intervention was filed, the trial court conducted a hearing but did not rule on the motion. *In re Union Carbide Corp.*, --- S.W.3d ---, 52 Tex. Sup. Ct. J. 109, 2008 WL 4891243, at \*1 (Nov. 14, 2008) (per curiam). Instead, the court severed the intervenors' claims into a separate suit and directed that the severed suit be docketed and maintained on the court's own docket. *Id.* In a mandamus proceeding, the intervenors argued that, even if they did not properly intervene, the trial court had discretion to sever, rather than strike, their claims. *Id.* at \*2. The Texas Supreme Court disagreed, noting that permissive joinder (which allows severance) and intervention are authorized and governed by different rules with different processes. *Id.* Interventions by uninvited participants have potential for disrupting pending suits. *Id.* Therefore, trial courts should rule on motions to strike interventions before considering other matters, like severance. *Id.* Because the decision to sever in this case circumvented the applicable random-assignment-of-cases local rule, and because of the benefit of establishing the priority of rulings for trial courts, the Court held that Union Carbide did not have an adequate remedy by appeal. *Id.* at \*3.

## Jury Waiver

**Although a valid contractual jury waiver may be invoked by a signatory's agent, it will not be extended to a nonsignatory that is merely alleged to be the signatory's agent.** A developer and Credit Suisse First Boston Mortgage

Capital, L.L.C. (“Mortgage Capital”) signed a loan agreement containing a jury waiver. *In re Credit Suisse First Boston Mortgage Capital, L.L.C.*, --- S.W.3d ---, No. 14-08-00819-CV, 2008 WL 5220574, at \*1 (Tex. App.—Houston [14th Dist.] Dec. 11, 2008, orig. proceeding). Credit Suisse First Boston, L.L.C. (“CSFB”) was not a party to the loan agreement. *Id.* The developer sued Mortgage Capital and CSFB for alleged fraud. *Id.* Among other things, the developer contended that CSFB employees were authorized to act on behalf of Mortgage Capital. *Id.* Mortgage Capital and CSFB moved to quash the developer’s jury demand based on the contractual waiver. *Id.* In this second mandamus proceeding, two questions were presented. *Id.* at \*1, 3, 6. First, the court of appeals concluded that, when a valid contractual jury waiver applies to a signatory corporation, the waiver also extends to nonsignatories that seek to invoke the waiver as the corporation’s agents. *Id.* at \*3. However, in this case, Mortgage Capital and CSFB had neither admitted any agency relationship, nor detailed the legal relationship between them. *Id.* at \*4. Instead, Mortgage Capital and CSFB described themselves simply as “affiliates.” *Id.* Although the developer had alleged an agency relationship, the court of appeals concluded that allegations were not enough to allow a nonsignatory to invoke a contractual jury waiver. *Id.* at \*5-6. Because CSFB did not admit to being Mortgage Capital’s agent, and because the agency had not been proved, the court declined to extend the jury waiver to CSFB. *See id.* at \*6.

## Mistrials

**Before declaring a mistrial in a misdemeanor case when a jury composed of six people is reduced to five, the trial court must attempt to secure a waiver of jury trial to proceed to verdict with the five remaining jurors.** Although the Code of Criminal Procedure does not address how a court should proceed when there are fewer than six remaining jurors in a misdemeanor case due to the disability of one of the jurors, courts have treated this situation the same as for felony juries. *Garza v. State*, --- S.W.3d ---, No. 01-07-00740-CR, 2008 WL 5263559, at \*2 (Tex. App.—Houston [1st Dist.] Dec. 18, 2008, no pet. h.). In such cases, when a jury composed of six people is reduced to five jurors because a juror becomes disabled, the trial court can either declare a mistrial, or alternatively, proceed to a verdict with the remaining five jurors if the State and defendant agree. *Id.* at \*4. In this case, after the six-person misdemeanor jury was impaneled, a juror became disabled. *Id.* at \*1, 4. The trial court *sua sponte* declared a mistrial for manifest necessity. *Id.* at \*2. The defendant objected, asked for a two-week recess to allow the juror to overcome the disability, and alternatively asked “to proceed through trial with the five remaining jurors that did not have a problem.” *Id.* The State withdrew its motion for a mistrial. *Id.* at \*5. The trial court nonetheless confirmed its mistrial ruling. *Id.* at \*2. Prior to the start of the second trial, the defendant filed a habeas corpus application based on double jeopardy. *Id.* The court of appeals noted that nothing in the record reflected that proceeding with the five remaining jurors would not have been a viable, reasonable alternative to declaring

a mistrial. *Id.* at \*5. Therefore, the trial court erred by failing to consider the less drastic alternative of proceeding with the five remaining jurors pursuant to a written waiver by the defendant and the State. *Id.* The court of appeals also rejected the State’s argument that trial by five jurors would be unconstitutional if the defendant knowingly waived in writing his right to a six-person jury. *Id.*

## Oil and Gas Leases

**Termination of an oil and gas lease did not terminate the mineral-rights owner’s participation in a pooling unit because the pooling agreement allowed the owner’s tract (rather than just the lease) to be pooled.** In *Wagner & Brown, Ltd. v. Sheppard*, --- S.W.3d ---, 52 Tex. Sup. Ct. J. 130, 2008 WL 4958501 (Nov. 21, 2008), the Texas Supreme Court addressed for the first time how a pool of producing properties is affected if a lease in the pool expires. *Id.* at \*1. Sheppard, a 1/8<sup>th</sup> mineral interest owner, entered into a lease with an addendum providing that, if royalties were not paid within 120 days after first gas sales, her lease would terminate the following month. *Id.* The lease also authorized pooling with adjacent tracts. *Id.* The mineral lessees entered into a unit agreement pooling the Sheppard tract and eight others. *Id.* The Sheppard lease terminated for royalties nonpayment under the addendum. *Id.* The question was whether the lease termination also terminated Sheppard’s participation in the pooling agreement. *Id.* The Supreme Court held that termination of Sheppard’s lease did not terminate her participation in the pooling unit because the pooling agreement allowed Sheppard’s tract (rather than just the lease) to be pooled, and the lease’s termination did not change the lands committed to the unit. *Id.* at \*3. The Court noted that, if the parties want pooling to expire upon termination of one lease, they should be free to say so, but determined that the pooling agreement in this case did not so provide. *Id.*

## Service of Process

**A court order for service under Rule 106 must specify the particular method of substitute service.** Some time after granting a Rule 106 motion for substitute service, the trial court granted a no-answer default judgment. *Steinke v. Mann*, --- S.W.3d ---, No. 10-08-00079-CV, 2008 WL 5173623, at \*1 (Tex. App.—Waco Dec. 10, 2008, no pet. h.). Under the procedures set forth in Rule 106, a trial court may authorize service in any manner that the supporting affidavit or other evidence shows will be reasonably effective to give the defendant notice of the suit. *Id.* In this case, the trial court stated that the Rule 106 motion had come on for consideration and that, after consideration, the court was of the opinion that the motion should be granted in all respects. *Id.* It did not expressly authorize service by any particular manner. *Id.* Because the manner of service was left to the process server’s discretion, service was defective and the default judgment was improper. *Id.* at \*2.

**Service of process on a subsidiary constitutes service on an alter ego parent corporation, sufficient to uphold a default judgment against the parent, without any pleading or proof of alter ego in the default judgment case.** A plaintiff named and served Consolidated Employment Benefits Corporation (Consolidated), an Illinois corporation. *Cebcor Serv. Corp. v. Landscape Design & Const., Inc.*, 270 S.W.3d 328, 330 (Tex. App.—Dallas 2008, no pet. h.). Consolidated was served through the Texas Secretary of State, but after the secretary of state forwarded the original petition to the address on file, it was returned with the notation “No Forwarding Order On File.” *Id.* Consolidated did not answer, and the plaintiff moved for a default judgment. *Id.* On the day of the hearing, plaintiffs filed a first amended petition that alleged the defendant was Consolidated “a/k/a Cebcor Service Corporation,” without pleading or alleging alter ego. *Id.* No party was served with the amended petition, and the court signed a default judgment at the hearing. *Id.* at 331. The judgment awarded damages and attorneys’ fees against Consolidated “a/k/a Cebcor Service Corporation.” *Id.* Three years later, plaintiff-judgment creditor attempted to have the judgment executed with regard to Cebcor’s assets. *Id.* Cebcor filed suit alleging a bill of review against the default judgment and requesting declaratory judgment that the default judgment is void. *Id.* As a defense, the judgment creditor alleged alter ego, and an alter ego question was submitted to the jury, which answered “yes.” *Id.* The court of appeals determined that service of the amended petition in the first lawsuit was not required before obtaining a default judgment because “the original and amended petitions sought the same relief.” *Id.* at 332. The court further determined that alter ego was relevant to the second lawsuit because, to prevail on its bill of review, Cebcor had to prove it was not served. *Id.* Service on Cebcor’s subsidiary constituted service on Cebcor if it was the subsidiary’s alter ego. *Id.* at 332-33. Finally, the court of appeals found that Cebcor waived its argument that the judgment creditor was required to plead the alter ego relationship in the underlying case. *Id.* at 333. However, the court also noted that a party is entitled to obtain a judgment against one entity and later pursue a finding that another entity is the judgment debtor’s alter ego. *Id.* at 333-34.

## Statutory Caps

**The statutory damages cap in Texas Civil Practice and Remedies Code section 33.012(a) is applied before the damages cap in section 41.0105 (regarding medical and health care expenses).** Section 33.012(a) directs the trial court, in certain circumstances, to reduce the amount of recoverable damages by a percentage equal to the claimant’s percentage of responsibility. *Irving Holdings, Inc. v. Brown*, --- S.W.3d ---, No. 05-06-01654-CV, 2009 WL 18713, at \*1, 2 (Tex. App.—Dallas Jan. 5, 2009, no pet. h.). Section 41.0105 provides that, in addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant. *Id.* at \*3. In this case, the order of applying the two caps made a difference of approximately \$22,000. *Id.* at \*1. To decide this question of

first impression, the court of appeals examined the language of each section, noting that section 41.015 limits the “recovery” of expenses and section 33.012(a) reduces the “amount of damages to be recovered.” *Id.* at \*4. A plaintiff’s recovery is not determined until after a court has ascertained the amounts of damages sustained and then, if applicable, reduced those amounts under section 33.012(a). *Id.* Therefore, the court concluded that section 41.0105 must be applied after all other calculations limiting or reducing the amount of recoverable damages. *Id.*

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## Fifth Circuit

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### Covenants Not to Compete

**In a covenant not to compete, the term “termination” may have a meaning different than “expiration” when applied to the employment.** An employment contract set the period of a noncompete provision as “the second anniversary of the Date of Closing or on the second anniversary of the termination of [the employee’s] employment by [the employer], whichever occurs later . . . .” *Specialty Rental Tools & Supply, LP v. Shoemaker*, --- F.3d ---, No. 08-60061, 2008 WL 5235987, at \*1 (5th Cir. Dec. 17, 2008) (emphasis omitted, bracketed text changed). The contract further defined the employment period as “five (5) years, beginning on March 1, 2002 and ending on March 1, 2007 . . . .” *Id.* at \*2. Finally, the contract defined “termination” as permitted by either party upon 14 days written notice. *Id.* Toward the end of the five-year employment period, the employer notified the employee by letter that his employment contract would expire and not be renewed. *Id.* The employer’s letter made clear that it was not a notice of termination, but rather a notice of non-renewal. *Id.* Within days after the employment period ended, the employee went to work for a direct competitor of the employer. *Id.* Based on the wording of the contract, the Court held that “termination” was unambiguously limited to affirmative acts of the contracting parties and did not include “expiration” of employment at the end of the five-year period. *Id.* at \*5-6 Thus, the employer was not entitled to enforcement of the noncompete provision in the employment contract when it expired. *Id.* at \*6.

### Due Process

**Due process does not require the Parole Board to specify the evidence on which it bases its decision to deny supervised early release.** A state prisoner sought federal review of the Texas Board’s of Pardons and Parole decision to deny him supervised early release (slightly misnamed “mandatory supervision” release, since the parole board has some discretion to deny release). *Boss v. Quarterman*, 552 F.3d 425, 426 & n.1 (5th Cir. 2008). The parole panel denied mandatory supervision based on a review of his record and additional information he submitted. *Id.* at 427. The one-page decision listed five reasons for denial, which were verbatim restatements of five paragraphs of the Parole Board’s

Directives. *Id.* The prisoner argued that due process required the parole panel's report to be supported by "some evidence" in the record, and to specify particular evidence. *Id.* The U.S. Supreme Court has held that "some evidence" must support a prison disciplinary board's decision to revoke an inmate's "good-time credits." *Id.* (citing *Superintendent v. Hill*, 472 U.S. 445, 453-54 (1985)). The Ninth Circuit recently applied this "some evidence" requirement to denials of parole to California prisoners. *Id.* at 428 (citing *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006)). However, the Fifth Circuit disagreed that the Supreme Court's "some evidence" requirement is clearly established law in the context of a Texas parole board's denial of mandatory supervision. *Id.* Instead, the Court found "no persuasive reason to conclude that *Hill* supplanted *Greenholtz*," a previous opinion from the U.S. Supreme Court specifically addressing due process in the context of a parole board's denial of conditional release. *Id.* at 429 (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979)). The Fifth Circuit had recently held that Texas' mandatory supervision scheme is virtually identical to the parole scheme at issue in *Greenholtz*. *Id.* at 429 n.1. Thus, the Fifth Circuit held that *Hill*'s "some evidence" requirement does not apply to the Texas parole board's denial of mandatory supervision, which is instead governed by the due process principles stated in *Greenholtz*.

## Offers of Judgment

**A Rule 68 offer of judgment that fully satisfies an FLSA plaintiff's claims, made before certification of the collective action, does not necessarily moot the plaintiff's case.** In *Sandoz v. Cingular Wireless LLC*, --- F.3d ---, No. 08-30769, 2008 WL 5341434 (5th Cir. Dec. 23, 2008), the Fifth Circuit addressed the interplay between Federal Rule of Civil Procedure 68 (regarding offers of judgment) and section 216(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)). Section 216(b) allows an employee to bring a collective action on an "opt in" basis. *Sandoz*, 2008 WL 5341434 at \*2. No unnamed employee is a party plaintiff unless he/she gives consent in writing and such consent is properly filed. *Id.* Cingular made a Rule 68 offer of judgment to the named plaintiff-employee before the collective action was certified (i.e., before any other employee had opted in). *Id.* at \*5. Cingular argued that, since the offer of judgment fully satisfied the only plaintiff's claims, the case was moot. *Id.* However, the Court noted that the suggested mootness analysis "would provide an incentive for employers to use Rule 68 as a sword, 'picking off' representative plaintiffs . . ." *Id.* at \*6. This situation was avoided through application of the relation-back doctrine. *Id.* The Court stated that, despite the opt-in/opt-out differences between a Rule 23 class action and an FLSA case, "the policies behind applying the 'relation back' principles for Rule 23 class actions apply with equal force to FLSA § 216(b) collective actions. *Id.* at \*7. The Court did not foreclose the possibility that a Rule 68 offer of judgment could moot an FLSA collective action, but held that in this case, Cingular's offer had not mooted the plaintiff's case for consideration of the timeliness and, if necessary, the merits of the plaintiff's motion to certify. *Id.* at \*8.

## Removal and Remand

**A district court cannot remand federal claims conferring removal jurisdiction where those claims are part of a case "predominated" by state law.** In cases in which a separate and independent claim is removable but joined with one or more otherwise non-removable claims, 28 U.S.C. § 1441(c), before its amendment in 1990, provided district courts with discretion to "remand all matters not otherwise within its original jurisdiction." *Poche v. Texas Air Corps, Inc.*, 549 F.3d 999, 1001 (5th Cir. 2008). The Fifth Circuit interpreted this language as prohibiting remand of the federal claims conferring removal jurisdiction. As amended in 1990, section 1441(c) now permits a district court to "remand all matters in which State law predominates." *Id.* The removed action at issue was remanded in full – including the FLSA claim conferring removal jurisdiction – after the trial court determined that state-law claims predominated. *Id.* at 1000. In order to affirm, the Fifth Circuit would have had to hold that the word "matters" in the current version of section 1441(c) refers to an entire action, including the removable federal claim. *Id.* at 1001. Although other federal courts had so held, the Fifth Circuit concluded that its precedent requires a different result. *Id.* After discussing this precedent, the Fifth Circuit concluded that the district court was without authority to remand the FLSA claim. *Id.* at 1005. The Court left the disposition of the remaining state-law claims to the district court's discretion. *Id.*

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## Notes and News

**In a medical malpractice case, the Fort Worth Court of Appeals discussed the interaction of contributory negligence and mitigation, the application of unavoidable accident instructions, and the effect of an improper new and independent cause instruction** in *Young v. Thota*, --- S.W.3d ---, No. 02-05-00350-CV, 2008 WL 4938314 (Tex. App.—Fort Worth Nov. 20, 2008, no pet. h.). Justice Gardner dissented because she would have held that, even if there was error in the jury charge: (1) it should not have been the subject of a *Casteel* presumed harm analysis, and (2) it probably did not result in an improper judgment. The entire opinion is available on the court's website at <http://www.2ndcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=19957>.

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## Quarterly Tip: Pattern Jury Instructions

The Texas Pattern Jury Charges are updated on a regular basis. The previous versions were published as of 2006. Now, the 2008 editions of the various books are available from the State Bar of Texas. These new editions include a very helpful CD-ROM containing both the book (with explanations and comments), as well as the charge language itself.

In connection with developing the 2008 editions, TexasBarBooks – which publishes the Texas Pattern Jury Charges – hosted a web forum to allow comment from the Bar on draft

jury charge materials. We hope that this great new tradition will continue for the next editions. To see the type of materials that were posted for comment (and to keep tabs on the site for when things rev back up again), visit the TexasBarCLE site at <http://www.texasbarcle.com>, scroll down to “Practice Manuals,” and click on “Review proposed changes to the Pattern Jury Charges.” As I mentioned, the 2008 editions are now published, but please keep this feature in mind as we move into the next revision cycle.

Also be aware that, although not officially endorsed by the State Bar of Texas, the State Bar’s Oil, Gas, and Energy Resource Law Section has promulgated a set of Oil & Gas Pattern Jury Instructions and Questions. These can be accessed on the Section’s website at <http://www.oilgas.org/DrawOnePage.aspx?PageID=13>.

Though not part of the jury charge, there is a “Texas Uniform Jury Handbook” prepared by the Texas Young Lawyers Association and published by the State Bar of Texas. If you’re curious about what jurors are learning about jury service (including explanations on events at trial, such as jury instructions), check out the adaptation of the brochure on the State Bar’s website: [http://www.texasbar.com/Content/ContentGroups/Public Information1/Legal Resources Consumer Information/Legal and Judicial System1/Texas Uniform Jury Handbook.htm](http://www.texasbar.com/Content/ContentGroups/Public%20Information1/Legal%20Resources%20Consumer%20Information/Legal%20and%20Judicial%20System1/Texas%20Uniform%20Jury%20Handbook.htm).

Last but not least, the Fifth Circuit Pattern Jury Instructions (both civil and criminal) are available online at <http://www.lb5.uscourts.gov/juryinstructions/>. In addition, the Fifth Circuit has provided on this page a very helpful list of links to other circuits’ pattern/model jury instructions.



## EVIDENCE & DISCOVERY UPDATE

by Mary Evelyn McNamara

### Texas Courts of Appeal

#### **Personal Injury: Cost of New Home and Fees for Financial Planner Not Recoverable as Future Medical Expenses**

*Matbon, Inc. v. Gries*, No. 11-06-00258-CV, 2009 WL 94310, (Tex. App.—Eastland Jan. 15, 2009, no pet. h.) (not yet released for publication).

In the underlying case in Palo Pinto County, Dennis Gries and Debra Gries intervened in a suit against Matbon, Inc. and Hutton, a truck driver employed by Matbon, for injuries sustained in an automobile accident. Another vehicle was involved in the accident, in which the driver and passenger were killed. After a jury trial, the trial court rendered a judgment of more than \$3 million for the Grieses.

Among several issues on appeal, Matbon challenged the future medical expenses awards of \$500,000 to Dennis Gries and \$65,000 to Debra Gries. Matbon contended that the trial court erred in permitting plaintiffs to present evidence of the cost of a new, custom-built home and fees for a financial planner in support of their claim for future medical expenses. Matbon asserted that future medical expenses are limited to actual medical expenses and therefore that these costs are not recoverable.

An orthopedic surgeon testified about the Grieses’ future medical expenses, including needs for a new wheelchair-accessible home and a financial planner to help them manage

their potential recovery. The appellate court held that the trial court abused its discretion in permitting evidence of the projected costs of these items as recoverable future medical expenses. As to the financial planner, because the Grieses cited no authority authorizing a personal injury claimant to recover the cost of a financial planner to manage a potential recovery, the award was not permitted. The award for cost of the house was a closer question. Although there was some evidence that relocation and a new home were necessary, recovery for the cost of a new home was “troublesome” because it involves personal tastes in housing. Further, the expert physician’s calculations did not include an offset for the value of the plaintiffs’ current home. On those facts, the court of appeals held that the cost of relocating and constructing a new home went beyond the goal of making a plaintiff whole.

In examining whether admission of evidence of the costs of a financial planner and new home was harmful, the court of appeals held that the admission of evidence about the financial planner’s costs for Debra Gries was harmless because the evidence of her other future medical expenses exceeded the amount awarded by the jury. Concerning the damages awarded to Dennis Gries, the court of appeals reached a different result. Because a significant amount of his future medical expense projection was attributable to the costs of a new home and the financial planner, admission of evidence of these costs was harmful. The court of appeals suggested a remittitur from \$500,000 to \$325,000 in future medical expenses for Dennis Gries.

Matbon also challenged the awards for past medical expenses, alleging that the trial court incorrectly applied Texas

Civil Practice and Remedies Code section 41.0105, concerning recovery of medical expenses “actually paid or incurred by or on behalf of the claimant.” After the verdict was returned, Matbon presented two exhibits showing the amounts of medical bills written off by medical providers. The trial court found however that the Grieses were entitled to recover the gross amount of their medical bills. The court of appeals concluded that this was an incorrect application of section 41.0105, and reversed and remanded the claim of past medical expenses for a new trial.

Matbon additionally challenged the jury’s awards to Dennis Gries for past and future lost earning capacity, on the ground that the expert witness on this issue was not qualified to testify because he was an economist, not a vocational rehabilitation specialist. The court of appeals noted that Matbon cited no authority in support of this assertion. The court held that because the expert relied on information from Dennis Gries, whose employment background was in human resources, the trial court did not err in admitting the economist’s testimony on lost earning capacity. Further, the jury’s awards were supported by the evidence.

Matbon challenged several other evidentiary rulings, including the assertion that admitting evidence of Matbon’s negligence constituted error, because Matbon had stipulated to its negligence before trial. The court of appeals disagreed, holding that evidence of Matbon’s negligence was relevant to issues of proportionate responsibility and exemplary damages. Admission of Matbon’s post-accident conduct was also relevant to the issue of exemplary damages. Further, it was not error to admit evidence of the deaths of another driver and passenger because that driver’s conduct was a focal point of the trial, and the evidence provided the jury with the reason why the driver and passenger did not testify at trial. Matbon also contended that the trial court improperly showed emotional support for plaintiffs by weeping in the presence of the jury during plaintiffs’ counsel’s closing argument. Matbon failed to preserve error on this issue because it did not object to the conduct at the time it occurred.

Matbon also asserted that the jury’s finding that Matbon’s driver Hutton was grossly negligent was not supported by the evidence. At trial, both a state trooper and Gries’s accident reconstruction expert testified about Hutton’s action of taking his eyes off the road to reach for a package of crackers while driving. The trooper characterized the action as a “gross deviation from the appropriate standard of care”; the expert witness testified that Hutton’s actions “involved an extreme degree of risk.” The court of appeals determined that, although Hutton’s conduct was negligent, on these facts his conduct did not create the likelihood of serious injury to the plaintiffs. Because Hutton’s actions as a matter of law did not rise to the level of extreme risk necessary to establish gross negligence, the exemplary damages award was reversed and a take-nothing judgment rendered in favor of Matbon on this issue.

### **Construction Defect: Judgment against Homeowners Upheld; No Error in Evidentiary and Discovery Rulings**

*Hooper v. Smallwood*, 270 S.W.3d 234 (Tex. App.—Texarkana 2008, pet. filed).

In Lamar County, Roger and Linda Hooper brought a construction defect suit for foundation problems against home builder Smallwood and concrete subcontractor Skinner. At the conclusion of the trial, the jury found the Hoopers’ negligence in making changes to the area around the foundation was the sole cause of the problems; that Smallwood and Skinner did not fail to comply with any warranty; that Smallwood did not engage in deceptive acts or practices; and that the cost of repairs, loss of value, consequential damages, and attorney’s fees for the Hoopers’ attorney were all zero. The Hoopers appealed.

A primary issue on appeal was whether the trial court erred in refusing voir dire examination of a witness, Junior Fowler, and allowing his testimony. The Hoopers had met with Fowler before trial to get an estimate of the costs of rebuilding their house. Fowler looked at the house and gave the Hoopers a “generic cost of construction,” plus a percentage for everything involved, because of an increase in materials and transportation costs since the original construction was completed. Mr. Hooper had one of his employees take that information, calculate amounts, and place it on one of Fowler’s letterheads. That information was then provided to Smallwood in discovery, represented as being Fowler’s expert report.

Fowler refused to appear for deposition before trial. When he appeared at trial pursuant to Smallwood’s trial subpoena, the Hoopers’ attorney attempted to question him on voir dire pursuant to a motion for contempt, which the trial court denied. Fowler then testified that the Hoopers’ installation of a sidewalk and flattening of the site caused the damage. He further testified that he had told the Hoopers he was a friend of Smallwood and did not want to get in the middle of the dispute. He also testified how his “report” came into existence and that he had never agreed to be an expert witness for the Hoopers. The court of appeals found no error in admitting Fowler’s testimony because the issue was inadequately briefed. The court of appeals also found no error in the trial court’s denial of the request to question Fowler on voir dire. On appeal, the Hoopers asserted that the basis of the request for voir dire was Texas Rule of Evidence 705, “directed to the underlying facts or data upon which the [expert’s] opinion is based.” The record did not support this basis. Concerning another witness, the Hoopers’ damages expert, limiting the testimony was not found to be error because the jury awarded no damages to the Hoopers.

The Hoopers further asserted that the evidence was legally and factually insufficient to support the jury’s verdict.



The court of appeals, after an extensive review, found that the evidence adduced at trial “would support a rather large number of outcomes in this case. That being so, we cannot choose one over the other and disregard the jury’s resolution of the disagreements among the witnesses. The jury’s verdict was not reached against the great weight and preponderance of the evidence.”

The Hoopers also asserted that they were not provided with sufficient post-trial discovery to fully develop their theory about an alleged conspiracy to commit fraud on the trial court that required the granting of a new trial. After trial, the Hoopers sought additional discovery of communications between counsel and communications with adjusters, billing records, and additional telephone records. The trial court limited the scope of this discovery. The court of appeals noted that unlike with pretrial discovery, there are no clear rules regarding the provision of post-trial discovery in this context. The court of appeals agreed with Smallwood’s counsel that part of the request raised issues of attorney-client privilege, concluding there was no abuse of discretion in the limitation of post-trial discovery, at least in part because the Hoopers provided no rationale suggesting an abuse.

The Hoopers had sought a new trial on the ground that Smallwood and his attorney had improperly communicated with Fowler. The court of appeals found no abuse of discretion in the denial of the motion for new trial. The evidence showed that Fowler was not a retained expert for the Hoopers. Fowler testified that he never agreed to be an expert for the Hoopers and was not paid to be one. The contacts between Fowler and Smallwood were not shown to be wrongful: there was no evidence that Fowler changed his testimony because of Smallwood. As to Fowler’s contact with Smallwood’s attorney, unless Fowler was the Hoopers’ retained expert witness, contacts with him by Smallwood’s attorney would have been entirely proper. The court of appeals affirmed the judgment.

**Antitrust: Privilege Attaching to Documents Produced Pursuant to Texas Attorney General’s Civil Investigative Demand Does Not Confer Privilege on Producing Entity in a Subsequent Suit**

*In re Mem’l Hermann Healthcare Sys.*, No. 14-08-00204-CV, 2008 WL 4542720 (Tex. App.—Houston [14th Dist.] Oct. 9, 2008, orig. proceeding) (not yet released for publication).

Stealth, LP opened a hospital in Houston near a hospital operated by Memorial Hermann. After the hospital operated by Stealth failed, Stealth brought an antitrust suit in Harris County against Memorial Hermann, alleging that Memorial Hermann arranged a “horizontal boycott” to keep insurance companies from contracting with Stealth. The Texas attorney general subsequently opened an antitrust investigation and issued a civil investigative demand (CID) to Memorial Hermann. Memorial Hermann produced approximately 87,000 pages of responsive documents to the attorney general pursuant to the CID.

During discovery in its suit, Stealth sought production of all of the documents Memorial Hermann provided to the

attorney general. Memorial Hermann produced 54,000 pages to Stealth but withheld the other 33,000 pages on the ground that the documents were privileged from disclosure under section 15.10(i) of the Texas Free Enterprise and Antitrust Act. TEX. BUS. & COMM. CODE § 15.10(i). The trial court ordered that Memorial Hermann fully respond to the requests for production, and Memorial Hermann sought mandamus relief.

The court of appeals denied Memorial Hermann’s request for mandamus relief. Section 15.10(i) reads in relevant part:

Except as provided in this section or ordered by a court for good cause shown, no documentary material, answer to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

*Id.* § 15.10(i)(1). Memorial Hermann asserted that this provision causes all CID materials to be privileged, no matter who possesses them. Stealth countered that this provision creates a privilege that inures to the benefit of the attorney general only and may not be claimed by the person who produced CID materials to the attorney general. In the majority opinion, the court of appeals held that the plain statutory language does not confer a privilege upon the producing person in a subsequent lawsuit, which comports with legislative intent<sup>1</sup> and federal judicial interpretations of the analogous federal antitrust provision.

Memorial Hermann asserted, in addition to privilege, that two of Stealth’s requests for production pertaining to CID materials provided to the attorney general were overbroad. Memorial Hermann contended that, because the attorney general is authorized to conduct a “fishing expedition” through a CID, any discovery request that echoes a CID therefore must be patently overbroad. The court of appeals disagreed. A CID may require the production of documents “only if the material or information sought would be discoverable under the Texas Rules of Civil Procedure or other state law relating to discovery.” *Id.* § 15.10(d)(1). Although the court of appeals did not necessarily approve of the broad wording of the requests, absent evidence that Stealth’s requests would capture irrelevant documents, the court determined that Memorial Hermann had not shown an abuse of discretion warranting mandamus relief.



<sup>1</sup> In a concurrence, Justice Kem Thompson Frost did not join section B of the majority’s opinion concerning the legislative purpose of section 15.10(i). Justice Frost stated in her concurrence that because the plain language of section 15.10(i) was unambiguous, the court of appeals “need not resort to any tool of interpretation or construction to determine the meaning of the statute.”



# ALTERNATIVE DISPUTE RESOLUTION

by Susan Nassar

## **Parties cannot agree by contract to expand TAA's statutory grounds for judicial vacatur or modification of arbitration awards.**

*Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795 (Tex. App.—Dallas 2008, pet. filed).

This case involved claims by Margaret A. Quinn (“Quinn”) against her former employer Nafta Traders, Inc. (“Nafta”). Quinn sued Nafta for violations of the Texas Commission for Human Rights Act. The trial court signed an agreed order compelling the parties to arbitrate pursuant to an arbitration provision in Nafta’s employee handbook. The arbitrator awarded Quinn \$203,341, including attorneys’ fees. Quinn moved to confirm the arbitration award and requested additional attorneys’ fees incurred to enforce the award, and Nafta moved to vacate the arbitration award. The trial court granted Quinn’s motion to confirm and denied Nafta’s motion to vacate. The trial court also denied Quinn’s request for additional attorneys’ fees. Both parties appealed.

Nafta argued on appeal that the parties’ arbitration agreement expanded the scope of judicial review authorized under the Texas Arbitration Act (“TAA”) to include grounds not expressly identified in the statute and that the award should be vacated or modified under the agreement’s expanded review. The Dallas Court of Appeals concluded that both parties’ issues were without merit and affirmed the trial court’s judgment. In addressing Nafta’s argument regarding expanded review, the court of appeals noted that the Texas Supreme Court had not addressed the issue of whether parties could contractually agree to enlarge judicial review of an arbitrator’s award beyond the statutory grounds set forth in the TAA. The court went on to explain, however, that when recently confronted with this same issue under the Federal Arbitration Act (“FAA”), the United States Supreme Court held that the FAA’s statutory grounds for judicial vacatur or modification of awards were exclusive and could not be supplemented by contract. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1400, 170 L.Ed.2d 254 (2008). In extending the Supreme Court’s holding in *Hall* and reaching the same conclusion with respect to the TAA, the court of appeals reasoned that:

Like the FAA, the statutory grounds for vacating and modifying an award under the TAA are extremely narrow and there is no language allowing parties to contract for expanded judicial review.... A statute with no provision for expansion cannot permit contracting parties to supplement review for specific instances of egregious conduct or clerical error by additionally providing for judicial review

for any legal error. Moreover, section 171.087 addressing judicial confirmation is not written as a default provision in the event the parties’ contract is silent on this issue. On the contrary, the TAA specifically mandates confirmation in all cases except where statutory grounds are offered for vacation, modification, or correction.

The court of appeals therefore held that “parties seeking judicial review of an arbitration award covered under the TAA cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute.”

## **The right to arbitration is not waived absent evidence of prejudice to the other party.**

*In re Fleetwood Homes, L.P.*, 257 S.W.3d 692 (Tex. 2008) (orig. proceeding).

The question here was whether Fleetwood Enterprises, Inc. (“Fleetwood”), a manufacturer of mobile homes, impliedly waived arbitration by failing to pursue its arbitration demand for eight months while discussing a trial setting and allowing limited discovery. In January 2005, Fleetwood signed a dealer agreement with Gulf Regional Services, Inc. (“Gulf”) that included a provision requiring arbitration of “any dispute, controversy or claim among the Parties.” Fleetwood cancelled the agreement and Gulf filed suit in October 2005. Fleetwood filed an answer demanding arbitration, but did not move to compel arbitration until July 2006. Gulf argued that the motion should be denied because Fleetwood had waived its right to arbitration.

The Texas Supreme Court disagreed and conditionally granted Fleetwood’s petition for writ of mandamus and directed the trial court to compel arbitration. In doing so, it acknowledged but distinguished its earlier opinion in *Perry Homes v. Cull*, 258 S.W.3d 589, 590 (Tex. 2008), in which it held that “a party waives an arbitration clause by substantially invoking the judicial process to the other party’s detriment or prejudice.” Although Fleetwood had delayed eight months before moving to compel arbitration, the Court noted that it had only noticed one deposition that it subsequently cancelled, and it had served only one set of written discovery the day before it moved to compel arbitration. The Court also noted that Fleetwood had not waited until the eve of trial to compel arbitration. The Court concluded that, taken together, these actions were not sufficient to overcome the strong presumption against waiver. More importantly, Gulf had deposed three Fleetwood representatives and failed to explain how it was prejudiced in being allowed to do so.

## **Waiver-of-reliance provision precluded fraudulent inducement claim, with respect to arbitration clause.**

*Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008).

In an interlocutory appeal, the Texas Supreme Court reversed the court of appeals’ judgment in this case and remanded to the trial court to compel arbitration. The specific issue at hand



## NEWS FROM THE BAR

by Les Hatch

was whether an unambiguous waiver-of-reliance provision in a commercial contract precluded a fraudulent inducement claim as a matter of law. The Court held that it did because the parties were sophisticated and represented by counsel in an arm's-length transaction, which resulted in a negotiated settlement agreement that included "clear and broad waiver-of-reliance and release-of-claims language." Because the agreement conclusively negated reliance on representations made by either side, the Court concluded that any fraudulent-inducement claim lodged to avoid an arbitration provision was contractually barred. The Court therefore enforced the parties' contract as written.

### **NASD arbitration applies to broker's extra-contractual wrongful discharge claim.**

*In re NEXT Fin. Group, Inc.*, No. 08-0192, 52 Tex. Sup. Ct. J. 112, 2008 WL 4891735 (Tex. Nov. 14, 2008) (orig. proceeding) (per curiam).

The issue in this mandamus proceeding was whether former securities broker Michael Clements ("Clements") was required to arbitrate his extra-contractual Sabine Pilot claim that his employer NEXT Financial Group, Inc. ("NEXT"), a securities brokerage firm, wrongfully discharged him for refusing to commit an illegal act. The Court held that the employee's Sabine Pilot claim was subject to arbitration and did not fall within an exception limited to statutory employment discrimination claims. The Court therefore conditionally granted mandamus relief and directed the trial court to vacate its order denying NEXT's motion to compel arbitration and enter an order compelling arbitration of Clements's claims.

In so holding, the Court reasoned that under the FAA's plain language, "an arbitrable dispute can arise out of either the contract containing the arbitration clause or a transaction evidenced by the contract." While Clements's wrongful termination claim did not arise out of a written employment contract, the Court concluded based on First Circuit precedent that "the creation of an employment relationship ... is a sufficient 'transaction' to fall within section 2 of the [Federal Arbitration] Act." The Court noted that in keeping with federal policy to liberally construe arbitration agreements, at least one other court had held that a tort claim arising from a securities broker's illegal conduct "arose out of" the brokerage firm's business and was subject to arbitration based on the arbitration provision in pre-1993 NASD rules. The Court reasoned that although Clements's retaliatory discharge claim was premised on NEXT's allegedly illegal activities, the alleged conduct involved "significant aspects" of NEXT's legitimate business activities, and thus brought the dispute within the scope of the NASD arbitration clause.

Clements also contended that his Sabine Pilot wrongful termination claim was excepted from arbitration as a "claim alleging employment discrimination ... in violation of a statute" under NASD. Clements attempted to distinguish his claim on the basis that NEXT's conduct in terminating him for refusal to commit a crime was a violation of the Texas Penal Code. The Court rejected Clements's interpretation as strained and contrary to the plain meaning and intent of the NASD Code, which the Court was required to give effect. ■

### **Report on Court Reorganization**

On Oct. 3rd, the SBOT Board of Directors accepted the report of the Court Administration Task Force appointed to consider proposals related to court reorganization introduced during the 2007 legislative session, as well as other topics. The report addresses the complexity, shared local and state responsibility, and decentralization in the Texas court system. It sets out a new three-tiered trial court structure with minimal overlapping jurisdiction, and addresses flexibility and excellence issues. The SBOT Board has not approved or considered the recommendations of the report. The executive summary of the report can be found on p. 888 of the December *Texas Bar Journal*. The full report, including appendices and minority reports, can be found at [www.texasbar.com](http://www.texasbar.com).

### **New Executive Director of State Bar of Texas**

Michelle Hunter became the Bar's executive director after a unanimous vote Oct. 3rd by the Board of Directors at its quarterly meeting in Midland. She had been the Bar's deputy executive director, also having previously served as finance division director, information manager, and corporate counsel.

### **Client Trust Accounts**

For an article on Client Trust Accounts and the Financial Crisis, see p. 906 of the December 2008 *Texas Bar Journal*. The article discusses the effect of a growing number of financial institutions failing or being taken over on client trust accounts. It concludes that lawyers must be extra vigilant about the safety of such accounts and FDIC insurance considerations.

### **Texas Gavel Awards: Journalistic Excellence**

The Texas Gavel Awards submission deadline is April 1, 2009. This award recognizes journalistic excellence that educates the public about the law and fosters public understanding of the law. See the "News and Publications" link at [www.texasbar.com](http://www.texasbar.com) for an application.

### **"Paid or Incurred" Debate**

There has been much debate over the meaning of one sentence in Texas Civil Practice & Remedies Code § 41.0105: "In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." Articles on "Paid or Incurred" in the November 2008 (p. 812) and January 2009 (p. 16) *Texas Bar Journals* by Judge Randy Wilson and Judge Gisela D. Triana-Doyal represent differing views of the issue and are good reads on this hot topic. ■



# REPORT ON EQUAL ACCESS TO JUSTICE

by Jim Sales, Chair,  
Texas Access to Justice Commission

**J**UST AS THE TEXAS SUPREME COURT-ORDERED IOLTA “Comparability” Rule was beginning to generate an urgently needed increase in funds for the access to justice effort, the national, and now global, economic situation kicked revenue generation into a terrifying downward spiral. The comparability rule was designed to enhance the resources of the legal service providers who work to ensure that all Texans have access to the justice system in civil matters. Now, the anticipated increase in IOLTA revenue has evaporated and the existing level of financial support has dropped precipitously. Economic turmoil is having a cataclysmic impact on those who strive so tirelessly to help the less fortunate of the state.

No one seems willing to predict when the disastrous economic decline will stabilize. Even fewer economic experts seem willing, or even remotely confident, to suggest when a meaningful long-term restoration of economic stability will be achieved. The population in Texas is approaching 25 million. Roughly one-fifth of our population cannot afford the services of a private attorney and thus are effectively foreclosed from the justice system in the absence of legal aid.

Before the economic crisis, legal service providers were only able to help approximately 25 percent of those seeking legal help. That percentage is likely to decline as legal service providers are compelled to cut staff attorneys, reduce operations in the field, and reallocate resources for maintaining and operating intake units. Thus, while the Texas legal landscape was already distressing, the situation has deteriorated even further.

According to the latest figures, there are 80,562 active lawyers licensed by the state of Texas. 72,324 reside and practice in the state. Last May, the Bar mailed dues statements which included a request for contributions to the Access to Justice Campaign. Fewer than 6,000 lawyers contributed—only one out of every twelve privileged to practice in Texas. This is a particularly disappointing response.

Time and again I have heard lawyers rail, as Judge Learned Hand declared, “Thou shall not ration justice.” Yet, millions of less fortunate Texans are denied meaningful access to the justice system simply because they cannot afford a lawyer.

Understandably, some lawyers are unable to participate in pro bono representation because of their circumstances. It would seem, however, that even those would be persuaded to make some contribution to their profession’s access to justice effort. If all 72,324 licensed lawyers practicing and residing in Texas would contribute \$75, we would raise in excess of five million dollars to support and maintain those who are working on the front lines, providing legal help to those in real need.

As gatekeepers of the rule of law, we all bear an obligation to ensure the accessibility of our justice system. If we pitch in, we can help to make our justice system work for all Texans. Please, as a lawyer, care enough to make a difference – make a contribution to the access to justice effort in Texas! ■



# LITIGATION CALENDAR

by Tracy Nuckols

## Litigation Update Institute

Houston February 26-27 Holiday Inn Select  
Sponsored by TexasBarCLE. [More info.](#)

## Patent Prosecution Workshop

San Antonio March 4 Hyatt Hill Country Resort  
Sponsored by TexasBarCLE. [More info.](#)

## Trial by Movie

Forth Worth March 6 Texas Wesleyan University  
Sponsored by the Tarrant County Bar Association. [More info.](#)

## Advanced Medical Malpractice Course

Santa Fe March 12-13 La Fonda Hotel  
Sponsored by TexasBarCLE. [More info.](#)

## The Jury Trial 2009

Houston March 12-13 Hilton University of Houston Hotel  
Dallas March 26-27 Cityplace Conf. Center  
Sponsored by the University of Houston Law Center. [More info.](#)

## Winning Before Trial

Houston March 26 Hilton Houston Westchase Hotel  
Dallas (Video) April 30 Cityplace Conf. Center  
Sponsored by TexasBarCLE. [More info.](#)

## Choosing and Courting a Jury

Houston March 27 Hilton Houston Westchase Hotel  
Dallas May 1 Cityplace Conf. Center  
Sponsored by TexasBarCLE. [More info.](#)

## National Jury Summit

San Francisco April 1-3 Ritz-Carlton Hotel  
Sponsored by ABOTA. [More info.](#)

## How to Offer and Exclude Evidence

Houston April 16-17 Hilton University of Houston Hotel  
Dallas April 23-24 Cityplace Conf. Center  
Austin (Video) June 25-26 Norris Conf. Center  
Sponsored by the University of Houston Law Center. [More info.](#)

## Facilitating Powerful Coalitions

Austin April 14-16 McKinney Roughs State Park  
Sponsored by the Center for Public Policy Dispute Resolution, CDR Associates and Consensus Building Institute.

## State Bar of Texas Annual Meeting

Dallas June 25-26 Hilton Anatole Hotel  
[More info.](#)



# PHYSICIAN, HEAL THYSELF —and Your Lawyer Colleagues, Too: Reflections on a Profession’s Billing Conundrum

By Gretchen S. Sween<sup>1</sup>

**T**HE HEADLINES HAVE BEEN GRIM LATELY: “Thousands of Legal Jobs Cut in 2008,” “Major Firms in Major Markets Take Economic Blow,” “Billing Rates Expected to Slump in 2009.” Indisputably, the perfect storm engendered by a recession, the credit crisis, and Wall Street’s meltdown has already impacted law practice. Some firms have rushed to capitalize by promoting special “task forces,” poised to handle the complex legal and regulatory issues that financial institutions and their management, shareholders, and customers will have to address in the new global financial landscape. But many more firms are feeling push back from clients, who, even if they have not been affected directly by the economic downturn, have long been disgruntled about the process whereby they are charged for legal services—a process that is a reflection of law firms moving steadily from a professional to a business model. That is, clients are using the economic crunch as a reason to demand change—for instance, in the form of volume discounts or more flexible billing structures.<sup>2</sup> Indeed, evidence suggests that some firms have recently prospered by aggressively playing to clients’ pronounced unhappiness with the billable-hour system.<sup>3</sup>

The looming crisis suggests a crossroads. Perhaps lawyers will seize the opportunity to rethink a billing scheme that creates inherent tension between lawyers and their clients because it generally disaggregates their interests. Or perhaps lawyers will find themselves in the mess that has been visited upon doctors. At least a danger exists that lawyers, who have been so effective at commanding eye-popping hourly rates, will be hoist with their own petard; that is, we may be undone by our own success by pricing ourselves—and access to justice—out of reach for all but the deepest pockets.

## A Professional Dilemma?

Why do clients so hate paying their lawyers? Is it just the sheer magnitude of the fees that lawyers’ time can command?

<sup>1</sup> This article reflects opinions that are not necessarily shared by the editors of this publication, the law firm that employs the author, or anybody else on the planet. With that proviso, the author thanks Kay Phillips, Michael McDermott, Matthew Frederick, Geoff Gannaway, and Alex Argyros for their exceedingly helpful feedback.

<sup>2</sup> See, e.g., Denise Oliveira, *Inflexible Firms Risk Losing Both Clients and Partners*, *Law 360*, Dec. 5, 2008.

<sup>3</sup> See, e.g., Rachel M. Zahorsky, *Firm Leverages Billable Hour Animosity to Lure Clients*, *ABA Journal*, Dec. 18, 2008 (describing a new Chicago-based litigation boutique’s irreverent and successful anti-billables marketing campaign); *Winning Alternatives to the Billable Hour*, *ABA Net* at <http://www.abanet.org/media/youraba/200812/article03.html>, Dec. 30, 2008 (describing success of value-based, fixed-price billing model).

Or could it also be a function of irresolvable conflicts between the remuneration systems that lawyers employ and the professional mandate that a client’s best interests be paramount?

Law firms tend to take two approaches to billing: hourly rates and contingent fees. Both are problematic.

Probably no one needs to be convinced that the billable-hour system spawns plenty of misery—at least not associates at firms whose bonus structure is tied expressly to billable hours, partners who have to haggle with angry clients each month about the size of their bills, and legal secretaries called upon to review voluminous itemized bills to ensure compliance with individual clients’ billing prescriptions. But the worst thing about the billable-hour system may be that it creates a tacit conflict between the interests of client and service provider. Law is a profession wherein the principal service for sale is reasonableness—embodied in analysis and actions that enable clients to avoid trouble, to navigate their way out of trouble, or to assert themselves against others who are causing them trouble. And a basic premise underlying the service is that no rational person would want to be mired in legal trouble in the first place. Thus, clients who are so mired generally want to get to the finish line as swiftly and economically as possible. Yet their lawyers’ success, in many instances, is measured by how many hours are billed *before* a particular matter is successfully resolved. Thus, clients, particularly in the form of in-house counsel, feel a measure of suspicion toward their own lawyers at all times and worry that their hired guns are milking the file for all it’s worth, overstaffing cases, or at least failing to root out inefficiencies and redundancies when managing litigation. And certainly, clients, lawyers, and courts are keenly aware that the sheer expense of litigation, measured primarily in attorneys’ fees, often drives settlements, such that settlements are often achieved “by dint of nuisance and threat of expense . . . rather than . . . by threat of victory.”<sup>4</sup>

Of course, working on a contingent fee does not eradicate the problem; it simply recasts it in different terms. For instance, lawyers who seek out contingent-fee cases are, by definition, looking for fights. And although working on contingency can eliminate some of the management issues between client and counselor, the economics mean that, once a lawyer signs up a contingent-fee case, he is de-motivated to put time into it because the smaller the ratio of time to recovery, the bigger the “premium” the firm earns. Likewise,

<sup>4</sup> *Pacific Sunwear of Calif., Inc. v. Olaes Enters., Inc.*, -- Cal. Rptr.3d --, 2008 WL 4509090, at \*9 (Cal. Ct. App. 4th Dist. Oct. 9, 2008) (quoting *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 575, 21 Cal.Rptr.3d 331, 101 P.3d 140 (2004)).

contingent-fee arrangements can encourage lawyers to view the legal system as a prospecting vehicle as if lawsuits were venture-capital endeavors. Indeed, I have heard some plaintiffs' lawyers refer to themselves proudly as "hustlers," which suggests yet another reason for tension between lawyer *qua* service provider and client.

### If You Think Lawyers Have a Problem . . .

Plenty who practice law do so in hopes of striking it rich. But *because* practicing law is a profession, it is really a lousy business model. The goal of lawyering is not supposed to be impressive margins or alluring quarterly reports.

Is the challenge of balancing the demands of professionalism and the profit-motive no different from that under which all professionals labor? Does the fact that law firms have been so good at one side of the equation explain why their standing as professionals has been marred?

At least from the perspective of some other professionals, like doctors, lawyers have succeeded remarkably well at making sure that they get a fair rate of return on their sweat-equity. While hourly rates and starting salaries for associates entering law firms had been rising steadily for years, doctors were experiencing the opposite phenomenon.<sup>5</sup> Of course, doctors have the undifferentiated mass of humanity as potential clients, but, for billing purposes, their "clients" are either private insurers or the government. And in both instances, these pseudo-clients have virtually all of the say as to how the professionals will be paid. This was not always the case. As a result of a massive client-management problem involving their billing practices, over time doctors found themselves in Compensation Hell. Perhaps lawyers should heed doctors' descent into that particular inferno, about which Dante failed to dedicate a canto, as a cautionary tale.

When a client/patient sees a doctor, the pseudo-client directs the doctor to bill based on the "level of service" provided. Each "level of service" has a corresponding billing code, which the doctor duly records on forms as dictated by the insurance industry. The rates that a doctor may expect to receive for providing a particular "level of service" are negotiated each year between every practice group and every insurer. The smaller the practice group, the less leverage it has with insurers. Small groups have no negotiating clout and are just grateful to be approved by insurance plans such that the patients covered by a given plan can see doctors in the group. While large practice groups can decide not to see patients in a particular plan if that plan offers peculiarly bad rates, only the actual insured, not the insurer, will experience any real negative consequence as a result of this policy; thus, even that bit of leverage is rather illusory. Moreover, insurers routinely refuse to pay codes at the full, negotiated rate; and some even employ computer programs that enable them to downgrade and bundle codes systematically. Thus, practice groups need full-time administrators just to monitor collection issues

<sup>5</sup> The information on physician compensation was derived through utterly unscientific interviews with some physician friends whose names are being withheld to protect their paychecks.

and make challenges (before the 180-day limitations period lapses)—which of course adds to the overhead associated with practicing medicine, costs that doctors are unable to recover.

Further, insurers place caps on discrete visits, which in turn encourage doctors to schedule multiple visits of short duration. For instance, if a patient has an appointment for a physical but comes in with a urinary tract infection, the billing system is such that it is in the doctor's interest to treat the infection and ask the patient to come back at another time for the physical. By contrast, the patient, who has taken time off of work, would probably prefer to take care of all issues in one visit. *If* time permits, a doctor, suddenly presented with a patient with multiple problems (which were not reported when the appointment was scheduled), may try to provide multiple services in a single office visit. She will not, however, be paid for any "extra" time spent. She may only hope to collect for the extended visit warranted by multiple problems if the special "modifiers" that she reports on the insurance forms are ultimately accepted by the insurer.

Medicare pays all doctors a standard, low, baseline rate for service based on the same diagnostic codes used by private insurers. But Medicare never pays for a basic physical, only for services on top of the physical. Medicaid, really only available to certain low-income children and the severely disabled, pays even less. And the government, in processing bills for payment, is even stricter than private insurers. If a doctor includes a code on an invoice yet neglects to provide the proper documentation, the doctor becomes vulnerable to fines or litigation. Medicare audits the bills it receives for almost anything beyond the most common services. And again, the time doctors spend responding to these audits is time for which doctors cannot bill. Further, if a patient comes in for a relatively basic treatment, say, related to his hypertension and high cholesterol, the doctor can bill based on a standard code; but if that same person came in because he was having a stroke or heart attack, was sent to the hospital, and then got admitted, the doctor who initially saw the patient and arranged for him to get to a hospital cannot charge for the time spent on the diagnosis and admissions process—*unless* the doctor sends the patient to some hospital across town where the doctor is not on staff. Thus, some practice groups refuse to take Medicare and Medicaid patients.

Whether the pseudo-client is the government or an insurer, its ubiquitous presence guarantees that neither doctor nor patient is generally pleased about how professional services are rendered.

Moreover, doctors are not paid for many tasks that are a critical part of practicing medicine—such as preliminary analysis or writing a prescription (although they can charge for their time and the medication *if* they give an injection). Insurance companies will not reimburse doctors for time spent following up with a patient, *except* when the general practitioner has prescribed an anti-depressant. (Since treating mental illness principally with medication is ultimately the cheapest approach, insurers will pay for a general practitioner to follow up about a medication so that the patient does not have to see specialists, *i.e.*, a psychiatrist for medication and a

psychotherapist for “talk therapy.”) Indeed, insurers will not compensate doctors for *any* time spent on the phone, although primary-care physicians routinely spend hours each week practicing medicine *on the phone*, e.g., reviewing test results with laboratory personnel, conveying results to patients, and adjusting medications in response to test results.

A doctor with whom I spoke in preparing this article explained that she had just spent several hours on the phone that very day trying to resolve a crisis involving a suicidal patient who had gone AWOL. This new patient had come in, the doctor had referred her immediately to a psychiatrist, but when the patient arrived at the psychiatrist’s office, the patient learned that the psychiatrist did not take the patient’s insurance. Although the psychiatrist offered to see the patient at a reduced rate, the patient declined—and then disappeared. When the referring physician was apprised, she then spent hours on the phone with the psychiatrist, various members of the patient’s family, and the police trying to find the troubled patient and get her admitted to an appropriate hospital. While professional ethics mandated as much, it is unsettling that the compensation system applicable to the medical profession means that the time doctors spend laboring in this manner is *never* compensable.

Lawyers may find it nearly impossible to grasp the idea of being unable to bill for the time they spend on clients’ behalf on the phone or on e-mail. Even more alien may be the fact that doctors cannot expect to be compensated for many tasks that correlate directly with their professional training. For instance, if a general practitioner has in-house capacity to take x-rays, the doctor can bill for the process of taking an x-ray; but if a doctor reads an x-ray and then sends the patient to a radiologist for an expert opinion or simply refers a patient to a radiologist in the first instance, the general practitioner can only bill for taking the x-ray but not for reading it. By contrast, because insurers and Medicare will usually pay in full for laboratory work, state and federal regulations, including federal “Stark” laws,<sup>6</sup> have been implemented, premised on the view that doctors order more lab work, complex testing, and even physical therapy if they stand to benefit financially in any way if the test is performed. These laws also assume that doctors cannot be trusted *not* to abuse the system so they are generally not compensated at all for concluding that certain testing might benefit a patient or for any lab work performed in-house or at a facility employing anyone related to the doctor who orders the work.

The net result? An alarming shortage of primary-care physicians and a near-universal belief that the provision of routine healthcare in this country is decidedly deficient. And even as the general populace is aging, more and more primary-care physicians are refusing to see Medicare patients because treating those patients is both less lucrative and more difficult.

In sum, how doctors spend their time and how they are compensated are alarmingly out of joint. Their compensation is calibrated to reward logging as little time as possible to a large volume of clients. The mode of compensation also

discourages treating patients holistically with problems that are interconnected; doctors are paid to see patients’ problems as discrete issues, corresponding to a particular billing code, each of which is to be handled in a vacuum. By contrast, most lawyers are compensated based on the sheer volume of hours logged on a client’s behalf. Lawyers, as a professional group, have obtained tremendous monetary success—while engendering notable client dissatisfaction. But doctors seem to have a far more serious problem: they aren’t making enough money to justify the education debt and the grind and they *also* have a very frustrated client pool. Unlike lawyers, the doctors’ problems derive principally from (1) the lack of economic-related feedback between service provider and the primary recipients of service and (2) the fact that those who are actually calling the shots regarding payment have inordinate bargaining power and operate on a separate, largely independent plane. Lawyers have not made this mistake; fee arrangements are negotiated directly with clients, and lawyers hear directly from those clients about whether the client feels that the service it is getting is worth the cost. But neither of these systems is truly keyed to customer satisfaction or objective measures of success.

### **Is There No Balm in Gilead?**

The apocalyptic situation described above may never befall lawyers. However, Texas personal injury lawyers on both sides of the “v” may well see some analogy between the doctors’ circumstances and the results of recent intermeddling by the insurance industry in the legal system. But the moral is: when clients experience acute dissatisfaction with service, they may be inclined to overreact, thereby exacerbating the tension that already exists between lawyers and clients as to what constitutes appropriate compensation. Thus, it behooves lawyers to circumvent a crisis by committing to better customer service—a phenomenon inextricably bound up with how a service provider gets paid.

So, who gets it right? Who out there makes their client/customers feel really good about forking over the dough? Can lawyers possibly look to disparate models from the non-professional context for ideas about how to reverse a global disintegration in lawyer-client relations? These are questions meant to provoke creative cogitation. Meanwhile, I offer a few whimsical suggestions (that may suggest strategies that many lawyers already employ):

#### **The Discount Tires Model**

When a client comes in seeking legal services that will, out of necessity, require that the client make a significant investment, perhaps the firm could suggest more modest fixes to the client’s problem so that the big investment could be deferred, perhaps indefinitely. This offer could be couched in terms of an understanding as to just how quickly legal expenses can mount and that the client and lawyer should work together to resolve the problem in question expeditiously by trying to diffuse, instead of escalate, its adversarial nature.

<sup>6</sup> See, e.g., 42 U.S.C. § 1395nn.

### The Miracle-on-34<sup>th</sup>-Street Model

Law firms could adopt a proactive policy of “putting the customer ahead of the commercial,” thereby referring clients to other attorneys or even to non-attorneys when the firm does not have the precise resources or talent that the client’s problem demands. For this policy to really pay off in terms of engendering goodwill, these referrals would have to entail some real sacrifice and not arise only, say, because the firm in question does not do family law anyway.

### The Lowes/Home Depot Model

Law firms can use their competitive instincts effectively by refusing to be outdone by their closest competitors without ever getting nasty about it. Also, law firms might institute a policy of occasionally offering to make “no questions asked” exchanges if a client decides a particular work product is the wrong fit or a litigation strategy did not succeed—even if it means writing off some substantial fees. And when taking over a case from, or relinquishing a case to, another firm, the lawyers on both sides could, without ascribing any blame, commit to assume some of the transition costs.

### The Starbucks Model

With those clients willing to pay fees that mean truly high margins for a firm, that firm might want to ensure that those clients feel that they are not just buying legal services, but a sophisticated worldview or a peculiar state of ease. Firms could endeavor to make clients who pay top dollar feel that they are not just deep pockets but deep *thinkers* whose actions reverberate throughout the world economy. Meanwhile, the lawyers could demonstrate their cognizance of the obligation to perform at the kind of sophisticated level suggested by their rates. These white-shoe firms might even have a legitimate basis to suggest that, in paying their fees, clients are also engaging in some socially responsible conduct because it is the big firms who have the resources to do the most giving back to the community in the form of charitable contributions and pro bono work.

### The Costco Model

Free samples! As part of making pitches to new clients or to old clients for new matters, lawyers could provide some substantial free work product that shows exactly why that firm could better serve a client’s needs for a particular matter than others could. Offering free CLE programs to potential clients on topics important to them is a similar marketing tool that affords lawyers a chance to demonstrate what they are selling and why it is worth buying—even if the client is not yet aware of the



### A New Business Model?

need. And perhaps firms that provide bulk services to clients that involve a lot of form pleading, etc., could offer volume discounts to encourage those clients to shop within the firms for buried “treasure” that may cost more, but is still a remarkable find.

### The Amazon.com Model

Some firms might be able to provide their clients with access to significant databases of information and non-privileged work product so that the client could educate itself about options before weighing in on discovery strategies, briefing styles, or trial tactics. That is, lawyer-client relations could

benefit from an approach that encourages the client to inform itself regarding available options and their relative value by considering how particular strategies have played out in other cases. And by inviting clients to teach themselves about what the firm *could* do in response to the many forking paths that emerge during the course of litigation, this model might deepen clients’ confidence in the lawyers they have retained even as it demystifies decisions they must make in response to, or in anticipation of, actions taken by opposing parties, co-parties, and judges.

The take-away from all this may simply be the truism that consumers do not like to feel that they are being ripped off. And because consumers are poised to *suspect* that they are being ripped off at every turn (particularly by lawyers), policies and practices designed to assuage those latent anxieties might really pay off. When a service provider is prepared to sacrifice its own short-term gain for the customer’s comfort/pleasure/convenience, both sides ultimately win. And when they are being charged top dollar for a service, customers really need to experience concrete and immediate satisfaction of some kind—even in the context of something inherently unpleasant like a lawsuit. At the very least, customers should be treated such that they are not left with lingering concerns that they did not get anything particularly special, or even tangible, after paying top dollar for a service.

Lawyers, as a breed, seem rather disinclined to blaze new territory, particularly when it comes to their fees. But our clients may force us to find more customized ways to bill for the services that we provide—if we hope to continue to provide them. We certainly don’t want to end up in the kind of quagmire in which healthcare providers find themselves. Perhaps, by heeding the doctors’ fate and developing billing modalities that strike both sides of the transaction as imminently fair, lawyers could revive some of the intangible satisfaction associated with being a professional that many old-timers say has been lost. After all, the pursuit of economic “fairness” is supposed to be a foundational service that lawyers can provide. ■

# TIPS FROM TRIAL LAWYERS

by John McFarland



**Daryl Bristow**  
The Bristow Law Firm

**D**ARYL BRISTOW HAS PRACTICED LAW IN TEXAS since he joined Baker Botts in 1964, having earned his J.D. from Harvard Law School that year. He practiced with Baker Botts for twenty years before joining Dick Miller and his other partners in Miller, Keeton, Bristow & Brown in 1984. In 1991, he formed Bristow, Hackerman, Wilson & Peterson and focused much more than earlier in his career on representing plaintiffs in complex commercial litigation. In 1999, he rejoined Baker Botts as a Senior Trial Lawyer until he transitioned to Special Counsel to the firm in 2006. In October 2008, he started the Bristow Law Firm, where he practices law principally as a mediator and arbitrator. He is a member of the American College of Trial Lawyers and the American Board of Advocates, and has been recognized as one of the finest business trial lawyers in the country by the publications and organizations recognizing such things. Mr. Bristow is an Oklahoma Sooner. He is married to Rachel Bristow.

Over the course of his decades in the practice of law, Mr. Bristow has tried hundreds of cases. He laments the lack of trial opportunities for today's young lawyers. "Trial experience is so important to a young lawyer, in the sense of the confidence that you need on your feet in the courtroom, the sense of self." But that experience is harder and harder to come by. In his early days, he would carry a docket of between 300 and 400 cases, trying as many one to two trials a week. "It was a different time. The days of the generalist, the trial lawyer who can try to a jury anything that comes down the pipe, particularly the hard cases, are becoming more and more limited . . . the push to specialize, to be able to charge a premium for expertise, be it in IP, energy, environmental, securities, or whatever, and to work to develop a national following in that expertise, have largely replaced the generalist jury trial lawyer of the past." The higher rates have increased the cost of trial; fewer and fewer cases get tried, and "the ones that do are often on the hard side for a lawyer lacking trial experience."

He focuses much of his advice to those younger lawyers. "Young lawyers, particularly young lawyers in a large firm, too often focus on their own firm's culture. Instead, young lawyers should go to the courthouse, get to know the judges, the clerks and the personnel, see how the system works. . . be part of the courthouse culture, not just your firm's culture." And lawyers should look for opportunities to learn from the truly great lawyers in your area, not just the good trial lawyers in your firm. "There is a way to know when the great lawyers are going to be doing something at the courthouse, and you should make time to be there, work late or work weekends, if you need to to free up time to go down to the courthouse to watch and learn. As a young lawyer, I made the time to go

see a Dick Miller, Finis Cowan, John Hill, George Pletcher, Joe Jamail and others pick juries, cross-examine, and make their jury arguments. I reached for every opportunity to go to school real-time on the best we had out there."

For Mr. Bristow, the essential ability of a trial lawyer is the ability to take a complicated, complex case and cut through it to make it simple for the decision-maker, "to take the complicated forest and reduce it to the essential, right versus wrong, fair versus unfair, good and bad, overreaching and not overreaching." He retains his faith in the jury system, noting that "juries are the best equipped for those types of decisions, and I like having twelve or six of them making that decision, versus one."

That said, Mr. Bristow sees a real place for arbitration. He does not believe that a concern about runaway juries drives parties to choose arbitration for their disputes instead of litigation; instead, the concern of runaway costs of litigation does. He recognizes that "arbitration has not controlled costs the way we would have hoped, but can offer a viable alternative, particularly if used creatively." A practice that he thinks will eventually become more favored is the appointment of a kind of special chancery to act as an arbitrator of certain key components to a parties' dispute. The parties would retain the rights afforded civil litigants by the Rules of Civil Procedure and the right to seek review from the district court on substantial justice principles.

Mr. Bristow identified voir dire as the area of trial that has probably changed the most over the course of his years trying cases. Twenty to thirty years ago, the best lawyers "would never ask an open-ended question, and would never get the jury talking, to you and to each other, the way you do it now . . . . The science has changed and if you don't change with it, you're a dinosaur." In his early career, voir dire was more like an opening argument; strikes were often based on generalizations about occupations and attitudes, rather than juror-specific considerations. Now, a trial lawyer conducting a proper voir dire can become much more educated about the venire panel and do a much better job of disqualifying jurors.

Asked if he would give a final tip for trial lawyers, Mr. Bristow recalled the words of his partner and mentor, trial legend Dick Miller: "Always remember, success in trial is 1% talent, 98% preparation, and 1% luck." Preparation is the most important lesson that a lawyer can learn; "particularly in those first ten years of practice, it is invaluable."



*Sincere thanks to Daryl Bristow for providing his insights  
to the State Bar of Texas.*



## VIEW FROM THE BENCH: THE HONORABLE LEE YEAKEL

U.S. District Court for the Western District of Texas, Austin Division

by Matt Frederick

**A**S AUSTIN LAWYERS KNOW, JUDGE LEE YEAKEL makes every effort to stay in touch with the bar. Not only he is a regular at CLEs and bar association events; he was kind enough to open his chambers (and the courthouse, which was closed for the holiday) to share his thoughts on being a judge, the state of the profession, and what he expects of attorneys.

### Planting Roots in Austin

Judge Yeakel came to Austin from Oklahoma City to attend the University of Texas. The Texas-Oklahoma football rivalry was every bit as intense in those days, and a lifetime in Oklahoma left him with a vestige of solicitude for the Sooners. But, the Judge says, his blood changed color seven minutes into his first Texas-OU game. It was an opportune moment to see the light, as his freshman year at Texas saw the Longhorns win their first national championship under coach Darrell Royal.

If becoming a Longhorn weren't enough, becoming a lawyer in a family with three generations of doctors ensured his status as the black sheep. He entered UT as a pre-med student, expecting to follow his father into the family business, but he changed his major to government after his freshman year. At the beginning of his junior year, he learned, to his surprise, that he had enough credit hours to graduate a year early. Law school had always been a consideration, but he hoped to enter the business school. The business school would have required thirty additional hours. He applied to law school.

He notes that law school admission was nothing like it is today. He recalls that he did not even apply until April or May—about the time when law schools send their final acceptance letters now. While it may have been easier to get in, it was perhaps not as easy to stay. On the first day, he recalls, the entering class got the “look to your right, look to your left” speech—a warning that one of your immediate neighbors (or you) would not be there next year. The first year was grueling, and there was a definite sense that students were being weeded out. At the end of his first year, he was not convinced that law school was the right choice.

But for a riding accident, Judge Yeakel's career would have started in the Marine Corps instead of a law office. He was scheduled to report for active duty after graduation from law school, but an unplanned forward dismount (over the horse's head) left him with a broken arm, which required surgery, and which eventually led to his honorable discharge. (He explains that, unlike the other branches of service, the

Marine Corps requires every member to be prepared to serve as a rifleman.) His discharge from service left him with the task of finding a job.

The draw of Austin was just as powerful in those days, but there were even fewer jobs for young lawyers. Judge Yeakel recalls that there were only four big firms in town—“big” meaning more than fifteen lawyers. The large Houston and Dallas firms had not opened Austin offices. In fact, the major out-of-town presence was a firm from Midland (the city with the highest starting salaries at the time), and the existence of its Austin office was attributable less to the demands of business than to the fact that the governor had appointed one of its named partners to the UT Board of Regents.

He says that he never expected to have a career in Austin, but a combination of luck and planning kept him there. His first job was with the firm of Mitchell, Gilbert & MacLean. He had worked for the firm during law school—no cushy summer clerkships in those days—and he became the firm's first associate.

Judge Yeakel recalls returning to the office after his induction ceremony at the Texas Supreme Court to find a large stack of files on his desk. All of them were cases set for the next day's uncontested docket. Several were divorces, which left him scrambling to figure out what to do. Fortunately, he explains, “Buck MacLean took pity on me and gave me the list of magic questions to prove up an uncontested divorce, plus the correct answers.”

This was a fitting start to a true generalist's practice. His early practice was an even mix of civil and criminal cases. He recalls that criminal work in Austin in the late '60s and early '70s was basically keeping the sons and daughters of wealthy Houston and Dallas families from having felony convictions for possession of marijuana. His wife jokes that “if possession of marijuana had been a misdemeanor, we would have starved to death in two years.”

His practice eventually moved to all civil work, including bankruptcy when, in the collapse of the 1980s, his civil cases suddenly became adversary proceedings in bankruptcy court. His experience as a generalist was good training for the bench, but he notes ruefully, “The only thing I never did was patent law, as I am now painfully aware.” Patent cases, of course, now make up a significant portion of his docket.

### Appointments and Election

Judge Yeakel concedes that he had always considered going onto the bench, “but it was never a burning passion.” He was encouraged to run for a seat on the Third Court of

Appeals in 1997, but the only justice who would be up for reelection was Justice Powers, a law-school classmate and longtime neighbor. This was enough to quell his ambition. "I didn't want to run against someone who was doing a good job just to run," he explains. He heard a rumor, however, that Justice Powers planned to step down, so he asked him, and Justice Powers confirmed the rumor. As it turned out, he did not have to run at all. The Chief Justice resigned, and then-Governor Bush appointed him to the vacant seat. He lost the seat in 1998, but the governor appointed him to another seat on the court, and he won a full six-year term in the 2000 election.

When a seat on the federal bench became available, Judge Yeakel was again reticent. But a friend asked whether there would be another time when he would know both Texas senators and have a president who had already appointed him to the bench twice. That was enough to convince him that the time was right. In the end, he was happy to regain some of the interaction with other lawyers that he missed from his days in practice. He notes that serving as an appellate judge prepared him well for the trial court, particularly in giving him a sense of what the appellate court needs to see in the record. "I used to grade those papers," he explains. He describes his current position as a "died-and-gone-to-heaven" job and comments, "There's not a day that I don't wonder how I managed to be the one who was in the right place at the right time."

### **Jury Trial and the Role of the District Courts**

Our conversation turns, inevitably, to the subject of the jury trial. Judge Yeakel begins by observing that all of the various explanations for the so-called vanishing jury trial are correct. It is not as simple as the expense of litigation, tort reform, or the fact that lawyers are not being trained to try cases. The demise of the jury trial has not lightened the burden on the district courts. On the contrary, Judge Yeakel believes that the number of adjudications has increased exponentially. As evidence, he points to the Federal Supplement, which once recorded a mere trickle, but now a flood, of district court decisions on controlling legal questions.

With a sign in chambers that reads, "No Smoking. No Dispositive Motions," Judge Yeakel's preferences should come as no surprise. "Dispositive motions are the bane of my existence," he explains bluntly. Judge Yeakel recalls a recent Fifth Circuit judicial conference in which a speaker asked the district judges to raise their hands if they got a motion for summary judgment in each case. Every judge's hand went up. He notes that dispositive motions, particularly summary-judgment motions, create an enormous drain on the court's resources. Lawyers would be well-advised to ask whether a dispositive motion is warranted or whether it is being filed as a matter of course.

The decline in jury trials has coincided, he observes, with a shift in the role of the district courts. Under the traditional model, district judges presided over trials and charged the jury. The circuit courts decided the law. Now, the

district courts increasingly decide legal questions in motions for summary judgment and motions to dismiss. The circuit courts review legal decisions made in the first instance by the district courts. He believes that the district courts' gravitation toward legal decision-making signals a broader shift toward a European system, in which cases are resolved on the papers by judges. This is due, at least in part, to customer demand, for lack of a better term, as the globalizing economy brings more foreign litigants, many of whom are suspicious of juries, into U.S. courts.

Judge Yeakel disagrees emphatically with the suggestion that juries are incapable of deciding certain complex cases. "There are a lot of fallacies in that claim," he says, among them the notion that individuals who become judges are automatically better qualified to decide any particular issue. He also humbly questions the related notion that we always send our best and brightest to the bench. "This is not always true in an appointive system, and it is certainly not true in an elective system," he cautions. This populist note echoes Theodore Roosevelt, whose picture hangs in his chambers, and who commented that "the majority of the plain people of the United States will, day in and day out, make fewer mistakes in governing themselves than any smaller class or body of men, no matter what their training, will make in trying to govern them."

But Judge Yeakel's respect for the jury is primarily the product of experience. He believes that juries are getting it right. "I'm always amazed at the common sense of the jury. They get it." He talks to the jury after every trial, and he says that the first question is almost always, "Why didn't we hear about X?" where X is something that was decided on summary judgment or otherwise resolved before trial. In short, the jury knows what was missing. In five and a half years of trying jury cases, he has only missed predicting the verdict once. "I was a great believer in the jury system, and I have seen nothing in my time as a judge to change that." He suggests that people who question the jury's ability to comprehend should reexamine their ability to communicate. "If you can boil your case down to a believable story, any case can be tried to a jury."

### **Changes in the Profession**

Asked to comment on the changes in the practice of law, Judge Yeakel notes that there was much less specialization when he started his career—"everyone was just a lawyer." It was easier to be a generalist, he suggests, because there simply was not as much law. "In 1969, it was possible to 'know the law' to a much greater degree than it is now." The relationship between firms and clients also played a part. "Clients expected lawyers to handle all of their legal issues. If you represented a company, you represented their employees on traffic tickets and DWIs." It was also standard practice, he says, to take each case "cradle to grave."

The standards of behavior among lawyers have also changed. When he entered the practice, "there were rules that you just followed." For example, if you sued a company

whose lawyer you knew, and there was no answer on file by the Monday after 20 days, you didn't get a default judgment. You called the lawyer to see if he still represented the client and let him know about the case. It was also common to make a client available to opposing counsel at the office on a Saturday morning—not for a deposition, just to let the lawyer talk to the client. This unwritten code was based in part on a there-but-for-the-grace-of-God sense that “every dog's going to get one bite, and the next one might be you.” He recalls a running joke on the court of appeals that whenever a motion for an extension of time was contested, the lawyer opposing the extension would invariably return within three months to seek an extension.

The diminishing number of jury trials inevitably results in less training for young lawyers. This is particularly true when senior attorneys lack trial experience. “People who have not soloed a lawsuit are not the best people to train other people to try lawsuits,” he notes. The lack of trial training is largely a product of tort reform, as the subrogation and workers' compensation cases on which lawyers used to train just aren't around anymore. “Now,” he observes, “the first time many lawyers get into the courtroom is in a multimillion dollar case where someone will be sued if they let a young lawyer stand up in court.”

Judge Yeakel attributes changes in the profession partly to the increasing unpredictability of litigation. In the early part of his career, he explains, there was not as much discovery, and cases tended to be less complex. It was not uncommon to take civil cases on a flat fee, partly because you could predict how much time would be spent on the case. He recalls that when he did collection work for banks, he would try cases on promissory notes where there was nothing in the file but the pleadings and the note. But as it becomes harder to predict what the other side will do, it becomes impossible to predict how much work a case will require. Having lived through this transformation, he empathizes with lawyers who have to give litigation forecasts to their clients. “It is hard for clients to understand that the amount of work required in a case is controlled, to a large degree, by what the other side does,” he says. Your opponent may make a frivolous motion, “but the judge doesn't know it's frivolous until you tell him it's frivolous.”

He sees more risk aversion in the profession, at least with respect to the risk of a jury trial. This risk aversion is not, however, ingrained in young lawyers. Of new lawyers generally, he comments, “I think they come out fearless.” (Of his own clerks, he says, “I'm glad I don't have to try a lawsuit against them.”) Whatever aversion there is to litigation risk, he says, is taught in the first job. “Corporate America is hard-wired to believe ‘judge good; jury bad,’” he says. He also notes that legal fees are so high that they create a fear of losing. He recalls that in his early career, “there was more of an awareness that we bat about five hundred as a profession, and if you try good, hard cases, you will lose thirty-five, forty, fifty percent of them.” He suggests that “if you win every case, you're either not taking hard cases, or you're not settling cases that should be settled.”

## Practice Tips

Above all, Judge Yeakel demands that lawyers conduct themselves like the professionals that they are. “We lost something when we started referring to ourselves as ‘the law business,’” he remarks. Professionalism means more than civility to fellow lawyers. Among other things, it requires cooperation with opposing counsel to get the case resolved, whether by settlement or judicial intervention. This includes being prepared and doing your own housekeeping. Discuss your case with opposing counsel, figure out what you have to do to get the case ready for trial, and be reasonable about scheduling matters. He offers the following advice to lawyers practicing in his court:

- **File dispositive motions early, if not often.**

Generally, the court needs about four months from the dispositive motions deadline to the trial. The closer you get to the trial month, the greater the chance that your dispositive motion will be carried to trial.

- **Do not move for an extension of time.**

Lawyers may agree to extend any date except for the pretrial conference date and the trial month. Motions will be denied with a reminder that the lawyers can change deadlines by agreement. Refusal to agree to a reasonable extension will not be viewed favorably by the court.

- **“It's called a brief. There's a reason for that.”**

Although he is generally liberal with page-limit extensions, Judge Yeakel cautions lawyers not to go over and over the same ground. “Give me one or two sentences and your two or three best cases,” he advises.

- **Open Chambers Policy.**

Judge Yeakel permits lawyers to contact his clerks for answers to questions about general matters, such as the Judge's preferences and best practices. Just don't ask when he will rule on a motion or which way he is leaning, and don't ex parte the clerk. And remember that the Judge knows about every call.

- **Play it straight.**

Judge Yeakel cautions that “everything you do as a lawyer is noticed.” Every word you utter, whether in writing or in person, is noticed by someone, and judges talk—to each other and to their law clerks. “It's just like your mother told you,” he says, “Reputations are easy to get but hard to lose.”



*Special thanks to Judge Yeakel for taking the time for the interview that made this article possible.*