STATE BAR LITIGATION SECTION
NEWS for the BAR
Spring 2009

Chair's Update

by Elizabeth E. Mack

I RECENTLY HAD DINNER IN WASHINGTON, D.C., with a friend of mine from college, Michael, who is a very successful lawyer. We talked about work, law firms, the economy, politics, mutual friends, our kids. When I mentioned some of the pro bono work I do, Michael confided, "I haven't taken on a pro bono matter in three years." "I feel terrible about it, but I have no time," he continued. "Look at all I do: I am on the Board of my synagogue, I volunteer at the kids' school, I help organize a charity golf event with a client…." The list of his volunteer activities was long and impressive. He's right; he absolutely does not have time to take on more volunteer work, get his paying work done, and still be an effective parent.

Many of us are just like Michael. We volunteer lots of time in support of organizations that need us. Some are even law firm or bar sponsored, perhaps a Habitat for Humanity Project, the Dallas Bar Association's Amachi Texas program, benefiting at-risk children, or as in the case of my law firm, adopting an underprivileged elementary school. Lawyers and staff go to the school every week and tutor children who are otherwise falling through the cracks and who get no parental attention at home. All of this kind of volunteer work is vital to our communities. We should not and cannot stop doing it.

So then what's the problem? The problem is that donations of time or money to these wonderful charitable projects don't solve our pro bono problem. These charitable projects are generally not considered "pro bono" in the classic sense. Classic pro bono is "providing public interest legal services without a fee in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation, the administration of justice, and by financial support of organizations that provide legal services to persons of limited means." Tex. Disciplinary R. Prof'l Conduct, Preamble, *reprinted* in Tex. Gov't Code Ann., tit. 2, subtit. G app A (Vernon 2005). Pro bono providers in Texas are facing their worst funding crisis in decades and perhaps ever. Interest on Lawyer's Trust Accounts (IOLTA) is a significant source of funding for legal aid in Texas. Recent low and declining interest rates mean that IOLTA revenue in Texas is projected to drop to $1.5 million in 2009 from $20 million in 2007. In the best of times, IOLTA revenue met only 20% of the legal needs of indigent Texans (who make less than $27,563 as a family of four or $13,538 if an individual). The crisis is so acute that the Texas Access to Justice Foundation, which receives much of the IOLTA revenue for distribution to pro bono providers across Texas, has asked former grant recipients to begin planning for shortfalls of at least 75% beginning in 2010, and will not be considering any grant applications from organizations that it has not funded in the past.

How do we solve the pro bono problem when we are already maxed out on the time that we can devote to "causes"? The answer is relatively simple, and it's what I suggested to Michael too: open your checkbook – a little or a lot, it's up to you and your budget. Money is an essential resource for pro bono providers. Write a check to your favorite pro bono provider. You will have contributed something very important. If you do not have a favorite provider, visit our website at www.litigationsection.com to see which pro bono providers we selected to be recipients of the Litigation Section's Internship Program and the Litigation Section's Grants Program, which together total $50,000 in money to pro bono providers in Texas. Or you can make a donation to the Texas Equal Access to Justice Foundation at www.teajf.org, which will then distribute the money to selected pro bono organizations.

You have lots of demands on your time, and I know most of us are feeling less prosperous than in recent years. But this is when the neediest Texans need us the most. Please consider giving to your favorite pro bono provider, or one of our pro bono program recipients, or to the Texas Access to Justice Foundation. There has never been a more critical time to do so.

Please email me with any questions or comments. ■

Legislative Update

by David Courreges

In the months leading up to the 81st Legislative Session the consensus was that the session would yield major reforms in transportation, insurance, the judiciary and education, with a primary concern being the looming budget shortfall. By the time January 13, 2009 arrived, all signs pointed to a promising 140 days.

Members enjoyed a very productive interim and were already well on their way to filing a record 7419 combined bills aimed at, or at least pointed somewhere in the vicinity of, addressing many of the problems faced by the State. A new Speaker brought with him renewed camaraderie in the House. It even looked as though the ever-present budget crisis would be diverted as Congress was in the midst of passing the controversial Economic Recovery Act, which would remove many of the challenges that stood in the way of the Legislature producing a balanced state budget for the 2010-2011 biennium. Everything was falling into place.

The consensus was quickly proven wrong. Of the 7419 bills filed this session, only 19.6% (1459) were sent to the Governor for approval – a twenty-year low. Measures once sure to pass began to be threatened, and ultimately failed. Sunset Legislation for the Texas Departments of Insurance and Transportation, as well as many bills related to litigation (listed below) all met untimely ends. The reason can be summarized in two words – voter identification. I'm sure if you have watched the news at all, you know all about the Voter ID issue. If not, here's a synopsis in 180 words or less:

Because of Voter ID, the promise of the 81st was quickly dashed before it really began. On opening day we saw the Senate do away with the decades-old tradition of honoring the two-thirds rule, which requires consent of 21 of the 31 senators to allow a bill on the floor for debate. In March, we saw a procedural oddity when the Lieutenant Governor referred the bill to a committee of the whole rather than a traditional Senate committee. Of course, you know about the five-day local calendar marathon in the House of Representatives to ensure that the measure didn't come up before House deadline to hear Senate Bills on second reading. If you've been under a rock, search for "chubbing" in your search-engine of choice. We saw an unprecedented number of rules-suspensions in the House and Senate in an attempt to salvage legislation that died in the House as a result, and though I have yet to count, I am sure the record was smashed for most points of order and parliamentary inquiries in a single session.

Though a majority of litigation-related bills failed, some new legislation will affect lawyers. For example:

1. HB 148 and HB 3515 stiffened the criminal penalties for barratry and the failure to report the same. However, efforts to create a civil cause of action for clients against attorneys who engaged in barratry were not successful.
2. SB 956 created a new public law school in downtown Dallas to be run by the University of North Texas System.
3. HB 1665 significantly increased fines for jurors who fail to respond to a summons.
4. $26 million was appropriated to assist Access to Justice to supplement the IOLTA shortfall.

Notable "non-events" occurred related to litigation. Specifically, no legislation was passed relating to:

1. the Texas Supreme Court's *Entergy v. Summers* decision;
2. the "paid or incurred" issue;
3. causation standards for asbestos-related mesothelioma cases;
4. restructuring the court system;
5. permitting jurors to ask questions during trial;
6. restriction of arbitration provisions;
7. establishing a law school in Brownsville; and
8. selection of judges.

One bill in particular that has received little press exemplifies the Jekyll and Hyde nature of the Texas Legislature. House Joint Resolution 39, which passed unanimously out of both houses, ratified the Twenty-Fourth Amendment of the United States Constitution, which prohibits the denial or abridgment of the right to vote for failure to pay any poll tax or other tax. If you recall, the Twenty-Fourth Amendment was adopted by Congress in 1962, and formalized in 1964. Texas was one of twelve states not to ratify the XXIV Amendment.

Two bills that most agreed were keys to avoiding a special session were also passed: SB 1, the General Appropriations Bill, is constitutionally the only bill that must pass, and SB 14 as amended to HB 4409, the Windstorm Bill. Unfortunately, most of us were wrong once again. The Legislature's failure to pass the aforementioned Sunset Bills, in addition to their failure to move the Sunset Safety Net bill to the Governor's desk may result in the potential winding-down of two of the larger agencies in the State. This has resulted in the Governor's recent revelation that he will be calling a Special Session in the future to deal with these issues. Stay tuned. ■

News from the Bar

Texas Supreme Court Appoints Harry M. Reasoner to Lead the Texas Access to Justice Commission

The Supreme Court of Texas has chosen **Harry M. Reasoner** to lead the Texas Access to Justice Commission. The 15-member Commission was created in 2001 by the state's highest court to expand and improve legal assistance to low-income Texans throughout the state.

Reasoner is a partner in the Houston-based firm of Vinson & Elkins LLP, practicing primarily in complex civil litigation. He was first appointed to the Texas Access to Justice Commission in 2006. Reasoner succeeds James B. Sales of Fulbright & Jaworski L.L.P., who served as chair of the Commission since 2004.

Also appointed as new members of the Texas Access to Justice Commission are: **Michelle Cheng** of Whitehurst, Harkness, Brees, Cheng & Imhoff, P.C. in Austin; **Beverly B. Godbey** of Gardere Wynne Sewell LLP in Dallas; **Clint Harbour** with the Office of the Attorney General in Austin; **Randall Sorrels** of Abraham, Watkins, Nichols, Sorrels, Agosto & Friend in Houston; **Errol Summerlin** of Legal Aid of Northwest Texas in Fort Worth; and **Marc Vockell** of Dell, Inc. in Round Rock.

State Bar Announces Pro Bono and Legal Services Awards

The State Bar of Texas Legal Services to the Poor in Civil Matters Committee has announced the recipients of the 2009 Pro Bono and Legal Services Awards.

The **Frank J. Scurlock** Award will be presented to two recipients: **John Crews** of Crenshaw, Dupree & Milam, L.L.P. of Lubbock, and **Ed & Maria Hernández** of Hernández & Hernández Law Office in El Paso. The award is named for the late Frank J. Scurlock, the first chair of the Legal Services to the Poor in Civil Matters Committee, known for his tireless efforts to provide legal services to the poor.

John Crews has donated over 400 hours of free legal services to the poor through the Equal Justice Volunteer Program at Legal Aid of NorthWest Texas (LANWT). In 1992, Crews became one of the founders of free evening legal clinics at St. John's United Methodist Church in Lubbock with the then West Texas Legal Services (now LANWT), which he and his firm have continued to sponsor. Crews is a recipient of the "Lubbock County Legal Clinic Volunteer Attorney Award" and the "Pro Bono Attorney of the Year" award, which was later renamed after him.

Ed & Maria Hernández have devoted their entire careers to providing pro bono assistance to low-income people. They are exemplary community-oriented lawyers who, along with others, helped bring a civil rights center to El Paso, the Paso Del Norte Civil Rights Project. They have volunteered as pro bono co-counsel and serve on the office's regional Council of Directors. In 2006, the Texas Civil Rights Project recognized Ed and Maria's community work with its Henry B. González Award, which Congressman Charles González presented to them.

The Pro Bono Award will be presented to the Houston Volunteer Lawyers Program (HVLP). This award honors a volunteer attorney organization that has made an outstanding contribution toward guaranteeing access to the legal system by the poor.

HVLP is a volunteer-driven organization with a mission to provide pro bono legal services to indigent and low-income people in Harris County and to promote volunteerism within the legal community. During 2008, HVLP screened a total of 26,850 requests for assistance, representing a 21 percent increase over 2007. Volunteer attorneys donated 21,882 hours of their time and accepted 1,756 pro bono cases. Using $200 per hour as the base rate, volunteers provided legal services valued at $4,376,400. Highlights of HVLP's 2008 initiatives include: 1) a Crisis Response Team for Hurricane Ike; 2) "A Day of Giving," a project HVLP conducted with the Houston Bar Foundation and the Houston Bar Association (HBA), which manifested in 10 simultaneous legal advice clinics in diverse locations throughout Harris County; 3) expansion of services to Houston-area veterans through the HBA's Veterans' Legal Initiative (a partnership between HVLP, the HBA and local veterans' service providers); 4) enhanced collaboration with other area legal service providers, such as Houston's Catholic Charities, Texas C-Bar and the Southeast Texas Legal Clinic; and 5) increased outreach to Houston's Asian community through its monthly Will and Legal Clinics.

The **J. Chrys Dougherty** Legal Services Award will be presented to **Scott Medlock** of the Texas Civil Rights Project (TCRP) in Austin. This award honors an outstanding legal services staff attorney and is named for J. Chrys Dougherty, who helped build a strong working partnership between the State Bar of Texas and legal services providers.

Scott Medlock is the Prisoners' Rights Attorney for TCRP's Austin office. He represents prisoners and their families in a wide variety of cases involving disability discrimination, medical neglect, wrongful death, jail suicide, free speech, excessive force, and due process. Due to Medlock's success, the Texas Access to Justice Foundation provided TCRP with funding to expand the Prisoners' Rights Attorney program. In 2008 the program assisted over 200 individuals. Medlock is an active volunteer for cases outside of his grant funding and assumes a variety of leadership roles. He currently serves as chairperson of the Texas Access to Justice Commission's Inmate Representation Workgroup, which brings together various interest groups to improve inmates'

ability to access courts and lawyers.

The **W. Frank Newton** Award will be presented to Vinson & Elkins LLP's Veterans Initiative. Named for the former law professor, dean and State Bar president, this award recognizes the efforts of attorney groups that have made outstanding contributions toward increasing access to legal services for the poor.

From a small project conducted by a few lawyers in just two offices, the V&E Veterans Initiative has grown to a firm-wide initiative with a practice group of 35 lawyers among each of V&E's five offices in the United States. V&E launched the Veterans Initiative in 2007 as a standing pro bono practice, dedicated to assisting veterans and servicemen without financial resources with their legal needs. V&E has assisted veterans with matters ranging from improper denial of benefits and efforts to take unfair financial advantage of deployed personnel, to defending military men and women in custody battles, evictions, and even in military proceedings. To ensure that its legal services for this project are going to those who have the strongest and most urgent needs, V&E has partnered with the Texas Veterans of Foreign Wars, and other groups.

The 2009 Pro Bono and Legal Services Awards will be presented at a luncheon June 25 during the State Bar of Texas Annual Meeting in Dallas.

Austin Attorney Terry Tottenham Named President-Elect of State Bar of Texas; Dallas Attorney Jennifer Evans Morris Named President-Elect of TYLA

Terry Tottenham of Austin was elected by the state's lawyers to serve as president-elect of the State Bar. **Jennifer Evans Morris** of Dallas was elected president-elect of the Texas Young Lawyers Association (TYLA).

Terry Tottenham is partner-in-charge at Fulbright & Jaworski L.L.P.'s Austin office, and head of the firm's Pharmaceutical and Medical Device Litigation Group. He is board certified in personal injury and civil trial law. Tottenham has served on the State Bar of Texas Board of Directors, as founder and first chair of the Health Law Section, and chair of the Litigation Section. He is a fellow of the American College of Trial Lawyers, International Academy of Trial Lawyers, and the International Society of Barristers. Tottenham has served in leadership positions with the American Board of Trial Advocates, Austin Bar Association, Austin Bar Foundation, American Academy of Healthcare Attorneys, Texas Bar Foundation, Texas Board of Legal Specialization, and TYLA. He has developed and delivered continuing legal education programs for lawyers and created a nationwide training program to develop trial advocacy skills for public interest and pro bono lawyers. He is an adjunct professor at the University of Texas School of Law and is active in civic affairs. He earned a B.S. from the University of Texas, J.D. from the University of Texas School of Law, and LL.M. from George Washington University. He will serve as president of the State Bar of Texas from June 2010 until June 2011.

Jennifer Evans Morris is a partner at Carrington, Coleman, Sloman & Blumenthal, L.L.P. in Dallas where she practices complex commercial litigation. She served as TYLA secretary in 2007-08. Morris has been an active member of the TYLA Board of Directors and Dallas Association of Young Lawyers Board of Directors since 2004. She has served on the Community Partners of Dallas Executive Committee and Board of Trustees since 2003 and is a member of the grant committee of the Dallas Women's Foundation. Morris earned her B.A. and J.D. from Southern Methodist University. She will serve as TYLA president from June 2010 until June 2011.

Also elected to the State Bar of Texas Board of Directors are **Mark G. Daniel** of Evans, Daniel, Moore & Evans in Fort Worth, **Allan K. DuBois** of the Law Office of Allan K. DuBois, P.C. in San Antonio, **Damon D. Edwards** of Linebarger Goggan Blair & Sampson, LLP in Houston, **Bethew (Bert) Jennings III** of the Jennings Law Group in Houston, and Travis J. Sales of Baker Botts L.L.P. in Houston. Visit www.texasbar.com for additional election information. ■

Appellate Update

by Kirsten Castañeda

State Appellate Courts

Expert Testimony

The Property Owner Rule applies to corporations that own property, and a corporate representative familiar with the property's market value may testify under the Rule without being designated as an expert witness. *Speedy Stop Food Stores, Ltd. v. Reid Road Mun. Util. Dist. No. 2*, --- S.W.3d ---, No. 14-07-00225-CV, 2009 WL 237265 (Tex. App.—Houston [14th Dist.] Feb. 3, 2009, pet. filed).

A longstanding rule in Texas allows a property owner who is familiar with the market value of his property to testify regarding that market value, even if he is not qualified or designated as an expert witness. 2009 WL 237265, at *1. This rule is called the Property Owner Rule. *Id.* The Houston Fourteenth Court of Appeals recently addressed whether the Rule applies to corporations through an appropriate corporate representative. *Id.* The Texas Supreme Court has not directly addressed the issue, and there is a split among the courts of appeals as to how the Rule applies. *Id.* at *1, 3. After discussing these intermediate appellate opinions, as well as cases from other jurisdictions, and the purposes of the Rule, the Houston Court concluded that the Rule applies to corporate entities owning property. *Id.* at *6. Accordingly, a corporate representative who is familiar with the property's market value may testify as to the property's market value without being designated as an expert witness. *Id.*

Insurance

An insurer's duty to defend does not include a duty to defend a claim that might have been alleged but was not, or a claim that more closely aligns with the actual facts but has not been asserted. *Pine Oak Builders, Inc. v. Great Am. Lloyd's Ins. Co.*, 279 S.W.3d 650 (Tex. 2009).

An insurance policy required the insurer to defend "any 'suit'" seeking damages for bodily injury or property damage covered by the policy. *Id.* at 655. "Suit" is defined as "a civil proceeding in which damages because of [property damage or other injuries] to which this insurance applies are alleged." *Id.* Under the policy, the insurer did not have a duty to defend a claim that might have been alleged but was not, or a claim that more closely tracks the true factual circumstances surrounding the third-party claimant's injuries but which, for whatever reason, has not been asserted. *Id.* at 655-56. To hold otherwise would impose a duty on the insurer that is not found in the language of the policy. *Id.*

Jury – Outside Influence

Discovery regarding outside influence on the jury is permissible, but it should be limited in scope. *Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex. 2009).

In a products liability case, the jury deliberated for two days before the presiding juror sent out the question, "What is the maximum amount that can be awarded?" *Id.* at 659. The parties promptly settled. *Id.* The jurors were dismissed, but some stayed and voluntarily spoke with the defendant, Ford. *Id.* From these discussions, Ford learned that some of the jurors were unaware of the presiding juror's note and that she sent the note over the objection of other jurors. *Id.* At the time the note was sent out, the jurors had decided the first of two liability questions in Ford's favor, and eight jurors had voted in Ford's favor on the second liability question, with two jurors undecided. *Id.* Ford moved the trial court to delay settlement and allow discovery on the issue of outside influence in the drafting of the question, attaching affidavits from four jurors regarding the presiding juror's behavior. *Id.* at 659-60. The trial court denied the request for discovery but encouraged Ford to conduct its own investigation. *Id.* at 660. Ford later withdrew its consent to settlement and an agreed judgment, and requested a new trial. *Id.* The trial court struck the juror interview transcripts Ford attached to its filings, and denied Ford's motions. *Id.* The plaintiff filed a summary judgment motion for breach of the settlement agreement, and after striking the juror affidavits Ford had attached to its initial motion for discovery, the trial court granted summary judgment. *Id.*

After concluding that Ford had preserved its complaint regarding the denied discovery on outside influence (*id.* at 661-63), the Court turned to the question of whether the discovery Ford sought was permissible. The plaintiff argued that Texas Rules of Civil Procedure 327(b) and 606(b) precluded any discovery about any aspect of jury deliberations. *Id.* at 665-666. Because Ford had not sought the discovery in connection with a motion for new trial (even though a new trial would result if Ford succeeded on its request to set aside the settlement agreement), the rules did not strictly apply. *Id.* at 666. Moreover, even when the rules apply, their plain language allows jurors to testify about outside influence brought to bear on any of them. *Id.* The Court opined that "[d]iscovery involving jurors will not be appropriate in most cases, but in this case there was more than just a suspicion that something suspect occurred-there was some circumstantial evidence that it did." *Id.*

In finding that the discovery sought by Ford was, in general, permissible, the Court also recognized that there is a difference between jurors choosing to talk about their service and their being compelled to do so in discovery depositions and court hearings. *Id.* The Court "believe[s] the better policy, in general, is to conform discovery involving jurors to those matters permitted by Rule of Civil Procedure 327 and Rule of Evidence 606. That is, discovery involving jurors should ordinarily be limited to facts and evidence relevant to (1) whether any outside influence was improperly brought to bear upon any juror, and (2) rebuttal of a claim that a juror was not qualified to serve." *Id.* The Court also clarified that the trial court retained discretion to reasonably control the limits of discovery and the manner in which the discovery may be obtained. *Id.*

Justice Wainwright, joined by Justice Medina, wrote a concurring opinion in which he provided an additional reason he believed supported the Court's decision. Justice Wainwright also wrote to address the limited circumstances to which he believes the Court's opinion would apply.

Jury Waivers

Prudential does not impose a presumption against a contractual jury waiver. *In re Bank of Am., N.A.*, 278 S.W.3d 342 (Tex. 2009) (per curiam).

In *Bank of America*, the Texas Supreme Court clarified that its holding in *In re Prudential Ins. Co.*, 148 S.W.3d 124, 130-33 (Tex. 2004), does not create a presumption against waiver that places the burden on the party seeking enforcement to prove that the opposing party knowingly and voluntarily agreed to waive its constitutional right to a jury trial. *Bank of Am.*, 278 S.W.3d at 343. The Court gave two reasons for its rejection of such a presumption. First, a presumption against waiver would incorrectly place the initial burden of establishing a knowing and voluntary execution on the party seeking to enforce the waiver, which is inapposite to the Court's burden-shifting rule as articulated in *In re General Electric*, 203 S.W.3d 314, 316 (Tex. 2006) (per curiam). *Bank of Am.*, 278 S.W.3d at 343. Second, a presumption against waiver would create an unnecessary distinction between arbitration and jury-waiver clauses, even though the Court has expressed that our jurisprudence "should be the same for all similar dispute resolution agreements." *Id.* at 343-44.

Oil and Gas

Texas Natural Resources Code section 85.321 provides for a private cause of action, but that claim belongs to the person who owns the property at issue at the time of the injury, and does not pass to a subsequent purchaser (or lessee) without an express assignment. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, --- S.W.3d ---, 52 Tex. Sup. Ct. J. 462, No. 05-0739, 2009 WL 795760 (Mar. 27, 2009).

Emerald Oil, the current mineral lessee, asserted a section 85.321 claim against Exxon, a previous mineral lessee on the same tract, for allegedly violating Commission plugging rules when Exxon abandoned the wells on the tract. 2009 WL 795760, at *1, 4. The Court agreed that, under section 85.321 of the Texas Natural Resources Code, a party whose interest in property is damaged by another party violating provisions of a conservation law of this state or a Railroad Commission rule or order "may sue for and recover damages" and other relief to which the party may be entitled. *Id.* at *2. Nevertheless, the Court determined that Emerald Oil did not have standing to assert such a claim. *Id.* at *5. The Court noted the principle that the right to sue is a personal right that belongs to the person who owns the property at the time of the injury, and the right to sue does not pass to a subsequent purchaser of the property unless there is an express assignment of the cause of action. *Id.* The Court applied this principle to section 85.321, and determined that a subsequent lessee, like Emerald, can stand in no better shoes than a subsequent owner. *Id.* The Court also acknowledged that, if the Legislature intended to change this common law principle, it could have done so in the statute. *Id.*

Post-Judgment Motions

The rule requiring a written order to grant a motion for new trial is a bright-line rule without exception. *In re Lovito-Nelson*, 278 S.W.3d 773 (Tex. 2009).

The Texas Supreme Court has clarified that the rule requiring a written order to grant a motion for new trial is a bright-line rule. *Id.* at 775. An oral pronouncement accompanied by a written docket sheet entry will not suffice. *Id.* at 774-75. An oral pronouncement made at the same time the court signs an order granting a preferential (new) trial setting (i.e., a written order implying the grant of a motion for new trial) will not suffice. *Id.* at 775. Because of the uncertainty in appellate deadlines that would be caused by a pliable rule, the rule must be strictly enforced. *Id.* at 774-75.

Sanctions

Provisions in a court order that are incorporated from the parties' agreement cannot be enforced by contempt unless the order contains decretal language actually ordering the parties to perform or refrain from particular conduct. *In re Coppock*, 277 S.W.3d 417 (Tex. 2009).

The trial court's final decree of divorce incorporated a mediated settlement agreement between the parties which, among other things, permanently enjoined them from communicating with each other "in a coarse or offensive manner." *Id.* at 418. The trial court later held the ex-wife in contempt of this provision. *Id.* The divorce decree grants a "permanent injunction" that included "communicating with the other party in person or in writing in vulgar, profane, obscene, or indecent language or in a coarse or offensive manner," and recited that the injunction was "binding on both parties." *Id.* at 419. However, the decree did not include language that required the parties to refrain from the listed conduct or that mandated compliance with the

injunction. *Id.* Without such language, the provisions in the order – incorporated from the parties' agreement – were enforceable only as contractual obligations. *Id.* at 420. Because contractual obligations cannot be enforced by contempt, these provisions could not be so enforced, either. *Id.* The Court also noted that the provision regarding "coarse or offensive communication" was "less than clear," but did not reach this specific issue due to the lack of decretal language. *Id.* at 418.

Venue

In an action against a county, the mandatory venue prescribed by Section 15.015 of the Texas Civil Practice and Remedies Code is not trumped by Section 15.016, and the county is not required to challenge venue facts. *In re Fort Bend County,* 278 S.W.3d 842 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

The plaintiffs brought a premises defect case against Fort Bend County and other defendants under the Texas Tort Claims Act. *Id.* at 843. The plaintiffs sued in Harris County, where the accident occurred. *Id.* Fort Bend County moved to transfer venue to Fort Bend County, under section 15.015, which provides that "[a]n action against a county shall be brought in that county." *Id.* at 843-44. The plaintiffs argued that section 15.015 was trumped by section 15.016, which provides that "[a]n action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute." *Id.* at 844. The Tort Claims Act contains such a mandatory venue provision. *Id.* However, the court of appeals concluded that section 15.015 controls, and required venue in Fort Bend County. *Id.* Although Fort Bend County had not complied with the general requirement of specifically denying the plaintiffs' venue facts, the court of appeals held that the County was not required to do so in light of the mandatory and controlling nature of section 15.015. *Id.*

Workers' Compensation

A general contractor "provides" workers' compensation insurance coverage to a subcontractor and its employees when the general contractor's written agreement with the subcontractor requires that the subcontractor enroll in the site owner's worker's compensation insurance plan. *HCBeck, Ltd. v. Rice,* --- S.W.3d ---, 52 Tex. Sup. Ct. J. 555, No. 06-0418, 2009 WL 886160 (Apr. 3, 2009).

With regard to the Texas Workers' Compensation Act, a subscribing employer is entitled to assert a statutory exclusive remedy defense against the tort claims of its employees for job related injuries. 2009 WL 886160, at *1. This exclusive remedy defense provided to subscribing employers is also afforded to a general contractor if, pursuant to a written agreement, it "provides" workers' compensation insurance coverage to the subcontractor and its employees. *Id.* (citing Texas Labor Code §§ 406.123(a) & 408.001(a)). The question arose: does a general contractor "provide" coverage in the manner contemplated by section 406.123(a) when its written agreement with the subcontractor requires only that the subcontractor enroll in the site owner's workers' compensation insurance plan? The Texas Supreme Court answered yes. *Id.* In doing so, the Court reasoned that a general workplace insurance plan that binds a general contractor to provide workers' compensation insurance for its subcontractors and its subcontractors' employees achieves the Legislature's objective to ensure that the subcontractors' employees receive the benefit of workers' compensation insurance. *Id.*

Justice Johnson, joined by Justice Medina, dissented in large part from the majority opinion. Justice Johnson would have held that. "under section 406.123, a general contractor 'provides' workers' compensation insurance if the general contractor 'puts something in the pot,' that is, if it contributes something of value for statutory immunity." *Id.* at *13 (Johnson, J., concurring).

U.S. Supreme Court

Arbitration

In deciding whether to grant a Federal Arbitration Act § 4 petition to compel arbitration, a district court may "look through" the petition to the underlying controversy, but may not base federal jurisdiction on counterclaims. *Vaden v. Discover Bank*, --- U.S. ---, 129 S.Ct. 1262 (2009).

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, authorizes a United States district court to entertain a petition to compel arbitration if the court would have jurisdiction, save for the arbitration agreement, over "a suit arising out of the controversy between the parties." 129 S.Ct. at 1267-68. In determining whether the court has federal-question jurisdiction over the underlying controversy, the district could should "look through" the petition and examine whether the underlying controversy arises under federal law. *Id.* at 1268. However, even if the answer to that question is yes (i.e., the underlying dispute is the proper focus of a section 4 petition), the district court may not exercise jurisdiction under section 4 when the petitioner's complaint rests solely on state law, even if an actual or potential counterclaim also is asserted based on federal law. *Id.* Put another way, the petitioner may not invoke section 4 by sidestepping its own pleading – which has no federal element – and instead relying on counterclaims asserted by another party. *Id.* at 1270.

Civil Rights Claims

The *Saucier* procedure for determining whether a police officer has qualified immunity from a civil rights claim is not required in all cases. *Pearson v. Callaham*, --- U.S. ---, 129 S.Ct. 808 (2009).

In *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Court set forth a required procedure for determining whether a police office has qualified immunity from a civil rights claim. 129 S.Ct. at 813. The *Saucier* procedure

mandated the order of decision: first, whether the plaintiff has alleged a deprivation of a constitutional right at all, and second, whether the right was clearly established. *Id.* at 816. In *Pearson*, the Court held that the *Saucier* procedure "should not be regarded as an inflexible requirement . . . ." *Id.* at 813. Instead, the Court concluded that the judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified-immunity analysis should be addressed first in light of the circumstances in the particular case at hand. *Id.* at 818. In the case at hand, the Court found that the petitioners were entitled to qualified immunity on the ground that, at the time of the search, it was not clearly established that their conduct was unconstitutional. *Id.* at 813.

Constitutional Law

Placement of a permanent monument in a public park is a form of government speech that is not subject to scrutiny under the Free Speech Clause. *Pleasant Grove City, Utah v. Summum*, --- U.S. ---, 129 S.Ct. 1125 (2009).

A private group demanded that Pleasant Grove City allow it to place a permanent monument in a city park. 129 S.Ct. at 1129. The court of appeals held that the municipality was required by the Free Speech Clause of the First Amendment to accept the monument, because a public park is a traditional public forum. *Id.* The Supreme Court disagreed. *Id.* Instead, the Court concluded that, although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. *Id.* Instead, the Court reasoned that the placement of a permanent monument in a public park is best viewed as a form of government speech and is, therefore, not subject to scrutiny under the Free Speech Clause. *Id.*

Evidence

When police mistakes leading to an unlawful search result from isolated negligence attenuated from the search, rather than system error or reckless disregard of constitutional requirements, the exclusionary rule does not apply. Herring v. U.S., --- U.S. ---, 129 S.Ct. 695 (2009).

A police officer learned that the defendant had driven to the Sheriff's Department impound lot to retrieve something from his impounded truck. 129 S.Ct. at 698. The officer asked the county's warrant clerk to check and see if the defendant had any outstanding arrest warrants. *Id.* The warrant clerk checked the neighboring county's computer database and found an outstanding arrest warrant. *Id.* The police officer pulled over the defendant as he left the impound lot and arrested him. *Id.* A search incident to the arrest revealed methamphetamine in the defendant's pocket and a pistol in his vehicle (which, as a convicted felon, the defendant was not entitled to possess). *Id.* However, while the arrest was taking place, the warrant clerk was discovering that the computer database was incorrect, and that the arrest warrant had been recalled. *Id.* For whatever reason, the recall had not been entered into the database. *Id.* By the time the warrant clerk got the updated information to the police officer, the arrest and search already had taken place. *Id.*

Based on previous case law establishing that such suppression is not an automatic consequence of a Fourth Amendment violation (*id.*), the Court analyzed whether the evidence produced by the search should be excluded under the circumstances. The Court made clear that not all recordkeeping errors by the police are immune from the exclusionary rule. *Id.* at 703. The Court noted that exclusion would be justified if the police have been shown to be reckless in maintaining a warrant system or to have knowingly made false entries to lay the groundwork for future false arrests, or even if the database is shown to suffer from systemic errors. *Id.* at 703-04. However, where the police mistakes at issue are isolated negligence attenuated from the search, as here, the Court determined that the exclusionary rule would not apply. *Id.* at 704.

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented. She would have applied the exclusionary rule and found that the "most serious impact" of the Court's holding will be on innocent persons "wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base." *Id.* at 705 (Ginsburg, J., dissenting).

Voting Rights Act

In a district that is not a majority-minority district, the Voting Rights Act does not require a district to be drawn to accommodate the possibility that a racial minority could elect its candidate of choice with support from crossover majority voters. *Bartlett v. Strickland*, --- U.S. ---, 129 S.Ct. 1231 (2009).

One of three threshold factors in analyzing a claim under section 2 of the Voting Rights Act is whether the minority group at issue is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Bartlett*, 129 S.Ct. at 1241. In the case at bar, the minority group would constitute less than 50 percent of the voting-age population in the potential election district. *Id.* However, in previous section 2 cases, the Court had reserved the question of whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. *Id.* at 1242. The Court had previously held that section 2: (1) can require creation of "majority-minority" districts – where a minority group represents a numerical, working majority of the voting-age population; but (2) does not require creation of "influence districts" – where a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. *Id.* This case presented an intermediate type of district: a crossover district. *Id.* In a crossover district, minority voters make up less than a majority of the potential district, but are a sufficiently large group to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. *Id.*

In a plurality decision, the Court affirmed the judgment of the Supreme Court of North Carolina, finding that section 2 did not require the district to be drawn to accommodate the minority group. The Court's decision was announced in an opinion by Justice Kennedy, in which he concluded that the "sufficiently large" threshold requirement could not be met unless a geographically compact group of minority voters could form a majority in a single-member district. *Id.* at 1249. Chief Justice Roberts and Justice Alito joined in Justice Kennedy's opinion. Justice Thomas, joined by Justice Scalia, concurred in the judgment only, disagreeing that any of the three threshold factors were supported by the statutory text. *Id.* at 1250. In a dissent, Justice Souter explained that he would have held that a district may be a minority-opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority. *Id.* Justices Stevens, Ginsburg, and Breyer joined the dissent. *Id.*

Fifth Circuit

Abatement for State Proceeding

When determining the type of declaratory proceeding for purposes of applying the proper abstention standard, the court may consider all pleadings in the action – including a counterclaim by the defendant – in determining whether the action involves a request for coercive relief. *New England Ins. Co. v. Barnett*, 561 F.3d 392 (5th Cir. 2009).

When reviewing a district court's decision to stay a federal declaratory proceeding based on a parallel state action, different standards apply depending on whether the proceeding involves declaratory relief alone or also coercive relief. *Id.* at 394-95. In the Fifth Circuit, if a declaratory proceeding also involves a request for coercive relief, the *Colorado River* abstention standard applies. *Id.* at 396. However, the Court had never addressed whether, in deciding whether the proceeding involves a request for coercive relief, the inquiry was limited to the plaintiff's pleadings. *Id.* In the case at bar, the request for coercive relief was found in a counterclaim by the defendant. *Id.* at 397. The Court determined that the proper inquiry was whether the action as a whole contained any claim for coercive relief. *Id.* The Court indicated that potential exception would arise if the non-plaintiff's request for injunctive relief is either frivolous or is made solely to avoid application of the non-"coercive" standard. *Id.*

Arbitration

Where arbitration expressly confers on arbitrator the power to decide issues of arbitrability, such issues are removed from the district court's sphere. *Agere Sys., Inc. v. Samsung Elec. Co., Ltd.*, 560 F.3d 337 (5th Cir. 2009).

In general, arbitrability under the Federal Arbitration Act is a matter committed to the district court. *Id.* at 339. However, an exception applies in cases in which the parties unmistakably provide for the arbitrator to decide the issue. *Id.* In this case, the agreement at issue provided, among other things, that the arbitrator "shall determine issues of arbitrability . . . ." *Id.* at 340 (emphasis omitted). Because the applicability of the agreement to the parties' dispute was arguable, the Fifth Circuit determined that the question was for the arbitrator to decide. *Id.* Although the Court referenced the Federal Circuit's two-part test for analyzing whether the parties' language clearly demonstrates an intent to shift the arbitrability decision to the arbitrator, the Court expressly stated at the opinion's conclusion that it was "adopt[ing] no new standards of Fifth Circuit analysis of arbitration provisions today." *Id.*

In determining whether a plaintiff (as opposed to a defendant) waived the right to compel arbitration, the act of filing suit constitutes a substantial invocation of the judicial process unless an exception applies. *Nicholas v. KBR, Inc.*, --- F.3d ----, No. 08-20140, 2009 WL 998974 (5th Cir. Apr. 15, 2009).

Although in most cases a plaintiff argues that a defendant waited too long to compel arbitration, *Nicholas* presented the opposite situation. The plaintiff filed suit in state court, and the defendant removed. 2009 WL 998974, at *1. In federal court, the plaintiff amended her pleading, responded to written discovery, and sat for a deposition. *Id.* at *1-2. More than ten months after filing suit, the plaintiff moved to compel arbitration. *Id.* at *2. The district court denied the motion. *Id.* Although the Fifth Circuit stated that the legal standard for waiver is the same for both plaintiffs and defendants, the Court held that "the act of a plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process, unless an exception applies." *Id.* at *3. The Court gave two non-exhaustive examples of exceptions: (1) filing suit solely to obtain a threshold declaration as to whether a valid arbitration agreement existed; and (2) filing suit to obtain injunctive relief pending arbitration. *Id.* at *4. In addition to substantial invocation, of course, the party opposing arbitration must demonstrate prejudice in order to establish waiver. *Id.* at *5. In this case, the Court also found prejudice, and affirmed the district court's waiver decision. *Id.* at *5-6.

Diversity Cases

The Texas Declaratory Judgment Act is not "substantive law" in a diversity case and will not support an award of attorneys' fees. *AG Acceptance Corp. v. Veigel*, 564 F.3d 695 (5th Cir. 2009).

The Federal Declaratory Judgment Act authorizes an award of attorney's fees "where 'controlling [state] substantive law' permits such recovery." The Texas Declaratory Judgment Act authorizes a court to award reasonable and necessary attorney's fees as are equitable and just. Tex. Civ. Prac. & Rem. Code § 31.009. However, the Texas Declaratory Judgment Act is not "substantive law" in a federal diversity case. *Veigel*, 564 F.3d at 701. Therefore, an attorney's fees award is not supported by the Texas act in a federal declaratory judgment case brought as a diversity action. *Id.*

Interlocutory Appeal

28 U.S.C. § 1292(b) authorizes certification of orders, not questions, for interlocutory appeal, and in certifying an order, district courts are advised to include more "reasoning" than an abstract description or bare finding. *Linton v. Shell Oil Co.*, 563 F.3d 556 (5th Cir. 2009) (per curiam).

In *Linton*, the district court denied a summary judgment motion and certified for a section 1292(b) interlocutory appeal "the issues raised" in that motion. *Id.* at 557. The Fifth Circuit began by noting that section 1292(b) authorizes certifications of orders for interlocutory review, not certifications of questions. *Id.* And, although the district court had helpfully identified the specific legal issues that were involved, it did not certify the order for review or include in that order its reasoning as to how the questions were resolved or why that resolution led to the motion's denial. *Id.* at 558. In denying the application for leave to appeal, the Fifth Circuit "strongly suggest[ed] to district judges the advisability of stating more than an abstract description of the legal questions involved or a bare finding that the statutory requirements of section 1292(b) have been met." *Id.*

Pleading Requirements

If a False Claims Act pleading cannot allege the details of an actually submitted false claim under section 3729(a)(1), it may still survive by alleging particular details of a scheme to submit false claims, paired with reliable indicia leading to a strong inference that the claims were actually submitted. *Grubbs v. Kanneganti*, 565 F.3d 180 (5th Cir. 2009).

In the Fifth Circuit, a complaint filed under the False Claims Act must meet the heightened pleading standard of Rule 9(b). *Id.* at 185. This standard requires only "simple, concise, and direct" allegations of the "circumstances constituting fraud," which, after *Twombly*, must make relief plausible, not merely conceivable, when taken as true. *Id.* at 186. As opposed to a fraud claim, a False Claims Act claim does not require the elements of reliance or damages. *Id.* at 189. Thus, a claim under the False Claims Act and a claim under common law or securities fraud are not on the same plane in meeting the requirement of "stat[ing] with particularity" the contents of the fraudulent misrepresentation. *Id.* With regard to pleading presentment, this element requires proof only of the claim's falsity, not of its exact contents. *Id.* Therefore, a plaintiff does not necessarily have to plead the exact dollar amounts, billing numbers, or dates of presentment. *Id.* at 190. To plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted. *Id.*

Discussion with regard to sufficient pleading of loss causation, in the context of the Private Securities Litigation Reform Act. *Lormand v. US Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009).

The Private Securities Litigation Reform Act provides that a private plaintiff who claims securities fraud has the burden of proving that the defendant's fraudulent act or omission caused the loss for which the plaintiff seeks to recover. 565 F.3d at 255. In order to satisfy Rule 8(a)(2) and *Twombly* in pleading loss causation, a plaintiff must allege a facially "plausible" causal relationship between the fraudulent statements or omissions and plaintiff's economic loss, including allegations of a material misrepresentation or omission, followed by the leaking out of relevant or related truth about the fraud that caused a significant part of the depreciation of the stock and plaintiff's economic loss. *Id.* at 258. Put another way, the complaint must allege enough facts to give rise to a reasonable hope or expectation that discovery will reveal evidence of the foregoing elements of loss causation. *Id.* The Court's opinion also contains a thorough discussion applying these principles to the pleading at issue.

Sanctions

Attorneys' fees are not a valid Rule 11 sanction issued *sua sponte*. *Brunig v. Clark*, 560 F.3d 262 (5th Cir. 2009).

Federal Rule of Civil Procedure 11 provides that a sanctions order directing payment of attorneys' fees is available only "if imposed on motion" and warranted for effective deterrence. *Id.* at 298. In the case before the Court, a party had moved for sanctions, but had not satisfied the Rule 11 safe-harbor requirements. *Id.* at 297. Therefore, the sanctions entered by the district court had been imposed "on its own initiative." *Id.* The Court reversed the sanction of attorneys' fees, expressly holding that "[a]ttorneys' fees paid to another party are not a valid sua sponte sanction under the Rule." *Id.* at 298.

Sentencing Guidelines

A Sentencing Guideline enhancement applicable where the minor involved was "within the defendant's care, custody, and control" applies to more than legal caretakers of a minor. *U.S. v. Alfaro*, 555 F.3d 496 (5th Cir. 2009).

Under the U.S. Sentencing Guidelines, section 2G2.1(b)(5) provides for an enhancement where the minor involved in the offense was within the defendant's care, custody, and control. *Id.* at 497. In this case, the minor involved was the defendant's 15-year-old sister-in-law. *Id.* The defendant would pick up his sister-in-law at her house, take her to his house, and produce videotapes there while his wife was away. *Id.* However, the defendant argued that his sister-in-law was not under his custody or control, and pointed to the fact that her mother disapproved of the sister-in-law's spending time with him, to argue that he was not "entrusted" with the sister-in-law's care. *Id.* at 498-99. The Court examined whether "a minor victim can be in the custody, care, or supervisory control of a defendant when the victim's parent or legal guardian did not specifically entrust the victim to the defendant's care." *Id.* at 499. Section 2G2.1(b)(5) applies where the defendant is the parent, relative, or legal guardian of the minor, or if the minor

was "otherwise in the custody, care, or supervisory control of the defendant." *Id.* The commentary to the guidelines notes its "broad application" and lists examples of babysitters, day-care providers, and other temporary caretakers. *Id.* In finding that the district court properly applied the guideline in looking to the actual relationship between the defendant and the minor, the Court noted both: (1) the 20-year age difference between the defendant and his teenage minor victim, which mitigates against a finding that the two were "peers;" and (2) there was some evidence in the record that their relationship had been longstanding. *Id.* at 500-01. However, as to the latter factor, the Court's opinion indicates that the better practice would be to provide specific details of the minor's actual relationship with the defendant in the record, to support the conclusion that the two persons were in an "entrustful relationship." *Id.*

Settlement Agreements

Limiting language in a settlement agreement that is not made part of an order dismissing the case will not be considered in determining the preclusive effect of the order dismissing the case with prejudice. *Oreck Direct, LLC v. Dyson, Inc.*, 560 F.3d 398 (5th Cir. 2009).

Oreck and Dyson reached a settlement agreement in a false advertising suit. *Id.* at 400. They signed a binding term sheet, which ultimately was replaced by a complete written settlement agreement. *Id.* The term sheet and/or the settlement agreement allegedly limited the scope of the claims or disputes being settled. *See id.* at 400-01. The district court also signed an order of dismissal with prejudice. *Id.* at 400. The order did not incorporate the term sheet or include any language limiting the scope of the parties' agreement or the dismissal. *Id.* Oreck later filed a second false advertising lawsuit against Dyson. *Id.* The district court dismissed that suit based on ***res judicata***, finding that the claims were part of the same series of transactions at issue in the first suit. *Id.* The first three elements of ***res judicata*** were undeniably established, but the parties disputed whether the fourth element existed: that the same claim or cause of action is involved in both cases. *Id.* at 401. Oreck argued that the "transactional test" should be abandoned in favor of an examination of the parties' actual intent, as shown by the terms of the settlement agreement. *Id.* at 402. The Court rejected this argument. In doing so, the Court noted that the final judgment in the first lawsuit simply dismissed the case with prejudice, without incorporating the settlement agreement (whose terms were not finalized until after judgment was entered) and without any reservations. *Id.* ■

Fixing a Hole? The Texas Legislature Takes on Public Use

by Charles B. McFarland, Joyce, McFarland + McFarland LLP

In the wake of the Supreme Court's opinion in *Kelo v. City of New Londo*n, 545 U.S. 469 (2005), affirming government's taking of private property for the promotion of economic development without any proposed public use or ownership of the property to be taken, state legislatures across the country scrambled to respond to public outrage over the perceived abuse by government of its power of eminent domain. In 2005, the Texas legislature enacted Section 2206 of the Texas Government Code, entitled *Limitation On Eminent Domain For Private Parties Or Economic Development Purposes*. Like the legislature's other meaningless gesture towards private property rights, the 1995 *Private Real Property Rights Preservation Act*, the statute was most noteworthy for its exceptions. The legislature revisited the public-use issue during the 2009 session and is likely to take it up during the anticipated special session this summer. However, if the goal is to curb eminent domain abuse, it is not clear that limiting what can be construed as public use is an effective approach.

The ownership of private property is not absolute. It is a fundamental premise to private property ownership that all property is held subject to the governmental powers of taxation, escheat, the police power, and eminent domain. The government's power to take private property is constrained by two requirements: that the taking serve a public use, and that just compensation be paid. *Kelo* addressed the scope of the limitation imposed on takings by the public-use requirement. Charles and Susette Kelo and the other property owners lived in the Fort Trumbull area of New London, Connecticut. Although a few of the properties were held for investment, most were either owner-occupied or occupied by members of the owner's family. There was no allegation that any of the properties was blighted or in poor condition. At the same time, there was no evidence of an illegitimate purpose behind the takings in the case. In the Supreme Court's opinion, the *Kelo* majority set forth the precedential ground rules applicable to the case, and its framing of these ground rules dictated the result in the case. First, the Court recognized that the concept of "public use" had long been extended beyond actual use by the public. Instead, if a taking is shown to serve the broader concept of a "public purpose," it will withstand constitutional scrutiny. The Court additionally reaffirmed both the limited scope of its review of determinations of what takings would serve the public welfare and its deference to the legislature and its authorized agencies in these determinations.

In affirming the city's taking in the *Kelo* case, the Court rejected as clearly inconsistent with these precedents a bright-line rule that economic development does not qualify as a public use. The Court also declined to impose heightened scrutiny to takings for economic development, such as a requirement of a "reasonable certainty" that the expected public benefits would occur, as inconsistent with the Court's view of the judicial role in the takings process. Put simply, the Court held that it is not the role of the courts to second-guess a legislative determination as to what projects will serve the public good, what land is necessary for those projects, or how the projects will be implemented.

The Court's opinion implicitly recognized that government's decision to take private property is largely political. The *Kelo* Court ultimately deferred to the public-use determination of the City's elected officials. If the people are dissatisfied with their elected officials' decisions with respect to the condemnation of private property, they may turn to the political process for redress. In other words, they can vote the rascals out of office. The *Kelo* Court's deference to the City's public-use determination reflects a pragmatic reality: it is more practical to replace elected officials than to replace life-tenured judges or to engage in the laborious process of attempting to amend the Constitution. In the long term, reliance on the political process is a more efficient, flexible, and responsive system than expecting courts, much less the Supreme Court, to act as case-by-case monitors of the governmental public-use determinations.

With the *Kelo* decision, the public learned what practitioners in the area of eminent domain law already knew (despite post-*Kelo* protestations): the public-use requirement is a minimal protection of private property rights. Following *Kelo*, dire predictions flowed from scholars and legal commentators forecasting a torrent of governmental takings for private development. Instead, the overwhelming response to *Kelo* has been exactly the opposite: over 30 state legislatures have passed more restrictive measures on the exercise of eminent domain for economic development. While clearly contemplated (even invited) by Justice Stevens's opinion, that legislative response is not necessarily advisable. Over the next few years, courts and state legislatures likely will struggle to reconcile these reactive measures with generally-accepted principles of good government. While the reaction to *Kelo* brought unprecedented interest, this interest was pointedly one-sided. Riding a wave of strong public sentiment regarding the sanctity of private property ownership, the only publicly-acceptable viewpoint following *Kelo*, even among experienced practitioners and scholars in eminent domain law, was that the case was wrongly decided and would result in a number of catastrophes, none of which have transpired or are likely to.

The *Kelo* opinion highlights the limited effectiveness of the public-use requirement in protecting private property rights in eminent domain cases. In the end, whether a particular project serves a public purpose is a political issue regarding the allocation of tax dollars. Because the acquisition of private property for public projects costs money, the misallocation of these resources is the proper concern of the taxpaying public. A system that allows voters to elect different political leaders if they believe their current ones are authorizing the condemnation of property for uses that they do not support is more flexible, and desirable, than a nationwide system imposed by nine judges with lifetime appointments.

Fortunately, the Constitution includes an additional – and more meaningful – limitation on government's power to take private property for public use: "nor shall private property be taken for public use *without just compensation*." In contrast to the theoretical limitation of the public-use requirement, the obligation to pay just compensation serves as a practical limitation on government's power of eminent domain. It forces government to pick and choose which projects it can afford to implement, thus tending to promote responsible government in a way that the public-use requirement does not.

The basic goal of the just-compensation obligation is to make the property owner whole, monetarily, for the taking of property. In general, it is not designed to limit governmental interference with property rights. Instead, the takings clause secures just compensation when otherwise proper interference with these rights amounts to a taking. Because the property owner is, in theory, left in as good a position as before the taking, courts are not as concerned for the rights of property owners as they might be for uncompensated governmental intrusions. While the takings clause originally was intended to protect the use and enjoyment of private property, it now functions primarily as a constitutional safeguard against *uncompensated* taking or use of private property for public purposes. The underlying principle of the clause is the recognition that government should not force a select few to bear public burdens that should be borne by the public as a whole, and not by individual property owners.

At the end of the day, it is the just-compensation obligation, and not the public-use requirement, that serves as the necessary constitutional check on government's taking of private property. That this is true may readily be demonstrated by imagining having to give up one of the two requirements in the takings clause. Restricting takings to agreed-upon public uses, without a payment obligation, only limits the uses for which private property may be taken. The amount of property that could be taken would be unlimited. Alternatively, removing all use restrictions on takings so long as government pays just compensation would limit the amount of property that it could condemn. In this scenario, government would have greater flexibility in determining when to exercise its power of eminent domain. Under either scenario, the exercise of eminent domain would still be subject to the political process if the public perceived that the power was being abused. This abuse, however, is much more likely in the absence of the just-compensation obligation than if the public-use restriction were removed.

The 2009 legislature adjourned without reaching a resolution of this issue, and a special legislative session is likely. In this session, rather than focus on restricting the circumstances under which the eminent domain power can be exercised, the Texas legislature would be better served by making sure Texas has a process that considers the full economic consequences of a taking in determining compensation. This is more likely to curb eminent domain abuse than one in which government is not required to pay for the consequences of its actions, whatever the proposed use. ■

Litigation Calendar

by Tracy Nuckols

JULY

New Concepts of Persuasion: The Theory and Effect from a Recent Trial
Webcast July 14 2:00 to 4:00 pm CT on TexasBarCLE.com

Advanced Personal Injury Law Course
Dallas July 15-17 Cityplace Conference Center

State Bar College "Summer School"
Galveston July 16-18 Moody Gardens Hotel

Advanced Patent Litigation Course
Incline Village, NV July 23-24 Hyatt Regency Hotel

TechLawSA: Pragmatic Use of Technology in Litigation
San Antonio July 25 St. Mary's University School of Law

Understanding Juries: A Mock Trial and More
San Antonio July 28 Hyatt Hill Country Resort & Spa

From Lawbooks to Facebook: What Trial Lawyers Need to Know About Social Networking Sites
Webcast July 28 10:00 to 11:30 am CT on TexasBarCLE.com

Advanced Civil Trial Course
San Antonio July 29-31 Hyatt Hill Country Resort & Spa

AUGUST

Advanced Personal Injury Law Course
San Antonio August 5-7 Hyatt Hill Country Resort

The Car Crash Seminar: From Sign-Up to Settlement
Austin August 6-7 Hyatt Regency Austin

The Jury Trial 2009
Houston August 6-7 Hilton University of Houston Hotel
Dallas August 13-14 Cityplace Conference Center

SEPTEMBER

Advanced Personal Injury Law Course
Houston September 2-4 Westin Oaks Hotel

Nuts and Bolts of Appellate Practice
Austin September 9 Four Seasons Hotel

Advanced Civil Appellate Practice Course
Austin September 10-11 Four Seasons Hotel

Civil Collaborative Training
Dallas September 23-24 Belo Mansion

Advanced Civil Trial Course (video)
Dallas September 23-25 Cityplace Conference Center

OCTOBER

Nuts and Bolts of Appellate Practice (video)
Austin October 7 Cityplace Conference Center

Advanced Personal Injury Law Course
Houston October 7-9 Norris CityCentre

Advanced Civil Appellate Practice Course (video)
Austin October 8-9 Cityplace Conference Center

Advanced Personal Injury Law Course (video)
South Padre Island October 21-23 Sheraton Fiesta Hotel

NOVEMBER

Understanding Juries: A Mock Trial and More (video)
Houston November 3 Crowne Plaza - River Oaks Hotel

Advanced Civil Trial Course (video)
Houston November 4-6 Crowne Plaza - River Oaks Hotel

DECEMBER

The Ultimate Trial Notebook: Family Law
San Antonio December 3-4 Westin Riverwalk Hotel

The Trial of a Fiduciary Litigation Case
Fredericksburg December 17-18 Fredericksburg Inn & Suites

Tips from Trial Lawyers

by Matt Frederick

Alice London

Bishop London & Dodds
Austin, Texas

Originally from El Paso, Alice London went to college at Tulane ("a huge culture shock") and to law school at the University of Texas, where she immediately felt the pull of the courtroom. "I was focused more on moot court and mock trial than on the classes. I felt like that was where we were really learning our craft. At the time, I had the mistaken impression that ninety percent of what we were doing was in the courtroom." After a brief stint as an appellate lawyer, she went to work for the Austin firm then known as Kidd, Whitehurst & Harkness, where she discovered a passion for working directly with individual clients and presenting their stories.

She tried her first case with late Third Court of Appeals Justice Mack Kidd. She recalls that he "had this amazing flowchart mind," which, together with his depth of experience, allowed him to map out a number of alternative strategies depending on what the opposing party might do at trial. "In today's legal circles," she notes, "you don't find as many people who have that much experience—who have seen thirty or forty juries." She tried several more cases with now-Senator Kirk Watson, and she recalls that "[he] had such a natural gift for understanding the best message."

Why did more cases go to trial when you started practicing?

She believes that many of the causes (aside from tort reform) of the decline in jury trials can be found in the litigation process itself. "Litigation has gotten so much more complicated and expensive that it tips the scales in favor of settlement. Part of it is that a certain percentage of the population is without recourse, so there are fewer cases. Part of it is computers and e-mail. It's rare to see a case now that doesn't have a half-million pages of e-discovery. It is ironic that the discovery rules meant to streamline litigation have made it too expensive."

She notes that the expansion of discovery puts more pressure on lawyers to control costs. "The challenge for trial lawyers today is efficiency. We have a duty to our clients to find a litigation solution that minimizes cost and maximizes the ability to evaluate the case. That pressure hasn't been on the trial lawyer as much as it is now."

Are we generating better results with this explosion of evidence?

Considering her own question, she points out that lawyers and jurors have not experienced the same expansion in memory and processing speed as their computers. "Computer capacity has increased, but the case is tried by one, two, maybe three lawyers who have the same mental capacity. The jury's capacity is the same, too, [so] even though the case has one million documents instead of one thousand, you end up at the same place."

But the increased volume of discovery tends to create lingering uncertainty for lawyers. "The process used to be look at everything your client has and pick out what's responsive. Now, you can't look at everything they have. We're reduced to secondary searches, so you wake up at night thinking, 'Did we miss something?'"

Have the cases themselves increased in size along with discovery?

"The cases have always been needle-in-a-haystack. The haystack has just gotten bigger. The trial lawyer's job is to present the needle. Many a trial lawyer thinks their job is to present the haystack. You have to remember that the ultimate destination is the jury, which is never going to be able to reach the same level of understanding." Processing the information is only the first step. "Discovery is a process of complicating things, but once you get to the top of that mountain, you have to come down again."

"So what do we do about that? We have to use some of the newer techniques, such as focus groups. Reduce your case and present it to a focus group. Let them tell you what facts resonate. Focus groups weren't necessary when you saw so many juries. They gave you the sense of how people were reacting—what resonates, what doesn't, what do they want to know? Focus groups are a jury substitute."

She recommends that lawyers consult focus groups early in the case. "If you have big variables, you have to test them—not before you go to trial, but before you evaluate the case for the client, before you tell them their exposure." But she admits that all of this insight can be unsettling: "The first time I did a focus group, I figured out that most people don't think like me, and that was disturbing."

What advice would you give to aspiring trial lawyers?

"Find a really strong mentor. Trying lawsuits has gotten so complicated that it's hard to find a way on your own. Set your goals and your ideals early. Don't be afraid to be idealistic." She recommends that lawyers ask themselves, every day, "What do I need to do today to be the best lawyer I can be?" The answer, she says, usually comes down to a few basic things. First, ask "Do I really understand my client—have I heard them?" Second, ask "Do I understand the other side—have I really heard them?" Third, "have a strong grounding in what the law is—this is a key to efficiency. Do your jury charge first." Finally, think about the needle in the haystack—ask "have I looked everywhere I need to look?"

When it comes to trial, she cautions, it is not enough to understand your client's position. The trial lawyer must be able to stand in the shoes of the opposing party and the decisionmaker. "Once you can see it from everyone's viewpoint, go to the Mack Kidd flowchart approach. Know how you will argue it if a certain piece of evidence does or does not come in. You can't begin and end with what you think of the case."

Is there a defining moment for you as a lawyer?

"Not really. Being a trial lawyer is the biggest roller coaster ride imaginable. When you are winning and your client is happy, there is no high like it. When you're losing and the client is disappointed, it is the lowest low. I don't think you can be a mild trial lawyer. If you are, you're not working hard enough. Most of us get into it because we want to win. Somewhere along the way, you begin to want to do justice. You want to get to the right result, a fair result."

Above all, the individual lawyer must have an idea of where he or she is going. "The first lunar mission was off-course 95% of the time. The way they got there was constant course correction." But she notes that "you can't course-correct unless you know your destination. If you don't ask what you can do to be the best lawyer you can be, you won't get there because you haven't thought about it." ■

Federal Update

by Jason Fulton

Strict scrutiny applies to content-based restrictions on the speech of elected officials.
Rangra, v. Brown, --- F.3d ----, No. 06-51587, 2009 WL 1100611 (5th Cir. Apr. 24, 2009).

The Fifth Circuit considered whether the speech of elected officials made pursuant to their official duties is entitled to the same protections as other speech and held: "The First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general." *Id.* at *1. The Court determined that when a state limits the speech rights of elected officials, those limitations are subject to strict scrutiny, i.e., they are invalid unless the state proves the regulation is narrowly tailored to further a compelling state interest. The Fifth Circuit remanded the case for a determination of whether the state statute at issue, the Texas Open Meetings Act (TOMA), meets strict scrutiny.

A group of elected city council members from Alpine, Texas exchanged emails on the subject of whether to call a council meeting. They were indicted for violating the criminal provisions of TOMA because the number of people exchanging the email constituted a quorum of the city council. The prosecutor eventually dismissed the charges. The plaintiffs filed suits under 28 U.S.C. §1983 against the state attorney general and district attorney "challenging as content-based speech regulations the criminal provisions of TOMA." *Id.*

The Court worked through the standing factors under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and determined that at least Plaintiff Rangra had standing because he was a current city council member and because he had demonstrated a credible threat of criminal prosecution. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988). In addition, Rangra established injury because he demonstrated that he engaged in self-censorship from fear of prosecution. *Id.* at *2.

Turning to the speech issue, the Court first observed that the Supreme Court requires that laws that regulate speech on the basis of its content must pass strict scrutiny. The strict-scrutiny test imposes three "hurdles" on government action. The government has the burden of demonstrating that "its action or regulation pursues a compelling state interest: "its action or regulation is 'narrowly tailored' to further that compelling interest." *Id.* at *3.

The Court agreed that the criminal provisions of TOMA were "content-based regulations of speech that require the state to satisfy the strict- scrutiny test in order to uphold them." *Id.* TOMA is a content-based regulation because it restricts communications of public officials when their speech "refers to 'public business or public policy over which the governmental body has supervision or control.'" *Id.* (quoting Tex. Gov't Code § 551.001).

The Court examined and disagreed with the district court's determination that plaintiffs' speech was not entitled to any First Amendment protection. The district court considered Supreme Court cases holding that public employees were entitled to limited first amendment protection for speech made pursuant to their official duties and held the situation for elected officials analogous. The Fifth Circuit disagreed and found "there is a meaningful distinction between the First Amendment's protection of public employees' speech and other speech, including that of elected government officials." *Id.* at *4. The First Amendment protection for elected officials' speech is "robust and no less strenuous than that afforded to the speech of citizens in general." *Id.* Based on this assessment, the Court sent the case back to the district court to conduct the strict scrutiny analysis.

***Twombly* plausibility standard applies in all civil cases.**
Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

The Supreme Court held that theories of respondeat superior and vicarious liability could not be used to hold government officials liable for the unconstitutional conduct of subordinates. Instead, a plaintiff must plead that each government official

violated the Constitution by that individual's own actions. In considering the pleadings of the plaintiff as to former Attorney General Ashcroft and FBI director Mueller, the Supreme Court clarified that the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) applied to all civil cases. Applying Twombly, the Court determined the pleadings inadequate.

Plaintiff Iqbal was arrested in New York in 2001 on charges of conspiracy to defraud the United States and fraud in relation to identification documents. He alleged that he was designated a person "of high interest" in the investigation of the September 11 attacks solely because of his race, religion, or national origin. Based on this discriminatory policy, Iqbal claimed he was subjected to beatings, special confinement, and other actions. He pleaded guilty to using another man's social security card, served time, and was released.

After release, Iqbal sued. He sued Mueller and Ashcroft personally, arguing they were responsible for the policy toward Muslims that led to his arrest and treatment. The district court denied petitioners' motion to dismiss and the Second Circuit affirmed. The Supreme Court reversed.

The Supreme Court applied the pleading standard of Federal Rule of Civil Procedure 8(a)(2) as interpreted by *Twombly* and determined that Iqbal's complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination. To assert an action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), a plaintiff must plead the individual government official, by his own actions, violated the Constitution. It is inadequate to plead liability based on a theory of respondeat superior or vicarious liability.

In examining Plaintiff's allegations against Ashcroft and Mueller, the Court held that the plausibility pleading standard in *Twombly* applied to all civil suits, not just antitrust suits. Specifically, the Court found that Federal Rule of Civil Procedure 8 requires a complaint state sufficient factual matter that, accepted as true, states "a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570. In order to determine facial plausibility, the pleaded factual content must allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1249 (citing *Twombly*, 550 U.S. at 565.).

The Supreme Court outlined the process for consideration of a motion to dismiss based on *Twombly*. First, the court should identify allegations that are not entitled to the presumption of truth because they are mere conclusions. Second, the court should examine the remaining well pleaded factual allegations, assume they are true, and then determine whether they are sufficient to entitle plaintiff to relief.

Using this *Twombly* analytical framework, the Court determined that Iqbal's pleadings did not comply with Rule 8. Iqbal's allegations that Ashcroft was the "principal architect" of the discriminatory policy and that Mueller was "instrumental" in its execution were conclusory and not entitled to a presumption of truth. At most, the Court held, Iqbal had pleaded facts that gave rise to a plausible inference that his arrest was the result of unconstitutional discrimination. But that was insufficient to entitle him to relief. The Supreme Court remanded to the Second Circuit for determination of whether the case should be remanded to the district court to allow Iqbal to seek leave to amend his complaint.

Pro Bono Opportunities

by Les Hatch

Feature: Texas Lawyers Care

TEXAS LAWYERS CARE ("TLC") is the pro bono/legal services support project of the State Bar of Texas. TLC was established in 1982 to advocate on behalf of low-income Texans on poverty issues of statewide importance. It is the only statewide organization providing training to local legal aid program staff and private bar attorneys, relating exclusively to the legal rights of poor Texans. TLC provides support, technical assistance, training, resource materials, and publications to staff and volunteers of all providers of legal services to the poor in Texas. TLC conducts an annual statewide **Poverty Law Conference**, a **Pro Bono Coordinators Retreat**, and produces a **quarterly newsletter**, *LegalFront*.

The Pro Bono Coordinators Retreat is for staff whose primary roles include coordinating pro bono efforts, recruiting private attorneys to provide direct legal services to the poor, and/or organizing training events so attorneys can deliver civil legal services to poor Texans. Colleagues in similarly situated roles share strategies for recruiting and retaining pro bono attorneys and learn about best practices in coordinating pro bono efforts. This retreat is held in Austin each fall.

The Poverty Law Conference addresses the latest developments in civil law. This three-day event, designed primarily for legal-services advocates and attorneys providing pro bono civil legal services, provides valuable training on poverty-law issues affecting low-income and poor Texans. The conference features presentations from some of the most knowledgeable poverty-law practitioners and private attorneys in their respective fields. One of the most appealing aspects of the conference is that it offers targeted continuing legal education with a specific public-interest focus. This conference is held in Austin each spring.

TLC works closely with the State Bar Board Legal Services Committee and the Legal Services to the Poor in Civil Matters Committee of the State Bar of Texas to encourage the involvement of all Texas attorneys, as well as other professionals, in the delivery of legal services to the poor. The TLC staff also serves as the staff for the Texas Access to Justice Commission.

In early 2009, TLC recognized Robert H Etnyre, Jr. of Houston as a Pro Bono Champion. James B. Sales was presented with the Outstanding Service Award in February. Jessica Cassidy, a UT Law student, was awarded the ATJ Law Student Pro Bono Award and CenterPoint Energy legal department was honored with the first Magna Stella Pro Bono Award.

Additional information concerning TLC can be found on the **SBOT website under the "Pro Bono" tab.** ■

Report on Equal Access to Justice: A Plea for Heroes

by James B. Sales, Chair, Texas Access to Justice Commission

"Every noble work is at first impossible." – Thomas Carlyle

When the Supreme Court of Texas formed the Texas Access to Justice Commission in 2001, the State of Texas confronted a situation in which approximately three million poor and low-income Texans qualified for legal help. Seven years later, at the end of 2008, the number of poor and low-income Texans had increased to more than five million – almost a fifth of the state's population. Today, unfortunately, this unanticipated demand has simply overwhelmed our justice system. These numbers neither include the newly impoverished resulting from the recent economic collapse or those still suffering the devastation of Hurricane Ike.

Even before the current economic tsunami, all legal service providers throughout the state, collectively, were able to provide legal assistance to approximately 25% of those qualified to seek legal help. The financial resources critical to supporting the demand for legal assistance has relied on the funds generated by the IOLTA program as supplemented by the Comparability Rule. In May 2008, the income from the IOLTA program, bolstered by the Comparability Rule, was projected to generate approximately $28,000,000 in 2008. Suddenly, when the Federal Reserve lowered its benchmark interest rate to 0% – .25% in December 2008, the $28,000,000 generated for legal services suddenly collapsed to an amount in the range of $1,500,000. Essentially, the IOLTA funds will now produce barely enough revenue to cover administrative costs. As expert projections suggest, the economy is not likely to improve for at least one, and possibly two years. This means that projections for IOLTA revenue remain abysmal.

The reality is rather stunning: resources essential to sustain delivery of legal services to poor and low-income Texans have collapsed in a dramatic and alarming fashion, even as demand for legal services has accelerated at a correspondingly astonishing rate. Fundamentally, legal aid lawyers are challenged to do more and more with less and less. This clearly is not a sustainable effort.

> "RESOURCES ESSENTIAL to sustain delivery of legal services to poor and low-income Texans HAVE COLLAPSED."

We all respect the fact that the rule of law forms the foundation of our society. And, an equally important corollary, our system of justice represents the mechanism by which the rule of law is affirmed and applied. As a matter of right, therefore, every citizen should be entitled access to the justice system. Otherwise, the supremacy and majesty of the rule of law is little more than a meaningless abstraction – particularly to those who cannot afford legal representation.

I believe this is one of those unique moments in time when our honored profession has a responsibility to respond. This can only be achieved if we individually volunteer to participate in the process. As Roscoe Pound declared, "public service is the primary purpose of pursuing the learned art of the law." Otherwise, the practice of the art of law is little more than a business pursuit. The challenge to our profession and system of justice has never been greater nor has it ever demanded more from lawyers to pursue service for the public good. Yet, those of us privileged to practice are presented with an incredible opportunity to perform noble deeds that will turn an almost impossible adversity into real hope for those who have no hope. As the essayist Thomas Carlyle astutely observed, "every noble work is at [the beginning] impossible." Indeed, it is especially these difficult times and near impossible circumstances that plead for lawyers to be heroes. ■

View from the Bench:
Resilience in the Panhandle: The Honorable Mary Lou Robinson

by Gretchen S. Sween

She has been called many things: "Texas Woman of the Year" by the Texas Federation of Business & Professional Women; one of the "Outstanding Panhandle Women" by West Texas State University; a "Valiant Woman" by the United Church Women; a "Woman of Distinction" by Soroptimist International; a "Legal Legend" by Texas Lawyer; "Distinguished Alumnus" by Amarillo College; "Samuel Pessarra Outstanding Jurist" by the State Bar of Texas; "Woman of Distinction" by the Girl Scouts; "Board President" by numerous civic organizations; "Her Highness" by some members of the bar; and, principally, "Your Honor." But perhaps the aerial view of Judge Mary Lou Robinson's home turf says it all: Vast rectangular swaths of flat, bare earth, where trees are even fewer and farther between than signs of human habitation. The topology of the Texas Panhandle means there is simply nowhere to hide, no room for pretense. The wind will blow a person to New Mexico if she isn't properly grounded. Moreover, the weather can take a dramatic turn without warning, exhibiting little patience for the ill-prepared or thin-skinned.

Indeed, a few days before I arrived in Amarillo to meet with legendary jurist Mary Lou Robinson, the town had been pummeled by a late-spring blizzard that was sufficiently formidable to shut down the federal courthouse. Although snow drifts were still visible along the roadside when I arrived on Monday morning, the courthouse was back to business as usual. To my surprise, the CSOs were even expecting me. They graciously led me past the striking W.P.A. murals[1] that don the walls in the foyer of the J. Martin Federal Building, an Art Deco gem circa 1937, and then upstairs to the chambers of the Amarillo Division's sole federal district judge. And although I was nearly an hour early for our appointment, Judge Robinson was ready to get started, having agreed to accommodate the interview for this article on the one "free day" she had before commencing a two-week jury trial.

Judge Robinson was not born in Amarillo, but when her father lost his job during the Great Depression, he packed up the family and headed west from Dodge City, Kansas, settling in Amarillo in time for Judge Robinson to attend the first grade. She graduated from Amarillo High School in 1944 and earned her Associate's Degree from Amarillo College two years later. She then transferred to the University of Texas, where she earned her B.A. and, in rapid succession, her L.L.B. from the School of Law. With characteristic efficiency, she also met and married her husband before her two-year tenure in law school was up. "It was thanks to the alphabetical seating chart. He sat in the row right in front of me."

Before law school graduation, she and her new husband, A.J. Robinson, decided to return to Amarillo and hang out their own shingle. The firm of Robinson & Robinson "took whatever walked in the door—civil or criminal; wills, divorces. It was very exciting, very satisfying. I think the fact that law practice has become more of a business nowadays has taken some of the fun out of it. Because we definitely had a good time practicing law!"

When did you decide that you wanted to be a lawyer?

"It was in the seventh grade. I got the idea that I wanted to be a lawyer, and that never changed."

There were no lawyers in Judge Robinson's family. In fact, she was the first member of her family to go to college. She didn't even know any lawyers. She credits the high-caliber teachers she had in the Amarillo public school system with enabling her to obtain her goals. "It was a collateral benefit arising from the fact that so few careers were available to women in those days. I had some wonderful teachers! They were very encouraging."

What was it that attracted you to the idea of practicing law?

"I just had a sense that the law is where things are made fair. I had witnessed some injustices that troubled me. For instance, a friend of mine belonged to a religious group whose religion did not permit its members to salute the flag; as a result, she was not permitted to attend public school. And I'd become aware that black children in Amarillo were attending school in basements without any resources to speak of. I got it into my head that the law is where these kinds of things got straightened out. And you know, with those particular issues, that assumption proved to be correct: The legal system has been where those wrongs were righted."

Did you experience any hostility as one of only a handful of women at UT Law? Or as one of the only female practitioners in town? Or as the first female judge?

"No, not really. The people in Amarillo are pretty accepting. But it did require an adjustment for some—because, when I first went on the bench, women were not even allowed to sit on juries."

[1] The WPA or Works Progress Administration (later renamed Works Projects Administration) was a New Deal agency, which President Roosevelt created by presidential order. It employed millions of people all over the United States. Aside from overseeing the construction of many public buildings and roads between 1935 and 1943, the WPA managed large art projects—including wall murals still adorning walls in places like San Francisco's Coit Tower, Cook County Hospital in Chicago, and many post offices throughout the country. *See* *http://en.wikipedia.org/wiki/Works_Progress_Administration.*

As it turned out, her tenure as a practitioner was relatively short-lived. In 1955, a group of lawyers suggested that she apply for a newly created judgeship in the Potter County Court at Law, and she was selected over all of the other (male) applicants. "Initially, I just thought it would look good on a resume. I never dreamed that this would mark the end of my law practice." But after that initial appointment, Judge Robinson won her election and then re-election bids. (In fact, she never lost any election.) After five years, she decided to run for state district judge in Potter County. A number of years thereafter, she made a few more moves up the judicial ladder—to Associate Justice for the Court of Civil Appeals (becoming the first woman appellate judge in the state) and then becoming Chief Justice for the Court of Civil Appeals for the Seventh Supreme Judicial District (and thus the first female Chief Justice in the state's history). Then, in 1979, President Jimmy Carter, at the recommendation of Senator Lloyd Bentsen, appointed her United States District Judge for the Northern District of Texas, Amarillo Division. She knew Senator Bentsen because she was a high-profile Democrat in a very Republican area of the state—another indication that she was comfortable being atypical.

Despite being atypical, Judge Robinson was never an outsider. She was intimately entwined with the community—as board president and organizer of Opportunity House, Inc. for troubled youngsters, on the advisory committee to the Department of Continuing Education for Women of Amarillo College, on the regional council of Boy Scouts of America, on the YWCA board, president of the Amarillo Business and Professional Women's Club, on the state-wide Council for Juvenile Corrections Master Plan, board member of Kairos House, etc., etc., etc.

"As judge for the Potter County Court at Law and then as a state district court judge, I saw more of the people actually involved in the underlying disputes, which I enjoyed. I also really enjoyed campaigning, getting out and meeting people. So the transition to federal judge was a bit disconcerting. Initially, I felt quite disenfranchised. But I was mindful of the sacrifice that was required, the big lifestyle change involved. I resigned from all the groups that might have business before the court. Yes," she adds with a wry smile, "I quit it all cold turkey."

What is the biggest distinction you see between the role of advocate and judge?

"One has to be particularly aware of the distinction between the role of judge and social worker. A person who is not admirable can be right in a lawsuit; and a person who is very sympathetic may still be on the losing side under the law. You cannot adjudicate based on character. As an advocate, I really enjoyed the contest, the challenge of the fight. And while an advocate definitely needs to be in the client's corner, you need to know everything that is ***not*** good for the client's case well before you enter the courtroom on that client's behalf. A judge, however, needs to be totally objective, needs to give everyone a chance to be heard."

What kind of conduct have you observed in practitioners that you would like to see improved?

"Canned briefs. We have seen briefs filed where the lawyers did not even update them sufficiently to get their clients' names correct. This does not serve anyone well—it just adds to the work that the court must do and does not further the client's cause."

What about courtroom decorum?

"The local bar knows me and our rules well. Sometimes lawyers coming in from out of town have more of a learning curve, but they catch on fast. If lawyers have questions about purely procedural matters specific to this court, they can call chambers. My staff is very knowledgeable. The newcomer around here has been with me ten years now. Of course, my staff will not know when an order will issue in a case or may have to find a polite way to tell the caller that they are not able to practice law for them...."

> *"It's just that* I have always **done things** that I ***wanted*** to do."

Judge Robinson's staff is indeed seasoned. Her courtroom deputy has been with her since she was appointed to the federal bench and her permanent law clerk has been with her for twenty years now. But, she noted enthusiastically, she hires a second law clerk each year for a one-year term. "These young clerks bring in a fresh perspective. We all benefit from that."

What changes have you observed in the legal profession from the bench over the past few decades?

"Certainly, there are fewer trials, and law practice has become more focused on pre-trial motions. In part, this is related to billing practices. There is also the rise of alternative dispute resolution."

What do you think of the latter trend?

"I think mediation is ***wonderful***. I require it in most cases—but I give the parties a chance to agree on the mediator. Ideally, the mediator will be someone whom both sides have confidence in and whose fees they feel comfortable with. I like mediation because it lets people who have been doing business together get their relationship back on track; and when successful, it results in resolutions that both sides can live with instead of the all-or-nothing situation associated with a trial. Mediation also helps lawyers who have recognized that a case ought to settle, but whose clients have been resistant for some reason."

What makes a successful mediator?

"I don't think it is predictable. Of course, I am not privy to the actual process, but I have seen successful mediators who are

very laid back and others who are quite aggressive. The key is understanding the issues and the people involved. Essentially, successful mediation requires good people skills."

What are your views on arbitration?

"Arbitration is more a mixed bag. It seems subject to a great deal of abuse." She elects not to dwell, however, on the negative, moving the conversation on to the next topic. This reluctance about dwelling on the negative—or indulging in criticism of the bar or pursuing any kind of self-aggrandizement—is palpable.

THIS NO-NONSENSE ATTITUDE is perhaps what enabled her to handle the 1998 "celebrity trial" starring Oprah Winfrey with such skill. Oprah was sued by the Texas Beef Group, *et al.* for "food disparagement" and libel, trying to tie Oprah to a decline in beef futures after she aired a segment on her show about mad cow disease. The plaintiffs had ingeniously filed their lawsuit in Amarillo, the heart of Big Beef Country, where passengers deplaning at the airport enter the main terminal after passing under a large billboard advertising the famous 72-ounce steak available "free of charge" to any customer who can manage to eat every bite.

"We just handled the trial like any other. I had never seen an Oprah show, but I knew she was an international personality. So, my wonderful staff and many people in the clerk's office worked with me to handle all of the outside requests and to prepare the courtroom so that we could maintain order." Ironically, in order to handle the case as if it were just "like any other," Judge Robinson had to implement a number of special procedures. "For instance, I don't usually make special settings, but I did in that case so that all of the people involved could make arrangements to be here at the right time. We also had an anonymous jury. And we set up special seating in the courtroom for the media. In order to claim those seats, a person had to have media credentials but also had to agree to abide by specific rules of conduct. We were not going to have people running in and out of the courtroom during the trial."

In short, Judge Robinson's stewardship permitted the defendants to get a fair shake in a community whose biggest private employer is a slaughterhouse and where bumper stickers proliferated during the trial that read "The only mad cow in America is Oprah."[2] The jury was asked, "Did a below-named Defendant publish a false, disparaging statement that was of and concerning the cattle of a below-named Plaintiff as those terms have been defined for you?," and the jury answered, "No." Ultimately, the Fifth Circuit, in a *per curiam* opinion, found no plain error in the jury instruction or the result and affirmed.[3]

While many female lawyers, including many over fifty years younger than Judge Robinson, struggle with issues of "life-work balance," Judge Robinson seems almost perplexed by the suggestion that she had done anything special by managing to attend law school while working the entire time to pay her way, and then getting married, starting a law practice, and commencing a career as a judge while also raising three children. She explains that there was no such thing as "maternity leave" when her children were born (nor had people embraced the concept that a spouse should shoulder some of the domestic load); thus, she had taken no more than two weeks "vacation" off to accommodate the birth of each child. She then shrugs.

"It's just that I have always done things that I wanted to do."

But I continue to poke around, seeking an explanation as to how she has sustained her energy during years of multi-tasking. Eventually, she offers a brief allegorical tale about a single mom who had overcome a string of adversity. "A newsman asked her, 'Ma'am, how did you do it?' She said simply in response, 'I don't ponder, I just start.'" And that is how Judge Robinson sees herself.

At age eighty-three, Judge Robinson is still operating at full tilt, with no plans to take senior status, let alone retire, any time soon. "Maybe it's because I haven't found many other things that I'm good at. And I really love my job. I still see something new everyday. I welcome the intellectual challenge. My staff and I really appreciate the challenging cases in particular." She does not travel as much as she used to, but still sits for Judge Sam Cummings in Lubbock when he is disqualified, and he does the same for her. "Despite the decrease in the number of trials, we keep pretty busy—but we are mostly busy with the papers."

Again I wonder out loud how she has been able to maintain her stamina over the years. "Well, I'll tell you a story that is ***not*** about me. I have a granddaughter Rachel (one of 7 grandchildren and 2 great-grandchildren). Last year at 19, she went to Africa volunteering to care for AIDS orphans. She is going back there again this summer. Since grade school, she has been raising money and raising awareness for worthy causes all on her own. She is majoring in international health and she wants to pursue medical missionary work. Sometimes her parents believe they are dealing with an irresistible force. The fact is, she didn't decide to do this—she can't help herself. She was born programmed to do the things that she is doing."

Judge Robinson does not connect the dots, but her point is clear: She too "just can't help herself." She views service on the bench as a calling, a commitment to objective thinking. And her few "hobbies" suggest that there is not much distinction between the way she approaches public and private life. "I am a big C-SPAN fan. I particularly like to listen to people making arguments on the other side from my views. And I don't really have any favorite writers. I read everything—non-fiction, satire, plays."

AT THE END OF OUR CONVERSATION, Judge Robinson reaches into a drawer and pulls out a key chain. "You might appreciate this. The key to the courtroom," she explains while showing me a tiny silver charm, shaped like a book, that is attached to the key chain. The charm bears the following quotation attributed to Arthur Conan Doyle: "It is a capital mistake to theorize before you have all the evidence." The inscription seems aptly to reflect Judge Robinson's judicial philosophy as well as her personal worldview. That perspective also resonates nicely with the Texas Panhandle terrain—where one is afforded an unobstructed view for miles in each direction. ■

[2] *See, e.g.,* http://news.bbc.co.uk/1/hi/world/48964.stm.

[3] *Texas Beef Group v. Oprah Winfrey,* 201 F.3d 680 (5th Cir. 2000).

Alternative Dispute Resolution Update

by Susan Nassar

Manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.
Citigroup Global Mkts. Inc. v. Bacon, 562 F.3d 349 (5th Cir. 2009).

In the wake of the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, ___ U.S. ___, 128 S.Ct. 1396, 1402 (2008), the Fifth Circuit issued this opinion, holding that "to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA." The Court noted that the parties in *Hall Street* agreed contractually to give the district court authority to vacate or modify an arbitration award on grounds not included in Sections 10 and 11 of the FAA. The Supreme Court, however, concluded that the statutory grounds in Sections 10 and 11 were the exclusive grounds for review under the FAA. Based on this, the Fifth Circuit determined that because manifest disregard of the law was not one of the statutory grounds set forth in Sections 10 and 11, it was no longer a valid basis for vacating arbitration awards under the FAA.

The Fifth Circuit noted that the petitioner in Hall Street had argued based on an earlier Supreme Court decision, *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), that "the widespread judicial recognition of manifest disregard of the law as a nonstatutory ground for vacatur suggests that §§ 10 and 11 are not exclusive." The Fifth Circuit observed, however, that *Hall Street* questioned whether *Wilko* should be read as creating an independent ground for vacatur since that issue was not before the *Wilko* Court and the language in *Wilko* was vague. Thus, although it and many courts had come to recognize manifest disregard of the law as a nonstatutory basis for vacatur over the years, the Fifth Circuit reasoned that this ground for vacatur was no longer valid after *Hall Street*.

In a display of resolve, the Fifth Circuit subsequently issued a one page *per curiam* opinion, *National Resort Management Corp. v. Cortez*, No. 08-10805, 2009 WL 890622 (5th Cir. Mar. 31, 2009), affirming an arbitration award and noting that "[t]he number of grounds for challenging an arbitration award has been substantially reduced in light of *Hall Street* … and *Citigroup Global Mkts*...." Similarly, in *Nicholas v. KBR Inc.*, ___ F.3d ___, 2009 WL 998974 (5th Cir. Apr. 15, 2009), the court cited its opinion in *Citigroup Global Markets*. Although this case involved a motion to compel arbitration, the Court noted in passing that "appellate review of an arbitrator's award is severely circumscribed…. manifest disregard of the law is no longer an independent ground for vacating an arbitration award under the Federal Arbitration Act.").

Citigroup Global Markets was also recently cited by the Second Circuit in *Global Reinsurance Corp. v. Argonaut Insurance Co.*, No. 07 CIV. 7514, 2009 WL 928014 (S.D.N.Y. Mar. 23, 2009). According to that opinion, varying court interpretations of *Hall Street* have resulted in a split among the Circuits. While the Fifth and First Circuits have abandoned the manifest disregard standard, the Second and Seventh Circuits continue to recognize it as a valid, albeit "very narrow," ground for vacating an arbitration award. *Id.* ("*Hall Street* concluded that Sections 10 and 11 are the exclusive grounds for review under the Federal Arbitration Act, and suggested that 'manifest disregard' may have been 'short hand for § 10(a)(3) or § 10(a)(4).'").

Wrongful-death beneficiaries of an employee must arbitrate their claims against the employer even if they did not sign the arbitration agreement.
In re Labatt Food Serv., L.P., 279 S.W.3d 640 (Feb. 13, Tex. 2009) and *In re Jindal Saw Ltd.*, No. 08-0805, 2009 WL 490082, (Tex. Feb. 27, 2009) (per curiam) (not released for publication).

The issue in both of these cases was whether an arbitration agreement governed by the Federal Arbitration Act ("FAA") binds the nonsignatory wrongful-death beneficiaries of a party to the agreement. *In re Labatt Food Service, L.P.* involved wrongful-death claims brought against Labatt Food Service, L.P. ("Labatt") by the family of Labatt employee Carlos Dancy, Jr. ("Dancy"). In lieu of workers' compensation insurance for on-the-job injuries, Labatt offered its employees the option to participate in an "occupational injury plan."

To participate in the plan, employees were required to sign an "Election of Comprehensive Benefits, Indemnity, and Arbitration Agreement." Among other things, the agreement provided that the employee: (1) elected to be covered under the plan "individually and on behalf of heirs and beneficiaries," and (2) will indemnify Labatt from claims and suits based on injury to or death of the employee from occupational causes, except for claims filed pursuant to the plan. The agreement also required that disputes related to the agreement, the plan, and an employee's occupational injury or death be submitted to binding arbitration pursuant to the FAA. Dancy elected to participate in the plan and signed an agreement. He subsequently died from an asthma attack while working, and his parents and children filed a wrongful-death action against Labatt.

Labatt moved to compel arbitration pursuant to the agreement containing the arbitration provision. Dancy's beneficiaries contended they were not bound by the arbitration agreement because they were not signatories to the agreement. The trial court denied Labatt's motion to compel without stating its reasons, and the court of appeals denied mandamus relief. On appeal, the Texas Supreme Court concluded that a wrongful-death cause of action is derivative of a decedent's rights. The Court therefore held that an arbitration provision in an agreement between a decedent and his employer requires the employee's wrongful-death beneficiaries to arbitrate their wrongful-death claims against the employer even though they did not sign the agreement.

The Court reached the same result in *In re Jindal Saw Ltd.*, which involved a similar benefit plan and arbitration agreement and claims by the beneficiaries of deceased Saw Pipes USA employee Carlos Lara. Following and citing its holding in *In re Labatt Food Service, L.P.*, the Court held the trial court abused its discretion in denying the employer's motion to compel arbitration and directed the trial court to enter an order compelling arbitration of the beneficiaries' wrongful-death claims.

Communications and written materials related to arbitration proceedings may be discoverable.
Knapp v. Wilson N. Jones Mem'l Hosp., 281 S.W.3d 163 (Tex. App.—Dallas 2009, no pet. h.).

In this employment case, the Dallas Court of Appeals addressed the issue of whether the trial court erred in refusing to allow plaintiff Merlyn Knapp ("Knapp") to obtain depositions, testimony, and witness statements from an arbitration brought by Knapp's employer Wilson N. Jones Memorial Hospital ("WNJ") against its auditors Ernst & Young. Knapp sued WNJ for failure to pay his contractual severance benefits after his employment as WNJ's chief financial officer was terminated.

WNJ claimed it was not liable because Knapp was terminated for cause and, as a result, was not entitled to severance benefits under his employment agreement. Based on its alleged discovery of unauthorized bonuses, loans and write-offs, WNJ asserted counterclaims against Knapp for breach of contract, breach of fiduciary duty, fraud, and negligence. WNJ also pursued claims against Ernst & Young through arbitration and obtained an arbitration award.

During the course of discovery, Knapp moved to compel production of arbitration documents withheld by WNJ based on confidentiality or privilege. In particular, Knapp sought the arbitration depositions or testimony to determine if WNJ had taken a position in the arbitration regarding the authorization of bonuses different from that taken at trial. The trial court denied Knapp's motion, and a jury subsequently found against him and awarded WNJ $101,569 in damages, $939,000 in attorneys' fees, and $30,074.72 in prejudgment interest.

On appeal, Knapp argued that the trial court erred in denying his motion to compel. The Court of Appeals acknowledged that certain information pertaining to arbitrations is confidential and not subject to disclosure under Tex. Civ. Prac. & Rem. Code § 154.073. The Court recognized the importance of balancing the need for confidentiality and disclosure but reasoned that "section 154.073 does not create a blanket of confidentiality nor is it so broad as to bar all evidence regarding everything that occurs at arbitration from being presented in the trial court." The Court went on to explain that the following are not considered confidential under section 154.073:

> If the communication or written material does not relate to the subject matter of the dispute, or does not relate to or arise out of the matter in dispute, it may not be confidential . . . . Disclosure may be warranted when a party does not seek discovery of arbitration evidence to obtain additional funds from the defendant in the arbitration or to establish any liability on the arbitration defendant's part after the dispute has been peaceably resolved, but proposes to offer the arbitration evidence in a separate case against a separate party to prove a claim that is factually and legally unrelated to the arbitration claims. Also, disclosure may be warranted in a case alleging a new and independent cause of action when disclosure of the confidential communications or written materials will not disturb the settlement in the underlying arbitration.

The Court concluded the trial court erred in denying Knapp's discovery requests, because Knapp sought the information to defend against WNJ's counterclaims, and that such a defense would not disturb the arbitration award between WNJ and Ernst & Young. The Court further noted that Knapp did not seek discovery of the arbitration evidence to obtain additional funds from Ernst & Young, the defendant in the arbitration. Nor did he seek to establish any liability on Ernst & Young's part. Because the denial of Knapp's motion to compel probably caused the rendition of an improper judgment, the Court reversed the portion of the trial court's final judgment awarding judgment to WNJ on its counterclaims and remanded the cause for further proceedings consistent with its opinion.