

# Texas Business Litigation

——  
2019

SOFIA ADROGUÉ, EDITOR  
CAROLINE BAKER, CO-EDITOR



**TEXAS LAWYER**  
An ALM Publication

# Table of Contents

---



---

<b>Chapter 1: Alternative Dispute Resolution—Issues</b>		
<b>in Business Litigation</b> .....		<b>1</b>
1-1	INTRODUCTION.....	1
1-2	LAW GOVERNING MEDIATION IN TEXAS.....	1
1-2:1	The Process in Texas.....	1
1-2:2	The Facilitator.....	3
1-2:3	Texas Courts Ethical Guidelines for Mediators.....	3
1-2:4	Legal Issues in Mediation.....	9
	1-2:4.1    Enforceability of a Mediated Settlement Agreement.....	9
	1-2:4.2    The Mediation Privilege.....	11
1-3	LAW GOVERNING ARBITRATION IN TEXAS.....	14
1-3:1	The Federal Arbitration Act.....	15
	1-3:1.1    Ambit of the Federal Arbitration Act.....	20
	1-3:1.2    Preemption of State Law.....	20
	1-3:1.3    Remedies Under the Federal Arbitration Act.....	21
1-3:2	The Texas Arbitration Act.....	22
	1-3:2.1    Ambit of the Texas Arbitration Act.....	24
	1-3:2.2    Remedies Under the Texas Arbitration Act.....	24
1-3:3	Ascertaining Which Law Applies.....	25
	1-3:3.1    When Agreement Specifies.....	26
	1-3:3.2    When Agreement Does Not Specify.....	26
	1-3:3.3    Common Law.....	27
	1-3:3.4    Preemption of State Law.....	27
1-4	ENFORCEMENT OF ARBITRATION AGREEMENT.....	33
1-4:1	Parties Subject to Agreement.....	33
	1-4:1.1    State Contract Law.....	35
	1-4:1.2    Signature Requirements.....	35
1-4:2	Within Scope of Valid Agreement.....	35

## Table of Contents

1-5	DEFENSES TO ENFORCEMENT OF ARBITRATION AGREEMENT .....	37
1-5:1	No Agreement .....	37
1-5:2	Invalid Agreement .....	38
1-5:2.1	Fraud.....	38
1-5:2.2	Unconscionability.....	39
1-5:2.2a	Substantive Unconscionability .....	39
1-5:2.2b	Procedural Unconscionability .....	40
1-5:2.3	Illusory Agreement .....	41
1-5:3	Claim Outside Agreement’s Scope .....	42
1-5:4	Waiver .....	42
1-5:4.1	Substantial Invocation of Judicial Process.....	43
1-5:4.2	Prejudice.....	44
1-6	PRE-ARBITRATION LITIGATION IN TRIAL AND APPELLATE COURTS.....	45
1-6:1	Where to File.....	45
1-6:2	Interlocutory Appeal Available for Denial of Motion to Compel Arbitration.....	45
1-6:3	Standard of Review of Trial Court’s Denial of Motion to Compel Arbitration.....	45
1-6:4	Review by Mandamus.....	46
1-7	THE ARBITRATION .....	47
1-7:1	The Arbitrator .....	48
1-7:1.1	Number of Arbitrators.....	48
1-7:1.2	Selection of Arbitrators.....	48
1-7:1.3	Judicial Involvement in Selection Process.....	49
1-7:1.4	Disqualification of Arbitrator.....	50
1-7:2	Discovery.....	52
1-7:2.1	Permissible Discovery .....	53
1-7:2.2	Judicial Involvement in Arbitral Discovery.....	53
1-7:3	Decision to Request a Transcript of Proceedings.....	54
1-7:4	Award, Costs and Sanctions .....	54
1-8	CONFIRMING AN ARBITRATION AWARD.....	55
1-8:1	How to Confirm Award .....	56
1-8:1.1	Must Show Agreement Contemplated Judgment .....	56
1-8:1.2	Arbitral Award Must be Final .....	57

## Table of Contents

	1-8:1.3 Attachments .....	57
	1-8:1.4 Ruling on Motion When No Response Filed .....	58
1-8:2	Where to File Motion .....	58
1-8:3	Procedural Deadlines .....	60
	1-8:3.1 State Courts .....	60
	1-8:3.2 Federal Courts .....	61
1-8:4	Scope of Review .....	62
	1-8:4.1 Standard of Judicial Review .....	62
	1-8:4.2 Review Defined by Contract .....	63
1-9	<b>CHALLENGING AN ARBITRATION AWARD</b> .....	<b>64</b>
1-9:1	Procedural Hurdles to Challenging Award .....	65
	1-9:1.1 Determining Finality of Award .....	65
	1-9:1.2 Where to File Challenge .....	66
	1-9:1.3 Procedural Deadlines .....	68
	1-9:1.3a State Courts .....	68
	1-9:1.3b Federal Courts .....	68
1-9:2	Scope of Review .....	68
	1-9:2.1 Standard Judicial Review .....	69
	1-9:2.2 Review Defined by Contract .....	70
1-9:3	Remedies .....	71
	1-9:3.1 Modification of Award .....	71
	1-9:3.1a FAA .....	71
	1-9:3.1b TAA .....	72
	1-9:3.2 Vacatur of Award .....	72
	1-9:3.2a FAA Statutory Grounds .....	73
	1-9:3.2b Judicially Created Exceptions to the Enforcement of Arbitration Awards Under the FAA .....	74
	1-9:3.2c TAA Statutory Grounds .....	75
	1-9:3.2d Common Law Grounds Under Texas law .....	76
 <b>Chapter 2: Antitrust</b> .....		 <b>79</b>
2-1	INTRODUCTION .....	79
2-2	STATUTORY OVERVIEW .....	80
2-2:1	Texas Free Enterprise and Antitrust Act of 1983 .....	80
	2-2:1.1 History .....	80
	2-2:1.2 Purpose .....	81
	2-2:1.3 Defined Terms .....	81

## Table of Contents

2-2:2	Overlap With Federal Law .....	82
2-2:2.1	Sherman Act .....	82
2-2:2.2	Clayton Act .....	83
2-2:2.3	Robinson-Patman Act .....	83
2-2:2.4	Federal Trade Commission Act .....	84
2-2:3	Exemptions and Immunity .....	84
2-3	UNLAWFUL PRACTICES.....	87
2-3:1	Monopolies.....	87
2-3:1.1	Monopolization .....	87
2-3:1.1a	Monopoly Power in Relevant Market.....	88
2-3:1.1a(i)	Relevant Market.....	88
2-3:1.1a(ii)	Market Power.....	91
2-3:1.1b	Willful Acquisition, Maintenance, or Use of Power.....	92
2-3:1.2	Attempts to Monopolize.....	93
2-3:1.2a	Predatory or Anticompetitive Conduct .....	94
2-3:1.2a(i)	Economic Feasibility.....	95
2-3:1.2a(ii)	Price Below Cost .....	96
2-3:1.2b	Specific Intent to Monopolize.....	97
2-3:1.2c	Dangerous Probability of Achieving Monopoly Power ...	98
2-3:1.3	Conspiracy to Monopolize .....	98
2-3:1.3a	Specific Intent to Monopolize.....	99
2-3:1.3b	Combination or Conspiracy to Achieve Monopoly.....	99
2-3:1.3c	Overt Acts in Furtherance of Combination Or Conspiracy.....	100
2-3:2	Combinations in Restraint of Trade .....	100
2-3:2.1	Horizontal and Vertical Combinations ....	102
2-3:2.2	Illegality Per Se Versus the Rule of Reason .....	103
2-3:2.2a	Per Se Violations .....	103
2-3:2.2b	Rule of Reason Analysis .....	105
2-3:2.3	Practices Found To Be Illegal.....	106
2-3:2.3a	Price-Fixing.....	106

## Table of Contents

		2-3:2.3b Market Allocation	
		Agreements .....	107
		2-3:2.3c Resale Price Maintenance	
		Agreements .....	107
		2-3:2.3d Tying Arrangements.....	108
		2-3:2.3e Price Discrimination .....	110
		2-3:2.3f Exclusive Dealerships.....	110
		2-3:2.3g Group Boycotts.....	112
2-3:3	Covenants Not to Compete .....		114
	2-3:3.1 Ancillary to Or Part of Otherwise		
	Enforceable Agreement.....		117
	2-3:3.1a Non-Solicitation		
	Covenants .....		119
	2-3:3.1b Non-Disclosure Covenants..		121
2-3:3.2	Shifting Burden of Establishing		
	Compliance With the Act .....		122
2-3:3.3	Reasonableness .....		123
	2-3:3.3a Time.....		125
	2-3:3.3b Territory.....		126
	2-3:3.3c Scope of Activity.....		127
	2-3:3.3d Protection of Goodwill or		
	Business Interest.....		128
	2-3:3.4 Enforcement .....		128
	2-3:3.5 Reformation.....		129
	2-3:3.6 Availability of Costs and		
	Attorney’s Fees .....		131
2-4	ANTITRUST REMEDIES AND DEFENSES .....		132
2-4:1	Scope .....		132
2-4:2	Monetary Damages .....		133
	2-4:2.1 “Before and After” and “Yardstick”		
	Measures of Lost Profits.....		134
	2-4:2.2 No Double Recoveries Under Federal		
	and State Laws.....		135
2-4:3	Injunctive Relief .....		136
2-4:4	Declaratory Judgment .....		138
	2-4:4.1 Requirements for Declaratory		
	Judgment Complaint .....		138
	2-4:4.2 Specifications of Declaratory Judgments .		139
2-4:5	Attorney’s Fees and Costs.....		139
	2-4:5.1 Recovery of Plaintiff’s Fees .....		139
	2-4:5.2 Recovery of Defendant’s Fees.....		140
2-4:6	Prejudgment Interest.....		141

## Table of Contents

2-4:7	Treble Damages .....	141
2-4:8	Defenses .....	142
2-4:8.1	Affirmative Defenses.....	143
2-4:8.2	Defenses Under Antitrust Law .....	143
2-5	PRIVATE CAUSES OF ACTION .....	144
2-5:1	Jurisdiction .....	144
2-5:2	Venues .....	145
2-5:3	Statute of Limitations.....	146
2-5:4	Discovery.....	146
2-5:5	Standing .....	147
2-5:5.1	Injury in Fact.....	148
2-5:5.2	Antitrust Injury .....	148
2-5:5.3	Proper Plaintiff Status .....	150
2-5:6	Summary Judgment Practice .....	151
2-5:7	Class Actions and Multi-District Proceedings .....	152
2-5:7.1	State Court Class Actions.....	152
2-5:7.2	Federal Court Class Actions.....	153
2-5:7.3	Multi-District Proceedings.....	154
2-5:8	Final Judgments Rendered in Actions Brought by State of Texas.....	155
2-5:9	Practical Considerations .....	155
2-6	ENFORCEMENT ACTIONS .....	157
2-6:1	Civil Investigative Demands.....	157
2-6:1.1	Purpose.....	157
2-6:1.2	Format and Requirements of Demand ....	158
2-6:1.2a	Protections to Person Receiving Demand .....	159
2-6:1.2b	Required Content of Demand .....	159
2-6:1.2c	Product of Discovery .....	160
2-6:1.3	Responses Available.....	160
2-6:1.3a	Petition for Relief .....	160
2-6:1.3b	Means of Compliance With Demand.....	161
2-6:1.3c	Petition to Compel Compliance by Attorney General .....	163
2-6:1.4	Disclosure of Information Obtained by Demand Process.....	163
2-6:1.4a	Statutory Exceptions to Rule Against Non-Disclosure .....	164

## Table of Contents

		2-6:1.4b Disclosure for Good Cause .....	165
		2-6:1.4c Other Obligations Owed by Attorney General .....	165
2-6:2		Governmental Civil Suits .....	166
	2-6:2.1	Suit to Collect Civil Fine .....	166
	2-6:2.2	Suit for Injunctive Relief .....	166
	2-6:2.3	Federal and State Actions by Attorney General .....	167
2-6:3		Criminal Actions .....	168
2-6:4		Immunity from Criminal Prosecution .....	168
2-7		CONCLUSION .....	169

### **Chapter 3: Bankruptcy Ramifications in Business Litigation Cases ..... 171**

3-1	INTRODUCTION .....		171
	3-1:1	Types of Bankruptcy Relief Available .....	172
		3-1:1.1 Chapter 7 .....	172
		3-1:1.2 Chapter 11 .....	173
		3-1:1.3 Other Available Chapters .....	174
		3-1:1.3a Chapter 13 .....	174
		3-1:1.3b Chapter 12 .....	175
		3-1:1.3c Chapter 9 .....	175
		3-1:1.3d Chapter 15 .....	176
	3-1:1.4	Conversion Between Chapters .....	176
		3-1:1.4a By the Debtor .....	176
		3-1:1.4b By a Party in Interest .....	176
		3-1:1.4c Effect on Creditors .....	177
		3-1:1.4d Conversion to Chapter 7 .....	178
		3-1:1.4e Other Conversions .....	178
	3-1:2	The Parties .....	179
		3-1:2.1 The Debtor .....	179
		3-1:2.1a Role in Chapter 7 Cases .....	179
		3-1:2.1b Role in Chapter 11 Cases .....	180
		3-1:2.1c Role in Other Chapters .....	180
	3-1:2.2	The Debtor in Possession .....	180
		3-1:2.2a Duties and Responsibilities .....	180
		3-1:2.2b Right to Operate Business .....	181
	3-1:2.3	The Trustee .....	182
		3-1:2.3a Chapter 7 Trustee .....	182
		3-1:2.3b Chapter 11 Trustee .....	183
		3-1:2.3c Chapter 13 Trustee .....	183
	3-1:2.4	Official Committees .....	184



## Table of Contents

	3-1:2.4a	Unsecured Creditors’ Committee .....	184
	3-1:2.4b	Equity Security Holders’ Committee .....	185
	3-1:2.4c	Other Committees .....	186
3-1:2.5		Estate Professionals .....	186
	3-1:2.5a	Debtor’s Counsel.....	187
	3-1:2.5b	Special Counsel.....	187
	3-1:2.5c	Chief Restructuring Officer...	187
	3-1:2.5d	Examiner.....	188
	3-1:2.5e	Other Professionals .....	188
3-1:2.6		The Office of the United States Trustee ...	189
	3-1:2.6a	Role in Chapter 7 Cases .....	189
	3-1:2.6b	Role in Chapter 11 Cases.....	189
3-1:3		The Bankruptcy Estate .....	190
	3-1:3.1	Property of the Estate.....	190
	3-1:3.2	Exempt Property.....	191
	3-1:3.3	Excluded Property .....	191
	3-1:3.4	Property Acquired After Filing.....	192
3-1:4		Contested Matters and Adversary Proceedings.....	192
	3-1:4.1	Relief Available Only by Adversary Proceeding .....	192
	3-1:4.2	Contested Matters .....	193
	3-1:4.3	Applicable Rules of Procedure.....	193
	3-1:4.4	Arbitration and Mediation .....	194
3-2		THE AUTOMATIC STAY .....	195
	3-2:1	Scope .....	195
	3-2:1.1	Commencement of the Bankruptcy Case.....	196
	3-2:1.2	Property Covered.....	196
	3-2:1.3	Parties Covered.....	196
	3-2:1.4	Actions Prohibited.....	196
3-2:2		Effect on Pending Litigation .....	197
	3-2:2.1	When the Debtor Is the Sole Defendant.....	197
	3-2:2.2	When the Debtor Is One of Several Defendants .....	198
	3-2:2.3	When the Debtor Is a Plaintiff.....	199
	3-2:2.4	Non-Bankruptcy Appeals .....	199
3-2:3		Relief From the Stay.....	200
	3-2:3.1	By Motion .....	200
	3-2:3.1a	Grounds.....	200

## Table of Contents

		3-2:3.1b Procedural Issues.....	201
	3-2:3.2	By Operation of Law .....	201
	3-2:3.3	Consequences of Violation of the Stay ....	202
		3-2:3.3a Actions Made Void .....	202
		3-2:3.3b Damages and Attorney’s Fees.....	202
	3-2:3.4	Issues Specific to Litigation.....	203
		3-2:3.4a Insurance .....	203
		3-2:3.4b Status of Existing Litigation .....	203
		3-2:3.4c Jury Trial.....	204
3-3	<b>JURISDICTION.....</b>		<b>204</b>
	3-3:1	Scope of Bankruptcy Court Jurisdiction.....	204
		3-3:1.1 Core Matters.....	204
		3-3:1.2 Non-Core Matters .....	205
		3-3:1.3 Personal Jurisdiction.....	206
		3-3:1.3a Scope.....	206
		3-3:1.4 Service of Process .....	206
		3-3:1.5 Postconfirmation Jurisdiction in Chapter 11 Cases .....	207
	3-3:2	Constitutional Issues .....	207
		3-3:2.1 Article III v. Article I Judges.....	207
		3-3:2.2 Standing Order of Reference .....	208
		3-3:2.2a Scope of Order.....	208
		3-3:2.2b Withdrawal of Reference.....	209
		3-3:2.2c Effect of Withdrawal.....	209
		3-3:2.2d Procedure .....	209
		3-3:2.2e Strategic Considerations.....	210
	3-3:3	Additional Constitutional Issues .....	211
		3-3:3.1 The <i>Stern</i> Question .....	211
		3-3:3.2 Response by Courts .....	212
		3-3:3.3 Strategic Considerations .....	213
3-4	<b>REMOVAL AND REMAND.....</b>		<b>213</b>
	3-4:1	Statutory Basis for Removal .....	213
	3-4:2	Procedure For Removal .....	214
		3-4:2.1 Pleadings .....	214
		3-4:2.2 Local Rules .....	215
		3-4:2.3 Timing .....	215
	3-4:3	Abstention.....	216
		3-4:3.1 Mandatory Abstention .....	216
		3-4:3.2 Abstention on Other Grounds .....	216
		3-4:3.3 Procedural Issues .....	217

**Table of Contents**

3-4:4 Remand ..... 217

    3-4:4.1 Distinguished From Abstention ..... 217

    3-4:4.2 Grounds for Remand ..... 218

3-5 APPEALS ..... 218

    3-5:1 Right to Appeal ..... 218

        3-5:1.1 Final Orders ..... 218

        3-5:1.2 Interlocutory Appeals ..... 219

    3-5:2 Appellate Court ..... 219

        3-5:2.1 District Court ..... 220

            3-5:2.1a Timeline ..... 220

            3-5:2.1b Standard of Review ..... 221

        3-5:2.2 Circuit Court of Appeal ..... 221

            3-5:2.2a Appeal From District Court ..... 222

            3-5:2.2b Direct Appeal ..... 222

    3-5:3 Preserving Rights on Appeal ..... 222

        3-5:3.1 Equitable Mootness ..... 223

        3-5:3.2 Stay Pending Appeal ..... 224

            3-5:3.2a Procedure ..... 224

            3-5:3.2b Bonding Considerations ..... 224

3-6 INVOLUNTARY BANKRUPTCY ..... 225

    3-6:1 Procedural Requirements ..... 225

        3-6:1.1 Number of Petitioning Creditors ..... 225

        3-6:1.2 Aggregate Amount of Claims ..... 226

        3-6:1.3 Bona Fide Disputes ..... 226

    3-6:2 Debtor’s Response ..... 227

        3-6:2.1 Consent to Entry of Order for Relief ..... 227

        3-6:2.2 Contested Petition ..... 227

    3-6:3 Gap Period ..... 227

        3-6:3.1 Automatic Stay in Effect ..... 228

        3-6:3.2 Continuation of Business ..... 228

        3-6:3.3 Treatment of Gap Period Claims ..... 228

    3-6:4 Hearing on Petition ..... 229

        3-6:4.1 Elements to Be Proven ..... 229

        3-6:4.2 Burden of Proof ..... 229

    3-6:5 Considerations for Petitioning Creditors ..... 230

        3-6:5.1 Practical Effect of Involuntary Filing ..... 230

        3-6:5.2 Availability of Damages for Bad Faith Filing ..... 230

3-7 PRESERVING CLAIMS AGAINST A DEBTOR IN BANKRUPTCY ..... 230

    3-7:1 Proof of Claim ..... 231

## Table of Contents

	3-7:1.1	Bar Date .....	231
	3-7:1.2	Preparing and Filing the Proof of Claim .....	231
		3-7:1.2a Official Form .....	231
		3-7:1.2b Specific Types of Claims.....	232
		3-7:1.2c Unsecured Claims .....	232
		3-7:1.2d Secured Claims.....	232
		3-7:1.2e Priority Claims.....	233
		3-7:1.2f Administrative Claims.....	233
		3-7:1.2g Where and How to File .....	233
		3-7:1.2h Service.....	234
	3-7:1.3	Consequences of Not Filing a Claim .....	234
		3-7:1.3a Chapter 11.....	234
		3-7:1.3b Chapter 7 .....	234
		3-7:1.3c Strategic Reasons for Not Filing a Claim .....	235
	3-7:1.4	Untimely Claims.....	235
		3-7:1.4a Lack of Notice .....	236
		3-7:1.4b Excusable Neglect .....	236
		3-7:1.4c Other Circumstances .....	236
	3-7:2	Claims Objection Process.....	237
		3-7:2.1 Objection to a Claim.....	237
		3-7:2.1a Standing.....	237
		3-7:2.1b Timing.....	238
		3-7:2.2 Defending a Claim.....	238
		3-7:2.2a Responding to the Objection .....	238
		3-7:2.2b Burden of Proof.....	239
		3-7:2.2c Discovery .....	239
		3-7:2.2d Hearing .....	240
	3-7:3	Objection to Discharge .....	240
		3-7:3.1 Only Applicable to Individuals .....	240
		3-7:3.2 General Objection to Discharge.....	240
		3-7:3.3 Objection to Discharge of Specific Claims.....	241
		3-7:3.4 Practical Considerations .....	242
	3-7:4	Claims Covered by Insurance .....	242
3-8		<b>PRESERVING CLAIMS BELONGING TO THE DEBTOR .....</b>	<b>243</b>
	3-8:1	Necessity of Disclosure of Claims in Schedules of Assets.....	243
		3-8:1.1 Effect of Non-Disclosure .....	243

## Table of Contents

	3-8:1.2	Remedies .....	244
3-8:2		Preservation Under Chapter 11 Plan and Disclosure Statement .....	244
3-9		AVOIDANCE ACTIONS.....	245
3-9:1		Preferences.....	245
	3-9:1.1	Statutory Elements .....	246
	3-9:1.1a	Look-Back Period for Insiders.....	246
	3-9:1.1b	Presumption of Insolvency...	246
	3-9:1.2	Defenses .....	247
3-9:2		Fraudulent Transfer .....	247
	3-9:2.1	Under Bankruptcy Code.....	247
	3-9:2.2	Under State Law .....	248
3-9:3		Strong-Arm Powers .....	248
	3-9:3.1	Status as Judgment Creditor .....	248
	3-9:3.2	Status as Bona Fide Purchaser for Value.....	248
	3-9:4	Avoidable Liens .....	248
3-10		EXECUTORY CONTRACTS AND UNEXPIRED LEASES .....	249
3-10:1		Definition of Executory Contract .....	249
3-10:2		Debtor's Right to Assume or Reject.....	250
	3-10:2.1	Assumption .....	250
	3-10:2.1a	Effect of Assumption .....	251
	3-10:2.1b	Requirements for Assumption .....	251
	3-10:2.1c	Right to Assign to a Third Party.....	252
	3-10:2.2	Rejection.....	253
	3-10:2.2a	Effect of Rejection .....	253
	3-10:2.2b	Claim for Damages .....	253
3-10:3		Actions Available to Counterparties and Lessors.....	254
	3-10:3.1	Motion to Compel Assumption or Rejection.....	254
	3-10:3.1a	Procedure .....	255
	3-10:3.1b	Factors to Consider .....	255
	3-10:3.2	Rights in Connection With Assumption...	256
	3-10:3.3	Rights in Connection With Rejection .....	256
3-11		DISMISSAL.....	256
	3-11:1	Dismissal for Cause .....	256
	3-11:1.1	Unauthorized Filing .....	257
	3-11:1.2	Bad Faith.....	257

## Table of Contents

	3-11:1.3	Serial Filings.....	258
	3-11:2	Voluntary Dismissal.....	258
	3-11:3	Effect of Dismissal.....	258
3-12		POST-BANKRUPTCY ISSUES.....	259
	3-12:1	Effect of the Permanent Injunction .....	259
	3-12:2	Failure of a Chapter 11 Plan.....	259
	3-12:3	Re-Opening a Bankruptcy Case.....	259
3-13		PRACTICAL CONSIDERATIONS FOR ATTORNEYS.....	260
	3-13:1	Consequences of a Client's Bankruptcy Filing.....	260
		3-13:1.1 Authority to Represent the Client Post-Petition .....	260
		3-13:1.2 Attorney-Client Privilege .....	260
		3-13:1.3 Automatic Stay .....	260
	3-13:2	Representing the Debtor Post-Petition.....	261
		3-13:2.1 Retention by the Estate.....	261
		3-13:2.1a Special Counsel .....	262
		3-13:2.1b Ordinary Course Professional.....	262
		3-13:2.2 Fee Arrangements.....	262
		3-13:2.3 Getting Paid by the Estate .....	262
	3-13:3	Protecting Your Fees.....	263
		3-13:3.1 Retainers.....	263
		3-13:3.2 Avoidance Actions .....	264
		3-13:3.3 Additional Considerations.....	264

## Chapter 4: Breach of Fiduciary Duty Claims in the Commercial

		Setting.....	265
4-1		INTRODUCTION.....	265
4-2		ELEMENTS OF CLAIM .....	267
	4-2:1	Existence of a Fiduciary Relationship .....	267
	4-2:2	Breach of the Fiduciary Duty.....	268
	4-2:3	Defendant's Breach Resulted in Injury.....	269
4-3		SCOPE OF FIDUCIARY DUTIES.....	269
	4-3:1	Specific Duties Arising Out of Fiduciary Relationships.....	270
		4-3:1.1 Duty of Loyalty.....	270
		4-3:1.1a Entire Fairness .....	271
		4-3:1.1b Application of the Entire Fairness Test.....	272
		4-3:1.2 Duty of Candor.....	272
		4-3:1.2a Fraud by Non-Disclosure.....	273

## Table of Contents

	4-3:1.3	Duty to Account for Benefits .....	273
	4-3:1.4	Duties of Good Faith and Fair Dealing...	273
	4-3:1.5	Duties of Care and Competence .....	274
4-4	SOURCES OF FIDUCIARY RELATIONSHIPS.....		274
	4-4:1	Formal Fiduciary Relationships.....	275
	4-4:1.1	Attorney-Client Relationship.....	275
	4-4:1.1a	Rule Against “Claim Splitting” .....	276
	4-4:1.1b	Associate Attorneys .....	277
	4-4:1.2	Principal-Agent .....	277
	4-4:1.3	Trustee-Beneficiary .....	278
	4-4:1.4	Partners in a General Partnership .....	278
	4-4:1.4a	Partner Duties of Loyalty ....	279
	4-4:1.4b	Partner Duties of Care .....	279
	4-4:1.4c	Limits of Partnership Duties.....	280
	4-4:1.5	General Partner in a Limited Partnership .....	280
	4-4:1.5a	Duties of a General Partner .....	280
	4-4:1.6	Corporate Directors and Officers.....	281
	4-4:1.6a	Duties to Shareholders .....	282
	4-4:1.6b	Exculpation of Governing Persons.....	283
	4-4:1.6c	Limited Liability Companies .....	284
	4-4:1.6d	Interested Party Transactions.....	285
	4-4:1.7	Family Relationships .....	286
	4-4:1.8	Employer/Employee.....	287
4-4:2	Informal Fiduciary Relationships .....		287
	4-4:2.1	Acquisition of Influence .....	288
	4-4:2.2	Factors Supporting a Confidential Relationship.....	289
	4-4:2.3	Confidential Relationships Must Precede the Challenged Transaction .....	290
	4-4:2.4	Questions of Law and Fact in Connection with Confidential Relationships .....	290
	4-4:2.5	Informal Fiduciary Relationships in Closely-Held Entities .....	291
4-5	COMMON CLAIMS ARISING OUT OF BREACHES OF FIDUCIARY DUTIES.....		291

## Table of Contents

4-5:1	Self-Dealing .....	292
	4-5:1.1 Entire Fairness Rule.....	292
	4-5:1.1a Interested Transactions Involving Officers and Directors .....	292
4-5:2	Misrepresentation/Breach of Duty of Candor .....	293
4-5:3	No Cause of Action for Shareholder Oppression .....	294
	4-5:3.1 Protections Afforded Minority Shareholders in Closely Held Corporations .....	295
4-5:4	Aiding and Abetting .....	296
4-5:5	Conspiracy.....	297
4-6	DEFENSES .....	297
4-6:1	Affirmative Defenses.....	297
	4-6:1.1 Limitations .....	298
	4-6:1.2 Statute of Frauds.....	298
	4-6:1.3 Release/Waiver.....	298
	4-6:1.4 Ratification .....	299
4-6:2	Statutory Protections for Officers and Governing Persons.....	300
4-7	REMEDIES .....	300
4-7:1	Actual Damages .....	301
4-7:2	Constructive or Resulting Trust .....	301
4-7:3	Equitable Forfeitures .....	302
	4-7:3.1 Factors Governing Disgorgement of Fees .....	303
4-7:4	Rescission .....	303
4-7:5	Receivership.....	303
4-7:6	Exemplary Damages.....	304
	4-7:6.1 Standard of Proof for Exemplary Damages .....	305
4-8	PATTERN JURY CHARGES .....	305
 <b>Chapter 5: Evaluating Commercial Cases: Avoiding Icebergs.....</b>		<b>307</b>
5-1	INTRODUCTION.....	307
5-2	GENERAL RULES OF EVALUATING BUSINESS CASES .....	309
	5-2:1 A System Approach to Case Evaluation .....	309
	5-2:2 Basic Rules for Case Evaluation.....	311
5-3	COMMON LEGAL ISSUES THAT ARISE IN THE EVALUATION OF COMMERCIAL CASES FOR FILING IN TEXAS.....	316



## Table of Contents

5-3:1	Texas Rules on Arbitration .....	316
5-3:2	Motion to Dismiss Practice in Texas.....	318
5-3:3	Shareholder Oppression.....	319
5-3:4	Negligent Misrepresentation in Texas .....	320
5-3:5	Claims Against Attorneys.....	321
5-3:6	Claims Against Auditors.....	321
5-3:7	Holder Claims .....	323
5-3:8	Setting Aside Releases.....	324
5-3:9	Breach of Fiduciary Duty.....	326
5-3:10	Tortious Interference with Prospective Business Relations .....	327
5-4	CONCLUSION.....	328
	CHAPTER 5—APPENDIX A: Sample Case Acceptance Memo .....	330
	<b>Chapter 6: Contorts.....</b>	<b>337</b>
6-1	INTRODUCTION.....	337
6-2	CONTRACT OR TORT—WHAT DIFFERENCE DOES IT MAKE?.....	338
6-2:1	Recoverable Damages .....	338
6-2:1.1	Attorney’s Fees .....	339
6-2:1.2	Actual Damages: Pure Economic Loss vs. Personal Injury or Loss to Tangible Personal Property.....	339
6-2:1.3	Punitive and Mental Anguish Damages...	340
6-2:1.4	Consequential Damages .....	340
6-2:2	Venue.....	341
6-2:2.1	All or Substantial Part of Cause of Action.....	341
6-2:3	Statutes of Limitations .....	342
6-2:4	Personal Jurisdiction.....	343
6-2:5	Can a Party Pursue Both Remedies? .....	344
6-3	OVERVIEW .....	344
6-3:1	History of the Concept of Contorts .....	344
6-3:2	Source of Duty Test.....	345
6-3:3	Contract Undertaking Can Impose Tort Liability.....	347
6-3:4	Economic Loss Rule .....	348
6-3:5	Independent Injury Test.....	352
6-3:6	Impact of Risk Allocation .....	354
6-4	CONTRACTS.....	356
6-4:1	Sanctity of the Contract .....	356
6-4:2	Formation Issues .....	357
6-4:3	Implied .....	358

## Table of Contents

6-4:4	Strangers and Contractual Privity .....	359
6-4:5	Role of Privity of Contract.....	360
6-4:6	Risk Allocation Between Contracting Parties .....	360
6-4:7	Good Faith and Fair Dealing .....	361
6-5	APPLICABLE CAUSES OF ACTION .....	362
6-5:1	Negligence Action.....	362
6-5:2	Products Liability and Component Parts.....	363
6-5:3	Strict Liability Claims for Product Defect.....	364
6-5:4	Warranties .....	364
6-5:4.1	Application of UCC .....	364
6-5:4.2	Express Warranties .....	365
6-5:4.3	Implied Warranties—Created by Law, Tort or Contract remedies? .....	365
6-5:5	Tortious Interference .....	366
6-5:6	Fraudulent Inducement .....	366
6-5:7	Promissory Estoppel.....	368
6-5:8	DTPA .....	369
6-5:9	Negligent Misrepresentation.....	370
6-6	TRUST RELATIONSHIPS .....	370
6-6:1	Insurance Contracts and Duty of Good Faith.....	371

## **Chapter 7: Corporate Governance and Regulatory Proceedings ..... 373**

7-1	INTRODUCTION.....	373
7-2	FIDUCIARY DUTIES.....	374
7-2:1	Fiduciary Duties of Directors.....	374
7-2:1.1	Duty of Care .....	375
7-2:1.1a	Business Judgment Rule .....	375
7-2:1.1b	Contractual Limitations on Liability.....	377
7-2:1.1bi	Exculpation .....	377
7-2:1.1bii	Renunciation .....	377
7-2:1.1biii	Shareholders' Agreements....	378
7-2:1.2	Duty of Loyalty.....	378
7-2:1.2a	Safe Harbor From Duty of Loyalty .....	379
7-2:1.3	Duty of Obedience .....	379
7-2:1.4	Permissible Reliance on Others.....	380
7-2:1.5	Texas vs. Delaware Fiduciary Duties.....	381
7-2:2	Fiduciary Duties of Shareholders.....	382
7-2:3	Fiduciary Duties in LLCs .....	382
7-2:4	Fiduciary Duties in LLPs .....	384
7-2:5	Fiduciary Duties of Officers .....	384

## Table of Contents

7-3	TYPES OF CLAIMS AGAINST DIRECTORS AND OFFICERS .....	385
7-3:1	Usurpation of Corporate Opportunities— The “Corporate Opportunity Doctrine” and Self-Interested Transactions .....	385
7-3:1.1	Ratification .....	387
7-3:1.2	Estoppel.....	387
7-3:2	Waste of Corporate Assets .....	387
7-3:3	Use of Inside Information .....	387
7-3:4	Section 10(b) of the Securities Exchange Act and Rule 10b-5 .....	388
7-3:4.1	Standing .....	389
7-3:4.2	Material Misrepresentation.....	389
7-3:4.3	Scienter .....	390
7-3:4.4	“In Connection With” the Purchase or Sale.....	390
7-3:4.5	Reliance and Causation .....	390
7-3:5	Individual Liability to Shareholders .....	391
7-3:5.1	Shareholder Derivative Suits.....	391
7-3:5.2	Derivative vs. Direct Actions .....	392
7-3:5.3	Available Remedies .....	393
7-3:5.4	Rules and Statutes Regulating Derivative Suits.....	393
7-3:5.5	Shareholder Status and Contemporaneous Ownership .....	393
7-3:5.6	Effect of Merger .....	394
7-3:5.7	Pre-Suit Demand .....	395
7-3:5.8	Special Litigation Committees .....	395
7-3:5.9	Demand Refused .....	396
7-3:5.10	Discovery Limitations.....	396
7-3:5.11	Judicial Review of Settlements.....	397
7-3:5.12	Texas vs. Delaware Derivative Suit.....	397
7-3:5.12a	Fiduciary Duties .....	397
7-3:5.12b	Applying the Business Judgment Rule .....	398
7-3:5.12c	Demand Requirements.....	398
7-3:5.12d	Derivative Actions Brought On Behalf Of Closely Held Texas Corporations .....	399
7-4	MINORITY SHAREHOLDER OPPRESSION CLAIM .....	399
7-4:1	Definition and History.....	399
7-4:2	Standing .....	401

## Table of Contents

7-4:3	Basis for Claim .....	401
7-4:3.1	Oppressive Action—Toward a New Understanding .....	403
7-4:3.2	Receivership and Liquidation .....	404
7-4:3.3	Other Remedies .....	404
7-4:4	Texas vs. Delaware Oppression Claims .....	405
7-5	INSPECTION OF BOOKS AND RECORDS .....	405
7-5:1	By Governing Persons .....	406
7-5:2	By Shareholders.....	406
7-6	LIABILITY TO THIRD PARTIES .....	408
7-6:1	Contractual Liability .....	408
7-6:2	Tortious Liability .....	410
7-6:3	Creditor Liability .....	410
7-7	REGULATORY INVESTIGATIONS AND PROCEEDINGS.....	411
7-8	INDEMNIFICATION .....	412
7-8:1	Mandatory Indemnification.....	413
7-8:2	Permissive Indemnification .....	414
7-8:3	Court-Ordered Indemnification .....	415
7-8:4	Advancement of Expenses.....	416
7-9	INSURANCE .....	416
7-9:1	Insurance Types.....	417
7-9:2	Excess Insurance.....	417
7-9:3	Retention and Co-Insurance .....	418
7-9:4	Insurance Application Issues .....	418
7-9:5	Notice Issues.....	419
7-9:6	Defense Issues and Duty of Cooperation .....	420
7-9:7	Policy Language.....	421
7-9:8	Exclusions.....	422
7-9:8.1	Dishonesty or Conduct Exclusion.....	423
7-9:8.2	Prior Act Exclusion .....	423
7-9:8.3	Prior and Pending Litigation Exclusion .....	423
7-9:8.4	Particular Acts Exclusion.....	423
7-9:8.5	Other Policy Exclusions .....	424
7-9:8.6	Catastrophic Hazards Exclusion .....	424
7-9:8.7	Bump-Up Exclusion .....	424
7-9:8.8	Insured vs. Insured Exclusion .....	424
7-9:9	Insurance in Bankruptcy.....	425
<b>Chapter 8: Criminal Law in Business Torts Cases.....</b>		<b>427</b>
8-1	INTRODUCTION.....	427
8-2	WHY COMPANIES SELF REPORT .....	429

## Table of Contents

8-2:1	DOJ’s Principles of Corporate Prosecution .....	432
8-2:2	Deferred Prosecution Agreements .....	433
8-3	<b>THE SCOPE AND IMPACT OF THE FIFTH AMENDMENT</b> .....	434
8-3:1	How Will You Know You Have a “Criminal Problem?” .....	435
8-3:2	Dealing With Employees .....	436
8-3:2.1	The Tension Between the Company and Its Employees.....	436
8-3:2.2	<i>Upjohn</i> , Separate Counsel & Joint Defenses .....	438
8-3:2.3	The Yates Memo.....	440
8-3:3	The Fifth Amendment .....	441
8-3:4	Invoking the Fifth Amendment .....	442
8-3:4.1	By the Witness, Not His Lawyer .....	442
8-3:4.2	Question by Question .....	442
8-3:4.3	Proceeding by Proceeding .....	443
8-3:4.4	Waived if Not Invoked.....	445
8-3:5	The Scope of the Fifth Amendment: “Any Link in the Chain” .....	446
8-3:6	Applies to “Act of Production”.....	447
8-3:7	<i>Salinas v. Texas</i> : Must “Invoke” .....	449
8-3:8	Effect of Fifth Amendment on Criminal Case.....	451
8-3:9	Effect of Fifth Amendment on Civil Case.....	451
8-3:9.1	Adverse Inferences (Including Against Employers).....	451
8-3:9.2	Staying a Civil Proceeding .....	452
8-3:9.2a	Overlapping Facts Is the Main Criterion .....	454
8-3:9.2b	A Stay Avoids Improper Sharing of Discovery Between the Civil Plaintiffs and the Government’s Criminal Prosecution .....	454
8-3:9.2c	Balancing of Interests .....	455
8-4	<b>OBSTRUCTION OF JUSTICE</b> .....	456
8-4:1	Common Obstruction Statutes .....	456
8-4:1.1	18 U.S.C. § 1512c .....	456
8-4:1.2	18 U.S.C. § 1513 .....	456
8-4:1.3	Witness Tampering .....	457
8-4:2	Don’t Lawyers Obstruct Justice?.....	458
8-4:3	Crime-Fraud Exception .....	459

## Table of Contents

	8-4:3.1 The “In Furtherance” Test .....	460
	8-4:3.2 Crime-Fraud Under Texas Law .....	463
8-5	CONCLUSION.....	465
<b>Chapter 9: Damages .....</b>		<b>467</b>
9-1	INTRODUCTION.....	467
	9-1:1 Classifying the Action By Theory of Recovery .....	468
9-2	PLEADING DAMAGES.....	469
	9-2:1 Fair Notice .....	469
	9-2:2 Measure and Amount.....	469
	9-2:3 General Damages .....	470
	9-2:4 Special Damages.....	470
9-3	DAMAGES AND DISCOVERY .....	471
	9-3:1 Discoverable Materials.....	472
	9-3:2 Disclosure.....	473
9-4	GENERAL STRATEGIES FOR PROVING DAMAGES....	473
	9-4:1 Using Lay Witnesses.....	475
	9-4:2 Using Expert Witnesses .....	476
	9-4:2a Expert Testimony.....	476
	9-4:2b Challenging the Other Side’s Damages Expert.....	477
9-5	CONTRACT DAMAGES .....	478
	9-5:1 Expectancy or “Benefit of the Bargain” Damages ....	478
	9-5:2 Special or Consequential Damages.....	479
	9-5:2.1 Lost Profits .....	480
	9-5:2.1a Reasonable Certainty .....	480
	9-5:2.1b Proving Lost Profits.....	482
	9-5:2.2 Cost of Delay .....	482
	9-5:2.3 Cost of Substitute Performance.....	483
	9-5:2.4 Loss of Credit Reputation .....	483
	9-5:2.5 Loss of Financing.....	484
	9-5:2.6 Loss of Goodwill.....	484
	9-5:3 Reliance or “Out-of-Pocket” Damages .....	484
	9-5:3.1 Calculating Out-of-Pocket Expenses.....	485
	9-5:4 Restitution Damages .....	485
	9-5:5 Contract Damages Under the Uniform Commercial Code.....	486
	9-5:6 Liquidated Damages.....	487
	9-5:6.1 Validity .....	488
	9-5:6.2 Liquidated Damages and the UCC.....	488
	9-5:7 Damages for Breach of Warranty .....	489
	9-5:8 Mitigation.....	489

## Table of Contents

	9-5:8.1	Duty to Mitigate.....	489
	9-5:8.2	Exceptions to Duty to Mitigate.....	490
	9-5:9	Right of Offset.....	490
	9-5:10	Attorney’s Fees .....	491
9-6		<b>TORT DAMAGES</b> .....	492
	9-6:1	Compensatory Damages.....	492
	9-6:2	Damages-Related Considerations in Frequently Litigated Business Torts.....	493
	9-6:2.1	Negligent Misrepresentation.....	493
		9-6:2.1a Reliance Damages .....	493
	9-6:2.2	Fraud.....	494
		9-6:2.2a Reliance Damages .....	494
		9-6:2.2b Benefit of the Bargain Damages .....	494
		9-6:2.2c Other Recoverable Amounts .....	494
	9-6:2.3	Tortious Interference With Contract.....	495
	9-6:2.4	Breach of Fiduciary Duty.....	496
		9-6:2.4a Actual Damages.....	496
		9-6:2.4b Equitable Relief .....	497
		9-6:2.4bi Constructive Trusts .....	497
		9-6:2.4bii Forfeiture/Disgorgement of Fees .....	497
	9-6:2.5	Misappropriation of Trade Secrets .....	498
		9-6:2.5a Injunctive Relief.....	498
		9-6:2.5b Value to the Plaintiff .....	499
		9-6:2.5c Benefit to the Defendant/ Value of the Secret .....	499
		9-6:2.5d Reasonable Royalty.....	500
	9-6:2.6	Violation of Covenants Not to Compete .....	500
		9-6:2.6a Monetary Damages.....	501
		9-6:2.6b Injunctive Relief .....	501
	9-6:2.7	Business Disparagement, Defamation, and Slander of Title.....	502
		9-6:2.7a General Damages.....	503
		9-6:2.7b Special Damages .....	503
		9-6:2.7c Presumed Damages .....	504
	9-6:2.8	Patent Infringement .....	504
		9-6:2.8a Reasonable Royalty .....	505
		9-6:2.8b Lost Profits.....	505

## Table of Contents

	9-6:2.8c	The Entire Market Value Rule.....	506
	9-6:2.9	Trademark Infringement.....	506
		9-6:2.9a Statutory Damages.....	507
		9-6:2.9b Lost Profits.....	507
	9-6:2.10	DTPA Violations .....	508
		9-6:2.10a Economic Damages.....	508
		9-6:2.10b Mental Anguish .....	509
		9-6:2.10c Additional Damages .....	509
		9-6:2.10d Tie-In Statutes.....	510
	9-6:3	Economic Loss Rule .....	510
9-7		<b>DAMAGES TO REAL PROPERTY</b> .....	510
	9-7:1	<i>Temporary v. Permanent</i> .....	510
	9-7:2	Stigma Damages .....	511
9-8		<b>ONE SATISFACTION RULE</b> .....	511
9-9		<b>COLLATERAL SOURCE RULE</b> .....	512
9-10		<b>ATTORNEY’S FEES</b> .....	513
	9-10:1	Avenues for Recovery.....	513
		9-10:1a The Civil Practice and Remedies Code ....	513
		9-10:1b Contract .....	514
		9-10:1c Equity.....	515
	9-10:2	Prerequisites for Recovery.....	516
		9-10:2a Claimant Has Stated a Claim for Fees .....	516
		9-10:2b Claimant Is Entitled to Recover Attorney’s Fees .....	516
		9-10:2c Claimant Is Represented by Counsel .....	518
		9-10:2d Claimant Incurred Attorney’s Fees .....	518
	9-10:3	Reasonableness .....	519
	9-10:4	Proving Attorney’s Fees .....	520
9-11		<b>PUNITIVE DAMAGES</b> .....	522
	9-11:1	Awarded to Penalize the Defendant .....	522
	9-11:2	Chapter 41 of the Civil Practice and Remedies Code .....	522
	9-11:3	Conditions for Recovery .....	523
		9-11:3.1 Pleading Requirement.....	523
		9-11:3.2 Actual Damages Required .....	523
		9-11:3.3 Aggravated Conduct Required.....	524
		9-11:3.3a Fraud .....	524
		9-11:3.3b Malice .....	524
		9-11:3.3c Gross Negligence.....	525
	9-11:4	Vicarious Liability for Punitive Damages.....	525



## Table of Contents

9-11:5	No Joint and Several Liability for Punitive Damages.....	525
9-11:6	Trying Exemplary Damages.....	526
9-11:6.1	Bifurcating the Trial.....	526
9-11:6.2	Proving Aggravated Conduct.....	526
9-11:6.3	Calculating Punitive Damages.....	527
9-11:6.4	Unanimous Jury Verdict.....	528
9-12	NOMINAL DAMAGES.....	528
9-13	THE JURY CHARGE.....	528
9-14	EXCESSIVE OR INADEQUATE DAMAGES AWARDS.....	530
9-15	PREJUDGMENT INTEREST.....	531
9-15:1	When Recoverable.....	531
9-15:2	Application.....	532
9-15:3	Calculating Prejudgment Interest.....	532
9-16	POST JUDGMENT INTEREST.....	533
9-16:1	When Recoverable.....	533
9-16:2	Application.....	533
9-16:3	Calculating Post Judgment Interest.....	534
9-17	COURT COSTS.....	534
9-18	REJECTED SETTLEMENT AGREEMENT— LITIGATION COSTS.....	535
9-18:1	“Significantly Less Favorable”.....	535
9-18:2	“Litigation Costs”.....	535
9-18:3	Requirements of Settlement Offer.....	535
9-18:4	Limitations on Litigation Costs.....	536
9-18:4.1	Not Applicable to Certain Actions.....	536
9-18:4.2	Cannot Exceed Recovery.....	536
9-18:4.3	No Double Recovery.....	537
<b>Chapter 10: Discovery.....</b>		<b>539</b>
10-1	INTRODUCTION.....	539
10-2	SCOPE OF DISCOVERY.....	540
10-2.1	Proportionality In Discovery.....	541
10-2.2	Reasonably Tailored Discovery.....	541
10-2.3	Agreements and Court Limitations on Discovery.....	542
10-3	FORMS AND SEQUENCE OF DISCOVERY.....	543
10-3:1	Seven Forms.....	543
10-3:2	Any Sequence of Discovery Permissible.....	543
10-4	DISCOVERABLE ITEMS.....	543
10-4:1	Documents and Tangible Things.....	543
10-4:2	Persons with Knowledge of Relevant Facts.....	544

## Table of Contents

10-4:3	Trial Witnesses.....	545
10-4:4	Testifying and Consulting Experts.....	545
10-4:5	Witness Statements.....	545
10-4:6	Indemnity and Insurance Agreements.....	546
10-4:7	Settlement Agreements.....	547
10-4:8	Contentions.....	547
10-5	<b>SIGNING DISCLOSURES, DISCOVERY REQUESTS, RESPONSES AND OBJECTIONS.....</b>	<b>548</b>
10-5:1	Signing Disclosures.....	548
10-5:2	Signing Discovery Requests, Notices, Responses or Objections.....	548
10-6	<b>FILING DISCOVERY MATERIALS.....</b>	<b>549</b>
10-6:1	Discovery Materials Not Filed.....	549
10-6:2	Discovery Materials Filed.....	549
10-6:3	Service of Discovery Materials.....	550
10-7	<b>RESPONDING TO WRITTEN DISCOVERY.....</b>	<b>550</b>
10-7:1	The Mechanics.....	550
10-7:1.1	Restate the Request.....	550
10-7:1.2	Respond.....	550
10-7:1.3	Object.....	550
10-7:1.4	No Objection for Privilege.....	551
10-7:2	Waiver & Good Cause.....	551
10-7:3	Time Periods for Responses.....	552
10-8	<b>PROTECTIVE ORDERS.....</b>	<b>552</b>
10-8:1	Motion.....	552
10-8:2	Court Order.....	553
10-9	<b>AMENDING OR SUPPLEMENTING WRITTEN DISCOVERY.....</b>	<b>553</b>
10-9:1	The Basic Duty.....	553
10-9:2	Form and Verification.....	554
10-9:3	Timing.....	554
10-9:4	Mandatory Additional Discovery.....	555
10-9:5	Sanctions for Failure to Supplement or Amend.....	555
10-9:6	Certain Responses Not Admissible.....	556
10-10	<b>ASSERTING PRIVILEGES.....</b>	<b>556</b>
10-10:1	The Basics.....	557
10-10:2	Withholding Statements.....	557
10-10:3	Privilege Logs.....	557
10-10:4	In Camera Inspections.....	559
10-10:5	Burden of Proof and Hearings.....	559
10-10:6	Inadvertent Disclosure of Privileged Information Snap-Back Provision.....	560

## Table of Contents

10-11	PRIVILEGES .....	562
10-11:1	Work Product .....	562
10-11:1.1	General Rule.....	562
10-11:1.2	In Anticipation of Litigation .....	562
10-11:1.3	Core and Non-Core Work Product .....	563
10-11:1.4	Certain Materials Are Not Work Product .....	564
10-11:2	Attorney-Client Privilege .....	564
10-11:2.1	The Privilege.....	564
10-11:2.2	Subject Matter Test for Corporations .....	565
10-11:3	Clergy Privilege.....	565
10-11:4	Physician-Patient Privilege.....	565
10-11:4.1	The Rule .....	565
10-11:4.2	Limitations .....	566
10-11:5	Trade Secret Privilege.....	566
10-11:6	Mental Health Privilege.....	567
10-12	DISCOVERY PLANS.....	567
10-12:1	The Proper Discovery Control Plan .....	568
10-12:2	Level 1 Discovery.....	568
10-12:3	Level 2 Discovery .....	569
10-12:4	Level 3 Discovery .....	570
10-13	REQUESTS FOR DISCLOSURE.....	570
10-14	REQUESTS FOR PRODUCTION OF DOCUMENTS .....	571
10-14:1	Documents and Tangible Things from Parties .....	571
10-14:2	Documents and Tangible Things from Non parties.....	572
10-14:3	Hearing on Objections.....	572
10-14:4	Self-authentication of Documents .....	573
10-15	DISCOVERY OF ELECTRONIC INFORMATION.....	573
10-15:1	Procedure.....	574
10-15:2	Litigation Hold or Preservation Letters .....	575
10-15:2.1	When the Duty to Preserve Arises.....	575
10-15:2.2	Contents of Litigation Holds.....	576
10-15:2.3	Handling Litigation Holds.....	576
10-15:3	Discovery of Social Media.....	578
10-15:4	Objections to Social Media Discovery .....	579
10-16	ENTRY ON LAND .....	579
10-16:1	Specification of Request and Order .....	580
10-16:2	Response.....	580
10-17	INTERROGATORIES .....	580
10-17:1	General Use .....	580

## Table of Contents

10-17:2	Number of Interrogatories.....	581
10-17:3	No Expert Discovery .....	581
10-17:4	Responses and Business Record Option.....	581
10-17:5	Verification .....	582
10-18	REQUESTS FOR ADMISSIONS .....	582
10-18:1	General Use.....	582
10-18:2	Number of Request for Admissions.....	583
10-18:3	Responding to Requests.....	583
10-18:4	Effect of Deemed Admissions.....	584
10-18:5	Use at Trial or in Motions .....	585
10-19	DEPOSITIONS.....	586
10-19:1	Oral Depositions.....	586
10-19:2	Conduct During Oral Depositions.....	587
10-19:3	Waiver and Hearing.....	588
10-19:4	Time Limitations .....	588
10-19:5	Deposition of Organization .....	588
10-19:6	Deposition on Written Questions.....	588
10-19:7	Depositions in Foreign Jurisdictions .....	589
10-19:8	Apex Depositions .....	589
10-19:9	Use of Depositions in Trials or Hearings.....	590
10-19:10	Reviewing Deposition Transcripts .....	590
10-19:11	Depositions Before Suit .....	591
	10-19:11.1 Purpose.....	591
	10-19:11.2 The Petition .....	591
	10-19:11.3 When Allowed .....	592
10-20	PHYSICAL AND MENTAL EXAMINATIONS .....	593
10-20:1	Timing and Service .....	593
10-20:2	Good Cause.....	593
10-20:3	Order of Examination .....	594
10-20:4	Report of Examination.....	594
10-21	DISCOVERY FROM NON PARTIES.....	594
10-22	MANDAMUS ON DISCOVERY ISSUES.....	595
10-22:1	Standard for Mandamus Relief .....	596
10-22:2	Preserving Mandamus-Party Seeking Discovery .....	596
10-22:3	Preserving Mandamus-Non-Discovering Party.....	597
10-22:4	Mandamus Granted .....	597
	10-22:4.1 Apex Depositions .....	597
	10-22:4.2 Depositions Before Suit .....	598
	10-22:4.3 Failure to Conduct In Camera Review In Assessing Privilege.....	598
	10-22:4.4 Discovery of Electronic Storage Devices .....	598

## Table of Contents

10-22:4.5	Ordering the Discovery of Privileged Information .....	599
10-22:4.6	Trial Court Failed to Undeem Admissions .....	599
10-22:4.7	Trial Court Denial of Physical and Mental Examinations .....	599
10-22:4.8	Trial Court Improperly Orders Entry Upon Land .....	599
10-23	DISCOVERY SANCTIONS .....	600
10-23:1	Conduct Giving Rise to Sanctions .....	600
10-23:2	Purpose.....	600
10-23:3	Limitations on Death Penalty Sanctions.....	602
10-23:4	Procedure and Timing .....	602
10-23:5	Non-exclusive Sanctions Under Rule 215 .....	603
<b>Chapter 11: Employment Law Litigation .....</b>		<b>605</b>
11-1	INTRODUCTION.....	605
11-2	TEXAS COMMISSION ON HUMAN RIGHTS ACT .....	606
11-2:1	Overview.....	606
11-2:2	Forms of Discrimination .....	607
11-2:2.1	Disparate Treatment .....	607
11-2:2.2	Disparate Impact .....	609
11-2:2.3	Discriminatory Harassment.....	610
11-2:2.3a	Quid Pro Quo Harassment... ..	610
11-2:2.3b	Hostile Work Environment Harassment .....	610
11-2:2.4	Disability Discrimination.....	612
11-2:2.4a	Disability.....	613
11-2:2.4b	Failure to Accommodate .....	614
11-2:2.5	Retaliation .....	615
11-2:3	Enforcement .....	616
11-2:3.1	Procedure.....	616
11-2:3.2	Statute of Limitations.....	618
11-2:4	Remedies .....	619
11-2:4.1	Compensatory and Exemplary Damages .....	621
11-2:4.2	Mitigation of Damages.....	621
11-2:4.3	After-Acquired Evidence .....	622
11-2:5	Related Federal Laws.....	623
11-2:5.1	Title VII of the Civil Rights Act of 1964.....	623

## Table of Contents

11-2:5.2	Age Discrimination in Employment Act.....	625
11-2:5.3	Americans with Disabilities Act.....	627
11-2:5.4	Family Medical Leave Act .....	628
11-2:5.5	Equal Pay Act.....	630
11-3	WHISTLEBLOWER PROTECTION.....	631
11-3:1	<i>Sabine Pilot</i> .....	631
11-3:2	Texas Whistleblower Act.....	632
11-4	WORKERS COMPENSATION RETALIATION .....	634
11-4:1	Non-Subscribers .....	635
11-4:2	Absence Control Policies .....	636
11-4:3	Causation .....	636
11-4:4	Circumstantial Evidence .....	637
11-4:5	Statute of Limitations.....	639
11-4:6	Damages.....	639
11-5	EMPLOYMENT AT-WILL.....	639
11-5:1	Judicially Created Exceptions .....	640
11-5:2	Common Law Exceptions.....	641
11-5:2.1	Employment Contracts.....	641
11-5:2.2	Tort Claims.....	642
11-5:3	Good Faith and Fair Dealing .....	642
11-5:4	Federal and State Statutory Exemptions.....	642
11-6	EMPLOYMENT TORTS .....	643
11-6:1	Breach of Fiduciary Relationship .....	643
11-6:2	Tortious Interference with an Employment Contract .....	645
11-6:3	Tortious Interference with a Prospective Contract ....	646
11-6:4	Intentional Inflection of Emotional Distress .....	648
11-6:5	Defamation.....	649
11-6:5.1	First Amendment Consideration .....	650
11-6:5.2	Defenses .....	651
11-6:5.3	Damages.....	653
11-6:6	Conspiracy.....	653
11-6:7	Negligence .....	655
11-6:7.1	Negligent Misrepresentation.....	655
11-6:7.2	Negligent Hiring, Retention, Supervision, and Training .....	657
11-6:7.2a	Hiring.....	658
11-6:7.2b	Supervision .....	659
11-6:8	Covenants Not-to-Compete.....	659
11-6:8.1	Evolution of Texas Non-Compete Agreements.....	659

## Table of Contents

	11-6:8.2	Consideration .....	662
	11-6:8.3	What are Reasonable Time, Scope and Geographic Restraints? .....	663
	11-6:8.4	Remedies .....	665
	11-6:9	Non-Solicitation/Anti-Raiding Agreements .....	665
	11-6:10	Non-Disclosure/Confidentiality Agreements .....	666
11-7		<b>CONTRACTS</b> .....	667
	11-7:1	Overview .....	667
	11-7:2	Express Contracts .....	667
	11-7:3	Implied Contract .....	668
	11-7:4	Employee Handbooks .....	668
	11-7:5	Implied Covenant of Good Faith and Fair Dealing .....	670
	11-7:6	Remedies .....	670
		<b>Chapter 12: Expert Witnesses</b> .....	<b>671</b>
12-1		<b>INTRODUCTION</b> .....	671
12-2		<b>ADMISSION OF EXPERT TESTIMONY</b> .....	672
	12-2:1	Core Admissibility Requirements .....	672
	12-2:2	Burden of Proof .....	673
	12-2:3	Role of the Trial Court .....	673
	12-2:4	Standard of Review on Appeal .....	674
12-3		<b>RELEVANCE</b> .....	675
	12-3:1	General Rule .....	675
	12-3:2	Balancing Test: Relevant Evidence May Still Be Excluded .....	676
	12-3:3	Irrelevant Testimony .....	677
12-4		<b>QUALIFICATION OF EXPERTS</b> .....	679
	12-4:1	Qualifications .....	679
	12-4:2	Special Knowledge .....	680
	12-4:3	Related to Facts at Issue .....	680
12-5		<b>RELIABILITY</b> .....	682
	12-5:1	General Rule .....	682
	12-5:2	Foundational Reliability .....	682
	12-5:3	Reliability of Methodology .....	683
	12-5:4	Applicability to All Expert Testimony .....	685
	12-5:5	The “Analytical Gap” Test .....	685
	12-5:6	Reliability of Application of Methodology .....	686
	12-5:7	Role of the Trial Court .....	687
12-6		<b>APPROPRIATE SUBJECTS FOR EXPERT TESTIMONY</b> .....	688
	12-6:1	Expert Testimony Required .....	688

## Table of Contents

12-6:2	Expert Testimony Permitted .....	688
12-6:2.1	Ultimate Issues .....	688
12-6:2.2	Mixed Questions of Law and Fact .....	689
12-6:3	Expert Testimony Not Permitted .....	689
12-6:3.1	Questions of Law .....	689
12-6:3.2	Issues of General Knowledge and Experience .....	690
12-7	<b>EXPERT TESTIMONY IN BUSINESS LITIGATION</b> .....	690
12-7:1	Introduction .....	690
12-7:2	Liability .....	691
12-7:2.1	Contracts .....	691
12-7:2.1a	Custom and Usage .....	691
12-7:2.1b	Unambiguous Contracts .....	691
12-7:2.2	Fiduciary Duty: Standard of Care .....	692
12-7:2.2a	Generally .....	692
12-7:2.2b	Professional Standard of Care .....	693
12-7:3	Remedies .....	694
12-7:3.1	Damages Calculations .....	694
12-7:3.2	Lost Profits .....	695
12-7:3.3	Other Valuation Issues .....	697
12-7:3.4	Attorney's Fees .....	698
12-8	<b>OBJECTING TO EXPERT TESTIMONY</b> .....	698
12-8:1	Challenging Faulty Designation of Expert .....	698
12-8:2	Before Trial .....	699
12-8:2a	The <i>Daubert</i> Motion .....	699
12-8:2b	Deciding Whether to File a <i>Daubert</i> Motion .....	700
12-8:2c	Challenging Experts on Summary Judgment .....	701
12-8:3	During Trial .....	701
12-8:4	After Trial .....	702
12-8:5	Issues on Appeal .....	703
12-9	<b>FACTS OR DATA RELIED ON BY EXPERTS</b> .....	704
12-9:1	Expert Need Not Have Personal Knowledge .....	704
12-9:2	Disclosure of Facts or Data Underlying Expert Opinion .....	706
12-9:2.1	Underlying Facts Need Not Be Disclosed .....	706
12-9:2.2	Voir Dire .....	706



## Table of Contents

12-9:2.3	Admissibility of Underlying Facts or Data Used to Support or Explain Opinion .....	706
12-9:2.4	Limiting Instructions .....	708
12-9:3	Testimony May Be Excluded If Underlying Facts are Insufficient Basis for Expert's Opinion .....	708
12-10	EXAMINATION OF EXPERTS .....	709
12-10:1	Direct Examination of Experts .....	709
12-10:2	Cross-Examination of Experts .....	710
12-11	TYPES OF EXPERTS .....	711
12-11:1	Testifying Experts .....	711
12-11:2	Consulting Expert .....	712
12-11:2.1	Generally .....	712
12-11:2.2	Consulting-Only Expert .....	713
12-11:2.3	Consulting Expert Whose Work Has Been Reviewed .....	713
12-11:2.4	Consulting Expert With First-Hand Knowledge of Facts in the Case .....	714
12-11:3	Court-Appointed Expert .....	714
12-12	DISCOVERY OF EXPERTS .....	715
12-12:1	Information Discoverable .....	715
12-12:1.1	Testifying Experts .....	715
12-12:1.2	Consulting Experts Whose Mental Impressions Have Been Reviewed by a Testifying Expert .....	717
12-12:1.3	Consulting-Only Expert .....	718
12-12:1.4	Consulting-Only Experts Who Have Obtained First-Hand Knowledge of Facts Related to the Case .....	719
12-12:2	Tools for Obtaining Discovery From Retained Testifying Experts .....	719
12-12:2.1	Requests for Disclosure and Required Disclosures .....	720
12-12:2.2	Oral Deposition .....	721
12-12:2.3	Reports .....	722
12-12:2.3a	Expert Reports in Texas Courts .....	722
12-12:2.3b	Expert Reports in Federal Court .....	722
12-12:3	Obtaining Discovery From Other Experts .....	723
12-12:3.1	Nonretained Testifying Experts .....	723

## Table of Contents

12-12:3.2	Consulting Experts Whose Mental Impressions Have Been Reviewed .....	724
12-12:4	Limits on Discovery of Experts .....	725
12-12:5	Designation of Experts .....	725
12-12:5.1	Generally .....	725
12-12:5.2	Changing Designation .....	726
12-12:6	Amending or Supplementing Responses to Written Discovery .....	727
12-12:6.1	Generally .....	727
12-12:6.2	Retained Experts .....	728
12-12:6.3	Nonretained Experts.....	728
12-12:7	Failure to Comply With Discovery Rules.....	729
12-12:7.1	Sanctions Under Texas Rules.....	730
12-12:7.2	Sanctions Under Federal Rules.....	731
<b>Chapter 13: Fraud and Negligent Misrepresentation.....</b>		<b>733</b>
13-1	INTRODUCTION.....	733
13-1:1	Generally .....	733
13-1:2	Potential Defendants .....	734
13-1:2.1	Employer (Vicarious Liability).....	734
13-1:2.2	Principal, If Agent Acted With Actual Or Apparent Authority .....	734
13-1:2.3	Principal, If Conduct of Agent Ratified .....	735
13-1:2.4	Agent's Own Tortious Conduct.....	735
13-1:2.5	Corporate Disregard.....	736
13-1:2.6	Beneficiary of the Fraud .....	739
13-1:3	False Statements .....	739
13-1:3.1	False Statements of Opinion Are False Representations in Limited Circumstances.....	741
13-1:3.1a	Defendant Knows Opinion Is False .....	741
13-1:3.1b	Opinion Is Based On Defendant's Superior Knowledge .....	742
13-1:3.1c	Opinion Is Based On False Facts.....	742
13-1:3.2	False Promises of Future Performance Actionable .....	742
13-1:3.3	False Representations by Conduct Equivalent to False Statement of Fact .....	743

## Table of Contents

13-2	CAUSES OF ACTION .....	744
13-2:1	Simple Fraud .....	744
13-2:1.1	Generally .....	744
13-2:1.2	False, Material Representation.....	744
13-2:1.3	Defendant’s State of Mind.....	745
13-2:1.3a	Knowledge .....	745
13-2:1.3b	Recklessness .....	746
13-2:1.4	Reliance .....	746
13-2:1.4a	Defendant Intends Plaintiff Will Rely Upon Falsity of Representation .....	746
13-2:1.4b	Actual Reliance .....	747
13-2:1.4c	Justifiable Reliance .....	747
13-2:1.4d	Plaintiff’s Personal Characteristics and Abilities.....	748
13-2:1.4e	Plaintiff’s Knowledge of Facts.....	748
13-2:2	Fraudulent Inducement .....	749
13-2:2.1	Generally .....	750
13-2:2.2	False, Material Representation.....	750
13-2:2.3	Defendant’s State of Mind.....	751
13-2:2.3a	Knowledge .....	751
13-2:2.3b	Recklessness .....	752
13-2:2.4	Reliance .....	752
13-2:2.4a	Defendant Intends Plaintiff’s Reliance Or Had Reason to So Expect .....	753
13-2:2.4b	Justifiable Reliance .....	753
13-2:2.4c	Plaintiff’s Personal Characteristics and Abilities.....	753
13-2:2.4d	Plaintiff’s Knowledge of Facts.....	754
13-2:3	Fraud by Non-Disclosure, Omission, or Concealment .....	755
13-2:3.1	Generally .....	755
13-2:3.2	Concealed Facts.....	756
13-2:3.2a	No Liability Where Plaintiff Executes Contract Without Reading Same .....	756
13-2:3.3	Duty to Disclose .....	756

## Table of Contents

	13-2:3.4 Material Knowledge ..... 757	757
	13-2:3.5 Defendant’s Knowledge ..... 757	757
	13-2:3.6 Defendant’s State of Mind..... 757	757
	13-2:3.7 Reliance On Non-Disclosure, Omission, Or Concealment..... 758	758
	13-2:3.7a Nonperformance Insufficient to Show Intent Not to Perform At Time Contract Is Executed ..... 759	759
13-2:4	Statutory Fraud in Real-Estate and Stock Transactions ..... 759	759
	13-2:4.1 Generally ..... 760	760
	13-2:4.2 Defendant’s Conduct ..... 760	760
	13-2:4.2a False Representation ..... 760	760
	13-2:4.2b False Promise ..... 761	761
	13-2:4.2c Non-Disclosure of Third Party’s False Representation Or Promise ..... 761	761
	13-2:4.3 Reliance ..... 762	762
	13-2:4.3a Defendant Intends Plaintiff’s Reliance Or Had Reason to So Expect ..... 762	762
	13-2:4.3b Actual Reliance..... 762	762
13-2:5	Negligent Misrepresentation..... 763	763
	13-2:5.1 Generally ..... 763	763
	13-2:5.2 Potential Defendants ..... 763	763
	13-2:5.3 Plaintiff’s Prerequisites ..... 765	765
	13-2:5.3a Plaintiff Is Person Or Member of Class of Persons Whom Defendant Intended to Benefit Or Whom Defendant Knew Or Should Have Known Would Receive Information ..... 765	765
	13-2:5.3b Showing That Defendant’s Pecuniary Interest Was Involved in Misrepresentation ..... 765	765
	13-2:5.3c Showing That Defendant Supplied False Information for Guidance of Others ..... 766	766
13-2:5.4	False Representation..... 766	766

## Table of Contents

	13-2:5.4a	Silence and Failure to Disclose Creates Liability Only When There Is a Duty to Disclose.....	766
	13-2:5.4b	Future Promises Not Actionable.....	767
	13-2:5.5	Failure to Exercise Reasonable Care .....	767
	13-2:5.6	Reliance .....	767
13-3	CAUSATION.....		768
13-4	BURDENS OF PROOF AND PRESUMPTIONS.....		769
13-5	DAMAGES AND REMEDIES.....		769
	13-5:1	Plaintiff’s Injury.....	769
	13-5:2	Remedies .....	770
	13-5:2.1	Choice of Legal Or Equitable Remedies .....	770
	13-5:2.2	Legal/Monetary Remedies .....	770
	13-5:2.2a	Direct Damages.....	771
	13-5:2.2a1	Direct Damages—Damages Were Foreseeable.....	772
	13-5:2.2a2	Consequential Damages— Fraud Proximately Caused the Damages.....	772
	13-5:2.2a3	Exemplary Damages .....	772
	13-5:2.3	Equitable Remedies.....	773
	13-5:2.4	Interest.....	774
	13-5:2.5	Court Costs .....	774
	13-5:2.6	Attorney’s Fees .....	774
13-6	DEFENSES .....		774
	13-6:1	Fraud Defenses.....	775
	13-6:1.1	Limitations .....	775
	13-6:1.2	Contractual Disclaimer.....	776
	13-6:1.3	Merger Clause.....	777
	13-6:1.4	Immunity.....	778
	13-6:1.5	Plaintiff’s Fault Or Negligence.....	778
	13-6:1.6	Statute of Frauds.....	778
	13-6:1.7	Ratification .....	779
	13-6:1.8	Knowledge of Falsity/Concealed Facts....	779
	13-6:1.9	Religious Belief.....	780
	13-6:2	Negligent Misrepresentation Defenses.....	781
	13-6:2.1	Limitations .....	781
	13-6:2.2	Plaintiff’s Education .....	782
	13-6:2.3	Immunity.....	783

## Table of Contents

13-6:2.4	Plaintiff's Fault Or Negligence.....	783
13-6:2.5	Statute of Frauds.....	784
13-6:2.6	Economic-Loss Rule.....	784
13-6:2.7	Inferential Rebuttals.....	785
13-6:2.8	First Amendment.....	785
<b>Chapter 14: Intellectual Property and Trade Secrets Litigation .....</b>		<b>787</b>
14-1	INTRODUCTION.....	787
14-2	PATENT LITIGATION .....	787
14-2:1	Constitutional and Statutory Sources .....	788
14-2:2	Jurisdiction and Venue Considerations .....	788
14-2:3	Claim Construction .....	791
14-2:3.1	General Principles.....	791
14-2:3.2	Means Plus Function Claims .....	794
14-2:4	Direct Infringement .....	796
14-2:4.1	Literal Infringement .....	796
14-2:4.2	Infringement Under the Doctrine of Equivalents .....	796
14-2:5	Indirect Infringement.....	797
14-2:5.1	Induced Infringement .....	797
14-2:5.2	Contributory Infringement .....	798
14-2:6	Joint Infringement .....	799
14-2:7	Willful Infringement .....	800
14-2:8	Defenses .....	802
14-2:8.1	Invalidity .....	802
14-2:8.1a	Non-Patentable Subject Matter .....	803
14-2:8.1b	Anticipation .....	804
14-2:8.1c	Obviousness .....	805
14-2:8.1d	Other Grounds for Invalidity.....	806
14-2:8.2	Unenforceability .....	807
14-2:8.3	Laches Restricted as a Defense .....	808
14-2:9	Remedies .....	808
14-2:9.1	Damages.....	809
14-2:9.1a	Lost Profits.....	809
14-2:9.1b	Reasonable Royalty .....	809
14-2:9.2	Injunctions.....	810
14-2:9.2a	Preliminary Injunctions.....	810
14-2:9.3	Permanent Injunctions.....	812
14-2:9.4	Exceptional Cases .....	813
14-3	COPYRIGHT LITIGATION.....	814

## Table of Contents

14-3:1	What is Protected by the Copyright Laws?.....	814
14-3:1.1	Originality .....	815
14-3:1.2	Fixation .....	816
14-3:1.3	Idea vs. Expression .....	817
14-3:1.4	Special Categories of Works .....	818
14-3:1.5	Derivative Works .....	818
14-3:1.6	Formalities—Notice and Registration Requirement .....	820
14-3:1.7	Duration and Renewal Rules .....	821
14-3:1.8	Exclusive Federal Jurisdiction.....	822
14-3:2	Infringement Claims .....	822
14-3:2.1	Ownership .....	823
14-3:2.2	Copying .....	823
14-3:2.3	Substantial Similarity .....	824
14-3:2.4	Protected Rights .....	825
14-3:2.5	Right to Perform Publicly .....	825
14-3:3	Contributory Infringement .....	826
14-3:4	Defenses .....	826
14-3:4.1	Fair Use .....	826
14-3:4.2	First Sale.....	828
14-3:4.3	New Technological Uses .....	829
14-3:4.4	Safe Harbors for Online Service Providers (OSPs).....	829
14-3:5	Remedies .....	829
14-3:5.1	Injunctions.....	829
14-3:5.1a	Preliminary Injunctions.....	829
14-3:5.1b	Permanent Injunctions .....	830
14-3:5.1c	Compulsory Licensing .....	831
14-3:5.2	Statutory Damages .....	831
14-3:5.3	Actual Damages .....	832
14-3:5.4	Infringer's Profits .....	832
14-3:5.5	Criminal Liability .....	832
14-3:5.6	Statute of Limitations.....	833
14-4	TRADEMARK LITIGATION .....	833
14-4:1	Sources of Protection.....	833
14-4:2	Federal Requirements.....	834
14-4:2.1	The Lanham Act Definition of Trademark .....	834
14-4:2.2	Distinctiveness Requirement (Classifications of Marks).....	834
14-4:2.3	Registration .....	836
14-4:3	Texas Trademark Act.....	838

## Table of Contents

14-4:4	Loss of Rights (Genericism) .....	840
14-4:5	Infringement Claims .....	840
14-4:5.1	Likelihood of Confusion .....	842
14-4:5.2	Dilution .....	843
14-4:5.3	Contributory Infringement .....	845
14-4:6	Defenses .....	846
14-4:6.1	Fair Use/Use in Limited Area .....	846
14-4:6.2	Fraudulent Acquisition.....	847
14-4:6.3	Abandonment.....	848
14-4:7	Remedies .....	848
14-4:7.1	Injunctions.....	848
14-4:7.2	Actual Damages .....	849
14-4:7.3	Infringer’s Profits .....	849
14-4:7.4	Remedies Under the Texas Trademark Act.....	850
14-5	TRADE SECRET LITIGATION.....	851
14-5:1	Source of Protection.....	851
14-5:2	Definition of a Trade Secret.....	852
14-5:3	Secrecy.....	854
14-5:4	Misappropriation.....	855
14-5:5	Remedies .....	857
14-5:5.1	Injunctions.....	857
14-5:5.2	Damages .....	859
14-5:6	Statute of Limitations.....	860
14-5:7	Court Preservation of Trade Secrets—Participation in Proceedings.....	860
14-5:8	Texas Theft Liability Act .....	862
 <b>Chapter 15: Ethics.....</b>		<b>865</b>
15-1	INTRODUCTION.....	865
15-2	ETHICAL TRAPS.....	866
15-2:1	Texas Rules vs. the ABA Model Rules .....	866
15-2:1.1	Texas Disciplinary Rules of Professional Conduct vs. American Bar Association Model Rules.....	866
15-2:2	Overview of Texas Grievance Procedures .....	867
15-2:2.1	Procedures Before the State Bar of Texas Grievance Committees.....	867
15-2:2.2	Choosing the Evidentiary Panel of the Grievance Committee.....	871
15-2:2.3	Choosing a Trial in District Court .....	872
15-2:3	Traps and Common Violations .....	872



## Table of Contents

15-2:3.1	Ethical Duties to the Client.....	873
15-2:3.1a	Confidential Information .....	873
15-2:3.1b	Turning-Over the Client’s File.....	875
15-2:3.2	Trust Account Issues.....	876
15-2:3.3	Conflicts of Interest with Clients and Former Clients.....	877
15-2:3.4	Representing Multiple Clients.....	879
15-2:3.5	Dealing with Non-Clients .....	881
15-2:3.6	Fees .....	882
15-2:3.7	Advertising .....	884
15-2:4	Waiver of Conflicts .....	885
15-2:5	The Effect of Ethical Rules in Litigation .....	886
15-2:6	Resources Available to the Practicing Lawyer .....	887
15-3	PRIVITY AND NON-CLIENT EXPOSURE.....	889
15-3:1	Formation of the Attorney-Client Relationship.....	889
15-3:2	Non-Clients Who May Sue a Lawyer.....	890
15-3:3	Assignments of Legal Malpractice Claims.....	891
15-3:4	The Privity Rule.....	897
15-3:4.1	Strict Application of the Rule.....	897
15-3:4.2	Negligent Misrepresentation Claim .....	899
15-3:4.3	Secondary Liability Under the Securities Laws .....	901
15-3:4.4	Suing Opposing Counsel.....	902
15-3:4.5	Claims Against Criminal Attorneys.....	904
15-3:5	Cracks in/Tracks Around the Privity Rule?.....	905
15-3:5.1	Slander Claims.....	905
15-3:5.2	Insurance Defense Counsel Issues.....	909
15-3:5.3	Estate Legal Malpractice Claims .....	915
15-3:5.4	Conclusion.....	918
15-4	MULTIPLE CLIENT REPRESENTATION ISSUES .....	919
15-5	LIMITATIONS.....	921
15-6	CAUSES OF ACTION AGAINST A LAWYER.....	925
15-6:1	Negligence .....	925
15-6:2	DTPA .....	925
15-6:3	Negligent Misrepresentations .....	927
15-6:4	Breach of Fiduciary Duty.....	928
15-6:5	Negligence vs. Breach of Fiduciary Duty.....	931
15-6:6	Suing the Opposing Party’s Lawyer .....	932
15-7	DAMAGES.....	934
15-7:1	Mental Anguish Damages .....	934

## Table of Contents

15-7:2	Fee Forfeiture .....	935
15-7:3	Attorney’s Fees As Damages and Collectibility .....	938
15-8	CONTINGENT FEE PROBLEM AREAS .....	943
15-8:1	Minimizing the Risk .....	952
15-9	ADDITIONAL MISCELLANEOUS THOUGHTS AND MUSINGS .....	953
15-9:1	The Good Faith Rule .....	953
15-9:2	Insurance Issues .....	954
15-9:3	Proximate Cause .....	955
15-9:4	Law Office Issues .....	957
15-10	HOT SPOTS, DANGER ZONES, RED FLAGS .....	961
15-11	PREVENTION AND AVOIDANCE .....	964
CHAPTER 15—APPENDIX A: Proposed Multi-Client		
	Representation Letter .....	967
CHAPTER 15—APPENDIX B: Proposed Prospective Client		
	Letter Rejecting Case .....	971
CHAPTER 15—APPENDIX C: Proposed Hourly Retainer Letter ...974		
CHAPTER 15—APPENDIX D: Top 10 Ways To Avoid		
	Malpractice .....	978
<b>Chapter 16: The Liability Case .....</b>		<b>983</b>
16-1	INTRODUCTION .....	983
16-2	SCRUBBING THE CASE .....	985
16-3	SCULPTING THE PLEADINGS .....	988
16-4	STRUCTURING THE DISCOVERY .....	989
16-5	FOCUS GROUPS AND JURY RESEARCH .....	993
16-6	JURY SELECTION .....	993
16-7	OPENING .....	996
16-7:1	Tell a Story, Do Not Recite Facts .....	996
16-7:2	Use Names in Opening, Not Titles or Pronouns .....	997
16-7:3	Speak in Simple Terms Using Easy Words .....	997
16-7:4	Use Visuals and Demonstratives .....	997
16-7:5	Use Language of the Charge in Opening .....	999
16-7:6	Tell the Whole Story .....	999
16-8	ORDER OF WITNESSES, TESTIMONY, AND EVIDENCE .....	1000
16-8:1	Lead With Your Trump Card .....	1000
16-8:2	Plan on Calling the Opposite Party as an Adverse Witness .....	1000
16-8:3	Have Your Direct Examinations Prepared to the Nth Degree .....	1001
16-8:4	Keep Using Demonstratives .....	1002

## Table of Contents

16-8:5	Keep Objections to a Minimum.....	1003
16-8:6	Honor the Playing Field, But Use the Playing Field .....	1003
16-8:7	Be Smart With Exhibits .....	1004
16-9	CLOSING .....	1005
16-10	CONCLUSION.....	1006

## Chapter 17: Selected Causes of Action Unique to the Oil

	<b>and Gas Industry .....</b>	<b>1007</b>
17-1	INTRODUCTION.....	1007
17-2	BREACH OF IMPLIED COVENANTS.....	1008
17-2:1	Nature of Implied Covenants .....	1008
17-2:1.1	Classification .....	1008
17-2:1.2	Reasonably Prudent Operator Standard .....	1009
17-2:2	Implied Covenant to Develop the Leasehold .....	1010
17-2:2.1	Scope of Duty.....	1010
17-2:2.2	Elements of Claim .....	1011
17-2:2.3	Damages and Other Relief .....	1012
17-2:3	Implied Covenant to Protect the Leasehold Against Drainage.....	1013
17-2:3.1	Scope of Duty.....	1013
17-2:3.2	Elements of Claim .....	1014
17-2:3.3	Damages and Other Relief .....	1015
17-2:4	Implied Covenant to Market.....	1016
17-2:4.1	Scope of Duty.....	1016
17-2:4.2	Elements of Claim .....	1016
17-2:4.3	Damages and Other Relief .....	1018
17-2:5	Implied Covenant to Diligently and Properly Operate.....	1019
17-2:5.1	Scope of Duty.....	1019
17-2:5.2	Elements of Claim .....	1019
17-2:5.3	Damages and Other Relief .....	1020
17-3	SUBSURFACE TRESPASS.....	1021
17-3:1	Nature of the Claim.....	1021
17-3:2	Subsurface Trespass Resulting From Horizontal or Directional Drilling .....	1023
17-3:3	Subsurface Trespass Resulting From Hydraulic Fracturing.....	1025
17-3:4	Geophysical Trespass .....	1027
17-4	LEASE TERMINATION .....	1028
17-4:1	Nature of Lease Termination.....	1028

## Table of Contents

17-4:2	Trespass-to-Try-Title.....	1029
17-4:3	Declaratory Judgment .....	1030
17-4:4	Breach of the Lease .....	1032
17-5	<b>SURFACE DAMAGE CLAIMS .....</b>	<b>1033</b>
17-5:1	The Divided Estate: Severance of Mineral and Surface Estate .....	1033
17-5:1.1	The Mineral Estate Is the Dominant Estate.....	1034
17-5:1.2	Contractual Limitations on Mineral Lessee’s Usage of Surface .....	1034
17-5:2	The Accommodation Doctrine .....	1035
17-5:2.1	Application of the Accommodation Doctrine .....	1036
17-5:2.2	Reasonable Alternative Method of Surface Use.....	1036
17-5:3	Surface Restoration Issues .....	1037
17-5:4	Surface Damage Claims.....	1037
17-6	<b>BREACH OF DUTY BY EXECUTIVE RIGHTS HOLDER .....</b>	<b>1038</b>
17-6:1	Creation of the Executive Right.....	1038
17-6:2	Duties of Executive Right Holder.....	1039
17-6:3	Breach of Duty to Non-Executive .....	1040
17-6:3.1	Breach of Executive Duty by Self-Dealing.....	1040
17-6:3.2	Breach of Executive Duty by Refusal to Lease .....	1041
17-7	<b>POOLING CLAIMS.....</b>	<b>1041</b>
17-7:1	Railroad Commission of Texas Regulatory Scheme .....	1041
17-7:2	Purpose of Pooling .....	1042
17-7:3	Legal Effect of Pooling.....	1042
17-7:4	Voluntary Pooling.....	1043
17-7:5	Compulsory Pooling.....	1044
17-7:5.1	The Mineral Interest Pooling Act .....	1044
17-7:5.2	Required Voluntary Pooling Offer .....	1045
17-7:5.3	Requirements for Compulsory Pooling Order .....	1046
17-7:5.4	Appeal of Compulsory Pooling Order .....	1047
 <b>Chapter 18: Preservation of Error – Appeal Tactics .....</b>		<b>1049</b>
18-1	<b>INTRODUCTION.....</b>	<b>1049</b>

## Table of Contents

18-2	PLEADING .....	1050
18-2:1	Petition .....	1050
18-2:2	Special Exceptions .....	1051
18-2:3	Answer .....	1052
18-3	PRETRIAL MOTIONS.....	1054
18-3:1	Special Appearance.....	1054
18-3:1.1	Basic Requirements of Personal Jurisdiction .....	1055
18-3:1.2	General Jurisdiction and Specific Jurisdiction .....	1055
18-3:1.3	Burdens of Proof .....	1056
18-3:1.4	Preservation of Error—Order of Pleading and Hearing .....	1057
18-3:1.5	Appeals.....	1059
18-3:2	Motion to Transfer Venue.....	1060
18-3:2.1	Objecting to Venue.....	1060
18-3:2.2	Preservation of Error—Order of Pleading and Hearing .....	1060
18-3:2.3	Appeals.....	1061
18-3:3	Motion to Dismiss .....	1062
18-3:4	Plea to the Jurisdiction.....	1062
18-3:5	Motion to Recuse .....	1063
18-3:6	Motion for Summary Judgment.....	1064
18-3:6.1	The “Traditional” Motion for Summary Judgment .....	1064
18-3:6.2	The “No Evidence” Motion for Summary Judgment .....	1065
18-3:6.3	Summary Judgment Evidence.....	1066
18-3:6.4	Responses .....	1066
18-3:6.5	Appeals.....	1067
18-3:7	Motion in Limine .....	1068
18-4	BENCH TRIALS.....	1069
18-4:1	Overview.....	1069
18-4:2	Findings of Fact and Conclusions of Law .....	1070
18-5	JURY SELECTION.....	1071
18-5:1	Specific Questions Refused .....	1071
18-5:2	Specific Questions Allowed .....	1072
18-5:3	Objections to a Judge’s Bias.....	1073
18-5:4	Time Constraints .....	1073
18-5:5	Challenges to Venire Members.....	1074
18-6	TRIAL RULINGS.....	1078
18-6:1	Jury Demand .....	1078

## Table of Contents

18-6:2	Final, Appealable Judgments and Orders .....	1078
18-6:3	Admission and Exclusion of Evidence.....	1080
18-6:3.1	Objections.....	1080
18-6:3.1a	Objections Must Be Timely, Specific and Ruled Upon ....	1080
18-6:3.1b	Continuing Objections Necessary .....	1081
18-6:3.1c	When Evidence Has Limited Admissibility.....	1082
18-6:3.2	Offers of Proof .....	1082
18-6:3.3	Challenges to Experts .....	1083
18-6:3.4	Formal Bills of Exceptions .....	1084
18-6:3.5	Bystanders Bill.....	1085
18-6:4	Directed Verdict.....	1086
18-6:5	Closing Argument.....	1087
18-7	<b>JURY CHARGE</b> .....	1088
18-7:1	Overview of Texas Jury Charge Practice .....	1088
18-7:2	The Jury Charge Conference.....	1088
18-7:2.1	“Informal” and “Formal” Conferences .....	1088
18-7:2.2	Objections and Requests.....	1089
18-7:2.2a	Objections.....	1089
18-7:2.2b	Requests.....	1091
18-7:2.3	Relaxing the Error Preservation Rules ...	1092
18-7:3	Special Issues.....	1093
18-7:3.1	Valid and Invalid Theories of Recovery .....	1093
18-7:3.2	Importance of Error Preservation.....	1094
18-7:3.3	Deemed Findings.....	1094
18-7:3.4	Incomplete Verdicts and Inconsistent Findings.....	1095
18-8	<b>POSTTRIAL MOTIONS</b> .....	1096
18-8:1	Motion for Judgment on the Verdict.....	1096
18-8:1.1	Overview and Procedure .....	1096
18-8:1.2	Appellate Review .....	1096
18-8:2	Motion for Judgment Notwithstanding the Verdict .....	1097
18-8:2.1	Overview.....	1097
18-8:2.2	Procedure.....	1098
18-8:2.3	Appellate Review .....	1098
18-8:3	Motion for New Trial .....	1099
18-8:3.1	Overview.....	1099

## Table of Contents

	18-8:3.2	Procedure.....	1100
	18-8:3.3	Appellate Review .....	1101
18-8:4		Motion to Modify, Correct or Reform the Judgment .....	1101
	18-8:4.1	Overview.....	1101
	18-8:4.2	Procedure.....	1101
	18-8:4.3	Appellate Review .....	1102
18-8:5		Motion for Remittitur.....	1103
	18-8:5.1	Overview.....	1103
	18-8:5.2	Procedure.....	1103
	18-8:5.3	Appellate Review .....	1104
18-8:6		Motion for Judgment Nunc Pro Tunc.....	1105
	18-8:6.1	Overview.....	1105
	18-8:6.2	Procedure.....	1106
	18-8:6.3	Appellate Review .....	1106
18-8:7		Request for Findings of Fact and Conclusions of Law .....	1107
	18-8:7.1	Overview.....	1107
	18-8:7.2	Procedure.....	1107
	18-8:7.3	Appellate Review .....	1109
18-9		APPEALS .....	1110
18-9:1		Appellate Jurisdiction .....	1110
18-9:2		Types of Appeals .....	1110
	18-9:2.1	Appeals From Final Judgments .....	1111
	18-9:2.2	When Is Judgment “Rendered” .....	1113
	18-9:2.3	Interlocutory Appeals.....	1114
18-9:3		Perfecting the Appeal.....	1117
	18-9:3.1	Notice of Appeal .....	1117
	18-9:3.2	Docketing Statement .....	1119
18-9:4		Appellate Record .....	1120
	18-9:4.1	Clerk’s Record .....	1120
	18-9:4.2	Reporter’s Record .....	1121
18-9:5		Suspending the Judgment .....	1123
	18-9:5.1	Agreement to Suspend Judgment.....	1123
	18-9:5.2	Superseding the Judgment Via Appellate Security.....	1123
	18-9:5.3	Suspension of Judgment by Governmental Entities.....	1125
	18-9:5.4	Suspending Execution by Injunction.....	1126
18-9:6		Challenges to Legal and Factual Sufficiency of the Evidence.....	1126
18-9:7		Briefs .....	1127

## Table of Contents

18-9:7.1	Appellant’s Brief .....	1127
18-9:7.2	Appellee’s Brief .....	1131
18-9:7.3	Appellant’s Reply Brief .....	1132
18-9:8	Motion Practice .....	1132
18-9:8.1	Particular Motions.....	1134
18-9:8.2	Deadlines for Motions to Extend Time .....	1135
18-9:9	Oral Argument and Submission.....	1136
18-9:10	Opinion and Judgment .....	1137
18-9:11	Motions for Rehearing and En Banc Reconsideration .....	1139
18-9:11.1	Motion for Rehearing .....	1139
18-9:11.2	Motion for En Banc Reconsideration ....	1140
18-9:12	Mandate .....	1141
18-9:13	Appellate Timetable.....	1142
18-10	<b>SUPREME COURT REVIEW</b> .....	1147
18-10:1	Jurisdiction .....	1147
18-10:2	Petitions for Review .....	1147
18-10:2.1	Purpose.....	1147
18-10:2.2	Requirements of Procedure and Form ...	1149
18-10:2.3	Contents .....	1151
18-10:2.4	Response to Petition for Review.....	1156
18-10:2.5	Reply to Response to Petition for Review .....	1158
18-10:3	Direct Appeals.....	1159
18-10:4	Briefs on the Merits .....	1160
18-10:5	Appellate Record .....	1162
18-10:6	Oral Argument and Submission.....	1163
18-10:7	Opinion and Judgment .....	1164
18-10:8	Motions for Rehearing.....	1165
18-10:9	Mandate .....	1167
18-10:10	Supreme Court Timetable—Petition for Review.....	1168
18-11	<b>ORIGINAL PROCEEDINGS</b> .....	1172
18-11:1	Overview.....	1172
18-11:1.1	Writ of Mandamus .....	1173
18-11:1.1a	Clear Abuse of Discretion.....	1173
18-11:1.1b	No Adequate Remedy by Appeal.....	1174



## Table of Contents

	18-11:1.1c	Special Situations Where Mandamus Is Used in Business Litigation .....	1174
	18-11:1.2	Writ of Prohibition .....	1175
	18-11:1.3	Writ of Injunction .....	1176
18-11:2	Procedure.....		1176
	18-11:2.1	Parties to an Original Proceeding.....	1176
	18-11:2.2	The Original Proceeding Action.....	1177
	18-11:2.3	Preparation of the Mandamus Record...	1177
	18-11:2.4	Temporary Relief.....	1178
	18-11:2.5	Court’s Ruling on a Petition for Extraordinary Relief .....	1179
<b>Chapter 19: Speech Based Torts: Libel, Slander, Business</b>			
		<b>Disparagement and Invasion of Privacy .....</b>	<b>1181</b>
19-1	INTRODUCTION.....		1181
19-2	WHEN TO FILE A LIBEL ACTION .....		1184
	19-2:1	Retraction Statutes .....	1185
	19-2:2	Self-Help Remedies.....	1187
19-3	WHERE TO FILE A LIBEL ACTION .....		1188
	19-3:1	State or Federal .....	1188
	19-3:2	District or County Court .....	1189
	19-3:3	Venue.....	1189
	19-3:4	Personal Jurisdiction.....	1189
19-4	WHAT TO ALLEGE.....		1191
	19-4:1	New Pleading Standard Under TRCP 91a and <i>Twombly</i> and <i>Iqbal</i> .....	1191
	19-4:2	Elements of the Cause of Action .....	1192
	19-4:2.1	Publication.....	1192
	19-4:2.2	Of and Concerning Plaintiff, Including Businesses and Groups .....	1194
	19-4:2.3	False Statement of Fact Not an Opinion .....	1196
	19-4:2.4	Defamatory, Libel Per Se and Defamatory Impressions.....	1200
	19-4:2.5	Fault .....	1205
	19-4:2.5a	Public Figures and Public Officials .....	1207
	19-4:2.5b	Private Figures .....	1210
	19-4:2.5c	Media Defendants.....	1210
	19-4:2.5d	Private, Plaintiff, Non- Media Defendant, Subject	

## Table of Contents

	Not a Matter of Public Concern .....	1213
	19-4:2.5e Deceased Persons .....	1213
19-4:2.6	Proximate Cause .....	1213
19-4:2.7	Damages .....	1213
	19-4:2.7a Presumed Damages .....	1213
	19-4:2.7b “Actual Damages,” Including Reputational and Pain and Suffering .....	1215
	19-4:2.7c Special Damages .....	1216
19-4:3	Punitive Damages .....	1216
19-4:4	Equitable Relief .....	1216
19-5	<b>THE CITIZENS PARTICIPATION ACT (ANTI-SLAPP STATUTE) .....</b>	<b>1219</b>
19-5:1	What Triggers the TCPA? .....	1220
19-5:2	When to File .....	1224
19-5:3	What the Plaintiff Must Prove .....	1225
19-5:4	When the Judge Must Rule .....	1226
19-5:5	The Consequence of Not Ruling .....	1227
19-5:6	Discovery While the Motion Is Pending .....	1227
19-5:7	Interlocutory Appeal .....	1228
19-5:8	Sanctions .....	1229
19-5:9	Attorney’s Fees .....	1230
19-6	<b>SPECIAL EXCEPTIONS AND MOTION TO DISMISS UNDER RULE 91A .....</b>	<b>1231</b>
19-7	<b>THE ANSWER .....</b>	<b>1232</b>
19-8	<b>AFFIRMATIVE DEFENSES .....</b>	<b>1232</b>
19-8:1	Limitations .....	1232
	19-8:1a Discovery Rule .....	1233
	19-8:1b Truth .....	1234
19-8:2	Privileges .....	1234
	19-8:2a Statutory .....	1234
	19-8:2b Common Law .....	1235
19-8:3	Immunity .....	1236
19-8:4	Invited Publication .....	1236
19-8:5	Consent .....	1237
19-8:6	Communications Decency Act .....	1237
19-9	<b>DISCOVERY .....</b>	<b>1238</b>
19-10	<b>WHAT LAW APPLIES .....</b>	<b>1240</b>
19-11	<b>THE MOTION FOR SUMMARY JUDGMENT .....</b>	<b>1241</b>

## Table of Contents

19-12	INTERLOCUTORY APPEAL OF THE DENIAL OF SUMMARY JUDGMENT .....	1241
19-12:1	Constitutionality of the Act.....	1242
19-12:2	Who Is a Member of the Press Entitled to Protection?.....	1242
19-13	TRIAL .....	1243
19-14	POST TRIAL ISSUES .....	1244
19-14:1	Take Down Notices .....	1244
19-14:2	Collection of Fees.....	1245
19-15	SLANDER.....	1245
19-16	SLANDER DISTINGUISHED FROM LIBEL.....	1245
19-17	BUSINESS DISPARGEMENT .....	1246
19-18	BUSINESS DISPARGEMENT DISTINGUISHED FROM LIBEL AND SLANDER .....	1247
19-19	STATUTE OF LIMITATIONS .....	1247
19-20	DAMAGES.....	1247
19-21	INVASION OF PRIVACY.....	1248
19-21:1	Intrusion.....	1248
19-21:2	Misappropriation/Right of Publicity .....	1249
19-21:3	False Light.....	1250
19-21:4	Publication of Private Embarrassing Non-Newsworthy Facts .....	1250
19-22	THE VEGGIE LIBEL STATUTE .....	1252
19-23	SPECIAL PROBLEMS RAISED BY THE INTERNET .....	1253
19-24	APPELLATE ISSUES .....	1253
	<b>Chapter 20: Third-Party Litigation Financing.....</b>	<b>1255</b>
20-1	INTRODUCTION: WHAT IS THIRD-PARTY LITIGATION FINANCING?.....	1255
20-1:1	Overview.....	1255
20-1:2	The Litigation Financing Market .....	1258
20-1:2.1	Consumer Claims .....	1258
20-1:2.2	Commercial Litigation Financing.....	1260
20-1:2.3	Lending to Law Firms .....	1262
20-1:3	Criticisms of Third-Party Financing.....	1263
20-2	LEGALITY OF LITIGATION FINANCING .....	1269
20-2:1	Champerty, Maintenance, and Barratry.....	1269
20-2:1.1	Control .....	1275
20-2:1.2	Purpose.....	1277
20-2:1.3	Baseless Litigation .....	1278
20-2:2	Usury.....	1279

## Table of Contents

20-2:3	Fee Splitting.....	1282
20-3	DUTIES IN THE FINANCING CONTRACT.....	1287
20-4	EFFECT ON THE LAWYER-CLIENT RELATIONSHIP.....	1289
20-5	IMPACT ON THE LITIGATED MATTER .....	1292
20-5:1	Discovery: Relevance of Deal Documents .....	1292
20-5:2	Discovery of Underlying Documents: Privilege and Work Product.....	1294
20-5:2.1	Common interest doctrine .....	1296
20-5:2.2	Work Product vs. Privilege Waiver Standards.....	1298
<b>Chapter 21: Business Divorce.....</b>		<b>1301</b>
21-1	INTRODUCTION.....	1301
21-2	GOVERNING ORGANIZATIONAL DOCUMENTS .....	1302
21-3	OWNERSHIP STRUCTURE.....	1304
21-3:1	Majority/Minority .....	1305
21-3:2	50/50 and Supermajority Situations .....	1306
21-3:2.1	Deadlock .....	1307
21-3:2.1a	Receivership .....	1307
21-3:2.1b	Provisional Director .....	1309
21-3:2.1c	Dissolution.....	1310
21-4	CONTRACTUAL EXIT RIGHT .....	1311
21-4:1	Redemption Rights and Buy-Sell Agreements .....	1312
21-4:1.1	Different Types of Buy-Sell Agreements.....	1313
21-4:2	Valuation Issues.....	1315
21-4:2.1	Valuation Approaches.....	1316
21-4:2.2	Asset Approach .....	1317
21-4:2.3	Market Approach .....	1317
21-4:2.4	Income Approach .....	1318
21-4:2.5	Adjustments Made for the Specific Ownership Interest.....	1318
21-4:2.6	Personal Goodwill .....	1318
21-4:2.7	Minority Discount and Control Premium .....	1319
21-4:2.8	Lack of Marketability.....	1319
21-5	NO CONTRACTUAL EXIT RIGHT .....	1320
21-5:1	Books and Records Requests .....	1321
21-5:1.1	Shareholder .....	1322
21-5:1.2	Member of LLC .....	1323

## Table of Contents

	21-5:1.3	Limited Partner .....	1324
	21-5:1.4	Partner .....	1324
	21-5:1.5	Governing Persons .....	1325
21-5:2	Claims .....		1326
	21-5:2.1	Shareholder Oppression.....	1326
	21-5:2.1a	Court Ordered Buy-Out Pre- <i>Ritchie</i> .....	1327
	21-5:2.1b	Post- <i>Ritchie</i> Shareholder Oppression .....	1329
	21-5:2.1b1	Review of <i>Ritchie</i> – Majority and Dissenting Opinions .....	1330
	21-5:2.1b2	Additional Supreme Court Decisions Impacting Private Company Owners...	1333
	21-5:2.2	Derivative Claims .....	1334
	21-5:2.2a	Procedures Applicable to Closely Held Companies and LLCs .....	1336
	21-5:2.2a1	Damages in Close Corporation Suits Can Be Paid Directly to the Minority Shareholder.....	1339
	21-5:2.2b	Procedures Applicable to Partnerships .....	1340
	21-5:2.2c	Recovery of Fees and Costs .....	1340
	21-5:2.2d	Breach of Fiduciary Duty.....	1341
	21-5:2.2e	Potential Buyout Right.....	1343
	21-5:2.3	Breach of Contract .....	1344
	21-5:2.4	Fraud.....	1345
	21-5:2.5	Texas Securities Act .....	1347
	21-5:2.6	Implied Partnership .....	1347
21-6	SETTLEMENT.....		1349
	21-6:1	Scope of Release .....	1349
	21-6:2	Interest Transferred .....	1350
	21-6:2.1	Ownership of Entity .....	1350
	21-6:2.2	Commission and Other Payments Obligations .....	1350
	21-6:2.3	Intellectual Property .....	1350
	21-6:3	Timing of Transfer.....	1351

Table of Contents

21-6:4 Security for Delayed Payments ..... 1351

21-6:5 Other Contractual Relationships ..... 1352

21-6:6 Tax Consequences ..... 1352

21-6:7 Non-Competition Requirement ..... 1352

21-6:8 Disclaimer of Reliance..... 1352

**Chapter 22: Innovations to Improve Jury Trials in Texas ..... 1355**

22-1 INTRODUCTION..... 1355

22-2 LIMITING THE LENGTH OF TRIALS ..... 1357

    22-2:1 Summary ..... 1357

    22-2:2 Empirical Studies..... 1358

    22-2:3 Current Usage ..... 1360

    22-2:4 Legal Support ..... 1360

22-3 PRELIMINARY SUBSTANTIVE INSTRUCTIONS..... 1363

    22-3:1 Summary ..... 1363

    22-3:2 Empirical Studies..... 1364

    22-3:3 Current Usage ..... 1365

    22-3:4 Legal Support ..... 1365

22-4 JUROR-POSED QUESTIONS..... 1367

    22-4:1 Summary ..... 1367

    22-4:2 Empirical Studies..... 1367

    22-4:3 Current Usage ..... 1369

    22-4:4 Legal Support ..... 1370

22-5 PRE-VOIR DIRE JURY QUESTIONNAIRES ..... 1371

    22-5:1 Summary ..... 1371

    22-5:2 Empirical Studies..... 1373

    22-5:3 Current Usage ..... 1374

    22-5:4 Legal Support ..... 1375

22-6 OPENING STATEMENTS BEFORE VOIR DIRE ..... 1376

    22-6:1 Summary ..... 1376

    22-6:2 Empirical Studies..... 1377

    22-6:3 Current Usage ..... 1378

    22-6:4 Legal Support ..... 1378

22-7 INTERIM ARGUMENTS BY COUNSEL ..... 1378

    22-7:1 Summary ..... 1378

    22-7:2 Empirical Studies..... 1379

    22-7:3 Current Usage ..... 1380

    22-7:4 Legal Support ..... 1380

22-8 BACK-TO-BACK EXPERTS ..... 1381

    22-8:1 Summary ..... 1381

    22-8:2 Empirical Studies..... 1382

    22-8:3 Current Usage ..... 1382

## Table of Contents

22-8:4	Legal Support .....	1383
22-9	JUROR DISCUSSION OF EVIDENCE BEFORE DELIBERATION .....	1383
22-9:1	Summary .....	1383
22-9:2	Empirical Studies.....	1384
22-9:3	Current Usage .....	1385
22-9:4	Legal Support .....	1385
22-10	CONCLUSION.....	1386
<b>Chapter 23: E-Discovery .....</b>		<b>1387</b>
23-1	INTRODUCTION AND THE SEDONA CONFERENCE.....	1387
23-2	USEFUL SECONDARY SOURCES.....	1393
23-3	TERMINOLOGY.....	1399
23-4	RULES ADDRESSING DISCOVERY (INCLUDING E-DISCOVERY) .....	1417
23-4:1	Texas Rules of Civil Procedure .....	1417
23-4:1.1	Texas Rule of Civil Procedure 166 .....	1418
23-4:1.2	Texas Rule of Civil Procedure 191.2 .....	1418
23-4:1.3	Texas Rule of Civil Procedure 192.3 .....	1418
23-4:1.3a	Texas Rule of Civil Procedure 192.3(a) .....	1418
23-4:1.3b	Texas Rule of Civil Procedure 192.3(b) .....	1418
23-4:1.4	Texas Rule of Civil Procedure 192.4 .....	1419
23-4:1.4a	Texas Rule of Civil Procedure 192.4(a) .....	1419
23-4:1.4b	Texas Rule of Civil Procedure 192.4(b) .....	1419
23-4:1.5	Texas Rule of Civil Procedure 196.4 .....	1419
23-4:2	Federal Rules of Civil Procedure .....	1420
23-4:2.1	Federal Rule of Civil Procedure 1 .....	1420
23-4:2.2	Federal Rule of Civil Procedure 16 .....	1420
23-4:2.3	Federal Rule of Civil Procedure 26 .....	1421
23-4:2.4	Federal Rule of Civil Procedure 34 .....	1422
23-4:2.5	Federal Rule of Civil Procedure 37 .....	1423
23-4:3	Federal Rules of Evidence .....	1424
23-4:3.1	Federal Rule of Evidence 902(13) .....	1424
23-4:3.2	Federal Rule of Evidence 902(14) .....	1425
23-4:4	Texas Cases Addressing E-Discovery .....	1425
23-4:4.1	<i>In re Weekley Homes</i> .....	1426
23-4:4.2	<i>In re State Farm Lloyds</i> .....	1429

## Table of Contents

23-5	PRESERVATION OF ELECTRONIC INFORMATION ...	1431
23-5:1	When the Duty Arises.....	1431
23-5:2	Substantial Chance of Litigation.....	1431
23-5:3	Material and Relevant Evidence.....	1433
23-5:4	Proportionality.....	1433
23-5:5	Duties of Inside and Outside Counsel.....	1434
23-5:6	Litigation Hold.....	1435
23-5:7	Who Gets a Litigation Hold.....	1435
23-5:8	When to Send a Litigation Hold.....	1436
23-5:9	Preserving and Collecting Your Client's Data.....	1436
23-5:10	Preservation Letter.....	1437
23-5:11	Who Gets a Preservation Letter.....	1437
23-5:12	When to Send a Preservation Letter.....	1438
23-6	DOCUMENT PRODUCTION.....	1438
23-6:1	How to Request and Respond/Object to ESI Documents.....	1438
23-6:1.1	Requests for ESI Documents.....	1438
23-6:1.2	Respond/Object to Requests for ESI Documents.....	1439
23-6:2	Cooperation and Proportionality.....	1440
23-6:2.1	Texas Rules.....	1441
23-6:2.2	Federal Rules.....	1441
23-6:3	ESI Protocol.....	1442
23-6:4	Form of Production.....	1443
23-6:4.1	Native Format.....	1444
23-6:4.2	Static Format.....	1444
23-6:5	Responses and Objections to Requests for ESI Documents.....	1444
23-6:5.1	Two Types of Objections: General and Specific.....	1445
23-6:5.1a	General objections.....	1445
23-6:5.1b	Specific objections.....	1445
23-7	OUTSIDE E-DISCOVERY VENDOR CONSIDERATIONS.....	1446
23-7:1	Online Storage.....	1448
23-8	PRIVILEGE & INADVERTENT WAIVER.....	1450
23-8:1	Texas Rules and Cases.....	1450
23-8:2	Federal Rules and Cases.....	1452
23-8:3	Language of Federal Rule of Evidence 502.....	1454
23-9	USING E-DISCOVERY IN LITIGATION.....	1456
23-9:1	Document Review.....	1456
23-9:1.1	Methods of Document Review.....	1456



## Table of Contents

	23-9:1.1a	Manual review.....	1456
	23-9:1.1b	Data filtering.....	1457
	23-9:1.1c	Clustering or grouping documents.....	1457
	23-9:1.1d	Technology-assisted review...	1457
23-9:2		Authentication.....	1457
23-9:3		Self-Authentication.....	1458
	23-9:3.1	Texas Rules.....	1458
	23-9:3.2	Federal Rules.....	1459
23-9:4		Electronic evidence.....	1460
	23-9:4.1a	E-mail.....	1460
	23-9:4.1b	Text messages.....	1460
	23-9:4.1c	Social network postings.....	1461
	23-9:4.1d	Digital photographs.....	1461
23-10		SPOLIATION.....	1461
	23-10:1	Duty to Preserve.....	1462
	23-10:2	Culpability.....	1462
	23-10:3	Relevance/Prejudice.....	1463
		23-10:3.1 Relevance.....	1463
		23-10:3.2 Availability of other evidence.....	1464
	23-10:4	Sanctions.....	1464
	23-10:5	A Note About Spoliation Jury Instruction.....	1467
CHAPTER 23—APPENDIX A: Summaries of Articles from the Sedona Conference.....			1469
<b>Chapter 24: Construction Litigation.....</b>			<b>1501</b>
24-1		INTRODUCTION.....	1501
	24-1:1	Four Threshold Construction Law Litigation Issues.....	1502
	24-1:2	One Other Important Construction Litigation Issue.....	1503
24-2		CERTIFICATES OF MERIT.....	1503
	24-2:1	Introduction.....	1503
	24-2:2	Claims For Which a Certificate of Merit is Required.....	1504
	24-2:3	Parties Required to File a Certificate of Merit.....	1506
	24-2:4	Qualifications Required to Submit a Certificate of Merit.....	1507
		24-2:4.1 Licensure Requirements.....	1507
		24-2:4.2 “Actively Engaged” Requirement.....	1508
		24-2:4.3 Knowledge Requirement.....	1508

## Table of Contents

	24-2:4.3a Evidence Required to Satisfy the Knowledge Requirement.....	1509
	24-2:4.3b The Degree of Specialization Required to Satisfy the Knowledge Requirement.....	1510
	24-2:4.4 Practical Considerations for Selecting an Expert to Submit a Certificate of Merit .....	1511
24-2:5	The Certificate of Merit’s “Factual Basis” Requirement .....	1512
24-2:6	Exception to the Contemporaneous Filing Requirement .....	1513
24-2:7	Mandatory Dismissal for Failure to File a Valid Certificate of Merit .....	1514
24-2:8	Appealing a Certificate of Merit Ruling.....	1516
24-3	<b>STATUTES OF LIMITATIONS AND STATUTES OF REPOSE.....</b>	<b>1519</b>
24-3:1	Introduction .....	1519
24-3:2	Statutes of Limitations .....	1519
24-3:3	Statutes of Repose .....	1521
	24-3:3.1 Statutes of Repose Generally.....	1522
	24-3:3.2 Construction Law Specific Statutes of Repose in Texas .....	1522
	24-3:3.3 Individuals Not Covered by Construction Statutes of Repose .....	1524
	24-3:3.4 Defining Improvements Under the Texas Statutes of Repose .....	1525
	24-3:3.5 Raising a Statute of Repose Defense.....	1526
	24-3:3.6 Statutes of Repose as a Substantive Right.....	1526
	24-3:3.7 Constitutional Challenges to Statutes of Repose.....	1527
24-4	<b>ECONOMIC LOSS RULE .....</b>	<b>1528</b>
24-4:1	Introduction .....	1528
	24-4:1.1 What is the Economic Loss Rule? .....	1528
	24-4:1.2 Application to Defective Products .....	1529
	24-4:1.3 Application to Negligent Services .....	1532
24-4:2	Exceptions to the Economic Loss Rule .....	1534
	24-4:2.1 Intentional Torts.....	1534
	24-4:2.2 Special Relationships .....	1535

## Table of Contents

	24-4:2.3	“Other Property” .....	1536
	24-4:2.4	Out-of-Pocket Expenses.....	1537
	24-4:2.5	Post-Contractual Misrepresentation .....	1538
24-4:3		Recent Developments and Outstanding Issues.....	1539
	24-4:3.1	No Exception Where Damages are Not “Other Property” .....	1539
	24-4:3.2	Misappropriation is an Exception to the Economic Loss Rule Where a Duty is Outside of a Confidentiality Agreement .....	1540
	24-4:3.3	Implied Warranty May be an Exception to the Economic Loss Rule ...	1541
24-5		INTERPLAY BETWEEN CHAPTERS 33 AND 82.....	1542
	24-5:1	Introduction .....	1542
	24-5:2	Responsible Third Parties .....	1543
	24-5:3	Chapter 82 Indemnity.....	1545
	24-5:4	Chapters 33 and 82 Interplay .....	1546
24-6		EMPLOYER LIABILITY FOR ACTS OF AN INDEPENDENT CONTRACTOR.....	1548
	24-6:1	Third-Party Over Actions .....	1548
	24-6:2	Employer Duties and Liabilities Under the Common Law .....	1549
	24-6:2.1	Duties Owed by the Employer .....	1549
	24-6:2.2	Causes of Action for Negligence and Premises Liability.....	1550
	24-6:2.3	No Duty to Ensure That the Independent Contractor Performs Safely .....	1551
	24-6:3	Common Law Exceptions to the No-Liability Rule .....	1553
	24-6:3.1	Employer Liability for Negligent Selection of Contractor .....	1553
	24-6:3.2	The Employer’s Control Gives Rise to a Duty of Care .....	1554
	24-6:3.2a	Employer Control: General Principles.....	1554
	24-6:3.2b	Conduct That Does Not Amount to Control .....	1557
	24-6:3.2c	Conduct That Gives Rise to a Narrow Duty of Care... ..	1558
	24-6:3.3	The Importance of Contractual Language.....	1559

## Table of Contents

	24-6:3.3a Contractual Language That Protects the Employer .....	1559
	24-6:3.3b The Importance of Pass-Through Provisions .....	1560
24-6:4	Employer Liability Under Texas Civil Practice & Remedies Code Chapter 95 .....	1561
	24-6:4.1 Procedural Aspects .....	1561
	24-6:4.2 Applicability .....	1563
	24-6:4.2a Chapter 95 Also Applies to Claims Based on the Owner's Negligence .....	1563
	24-6:4.2b Chapter 95 Does Not Apply to Owner's Employees .....	1563
	24-6:4.3 Who is a Contractor and What Work Qualifies Under Chapter 95 .....	1564
	24-6:4.4 The Scope of an Improvement .....	1564
	24-6:4.5 Actual Knowledge Under Chapter 95 ....	1566
24-6:5	Jury Charge and Related Issues.....	1567
<b>Chapter 25: Tactical Considerations in Modern Business Trials.....</b>		<b>1569</b>
25-1	INTRODUCTION.....	1569
25-2	CORPORATE REPRESENTATIVES: YOUR BEST WITNESS .....	1570
	25-2:1 The Corporate Representative Mistake.....	1570
	25-2:2 Modern Function of the Corporate Representative Deposition .....	1571
	25-2:3 Using Corporate Representative Deposition at Trial .....	1573
	25-2:3.1 Corporate Representative Deposition Admissible Against Corporation .....	1573
	25-2:3.2 Additional Steps Required to Prevent Organization From Changing Position .....	1573
	25-2:4 Presenting a Winning Corporate Representative .....	1574
25-3	EXPERTS: RE-CHALLENGE AT TRIAL.....	1576
	25-3:1 The Expert Challenge Mistake.....	1576
	25-3:2 Re-Challenge Experts During Trial.....	1577
	25-3:2.1 Legal Reasons.....	1577
	25-3:2.2 Practical Reasons.....	1577
25-4	PLAINTIFFS & DAMAGES: GET ON BASE .....	1578
	25-4:1 The Greedy Plaintiff Mistake .....	1578

## Table of Contents

25-4:2	Weak Damages Theories Threaten Your Judgment .....	1579
25-4:3	Weak Damages Theories Hurt Your Credibility.....	1581
25-5	<b>DEFENDANTS &amp; LIABILITY: GOOD IS BETTER THAN PERFECT.....</b>	<b>1582</b>
25-5:1	The Perfect Defendant Mistake .....	1582
25-5:2	Perfection Is Not the Legal Standard.....	1583
	25-5:2.1 Contract Cases.....	1583
	25-5:2.2 Employment Cases .....	1583
25-5:3	Don't Promise Perfection .....	1584
25-6	<b>CONTENTION INTERROGATORIES: LAY TRAPS FOR TRIAL .....</b>	<b>1585</b>
25-6:1	The Interrogatories Mistake.....	1585
25-6:2	Obtaining Useful Interrogatories for Trial .....	1585
	25-6:2.1 Draft Good Interrogatories .....	1585
	25-6:2.2 Move to Compel on Objections and Answers .....	1586
25-6:3	Using Interrogatories at Trial.....	1586
25-7	<b>TRIAL EVIDENCE: DON'T RELY ON DISCOVERY .....</b>	<b>1587</b>
25-7:1	The Discovery Crutch Mistake .....	1587
25-7:2	Alternative Sources of Evidence and Admissibility.....	1588
	25-7:2.1 Publicly Filed Financial Statements.....	1588
	25-7:2.2 Prior Court Filings .....	1588
	25-7:2.3 Social Media .....	1589
	25-7:2.4 Patents & PTO Documents.....	1590
	25-7:2.5 Industry Reports.....	1590
25-8	<b>TRIAL EVIDENCE: PLAN AHEAD FOR <i>M-I</i> HEARINGS.....</b>	<b>1591</b>
25-8:1	The <i>M-I</i> Hearing Mistake.....	1591
25-8:2	Protecting Trade Secret Evidence under TUTSA ....	1591
25-8:3	Protecting Confidential Information.....	1593
25-8:4	Strategic Considerations for Protecting Trial Evidence.....	1593
25-9	<b>TECHNICAL CONCEPTS: EXPLAIN IT CLEARLY, ONCE .....</b>	<b>1594</b>
25-9:1	The KISS Mistake .....	1594
25-9:2	Texas Juries by the Numbers.....	1595
25-9:3	Provide One Organized Explanation of a Concept.....	1596

**Table of Contents**

25-10 EMOTIONS & POWERFUL EVIDENCE: DON'T  
OVERDO IT ..... 1596  
25-10:1 The Soapbox Mistake ..... 1596  
25-10:2 Keep Your Indignation Below the Jury's ..... 1597  
25-10:3 Limit Exposure to Powerful Evidence ..... 1598  
25-11 THE TRIAL TEAM: USE YOUR BENCH ..... 1598  
25-11:1 The One-Man Show Mistake ..... 1598  
25-11:2 Use Young Lawyers ..... 1599  
25-11:3 Strategic Use of Trial Team ..... 1599  
25-12 CONCLUDING THOUGHTS: TRIAL  
EXPERIENCE IS IRREPLACEABLE ..... 1600  
CHAPTER 25—APPENDIX A ..... 1601  
CHAPTER 25—APPENDIX B ..... 1604

**Table of Cases ..... 1607**

**Index ..... 1729**