The College Bulletin

News for Members of the College of the State Bar of Texas **Spring 2013**

Staying Balanced By Staying Involved

From the Chair

Leta Parks

My last column asked for feedback on how you keep your lives balanced amid the many demands—both professional and personal—on your time. I was gratified to hear from many of you. It's nice to know people actually take the time to read this *Bulletin*. I know from personal experience how easy it is to toss items we receive into a corner on our desk, thinking we will get to it later, only to discover it weeks later under a pile of unread papers.

One of the consistent comments from readers was that they liked the positive approach of balance. Rather than waiting until we are dealing with the aftermath of an "unbalanced" life—i.e. substance abuse, depression, loss of families, etc., let's talk about avoiding those problems in the first place.

The February issue of the *Texas Bar Journal* discusses this topic in several articles. The focus of the issue is retirement, but the advice there applies to lawyers at every stage of the profession. Stay balanced—through focusing on family, exercise, eating right, and participating in Bar-related activities.

Our State Bar President, Buck Files, emphasizes in his Opinion column that an important part of staying balanced is being involved in Bar-related activities throughout one's professional life. I agree. It's easy to argue that constraints prohibit a balanced life, especially during the middle years—when one is raising children and reaching the height of a busy legal career. Also, this is often when many families are struggling with elderly parents who need attention—the "sandwich generation." No one can deny the incredible stress this creates.

However I've been impressed by lawyers who continue to stay involved in volunteer work throughout their professional lives, and how they manage their time. They do two things consistently – they don't waste time and they don't compartmentalize. We all know what wasting time means; whether we want to give up the time-wasters in our lives is another issue.

As for not compartmentalizing, I'm talking about looking for ways to meet a number of needs through a single activity instead of assuming that different needs require separate time commitments. Look for ways to incorporate family time, volunteer time, community service, or professional networking in one activity. For example, local bar associations often have such activities as tree-planting and Habitat for Humanity home building days. Lawyer groups, churches, or service organizations often sponsor fun runs or games, where exercise can be combined with family time, faith, or professional service.

Another great opportunity for combining family time with professional responsibilities is coming up July 18-20. The College of the State Bar will host the **15th Annual Summer School** in Galveston. Held at the beautiful Moody Gardens Hotel, Spa and Conference Center, Summer School lets you earn 18.5 CLE hours while your families enjoy the beaches, gardens, and local attractions. It's also a great chance to network, see old friends and get up to date on the latest changes in major areas of the law. I hope to see you there! ■

Magna Carta: Foundation of American Liberty

By Chad Baruch

FOR MORE THAN 200 YEARS, Americans have viewed Magna Carta as the wellspring of their liberty. The Great Charter thunders down through the centuries as the progenitor of American legal rights, and each year thousands of Americans flock to London's British Museum for a personal glimpse of the famous relic. But despite countless tomes discussing and dissecting it, Magna Carta has—almost from its inception—engendered more myth than fact.

To the extent they know anything about it at all, most Americans think of Magna Carta as a carefully-designed blueprint for limiting English royal power and ensuring some degree of democratic governance. But this idealized version bears only a fleeting resemblance to the truth. Magna Carta was—at least initially—an abject failure; intended to secure peace, it fomented civil war. How Magna Carta came from such humble beginnings to its exalted place in history is a compelling story with roots in the Norman conquest of England.

In 1066, William, the Duke of Normandy (in present-day France), invaded England and defeated Harold, last of the Saxon kings. While still controlling Normandy, William eventually subdued enough of England to claim rule over most of the territory stretching from Scotland to the English Channel.

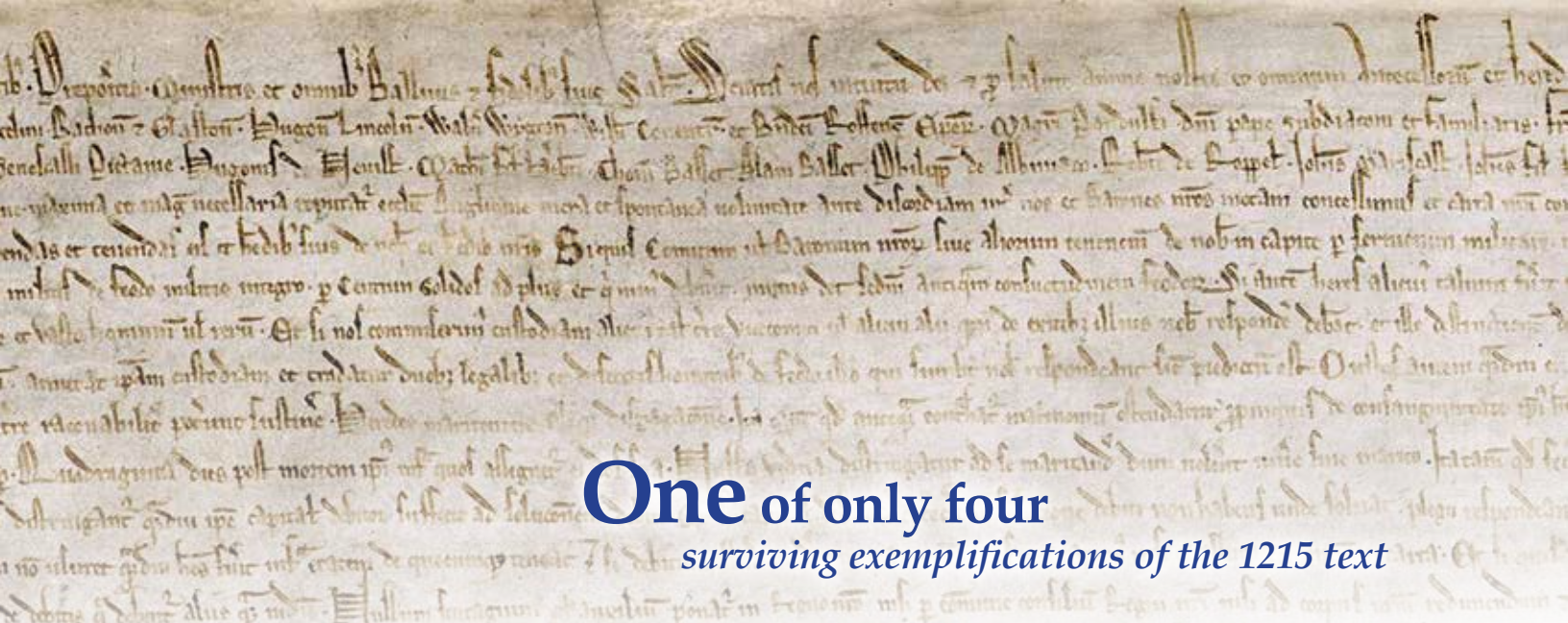
Along with his formidable army, William ferried across he Channel French notions of government and society. In England he instituted a societal structure based on the entrenched French system of feudalism, a hierarchical scheme with the king at its top and serfs at its bottom, with each person in the hierarchy owing allegiance and service to the person above him.

William died in 1087, leaving rule of his vast territories divided among his three sons, William Rufus, Robert, and Henry, with the unpopular Rufus inheriting control of England. When a hunter accidentally (or so he claimed) shot and killed Rufus, Henry I became sovereign of England. One of his principal contributions to English history was siring a daughter, Matilda, who ultimately birthed one of the England's greatest rulers, King Henry II, first of the Plantagenet line that governed England for the better part of 300 years.

Henry's principal problem during his reign was administering and maintaining order in his vast territories on both sides of the English Channel. This he accomplished largely through the force of his dominating personality and manic energy. Henry's frenetic royal court traveled frequently to the corners of his kingdom and focused on establishing lasting mechanisms for its administration and justice system. While Henry's territories were vast—extending into Scotland, Ireland, Wales, and France—his hold over them was at times tenuous, particularly on the French side of the Channel and in the northern-most reaches of England. Solidifying and maintaining his control of these far-flung holdings would consume Henry for the rest of his life.

Henry's heavy administrative load did not prevent him from fulfilling the kingly function of ensuring a male heir to this throne, as he and his wife, the legendary beauty Eleanor of Aquitane, had numerous children. Two of these children would sit on the throne, and one of them would affix his seal to Magna Carta.

The story of Magna Carta begins in the earnest with the divided kingdom ruled by Henry II and Eleanor. During



One of only four
surviving exemplifications of the 1215 text

Henry's later years, Eleanor fomented rebellion against him by their son, Richard, who was just beginning to build the reputation for skill in battle that would lead history to remember him as Richard Coeur-de-Lion ("the Lion-Heart"). In this rebellion, Richard received assistance from young French King Phillip II, a ruthless and clever politician who ascended the throne determined to fracture King Henry's cross-Channel empire. Forced to come to terms with the upstarts, Henry expressed his anger by telling Richard, "God grant that I may not die till I have had a fitting revenge on you." The following day, Henry was broken-hearted to discover that his youngest and favorite son, John, was also involved in Richard's insurgency. Henry died a broken man only days later and Richard, he of the deep blue eyes and movie-star aura, became King of England.

No sooner was Richard crowned than he departed his kingdom on a Crusade to the Holy Land, leaving England at the mercy of inept ministers. Throughout Richard's absence, John intrigued wildly against his brother. Early in the year 1193, England received the news that Richard, while en route home from the Crusade, had been taken prisoner in Germany. Duke Leopold of Austria, who still nursed a grudge against Richard from a personal insult, captured the English monarch and sold him to Emperor Henry VI. Upon hearing the news, John declared his brother dead and himself king.

John's efforts to displace Richard met with little success. At Eleanor's urging, the English government put down John's rebellion and reached a settlement for Richard's release. Young, dashing, and beloved, Richard returned, poised to rule England for many years. John set about the task of rebuilding his reputation and faithfully serving his brother. But fate intervened in John's favor. In April 1199, while laying siege to a poorly-defended castle, Richard carelessly walked within crossbow range without wearing his armor. An arrow struck his shoulder, and Richard succumbed to gangrene ten days later. The following month, John was crowned King of England at Westminster Abbey.

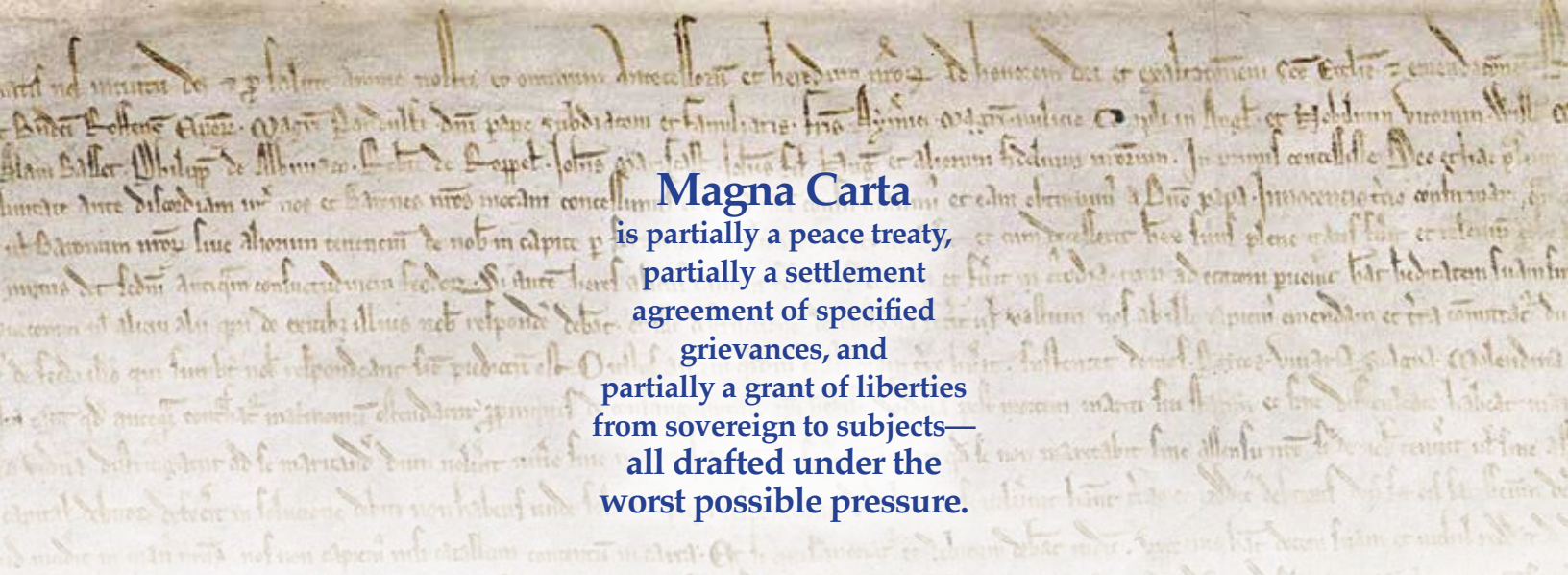
John had little time to rest on his throne. Phillip, continuing to stalk English possessions in France, attacked Normandy almost immediately upon learning of Richard's death. John achieved initial success against Phillip, but he alienated his Norman supporters.

John also faced a fiscal crisis. Henry II had left Richard in good financial condition, but Richard's wars quickly dissipated the treasury. Early in John's reign, inflation spiked suddenly and sharply, affecting rich and poor alike. John's constant and increasingly oppressive fundraising began to irk his subjects. Barons resented the growing financial burdens placed upon them to pay for the war. The more creative John's government became in wrestling funds from the barons, the more resentful the barons became. John was becoming an unpopular King pursuing an unpopular war through unpopular taxes and assessments.

John's hold over the Crown was so tenuous that, in 1212, he had to cancel an invasion of Wales for fear the barons would revolt in his absence. That same year, John learned several barons were plotting to assassinate him. The following year, John mounted an expedition against northern barons who had refused to support his war in France, but relented after the personal intervention of the Archbishop of Canterbury.

By 1214, John faced outright rebellion among English barons. In addition to an unpopular and expensive war, John's personality alienated many of his most powerful barons. Cruel and ruthless, John seduced his subjects' wives and daughters and had a reputation for political intrigue and murder that was substantial even by the forgiving standards of the day. His coffers were depleted, his revenues declining, his prestige at an all-time low. He was on a downhill slide toward Magna Carta.

In 1215, the barons formally renounced their allegiance to the King and marched on London. When London—the crown jewel of England—surrendered without resistance, John's situation turned desperate. The loss of his capital city persuaded John of the need to reach terms with the rebels. Of course, John had little intent of permanently



Magna Carta is partially a peace treaty, partially a settlement agreement of specified grievances, and partially a grant of liberties from sovereign to subjects—all drafted under the worst possible pressure.

conceding anything to the barons. But he needed a—at least temporary—stop to the hostilities, during which he could reform his army in hopes of crushing the rebellion once and for all.

The site chosen for the historic meeting was Runnymeade, a meadow convenient both to John's headquarters and the barons' camp on the other side of the Thames River. The two sides debated the precise terms of their agreement for several days. A number of the barons objected to making any peace with John. Though most finally were persuaded to accept the terms, a group of northeastern barons refused and left the conference. After three or four days, the remaining barons and the King reached an agreement for peace. The barons declared anew their homage to John and ended their hostilities.

Historians still differ over the precise course of negotiations and drafting, but Magna Carta represents the distillation of substantial discussions among the barons about their complaints, coupled with John's political need for compromise. Magna Carta, then, is partially a peace treaty, partially a settlement agreement of specified grievances, and partially a grant of liberties from sovereign to subjects—all drafted under the worst possible pressure, essentially a battlefield document prepared under crisis conditions.

Magna Carta addresses a wide array of topics. Several provisions essentially confided feudalism as the English practiced it at the time. Other provisions forbade the selling of justice and pledged that justice would not be denied or delayed to anyone. To claim this provision as a guarantee of equal protection is an overstatement, but the concept that the courts were available to both rich and poor points in that direction.

When it comes to a direct link between Magna Carta and American constitutional law, the closest parallel is in the Great Charter's method for guaranteeing enforcement of its provisions and protections. Magna Carta provided for the barons to elect a committee of 25 to act as keepers of the charter. To redress a violation, a citizen had simply to bring the transgression to the attention on this group, which had the power to "redress" it. But this group lacked any power to act without first receiving a complaint. In this notion we find the historical origins of the right to petition. Indeed, these enforcement provisions were among the lengthiest in Magna Carta, demonstrating the importance the barons attached to them.

Just one month after signing Magna Carta, John petitioned Pope Innocent III to release him from its obligations. The Pope obliged, declaring the concessions "illegal and unjust" and claiming they were forced upon John by "violence and fear." John's duplicity in almost immediately seeking to evade the requirements of Magna Carta is astonishing. But he was hardly alone in his double-dealing. A number of barons, frustrated at John's retention of his throne, continued their hostilities toward the Crown.

Pope Innocent III's incendiary letter voiding Magna Carta caused the civil war to erupt again. John waged war for a year, pursuing his barons while also fighting against a French invasion. Though things initially went poorly for John, his efforts gained steam as the barons grew disenchanted with the French king. But a year into the campaign, John contracted dysentery and died in October 1216. The war ended shortly thereafter and advisors to John's successor, young Henry III, reissued Magna Carta. The rehabilitation of the Great Charter's reputation had begun. ■

CHAD BARUCH *is an appellate attorney in the Dallas area and a member of the State Bar College Board of Directors. He is a longtime teacher of government and constitutional law.*

Judge Aliseda Appointed to UT Board of Regents

Governor Rick Perry has appointed State Bar College board member Judge Ernest Aliseda to The University of Texas System Board of Regents. Judge Aliseda, of McAllen, is managing attorney of Loya Insurance Group, a municipal judge for the City of McAllen, and a Major in the U.S. Army Reserves Judge Advocate General Corps.

"I deeply appreciate the dedication of each member of The University of Texas System Board of Regents, who are charged with overseeing the universities within the system. These volunteers sacrifice time away from their families and their careers on behalf of past, current and future students, enhancing the mission of the system and ensuring academic excellence and accountability to taxpayers," said Governor Perry.

Judge Aliseda said, "I would like to thank Governor Perry for nominating me to the Board of Regents. My roots are deep in the Rio Grande Valley and my selection reflects the commitment Governor Perry has to this important region. I hope to be an effective advocate and voice for all the state, and I feel I bring to the table the Valley's unique needs and ambitions for The University's expansion in South Texas."

Judge Aliseda is a former state district judge for both the 139th and 398th State District Courts in Hidalgo County. In addition to serving on the Board for the College of the State Bar, Aliseda is a member of the Texas Military Preparedness Commission and a board member of the Council for South Texas Economic Progress, vice president of the McAllen Citizen's League, and a volunteer judge for the McAllen Teen Court Program. Also, he is a past member of the State Bar of Texas Board of Directors, and past president of the Hidalgo County Bar Association.

Aliseda took classes at Pan American University, now The University of Texas–Pan American, and received a bachelor's degree from Texas A&M University. He received a law degree from the University of Houston Law Center, and is board certified by the Texas Board of Legal Specialization in personal injury trial law.

Judge Aliseda's appointment is a term set to expire in 2019. The appointment is subject to Senate confirmation.

Merianne Gaston Earns CAE Credential

The American Society of Association Executives has announced that Merianne Gaston, Managing Director of the College, has earned the Certified Association Executive (CAE®) credential. The CAE is the highest professional credential in the association industry. Less than five percent of all association professionals have earned the CAE.

To be designated as a Certified Association Executive, an applicant must have a minimum of three years experience in nonprofit organization management, complete a minimum of 100 hours of specialized professional development, pass a stringent examination in association management, and pledge to uphold a code of ethics. To maintain the certification, individuals must undertake ongoing professional development and activities in association and nonprofit management. 3,900 association professionals currently hold the CAE credential. The CAE program is accredited by the National Commission for Certifying Agencies (NCCA.)

Early in her career, Merianne worked in the restaurant/catering business at the Capitol Oyster Bar, which at that time was next door to the Texas Law Center. In fact, a former State Bar employee recruited her to apply for a position in the Bar's Professional Development Program (PDP), which later became TexasBarCLE. For 21 years Merianne utilized her organizational ability and communication skills with volunteer attorneys and staff, working her way up to Senior Program Planner. When the Bar College's Coordinator, Betty Saunders, retired in 2009, Merianne came on board, assuming additional responsibilities and becoming its Managing Director.

Beware the Boilerplate

By Linda Stahl

YOU'VE JUST SETTLED A BIG CASE OR NEGOTIATED A TRANSACTION, and the client is eager to sign papers by week's end. No problem; just plug the major terms into the last such document you drafted, customize where necessary, and hit print. You don't even worry about those boilerplate provisions at the back – they never change, right? Wrong! Hiding at the back of almost every contract is the Clark Kent of contract clauses. It's there most all the time and you hardly even notice it, but it packs a punch – the *merger clause.*

What is a Merger Clause?

A merger clause states that the written terms of a contract may not be varied by prior agreements, because all such agreements have been merged into the written document. *IKON Office Solutions, Inc. v. Elfert*, 125 S.W.3d 113, 125 n.6 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). A typical merger clause might look something like this:

> *All understandings, representations and agreements heretofore had with respect to this Agreement are merged into this Agreement which alone fully and completely expresses the agreement of the Parties.*

In the presence of a merger clause, a court interpreting the contract (assuming it's not ambiguous) must look only to the agreement itself and disregard any other dealings. That's a pretty powerful little boilerplate provision in the contract world. However, worded properly, it can *also* ward off efforts to avoid the contract by alleging fraud.

Negating Reliance

In *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997), the Texas Supreme Court held that the following merger clause, contained in a *post-dispute* release agreement, negated reliance and thus precluded a claim that the settlement was induced by fraud:

> [E]ach of us expressly warrants and represents and does hereby state . . . and represent . . . that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that *none of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment* and each has been represented by . . . as legal counsel in this matter.

A decade later the Court extended the ability to disclaim reliance to a settlement agreement resolving both past and future claims, where the disclaimer of reliance was "all-embracing." *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008).

Neither *Schlumberger* nor *Forest Oil* addressed whether a claim for fraud in the inducement could be negated by a disclaimer of reliance contained in a *pre-dispute* agreement. However, in 2011 the Texas Supreme Court came pretty close to addressing that issue in *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323 (Tex. 2011).

Italian Cowboy involved a lease containing a standard merger clause along with the following additional language:

> *14.18 Representations. Tenant acknowledges that neither Landlord nor Landlord's agents,*

employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this lease except as expressly set forth herein.

The Court (with three justices dissenting) held these provisions did not cut off a fraud in the inducement claim for two reasons. First, the contractual language expressed an intent to have a standard merger clause only. Second, even if the parties intended to negate reliance, the lease did not do so by "clear and unequivocal language" — the standard set in *Schlumberger*. However, the Court implied that with the right "magic words," a merger clause in a lease could negate reliance. Because a lease is entered into before any dispute between the parties, it "should be all the more clear and unequivocal in effectively disclaiming reliance and precluding a claim for fraudulent inducement . . . ."

To be safe, you might want to include language both **expressly disclaiming reliance** on any representations and **releasing any claims** of "fraud in the inducement of this Agreement."

Since *Italian Cowboy*, Texas courts have grappled with just how exacting a pre-dispute disclaimer of reliance must be. In *Dragon Fish LLC v. Santikos Legacy Ltd.*, No. 04-11-00682-CV (Tex. App.—San Antonio, May 2, 2012, no pet.), the San Antonio Court of Appeals considered whether the following clause barred a claim of antecedent fraud:

> *Landlord and Tenant hereby acknowledge that they are not relying upon any brochure, rendering, information, representation or promise of the other, or an agent or broker, if any, except as may be expressly set forth in this lease.*

The court held this provision barred a suit by commercial tenants against their landlord and the developer claiming that in marketing materials and elsewhere, the tenants had been fraudulently told there would be residences in the development to support retail traffic.

The Houston Court of Appeals has considered similar clauses, and in each case has scrutinized both the language used by the parties and the circumstances surrounding contract formation. For example, in *Fazio v. Cypress/GR Houston I, L.P.*, 2012 WL 3524842, (Tex. App.—Houston [1st Dist.] Aug. 16, 2012, no pet.), a real estate investor (Fazio) purchased a big-box store location from the defendant whose sole tenant was the retailer Garden Ridge. Both the letter of intent and the purchase agreement provided that the seller would deliver all documents relating to the property, including the Garden Ridge lease. The seller failed to disclose, however, that Garden Ridge had engaged an agent to restructure its leases, and had requested a 30% rent reduction due to financial difficulties. After the purchase, Garden Ridge filed for bankruptcy and rejected the lease.

The purchase agreement disclaimed reliance on "the truth, accuracy, or completeness of the Documents or the source(s) thereof," and stated that "except with respect to express warranties made in this Agreement, Purchaser shall rely solely upon its own investigation with respect to the property." A jury ruled in favor of Fazio on his fraudulent inducement claim, but the trial court entered a JNOV in favor of the seller based on the disclaimer of reliance.

The court of appeals reversed, holding the disclaimer was not a clear and unequivocal waiver of reliance on the seller's full disclosure. Rather, because the term "Documents" was defined as six distinct categories of information, the disclaimer was limited to reliance on the content of those documents only. Moreover, the court held it was unreasonable as a matter of law to read the disclaimer as waiving Fazio's right to rely on the seller's fulfillment of its common law and contractual obligations to disclose all material information in its possession about the Garden Ridge store. In short, Fazio didn't have a claim if the information it received was inaccurate; but it still had a claim for the seller's outright refusal to deliver documents relevant to the transaction that made its partial disclosures misleading.

In reaching this conclusion, the *Fazio* court distinguished its holding in *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2012, pet. filed), where it held that a minority shareholder in an oil and gas company who had redeemed shares for a price much lower than the actual value of the company had no claim for fraud. The agreement in *Allen* expressly disclaimed reliance on the accuracy of the reserve report and included a release of any claims based on a determination that the value of the shares at closing were more or less than the redemption price. Even with this language, however, the court allowed the shareholder's claim that he had been defrauded about the state of horizontal drilling technology and the company's leasing program.

So precisely what type of disclaimer language is most likely to defeat a fraudulent inducement claim? To be safe, you might want to include language both expressly disclaiming reliance on any representations and releasing any claims of "fraud in the inducement of this Agreement." *E.g.*, *Texas Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 2012 WL 6725614 (Tex. App.—Houston [14th Dist.] Dec. 28, 2012, no pet.). Whatever route you choose, draft carefully.

Combining "As-is" Provision and a Reliance-Negating Merger Clause

Lawyers involved in real estate transactions are familiar with a type of limited disclaimer of reliance—the "as-is" clause. What they may not consider is how a merger clause disclaiming reliance and an as-is clause can interact.

When a client purchases or leases commercial property "as is," the buyer/tenant agrees to make its own appraisal of the bargain and accepts the risks of the agreement. *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995). In *Prudential*, the Texas Supreme Court approved the enforcement of "as is" clauses *as long as the buyer is not induced by fraud* into accepting the "as is" provision.[1] An "as is" agreement negates the causation element essential to recovery on DTPA theories, fraud, negligence, and breach of the duty of good faith and fair dealing. *Id.*

It stands to reason that if an "as is" clause can only be defeated if procured by fraud, having a disclaimer of reliance in the merger clause makes the "as is" clause practically bulletproof. While no cases appear to have dealt with the interaction between these two provisions,[2] I would expect the result to be fatal to any attempt by a tenant/buyer to avoid the as-is provision on grounds of antecedent fraud.

Bottom line: Whichever contracting party you represent, be sure to read over the merger and as-is provisions and understand what they really mean -- especially in combination. ■

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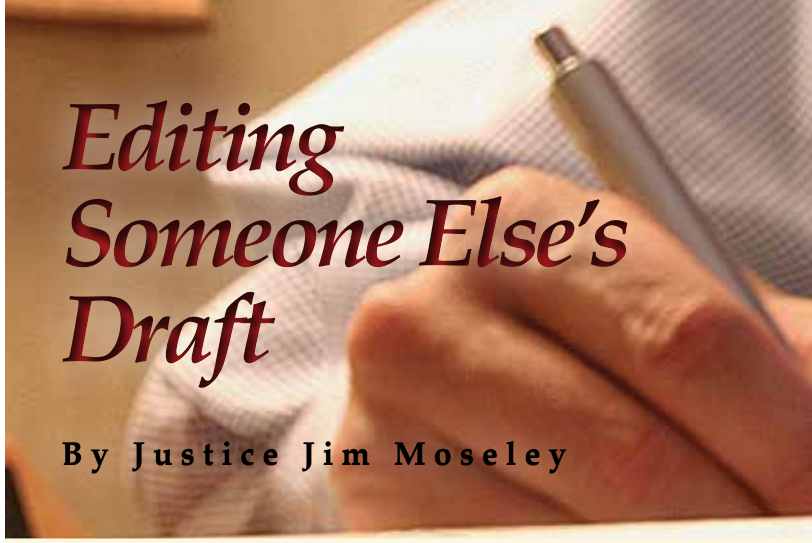
1 The Court in Prudential did leave open the possibility that other circumstances besides fraudulent inducement might warrant disregarding an "as is" clause. Courts generally consider five factors in making this assessment: (1) the sophistication of the parties, (2) the terms of the "as is" agreement, (3) whether the "as is" agreement was freely negotiated, (4) whether the agreement was an arm's length transaction, and (5) whether there was a knowing misrepresentation or concealment of a known fact. *Procter III v. RMC Capital Corp.*, 47 S.W.3d 828, 833 (Tex.App.—Beaumont 2001, no pet.) (distilling *Prudential* into five-factor test). Although not an independent factor, whether the buyer was represented by counsel is also important. *See id.* at 833-34.

2 The *Fazio* case discussed above considered the opposite scenario. It held that where a contract clause purporting to negation reliance did ***not*** bar a fraud in the inducement claim, the presence of an as-is clause does not change the result.



Editing Someone Else's Draft

By Justice Jim Moseley

YOUR ASSOCIATE BRINGS YOU A DRAFT. You start reading, but before you finish the third page you grab a pencil and tear into the text, wondering why you delegated the draft in the first place. Hard experience (because you've been here before) could have told you it would have been faster to just do it yourself. Isn't there a better way?

The answer is yes, but it will take some thought, effort, and discipline on your part. That's because editing someone else's work really involves two goals. The immediate goal is getting the written product out the door. However, the more important goal is to improve your associate's ability to produce good text efficiently.

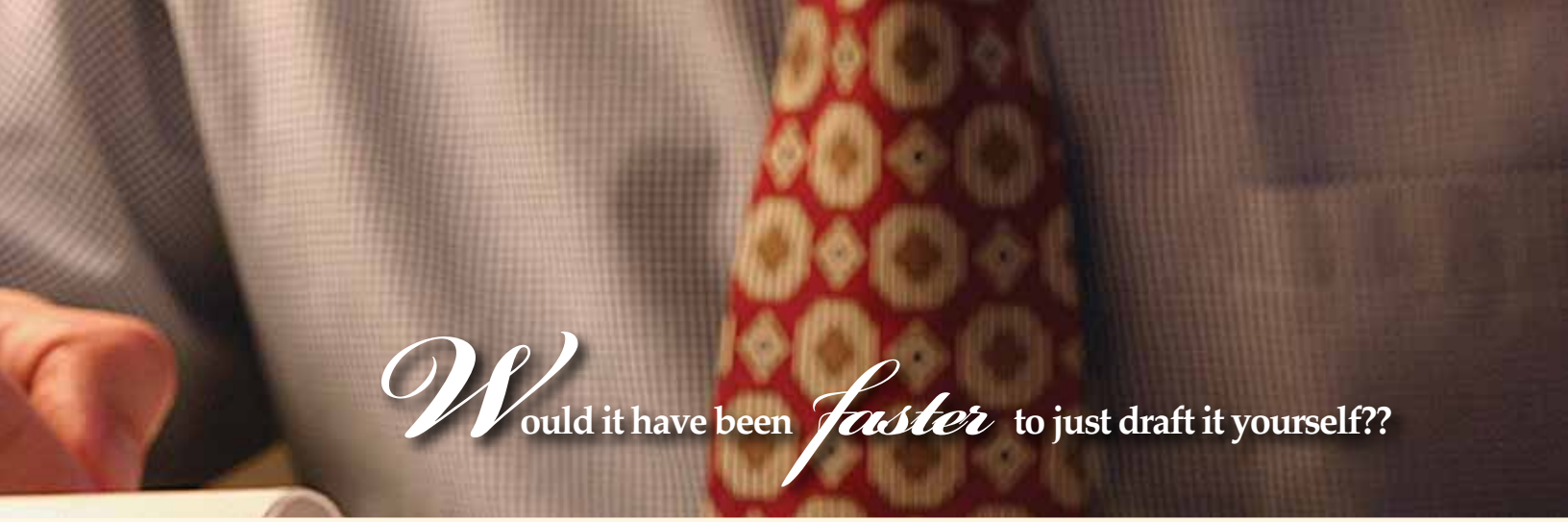
Here are some suggestions for accomplishing both goals.

1. **Start early.** Accomplishing both goals will take some time, and both of you will have to juggle other time commitments. It's your job to plan ahead. Give yourself and your associate time to succeed.

2. **The mindset.** You need to establish a collaborative relationship with those helping you, not an adversarial one. Communicate that relationship from the very beginning. Let your associate know you're "in this together," and that just as you are relying on him for part of the project, he can rely on you to make sure things stay on track.

3. **Explain the big picture.** When you first discuss the project, talk about both the work *product* and the work *process*.

    - ***The product.*** Explain what is being produced, when it's due, and how it fits into the bigger picture—the lawsuit, the closing, the client relationship, whatever. (Your associate will be better motivated if she understands why her work is important.) On a related point, make sure your associate knows she'll have an opportunity to provide strategic input into the project.



- *The process.* Map out how you expect the work will be done. Explain the various phases of the project and who is responsible for what during each phase. Go over the various editing steps (see below), and explain your priority at each step. Also, discuss the rough time frame involved in each step and make sure your associate blocks out enough time to work on the project.

4. **The hand-off.** Have your associate repeat back to you—verbally or in an abbreviated written format, the goal, scope, and process of the project. (You don't want to wait ten days to discover he was confused about the assignment.) Decide whether you expect an outline before a draft. Also, assemble in advance the documents and information he will need to get started. Better yet (if he's up to it), ask him what information he needs, giving guidance as to what is needed and where to find it (or at least where to look for it) only as needed.

5. **Schedule feedback.** At least initially, provide feedback face-to-face. When you schedule a draft deadline, also schedule a feedback session for shortly thereafter. This conveys that your associate's draft is a critical step in the process, and that each deadline is important. (It also keeps the draft from sitting on your desk until the last minute.)

6. **Edit in steps.** Editing involves solving a variety of problems. The order in which you tackle those problems is important. Don't waste time agonizing over sentences and connecting phrases that you'll be rewriting after you've reorganized the document's structure.

   - *Accuracy and organization.* Focus your first draft(s) and edits on "big picture" problems. Is the tone and length right for your intended audience? Are you providing all the information necessary, while omitting the unessential? Will the reader understand the information's significance as soon as he reads it? Just as important, is the information accurate? (Editing inaccurate information is inefficient.) Address these problems first, before you begin polishing the draft.

   - *Flow and clarity.* Use your next draft(s) to polish your text and make it more readable. Do your transitions explain how each point is related to the previous one? Would another word choice be more persuasive? Are you overstating anything?

   - *Repeat steps as needed.* Writing isn't a linear process—it's circular. While polishing you may have to go back and re-think a section of the draft, move around blocks of text, or even add new paragraphs. Editing by steps isn't designed to prevent these necessities, just to minimize them.

   - *Proofreading.* Grammar and punctuation errors distract the reader and undercut your credibility. Proofreading for these is a critical step, but make it the last step.

7. **Marking text.** Your edits shouldn't transform your associate into a scrivener. Where possible, use marginal notes. For example, rather than marking through three paragraphs of text without comment, bracket the text in the margin and ask questions. "Do we need this? All of it? Is this the best place?" Notes like this force your associate to think about how to improve the document. One final note—don't edit in red. You're a team, remember?

■ ■ ■

HON. JIM MOSELEY
is a Justice on the Fifth District Court of Appeals in Dallas.

The Law of Motherhood

By Mike Maslanka

I LOVE EMPLOYMENT LAW. What it says isn't always what it means. Let's talk the law of motherhood. It exists, it's here, and it's now. An employee gives birth. She is terminated while on maternity leave. She sues, alleging a violation of the Pregnancy Discrimination Act (PDA). But the employer asks for dismissal, reasoning that she was not pregnant at the time of termination. Denying summary judgment, the court says that the PDA covers not just pregnancy, but "childbirth" as well. Read all about it in *Canales v Schick Manufacturing*, a 2011 opinion from a federal court on Connecticut.

You are probably thinking that, using this reasoning, the mere intention to become pregnant would be protected as well. Know what? You'd be right. Look at a 2000 case out of the Northern District of Texas, where a female employee at a holiday party casually mentions she and her husband are thinking of starting a family in the new year. Well, the new year brought unemployment, not a bundle of joy. In denying the company's motion for summary judgment, the court held that intention is enough to trigger coverage. *Poucher v Automatic Data Processing, Inc.*

Well, what about the intention to have an abortion as opposed to a child? Give yourself an A+ if you concluded that taking an adverse employment action against an employee for considering an abortion violates the PDA. Because it is a medical procedure relating to childbirth, it too falls within the ambit of the PDA. *Turic v. Holland Hospitality* (6th Cir. 1996)

Speaking of motherhood, the issue of lactation is now before the Fifth Circuit. The Equal Employment Opportunity Commission is appealing a dismissal of a suit it brought alleging an employee was terminated because she intended to express milk at work upon her return from maternity leave. Here is the reasoning: lactation is the yielding of milk; such yielding is a medical condition caused by pregnancy/childbirth; lactation is a related medical condition to pregnancy/childbirth and thus PDA protected. The case, *EEOC v. Houston Funding Ltd. II* (5th Cir. 12-20220), was argued in December, 2012; watch for the opinion.

Surely, you imagine some law, say, oh, the Patient Protection and Affordable Care Act spares us from lactation law. Not quite. The law provides that employers must provide female employees a place other than a bathroom to express milk. And the location must be shielded from view and free from intrusion from other employees and the public. The law does not provide for a private right or action to enforce its terms. *But*, and this is a big but, it empowers an employee to sue for retaliation if she suffers an adverse employment action because she protests the lack of such a facility. It's all laid out in *Salz v Casey's Marketing Co.*, a 2012 case from a federal court in Iowa. And you thought Obamacare was just about health insurance exchanges.

Protection goes to those not just who have given birth or intend to give birth but those who are actually pregnant. No, not via the PDA but the Family and Medical Leave Act. Read 29 C.F.R 825.120 which gives protected leave status to women for pre-natal care. Look at the recent case of *Dean v. The Wackenhut Corp.*, (N.D. Ill. 2011), where the plaintiff was told she would be reprimanded if she took the day off for pre-natal appointment with her doctor. She was also told a few more choice items, as in she was using her pregnancy as a "crutch" and pregnancy is not a serious health care

condition under the FMLA. The first is dumb and the second is wrong–summary judgment granted to the plaintiff.

Another court did not hesitate to grant summary judgment to a plaintiff who sought to take time off for her morning sickness. The employer counted this time as an unprotected absence, and terminated for excessive absenteeism. Again, the employer was operating under the misapprehension that pregnancy and its complications could not be a serious health condition protected by the FMLA. *Wahl v. Seacoast Banking Corp of Florida* (S.D. Fla. 2011). As Mark Twain remarked, it's not what you don't know that hurts you but what you think is so that isn't.

There are limits, as the Fifth Circuit set out in *Puente v. Tom Ridge* (5th Cir. 2009). Upon plaintiff's return to work from giving birth, she asked her employer to extend her two 20–minute breaks to 30 minutes so she would have time to express milk. The employer said sure, but required that she use leave, take leave without pay, or extend her workday to make up the missed time. She sued. Dismissal affirmed because she was asking for a benefit different from what every other employee received. The PDA is not an affirmative action statute.

So said the Fourth Circuit in *Young v. United Parcel Service*, (4th Cir. 2012), where a pregnant employee had a twenty pound lifting restriction, but where UPS had a policy limiting light duty jobs to those employees injured on the job or disabled as defined by the Americans with Disabilities Act. She argued she should have been given one of those jobs. The ACLU chimed in, arguing that the PDA compels employers to grant employers a "most favored nation" status from other employees. This argument rolled up snake eyes, with dismissal affirmed.

There will be more to come. Lots more. Consider the amended version of the Americans with Disabilities Act. While pregnancy is not a disability *per se*, it can be a disability if there are complications that are not transitory. In those circumstances, an employer's legal duty is, contrary to the PDA, an affirmative one, namely, to discuss a reasonable accommodation to the disability with the employee.

What about an employee who asks for time off to undergo *in vitro* because they are unable to conceive because of a physical impairment? Yet another condition covered by the ADA with the attendant requirement of engaging in a reasonable accommodation. And what if a husband is terminated because he wants to accompany his wife to a treatment? The ADA contains protection for those who associate with an ADA–covered employee. (Yes, I spend lots of time thinking about these issues, but someone must.)

So, love your mom, enjoy your next Mother's Day, but know that the legal currents run deep. Very deep. ■

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