MAD AS HELL AND NOT GOING TO TAKE IT ANYMORE: FINDING THE BEST LITIGATOR FOR YOUR CLIENT

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CHAPTER 11

Patrick Carew practices all aspects of complex commercial and products liability litigation in state and federal trial and appellate courts. His experience includes commercial business disputes such as business torts, breach of contract, fiduciary liability, and lender liability; product liability, including novel theories of products as a public nuisance; real estate and mineral interests disputes; and construction litigation. Mr. Carew's trial role in the $80 million jury verdict in favor of a state pension fund was recognized as the largest counterclaim verdict nationally of 2010. He also was a member of the trial team in the highly publicized trial of the *NAACP v. AA Arms, Inc., et al.,* that resulted in a defense verdict and unanimous (12-0) advisory jury verdict of no liability for his client. The National Law Journal recognized the defense win as one of the top 10 defense verdicts of 2003.

He has worked extensively with a wide range of experts at the pretrial and trial phases, including experts in the fields of fiduciary liability, partnership, statistics, real estate and housing economics, forensic accounting, aircraft avionics, aeronautical and mechanical engineering, industrial hygiene, exposure assessment, neurology, molecular and cellular pharmacology, pharmacokinetics, and banking practices.

Mr. Carew has authored or coauthored legal articles related to emerging litigation trends and product liability. He is a member of the Texas and Dallas Bar Associations and was named "2006 Outstanding New Pro Bono Lawyer" by the Dallas Bar Association – Dallas Volunteer Attorney Program.

Before law school, Mr. Carew was a financial analyst for a major aerospace corporation where he performed subcontract cost analysis and negotiation, material cost estimating, and defense contract auditing. As a financial analyst for a national restaurant company, he built rate-of-return models for forecasting new restaurant construction and development costs. Mr. Carew served as a non-commissioned officer in the U.S. Army and is a decorated veteran of the first Iraq war.

CAROL BAVOUSETT MATTICK, P.C., ATTORNEY AT LAW
CORPORATE AND SECURITIES LAW FOR GROWING COMPANIES

CAROL BAVOUSETT MATTICK

Carol Mattick graduated in December 1984 with a law degree and MBA simultaneously from University of Texas at Austin. After a four year stint with a large law firm in San Antonio, Texas, she began a solo law practice dedicated solely to providing corporate and securities law advice to growing companies. Her clients and assignments have included acting as part-time in-house counsel for a medical device company; working with venture portfolio and other companies seeking private equity capital; companies developing intellectual property assets and/or engaged in product development with a "license out" business model; representation of "angel" investors; representation of senior executives with respect to employment and incentive compensation packages as they go from pre- IPO to post-IPO and cashing out those incentive packages; representation of private companies being acquired; and all kinds of contract drafting. Her skill sets include a variety of private equity securities offering work, corporate restructuring or re-organization of private companies, Sales of private companies with annual revenues up to $30 million, licensing agreements and other kinds of business transactions and contracts. Carol has been in solo practice doing this kind of work for twenty plus years.

Although she started her practice in San Antonio, Carol Mattick established a second location in Austin in 1998. The purpose was to take advantage of the large need for corporate legal services in that booming economy. Since then, she has split her time fairly equally between the two cities and between San Antonio and Austin clients. From time to time, she finds herself in a position akin to in-house counsel, bringing together the exact expertise needed by a client and managing the delivery of that expertise.

Ms. Mattick has taught the subjects in which she practices law to MBA level graduate students at UT Austin in the Masters in Science and Technology Commercialization offered by that institution's IC2 Institute. IC2 was founded by George Kozmetsky after his stint as dean of the UT business school and was the original parent organization for the Austin Technology Incubator and the Capital Network.

She has been a member of the planning committee of UT Law's Conference on Securities Regulation and Business Law Problems for many years, has been a speaker at that conference and co-chaired it in 2010; She was a creator and co-chair of the planning committee of UT Law's Private Companies Institute and a speaker at that conference which focuses on companies that intend to remain privately held or only consider acquisition as a retirement or exit option. She has also been featured as a speaker at the State Bar of Texas' courses in Advanced Business Law, the Essentials of Business Law and Representing Small Businesses, making presentations on broker-dealer rule making on the state and federal level and the fundamentals of contract drafting. She has spoken at meetings of the ABA Section on Taxation, Closely Held Businesses committee and the Section on Business Law, State Securities Regulation committee.

Ms. Mattick has been a member of the Securities Law committee of the Business Law Section of the State Bar of Texas for more than a decade and has chaired that committee since 2005. Under Carol's leadership, the Securities Law committee is currently working with state regulators to draft an exemption and registration regime for unregistered financial intermediaries, sometimes known as "finders" or deal consultants. In addition, she has been a member of the Business Law Section's governing council since 2008 and in that role is working on finding and creating content for the Texas Journal of Business Law. She also serves on the advisory group to the Center for Transactional Excellence at South Texas College of Law in Houston. In that role, she advises a program that teaches law students fundamental areas of business law through courses organized around structuring and completing particular kinds of business transactions or deals. Carol was a founding board member of the San Antonio Technology Accelerator Initiative ("SATAI") from its founding in 1999 to 2005.

Carol lives in San Antonio with her husband, Steve, and large hound "Bella". She works in the community with the National Kidney Foundation and the Girl Scouts.

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Business Litigation
Products Liability
Toxic Tort and Environmental Litigation
Appellate and Legal Issues

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Ed Slaughter is Partner-in-Charge of the Dallas office of Hawkins Parnell Thackston & Young LLP.

He has been representing corporations and individuals in high risk litigation for more than fifteen years including asbestos, benzene, and other toxic exposure cases. He has represented defendants as national trial counsel and national coordinating counsel including industrial employers and premises owners, friction product suppliers, retailers of joint compound and equipment manufacturers. Ed has served as lead counsel in trials across the country, including the landmark defense victory in *O'Neil v. Crane et al*, and the recent defense verdict in the Los Angeles mesothelioma trial of *Farag v. Advance Auto Parts et al*. As national coordinating counsel, he manages expert development and retention and national trial preparation. Ed has successfully managed dockets of mass tort cases, obtaining thousands of dismissals without payment in the earliest stages of litigation. Ed has also been actively involved in reshaping the Texas litigation landscape through tort reform. He assisted in drafting legislative proposals and testified before the Texas House Civil Practices Committee to close the loophole that allowed thousands of out-of-state claims to be filed in Texas.

Ed is also a frequent author and invited speaker of various topics, including alternative fee arrangements and developing efficient models for legal project management and cost control in litigation.

Education

J.D., University of Arkansas (1994)
B.A., University of Memphis (1991)

Publications

Co-author, "Spare the Rod and Spoil the Arbitration," *For the Defense* (June 2010)

Co-author, "National Counsel and Alternative Fee Agreements," Dallas Bar Association *Head Notes* (March 2010)

"Is Your Expert a Liar or Does He Really Believe That Garbage?" Chartered Property Casualty Underwriters, Consulting, *Litigation and Expert Witness Newsletter* (January 2010)

"When Experts Lie: The Lawyer's Duties of Advocacy and Candor in Tension," *For the Defense* (July 2009)

Co-author, "Spare the Rod and Spoil the Arbitration," *For the Defense* (June 2009)

"Defense Ethics and Professionalism: Can I Bill for This? A Call for Mentoring in the Modern Law Firm," *For the Defense* (December 2008)

"The Ethics 2000 Commission Amendments to the MPRC," *For the Defense* (2006)

"Aids Phobia: The Infliction of Emotional Distress and the Fear of Aids," 16 *U. Haw. L. Rev.* 143 (1995)

Presentations

"Review of the California Supreme Court's Landmark Decision in O'Neil v. Crane et al.," Harris Martin Federal and State Asbestos Litigation Conference (February 20-21, 2012)

"Gatekeepers & Garbage Men: Challenging Meritless Causation Opinions," Asbestos Defense Strategic Summit (November 9, 2011)

"An Ethical Alternative: Application of the Model Rules of Professional Conduct in Alternative Fee Arrangements," Dallas In-House Summit by Texas Lawyer (October 20, 2011)

"Defeating Claims Against Automobile Component Suppliers," 14th Annual National Asbestos Litigation Conference (October 3-4, 2011)

"Implementing Alternative Fee Agreements--Challenges and Concerns for Clients and Carriers," DRI Lawyers Professionalism & Ethics Committee Webinar (June 22, 2011)

"Deconstructing the Myth of Low Dose Causation in Toxic Tort Cases," In House CLE Series (June 9, 2011)

"Quasi-Intentional Torts & The Erosion of the Exclusive Remedy Provision," 4th Annual Emerging Trends in Asbestos Litigation Conference (April 7-8, 2011)

"Always Be Closing: The ABCs of Delivering Compelling Closing Arguments," Santa Fe Trial Tactics Seminar (January 15, 2011)

"Bending the Iron Triangle: A New Model for Predictability and Cost Control in Litigation." Dallas In-House Summit by *Texas Lawyer* (November 10, 2010)

"Legal Project Management, Achieving Quality Assurance and Cost Control in Litigation," In-House CLE Series (May 9, 2010)

"National Counsel and Alternative Fee Agreements: Aligning the Interests of Attorney and Client," Texas Lawyer Corporate Counsel Summit (April 7, 2010)

Co-chair, *HB Litigation Conferences* Annual Benzene Litigation Conference (July 2009)

"The Government Contractor Defense & The Duty to Warn," *Harris Martin Asbestos Seminar* (2008)

"A Practical Review of Disease Diagnosis and Causation Evidence in Asbestos Litigation," *Defense Research Institute Asbestos Medicine Seminar* (2007)

"Defending Retailers in Silica Litigation," *Defense Research Institute Silica Medicine Seminar* (2005)

"Internet Resources for Your Law Practice," *Arkansas Bar Association* (1999)

"Investigation and Trial of Fire Related Losses Due to Arson or Product Failure," *Arkansas Chapter of Association of Special Investigative Units* (1999)

"Scientific Evidence and Application of the *Daubert* Standard for Scientific Evidence," *Arkansas Bar Association* (1998)

"Winning Your First Trial," *Arkansas Bar Association* (1997, 1996)

Memberships and Affiliations

American Bar Association
Dallas Bar Association
Texas State Bar Association
Arkansas State Bar Association
Defense Research Institute
International Association of Defense Counsel
Counsel on Litigation Management
- Member, Alternative Fee Arrangements Committee
- Member, Environmental & Toxic Tort Committee

Bar Admissions

Arizona
Arkansas
California
Oklahoma
Texas

Courts

The Supreme Court of the State of Texas
The Supreme Court of the State of Arkansas
The Supreme Court of the State of Oklahoma
United States District Court of Arkansas (Eastern & Western Districts)
United States District Court of Texas (Northern, Southern, Eastern & Western Districts)
United States District Court of Oklahoma (Eastern District)
United States Court of Appeals (Eighth & Fifth Circuit)
United States Supreme Court

Professional Honors

International Order of Barristers
Judicial Externship, Honorable Jimm Larry Hendren, United States District Court (Western District, Arkansas)
National Champion, First Amendment Moot Court Competition, Vanderbilt University School of Law, 1994
Martindale-Hubbell AV Rated
Texas Super Lawyer (2007, 2008, 2009, 2010, 2011)

Representative Trials

Thomas Metcalf, et al. v. Parker-Hannifin Corp, et al., San Francisco Superior Court, San Francisco, California (January 2012)

Richard Steiner v. Abex, et al., Santa Barbara Superior Court (August 2011)

Robert Verant v. Allis Chalmers, et al., Los Angeles County Superior Court - Central District, Los Angeles, California (June 2011)

Nasseem and Sanna Farag v. Advance Auto Parts, et al., Superior Court of Los Angeles County, Los Angeles, California (December 2010)

Richard Spencer, et. al. v. Amcord, Inc. et. al., Superior Court of Los Angeles County, Los Angeles, California (November 2010)

Una Miller, et al. v. Alfa Laval, et al., Los Angeles County Superior Court - Central District, Los Angeles, California, BC381085 (November 2009)

Erik Lange, et al. v. Alfa Laval, et al., Los Angeles County Superior Court - Central District, Los Angeles, California, BC396922 (October 2009)

Rebecca Pelletier, et al. v. Alfa Laval, Inc., et al., Los Angeles Superior Court - Central District, Los Angeles, California, Cause No.: BC381497 (June 16, 2009)

Charles and Glenda Cundiff v. Alfa Laval, Inc., et al., Superior Court of California for the County of Los Angeles (2009)

Arleen Pellegal v. Northrop Grumman Ship Systems, Inc. f/k/a Avondale Industries, et al., Civil District Court for the Parish of Orleans, Section 6, Division L, No. 07-7749 (2008)

Barbara J. O'Neil, individually and as successor-in-interest to Patrick J. O'Neil, deceased, et al., BC 360274, Court of the State of California, County of Los Angeles (2008)

Mary Ann Duncan, Individually and as Rep of the Estate of Milton Duncan v. Alfa Laval, Case No. 2006-CP-46-3077, State of South Carolina, Court of Common Pleas, County of York (2008)

Allan Edward and Peggy Wilson v. A.W. Chesterton, et al., Supreme Court, State of New York, County of New York (2008)

Bobby Dale James, et al. v. The Sherwin-Williams Company, Cause No. 03-05383-L, 193rd Judicial District Court of Dallas County, Texas (2007)

Johnny Franklin et al. v. General Motors Corporation, et al., Commonwealth of Kentucky Anderson Circuit Court Civil Branch, No. 04-CI-00274 (2007)

The Vince Hagan Company, Inc. v. The Sherwin-Williams Company, Cause No. 05-05375, 68th Judicial District Court of Dallas County, Texas (2007)

Melba Learn et al. v. Warren Pumps et al., BC 330 606, Court of the State of California, County of Los Angeles (2007)

Stanley A. Racik and Geraldine Racik v. Warren et al., BC 366 520, Court of the State of California, County of Los Angeles (2007)

Paul Verret & Judith Verret v. American Biltrite, Inc., et al., District Court of Tarrant County, Texas (2004)

TABLE OF CONTENTS

HYPOTHETICALS
Essentials of Business Law
"I'm Mad as Hell and I'm Not Going to Take it Anymore:
Hiring a Litigator for your Client"

I INTRODUCTION OF THE SUBJECT

- Patrick Carew
- Ed Slaughter
- Carol Bavousett Mattick

II THE UNPAID SELLER

Terry Trevino was an army medic and served 10 years in the U.S. Army. When he got out of the service, he started a health care staffing company, focusing on the federal government. Over the course of ten-twelve years, he built a business that was creating $35 million in revenues every year. The gross profits on that revenue base were approximately $4.5 million per year. Terry had made it through the perils of starting his company and building the business without any outside equity financing – by saving profits and a succession of conventional financing from factoring of accounts receivable to a bank line of credit.

However, the company was beginning to achieve the size that would be of interest to an acquirer. Terry had a difficult choice because his company was close to the end of the time frame in which it could claim preferential status in bidding for federal contracts. Any acquirer would be concerned about the company's continued ability to maintain or improve on its performance. On the other hand, many similar companies don't survive the post-preference era. Not only is the preference gone, post-preference companies tend to team with companies that still have the preference and are therefore only eligible to perform a maximum of 49% of a contract. That fact, by itself, reduces the revenue opportunities for such a company. At the same time, Terry's company was solid financially, having audited financial statements, a line of credit with a major bank and a top notch executive team including a CFO, General Counsel and Business Development VP. Given all the considerations, Terry decided he wanted to sell now. Terry held 67% of the issued and outstanding stock and two other individuals held the remaining 33%. These were early employees who worked for reduced or no pay in the early days of the company.

The company's CFO recommended that the company try to create an auction by hiring a sell side investment banking firm specializing in federal contractors. Meanwhile, Terry was working his contacts to find potential buyers. In part because of a potentially weakening profile for Terry's company and partially because of a weakening economy, the company considered several overtures sequentially rather than in an auction. Over the course of negotiations with several acquirers, Terry settled on a range of purchase price he wanted to achieve.

On the third try, Terry found Pandora, a company willing to pay his purchase price. Pandora was owned by an East Asian Indian immigrant who owned several federal contracting companies. The two companies went through a letter of intent and started putting together definitive documents. The CFO sent a full set of due diligence questions to Pandora and its owner. The typical set of acquisition documents tends to incorporate a due diligence list for the seller and responses to that list through representations and warranties and exceptions to those reps and warranties in the form of schedules. However, it is also typical for buyers (who are usually drafting the documents) to create a short list of reps and warranties for themselves and try to avoid due diligence as much as possible. Regardless of these tendencies, it is important for the seller to confirm the buyer's financial capabilities especially if there are earnouts involved for the seller. The owner of the seller produced unaudited financial statements for several of his companies, including the seller. Neither the CFO nor the acquisition counsel was comfortable with the information they had on the seller, but the final call whether to go through with the acquisition was Terry's. He decided to go through with it. In the definitive documents, the acquisition counsel negotiated covenants of the seller that: 1) the seller would provide bank financing of comparable quality to that which the seller had had before the acquisition; 2) it agreed to detailed terms of an earnout for Terry in the acquisition agreement itself; and 3) it agreed to enter into separate earnout agreements with those same terms for the two other shareholders and one key employee. There were also typical indemnity provisions under which each party would indemnify the other for its breach of the agreement.

From the day of closing forward there were problems. Although the amounts due at closing were paid as prescribed, the credit facility was not of the same quality as that which the company had had before. Not all accounts receivable accepted under the old line of credit were accepted under the underwriting standards of the new bank and credit facility and, consequently, the total amount of credit available was not as great. The notes payable were paid to the former shareholders on time over a two year period. However, there were earnouts due at the end of the first three fiscal years after closing. The seller did not comply with any of the procedure in the acquisition agreement to determine and resolve disputes about whether the recipients were entitled to the earnouts or the amount of them. Fully half of the total consideration was in the earnouts. The seller and buyer had negotiated to have Terry remain as the President and CEO of his company for a three year period after the closing and left him in charge of the company's finances for the first year. Conversely, if he left, the remaining earnouts were no longer due. During that first year, Terry began to hear rumors that the owner's bank had insisted that he bring in new temporary financial officers for at least one of his other companies.

During the second year, Pandora began to consolidate financial management at the parent company and Terry had less visibility into the finances of the company he formerly owned. At the same time, the former shareholders made a demand for the first year's earnout within sixty days after the time Pandora was supposed to make the initial determination about whether earnouts were owed and four months after the end of the fiscal year in question. As relations between the owner of Pandora and Terry deteriorated during the second year, Terry gave notice that he would be leaving at the end of December -- two and a half years after the closing. During the last month of the second year but before the end of that year, Pandora officials told Terry that they would no longer need his efforts on a day to day basis, that they would like to keep him as a consultant and that they would pay him his same salary through December, the end date he had already set.

After the demand letter was sent to Pandora, setting out several violations of the acquisition agreement, there were many discussions with the acquisition counsel about getting ready for litigation. Pandora seemed to be running Terry's old company into the ground. There were questions whether it would be possible to regain ownership of the company and whether that would be worth the effort once accomplished. Acquisition counsel prepared a summary of the events during negotiations and since closing and sent that along with key documents to a colleague specializing in bankruptcy and receiverships. She also arranged a meeting with the litigator and the four potential litigants to discuss the merits and potential form of a suit. The bankruptcy lawyer was discouraging, both about the ability to get control of the company through a receivership and what would be left if the company were put into bankruptcy.

Terry and the other three earnout recipients still wanted to file suit for monetary damages. The total estimated damages just counting the two earnouts periods were $2 million. However, different potential litigants had different financial capabilities to fund litigation and also different ideas about the best possible profile for a litigator who would represent all of them. Terry had the resources to pay expenses in a contingency fee representation and some fees. He also had the most experience with litigation counsel, both with larger firms and smaller specialized firms. The other three had significantly less financial resources and were definitely more interested in a contingency fee arrangement. One, the former employee, had a strong preference for a buddy of his who was a solo licensed in New York but able to affiliate himself with a Texas firm.

The group asked the acquisition counsel to find, vet and compare several litigators on behalf of the group. The large firm that Terry initially preferred was conflicted out because it was still representing the company on some matters. That firm recommended a smaller firm that was a spin off from a well-known litigation boutique. Also under consideration was a small business litigation firm with whom both Terry and the acquisition counsel were familiar and the buddy of the former employee.

- How does a litigator approach representation of a group of plaintiffs that have mostly the same causes of action? Although the former employee was not a primary signatory to the acquisition agreement, he did sign it as a third party beneficiary.
- Although the acquisition agreement had choice of law and venue in Virginia, Terry's employment agreement was between a Texas resident and a Texas company, applied Texas law but had not venue provision. How might those facts change your answer to the question posed in a) above?

- Is it possible to craft an engagement letter to represent all four and take into account the financial capacity of each?

- What does a business transactional lawyer need to know to knowledgeably access different litigators and their firms?

- How do litigators feel about all of this preliminary activity (a letter threatening to unwind the transaction due to failure of the buyer to provide signature pages to the acquisition agreement; the demand letter; the appraisal by the bankruptcy lawyer) that may affect the litigation? What should the business transactional lawyer be careful about in that situation?

Post script: After a litigator was chosen, the engagement letter signed between the litigator and all four litigants and the case filed in Texas state district court, Pandora's bank counsel contacted the acquisition counsel. Although the bank counsel did not specifically reveal this, it seems that Pandora is in default on its bank loan and part of the collateral for that loan is the stock in Terry's former company. Bank counsel had been told by the owner of Pandora that Terry would try to take back the company for pennies on the dollar of value. Bank counsel wanted to know if and under what circumstances Terry would want to re-purchase the stock of his former company.

- How does this wrinkle affect how a litigator would handle the case? Who should be talking to the bank counsel and why?
- Is that an acceptable resolution for all the people we represent?

III A TEAM OF RIVALS

Jeff Bright was a long time employee in a very capital intensive industry which because of the capital requirements was dominated by less than five (5) companies in the U.S., all of which were very large -- and contained few smaller competitors. Bright worked for one of the largest companies for 25 years, starting in a division centered around a new mobile technology and working on almost every aspect of deployment of the technology within the business from design to manufacture to negotiation of contracts with major vendors to installation of the required infrastructure to management of a sales team.

David Fancher was an engineer who had founded and grown an engineering consulting company that catered to those "other" smaller competitors. Fancher initially hired Bright as a consultant after Bright's early retirement and then as an employee of the engineering consulting firm to lend Bright's big company experience to Fancher's smaller clients. Within a year of Fancher hiring Bright as a consultant, the U.S. Congress determined that this industry was not competitive enough and enacted legislation designed to require the larger established participants to share their infrastructure with new competitors for a fee. Bright saw an opportunity in the new law and made a presentation to Fancher about forming a new competitor which could use the technology infrastructure of the big companies and perhaps partner with them. For a year, Bright worked on the project while being paid by the engineering consulting company.

Fancher formed a Texas LLC (the "Venture Company") to exploit the opportunity and convinced the clients of his engineering consulting firm (the "Client Investors") to provide equity capital to the Venture Company. In addition, he got the CEO of a potential vendor to have the vendor invest (the "Vendor Investor"). Finally, a lawyer located in Dallas contributed equity capital (the "Lawyer Investor"). Initially, every equity investor had a representative on the board of managers. Bright was named President of the new endeavor because much of the development of the company was solely within his knowledge base and relied on his contacts from 25 years with his former employer. Fancher was named CEO and Chairman of the Board. Even though Bright was the President of the Venture Company, he was not elected as a member of the Board of Managers and was not allowed to be present during Board meetings, other than for his report to the Board. The skills each man brought to the venture, their contributions and their competitiveness set up a rivalry between Fancher and Bright.

During the next two-three years, Bright negotiated a master lease agreement with a very large international provider of equipment (the "Large Equipment Provider") that made up the physical structure (or network) of the Venture Company. Bright also negotiated with one of the very large capital intensive businesses in the industry ("BigCo") to allow the Venture Company to use BigCo's infrastructure and to sell its service under BigCo's brand.

During this time frame, the Venture Company entered into an exclusive agreement with the Vendor Investor to provide other components of the infrastructure and an agreement with Fancher's engineering services company (the "Engineering Company") to provide technical expertise. Both agreements were negotiated by Fancher and approved by Bright. The CEO of the Vendor Investor was able to negotiate the sale of the Vendor Investor based in part on the strength of the exclusive agreement it had to provide components of infrastructure to the Venture Company. One of the Client Investors built an office building with the understanding that the Venture Company would lease 90% of the available office space. The Engineering Company's agreement provided for it getting a $1 milllion bonus if it could provide its services in advance of a series of deadlines set forth in its agreement. All of these decisions were made or approved at the Board level and then brought to Bright for his concurrence.

Because the business of Venture Company was very capital intensive and it had the backing of BigCo, Fancher and the Board of Managers decided the time was right to "go public". Venture Company merged into a "merger sub" that was a wholly owned sub of a new Delaware holding company with a class of publicly traded securities ("Successor Company"). The successor to the Venture Company raised approximately $200 million in equity and an equal amount of debt financing in the offerings. The group of persons serving on the new Board of Directors remained largely the same as those on the Board of Managers of the Venture Company.

In conjunction with preparation for the IPO, both Fancher and Bright negotiated and entered into employment agreements and stock option agreements with the to-be-publicly traded holding company ("Successor to Venture" or the "Successor Company") effective with the IPO. Bright's agreement had a provisions calling for different outcomes depending whether he was fired for cause or without cause or if he left voluntarily. One of those provisions stated that the Company could fire Bright for non-performance if 75% of the company's board of directors voted, in their sole discretion, to fire him for non-performance. The outcome upon this type of termination was no severance and a loss of unvested stock options. Bright retained his position of President and added "Chief Operating Officer".

After the IPO and flush with cash, the Successor Company began looking for other smaller and private companies in the same business to acquire. It entered into discussions with such a company located in Oregon and then declared that it was not interested continued consideration of an acquisition. Although Bright did not discover these facts until much later, the Lawyer Investor (who was still on the board of the Successor Company) made an overture three months later to purchase that same company with a different investment group. Within three months of the Lawyer Investor's indication of interest, the acquisition was closed. Some six months after the close of that acquisition, Fancher was talking about the possibility of Successor Company purchasing the Oregon company from Lawyer Investor and his group.

During the calendar year after the IPO when Fancher was working to line up follow-on financing, Bright was trying to erect and test out the infrastructure needed to conduct the Successor Company's business. The agreement with the Large Equipment Provider contained deadlines for completion of different geographical areas of the infrastructure and tied continued lease financing for additional equipment to the meeting of those deadlines. In addition, once different areas of infrastructure were able to "go live", Successor Company needed to be able to sell access to the infrastructure in order to make operating revenues. Consequently, Bright was also hiring and training sales staff and arranging for retail locations during this period.

About midway through that year, Bright began having trouble with the Engineering Company's work The principals at the firm weren't able to put enough manpower on the tasks at hand and were seeking sign offs on tasks that Bright did not think were completed appropriately. Bright found out that processes had been set in motion to pay the Engineering Company its $1 million bonus and stopped the payment. A substantial conflict developed between Fancher and Bright over whether the Engineering Company was performing adequately and whether or when that company would be deserving of its large bonus. Bright appealed to the Board of Directors concerning the need he perceived to hire an additional engineering firm to complete the infrastructure by the deadlines required by the Large Equipment Provider.

The Board immediately appointed a special committee to investigate the issue at hand and the larger issue of conflict of interests and interested person transactions. On recommendation of the committee, the full Board adopted a resolution prohibiting most interested party transactions. However, the board did not referee whether the Engineering Company was providing adequate service. Relations between Fancher and Bright continued to be tense.

A year after the IPO, the Board of Directors fired Bright for non-performance despite the fact that Venture Company's ability to enter into contracts with Large Equipment Provider and BigCo were based on Brights industry contacts; that Successor Company's network was ready to go live in several locations; and that Venture Company and its successor were given an award from BigCo for the most successful execution of its business plan among several BigCo franchisees. While Successor Company and its Board could have terminated Bright on other bases, it chose the basis that was most punishing to Bright.

Over a two year period starting from the IPO to a year after Bright's termination, the price of Successor Company's stock went from an IPO price of $17 per share to a high of $42 per share to a low of $7 per share. During the year after his termination, Bright was busy making sure that he could exercise the vested options he had and retain the option stock he had already bought with a loan from the holding company of the IPO underwriter. Also, during this time period and with help of the counsel who negotiated his employment and stock option agreements, Bright engaged his first litigation counsel to file suit against Fancher and Successor Company for wrongful termination and tortious interference with the employment contract. He was able to interest a well-known plaintiff's lawyer in contingent fee representation when the stock price was at $37 per share.

The first counsel's interest seemed to wane as the stock price got closer to $7 per share. However, there were other problems that first counsel saw with the case: 1) the phrase in Bright's employment agreement that the 75% of the Board could fire him for non-performance *in their sole* discretion; and 2) a Texas Supreme Court decision which upheld summary judgment against a wrongful termination claim stating that if a CEO and Board had any purpose other than or in addition to improper purposes for firing an employee, that termination would stand and there was no cause of action for tortious interference with an employment contract.

At the same time, Bright was struggling to persuade the underwriter and its holding company that it did not need to make a margin call with respect to the stock he had already purchased with a loan. Nothing but an uptick in the stock price saved his ownership of that stock. Also, at the same time, the management of Successor Company had underwater options. Successor Company replaced those options with others at exercise prices equal to the low levels to which the public stock price had sunk.

In the second year after his termination and as the stock price of Successor Company rebounded somewhat, Bright was able to simultaneously buy and sell his vested options and sell the stock he owned outright, subject to the loan. This involved cooperation from Successor Company's counsel and the transfer agent for the stock. At the same time, due to the lack of interest from the first litigation counsel, Bright engaged a second well-known plaintiff's lawyer firm to represent him in his case on a contingent fee basis. Counsel for both parties threw out the dispute resolution provisions in the employment agreement and agreed to their own set of rules for the case to be heard before an arbitrator. In the fall of that year, as the parties were going before a federal court judge to force the choice of an arbitrator to hear the case, the lawyer within the second litigation counsel law firm died of a heart attack at the age of 48. In the aftermath of the lead lawyer's death, his firm reviewed the case and decided to withdraw as counsel. Different lawyers reviewed the facts of the case differently and reached different conclusions about the viability of the case.

As the third year after his termination began, Bright was looking for new litigation counsel again. New counsel was found, but Bright decided to settle his claim for $750,000, despite the facts relating to interested party transactions at the Board level; the fact that the options of which he had been deprived by termination for non-performance would have been worth millions at the time of termination and millions more at the time of settlement; and the fact that Fancher and the Board had given themselves new and larger quantities of options. The litigation was taking a toll on Bright's wife and he was tired himself.

- ➢ What role does a client's business lawyer play in finding counsel? What role should he or she play?

As younger and/or newer lawyers and/or lawyers new to business transactions, you are likely to be representing the party with less economic power and less control. That may lead your client to need to seek some form of contingent fee representation.

- ➢ What factors are important to finding contingent fee or hybrid contingent fee representation in a business dispute with these characteristics?
- ➢ What are the important issues peripheral to the litigation that often have to be managed? Who should manage them?
- ➢ What lessons can a business transactional lawyer take from this situation with respect to the things he or she could change?

- If the business transaction lawyer can see the likely outcome of Bright's complaints (either because of Fancher's ties with investors, his special deals for board members or other reasons), does the lawyer have an obligation to try to dissuade Bright from making the complaints to the board?
- Should business lawyer have put faith in the generally held belief that boards of directors of publicly traded companies hold themselves to a higher standard of conduct, avoid interested party transactions and look only for shareholder value?
- That phrase "*in their sole discretion*" and its effect on plaintiff's litigators
- Venue and choice of law: the first question a litigator will ask a business lawyer.
- The usefulness or lack of usefulness of dispute resolution provisions
- The choice of law and venue for the employment agreement vs the stock option agreement.
- Don't underestimate the power of presumptions: the business judgment rule
- Don't underestimate the effect of time being on the defendants' side.

➢ If as a litigator, if you see something in a document that the business transactional lawyer drafted that is a detriment to the client's case (big or small), how do you handle that issue?

IV THE DEFENDANT DELAWARE ENTITY AND EQUITY HOLDER

Like many Texas business lawyers, you may recommend the formation of Delaware entities for doing business in Texas – particularly if 1) the business has the potential for being funded by professional private capital (whether venture capital or private equity) or 2) the business has the potential to be acquired in the future by a publicly traded entity. The rationale for choosing Delaware entities is typically that Delaware entity law can be a common set of rules for entity governance that everyone can agree on if the entity is going to be doing business all over the country, involving investors from all over the country, negotiating contracts with lawyers from different parts of the country, etc. However, the heart of Delaware law's attraction is its court system which has a special type of court – called "Chancery" court -- which specializes in hearing business disputes. Many publicly traded companies are formed in Delaware. Over time and with a lot of cases before them, these Delaware courts have gained institutional knowledge of how businesses work and have taken a fairly conservative and pro-business stance on issues before them. Business people, in turn, believe that Delaware law gives them some predictability should they or their entities be involved in litigation.

One of the features pioneered by Delaware entity law has been the ability for governing boards or equity holders to take action by signing a document which gives consent to a particular resolution in writing. Equity holders may by "written consent" take any action they could take at a duly called meeting of equity holders, including removal of a member of the governing board or management. Why might controlling equity holders take such an action in this way? It avoids an equity holders' meeting at which there could be dissent and debate only to be followed by a vote for the same result.

However, what happens when: 1) you form a Delaware entity for all or some of these reasons; 2) the equity holders decide they want to remove the board and management. The governing documents and DE state law allow that result; 3) you prepare the written consents, obtain all the necessary signatures and arrange for notice of the action to be given to other equity holders in accordance with law; and 4) the ousted management sues the lead equity holder (but not all of the equity holders who signed the consent)? In Delaware.

➢ What are the Delaware Rules for In Personam Jurisdiction?

➢ What are the Delaware Chancery Court Rules for Appearance Before the Court Prior to Service of Process?

➢ Disputes Over Ousting Management or Board are Governed by a Specific Delaware Statute: §225 of the DGCL.

➢ What is the significance, if any, in the fact that management did not sue all of the shareholders signing the consent?

➢ Do you (or your client) need to hire someone from the Delaware Chancery Court bar?

As younger and/or newer lawyers and/or lawyers new to business transactions, you are likely to be representing the party with less economic power and less control. That may lead your client to need to seek some form of contingent fee representation.

- What factors are important to finding contingent fee or hybrid contingent fee representation in a business dispute with these characteristics? There are many situations like this that do not involve a lot of value or money.
  - How do you obtain lower cost Delaware counsel or counsel which will take a contingency or hybrid fee in Delaware?