BRIEFWRITING:
GIVING YOUR AUDIENCE WHAT IT NEEDS

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Chapter 16

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Ryan & Marshall: trial/appellate lawyer at small insurance defense firm (1979-85)
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Director of Legal Research & Writing, University of Houston Law Center (1987-91)
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Board Certified in Civil Appellate Law and Personal Injury Trial Law
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Author/speaker for the State Bar of Texas PDP Advanced Appellate Practice Course 1989-96, 1999, 2001-02 on Writing Appellate Briefs, Preserving Error Post-Trial, Effective Oral Argument, Ethics of Appellate Practice, Motions for Rehearing, Appellate Marketing (Course Director 1997).

Author/speaker for the State Bar of Texas PDP Advanced Civil Trial Course 1991, 1996, 1997, 1999 on Preserving Error at Trial, Preserving Error in Post-Trial Motions.

Author/speaker for South Texas College of Law Seminars 1989-91, 1996-97, 1999-2001 on Civil Appeals for Trial Lawyers (Ethics on Appeal, Oral Argument), Civil Litigation and Effective Motion Practice (Post-Trial Motions), Advanced Personal Injury Law Conference (Preserving Error at Trial), and Medical Malpractice (Ostensible Agency and Agency by Estoppel).

Author/speaker for University of Texas School of Law CLE Programs 1991-2001 on Appellate Advocacy (Briefwriting, Post-Trial Motions, Oral Argument, Publication Practices, Role of Appellate Lawyer at Trial, Ethics and Professionalism).

Author/speaker for University of Houston Law Center CLE Programs 1993-94, 1997 on Appellate Advocacy (Briefwriting), Litigation Techniques (Post-Trial Motions)

Author/speaker, faculty member, National Institute for Trial Advocacy, Appellate Advocacy Course, 1991 (Law of Appellate Advocacy).

Author, "Standards for Appellate Conduct Adopted in Texas," 2 J. APPELLATE PRACTICE & PROCESS 191 (2000)

Author, "Standards of Appellate Conduct: Insight into Their Creation and Purpose," 62 TEX. BAR J. 558 (1999).

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BRIEFWRITING: GIVING YOUR AUDIENCE WHAT IT NEEDS

I. STATEMENT OF THE PROBLEM: *MOST APPELLATE BRIEFS DON'T GIVE THE AUDIENCE WHAT IT NEEDS.*

Let's be blunt.

Most appellate judges and staff attorneys will tell you that most of the time the briefs they receive do not provide them with the basic tools they need to decide a case in favor of the briefwriter's client.

You're probably thinking that this statement doesn't apply to you and your briefs. Surely that statement is referring to pro se briefs, inmate briefs, or at least to briefs written by trial lawyers with little or no appellate experience who do not regularly attend appellate seminars like this one. But you would be wrong. Even attorneys who consider themselves appellate specialists often file briefs that simply don't give the courts what they need.

Understand that we are not talking about a high standard here—not briefs that are inspired or creative or eloquent. We just mean briefs that provide all of the essential procedural background, the relevant underlying facts of the case, the appropriate standard of review, and the applicable law. Sounds simple. It rarely happens.

Why is that? Why would bright, knowledgeable people who want to win cases for their clients consistently fail to do the minimal things required to make that happen? And, most importantly, how can you avoid falling into that class of briefwriters?

We propose that much of the problem lies, not with a lack of technical knowledge, artistic acumen, or jurisprudential erudition. No, the problem more often lies with attitudinal barriers to helpful briefwriting. Those barriers often start with the writer focusing on the writer, and what he or she has learned, thought about, or felt compelled to express. Those things are certainly important, for without the reader learning and thinking and expressing, there would be nothing to write and nothing to read. But the *focus* should be on the audience, and how it will receive and perceive the written discourse. To be an effective communicator *to the audience*, a writer should understand who its readers are, the conditions under which they work, the goal of the written product presented to them, and how they use that product to do their job. Understanding those concepts will put you in a better position to apply some common sense to the performance of your job so that the fruits of your labors will make it easier for your readers to do their job. The fruits of their labors, in turn, will be better opinions, which are more likely to do justice between the parties and to more wisely mold or maintain the jurisprudence of the State.

II. SOLUTION: UNDERSTANDING YOUR AUDIENCE.

Understanding your audiences first entails clarifying who it is. Then it requires an appreciation of how it receives your work, and how it uses that work to do its job.

A. Identifying your audience.

The first step in understanding your audience is to identify who your audience is. Although you may sometimes feel like you are writing to please several different people, there is only one audience that matters for an appellate brief: the appellate court.

An appellate brief should not be written to give voice to the pain or frustration of your client. It should not be written to convince opposing counsel that you are right and they are wrong. It should not be written to attempt to intimidate the opposing party to settle. It should not be written to impress other attorneys in your firm, or co-counsel. And most of all, it should not be written to amuse yourself. The brief may incidentally accomplish any or all of these goals, but if it is written with these purposes foremost in your mind, the likelihood of achieving the real purpose of the brief will be diminished.

The only acceptable purpose of an appellate brief is to assist the appellate court to write an opinion that is consistent with the applicable law and favorable to your client. Accordingly, the brief should be written as if the only people who ever will read it are the appellate judges and staff attorneys. Any temptation to pander to one of the audiences or purposes mentioned in the preceding paragraph should be banished from your consciousness. Your sole obligation is to further the interests of your client, and anything calculated to further your interests, your career, or your ego is likely to be counter-productive to the paramount goal of serving your client.

B. Understanding your audience's working conditions and mindset.

Aware that the only audience that matters consists of appellate justices and court attorneys (a term we will use to refer to briefing attorneys, law clerks, staff attorneys, research attorneys, and any other attorneys employed by appellate courts), consider some of the things you know, or should know, about appellate judges and court attorneys:

- They almost universally feel overworked, underpaid, over-extended, understaffed, and unappreciated.
- In most cases, they will not make nearly as much money from working on your case as you will.
- They have much, much less time to spend on your case than you have spent on it. More importantly, they have much less time to spend on your case than you would like for them to spend on it.
- They almost always read your brief as part of a stack of other briefs.
- They know much less about the facts of your case than you do.
- They probably know considerably less about the particular area of the law you are writing about when they start reading your brief than you knew when you finished writing it.
- Although they care deeply about getting each case right, they unavoidably care much less about your case coming out the way you want than you do.
- They are much less likely to be impressed with your clever or impassioned writing than you are. They are not reading your brief to be entertained, but to obtain the information they need to dispose of your case as quickly as possible.
- In every case, a court attorney checks your brief thoroughly, verifying record cites, reading the law that is cited, and conducting independent legal research. (The attached pre-submission memos give you an idea of how this work is conducted and reported to the justices.)
- Despite what you have heard or imagined about personal prejudices and agendas, appellate judges almost universally care about following the law and reaching a just result, within the framework of whatever personal biases or prejudices any human being brings to any decision-making process.

In short, you are writing for an audience that is always pressed for time, and that is fundamentally concerned with getting the law right. Accordingly, it becomes particularly important to write briefs that are short enough that they do not waste the reader's precious time; that are clear and simple enough that they can be understood in one continuous read-through; that at least give the appearance of objectivity; that provide thoughtful reasons for reaching a desired result, rather than a shallow presentation of words lifted out of context from cases, rules or statutes; and that reflect a sense of fairness and justice. Those realities should have a profound impact on how you write your briefs.

III. Application of Solution to Problem: Now That You Understand Who Your Audience Is and How it Does its Job, Give The Audience What It Needs.

A. Assisting the Court in doing its job.

When an appellate judge or court attorney reads your brief, they are probably either preparing a pre-submission memo, preparing for oral argument, or preparing to write an opinion. In order to do any of those things, there is certain information that they need from your brief. One of the best ways to determine what the court needs is to review the attached examples of pre-submission memos. Those memos include a detailed factual and procedural background, and a thorough analysis of the legal arguments presented. Thus, to give the court what it needs, a brief should fulfill several minimum requirements:

- It should tell the court everything it needs to know about the underlying facts and procedural developments with precise citations to the Reporter's Record or the Clerk's Record to support every factual statement. It should point the court to exactly where in the record error was preserved. The reader should not have additional questions that are unanswered by the brief.
- It should attach copies of all critical documents in an Appendix. This not only includes the documents required by the rules (judgment, jury charge, etc.), but also things like contracts, real estate documents, expert reports, or selected pages from the Reporter's Record. The reader should not have to go pull the record to make sense out of an argument. Neither should the reader have to wade through a voluminous, un-indexed appendix searching for relevant documents.
- It should provide citations and analysis of the applicable law, including, where applicable, the most recent law from the supreme court, the most recent law from the courts of appeals (if it has been a while since the supreme court addressed the issue), and the most frequently cited authority on the subject. Authorities that do not appear to support your position should be disclosed and distinguished, not disregarded. Although the court will confirm your research, your brief should leave no doubt about where to

start the research, and there should be no major surprises as the research progresses.

- It should contain arguments that make sense, that sound fair and reasonable, and that the court would be proud to express in an opinion as its own.
- It should address every non-frivolous argument raised by the opposing party.

In short, a helpful brief should provide everything that the court needs to write a thorough and well-reasoned opinion without having to start the process from scratch.

B. Assisting the Court in doing its job justly.

An appellate lawyer should write a brief with two goals in mind, and, *most importantly*, those goals should be in this order: (1) to assist the Court to reach the right result, and (2) assist the Court in reaching a result that favors your client. All too often, writers blow past the first goal in their haste to reach the second goal. What they do not realize is that adherence to the first goal makes the realization of the second goal much more likely.

If the reader of the brief begins to believe that the writer is willing to say anything in order to advance their perception of what it takes to "win"—whether or not it is supported by the record, whether or not it is supported by the applicable law, whether or not it makes any sense—then the writer loses all credibility, and the reader ceases to believe, or to be persuaded by, anything the writer has to say.

On the other hand, if the writer of the brief rigorously adheres to the record and the applicable law, even when they do not support his position; if the writer makes candid admissions and concedes some non-dispositive points; if the writer acknowledges his opponent's best arguments and turns them to his advantage rather than ignoring them; then the reader begins to get the feeling that the writer is not an obstructionist adversary trying to hide the truth, but, instead, is the court's ally in trying to reach the right result. A writer who achieves that status has a much greater chance of being an effective and persuasive advocate.

One of the worst mistakes you can make in appellate argumentation is to ignore facts or legal arguments that may hurt. Just because they are not mentioned in your brief does not mean that your adversary will not mention them, or, even if they do not, that court attorneys will not uncover those matters on their own, without any guidance from you about how to put them in context. You are much better addressing unfavorable arguments and coming to grips with them.

> "*Once you face and understand your limitations, you can work with them, instead of having them work against you and get in your way, which is what they do when you ignore them, whether you realize it or not. And then you will find that, in many cases, your limitations can be your strengths*." The Tao of Pooh, by Benjamin Hoff, pp. 48-49.

Sometimes an opposing argument is simply wrong, and you need to say so. But other times you know an opponent's argument rings true, and you will only lose credibility by resorting to the knee-jerk reaction of saying that everything the other side says is wrong. In those situations it is extremely effective to admit the point, embrace it, and try to find a way to turn your opponent's own argument to your advantage.

> "[*This*] *approach to conflict-solving can be seen in the Taoist martial art T'ai Chi Chu'uan, the basic idea of which is to wear the opponent out, either by sending his energy back at him or by deflecting it away, in order to weaken his power, balance, and position-for-defense. Never is force opposed with force; instead it is overcome with yielding*." The Tao of Pooh, by Benjamin Hoff, p. 87.

By now most readers are probably wondering what happens when reaching the correct result and reaching the result that favors your client are at odds with one another. This question is understandable, but it naively assumes that every case has only one issue, only one right result, and only one way to get there. Your challenge as an advocate is to find a way to make the result favoring your client to be *a* right result in the case, even if not the only right result. If that challenge cannot be met, you should seriously consider your willingness to undertake your client's representation in the appeal, and you should counsel with your client about whether the appeal is worth pursuing.

C. Assisting the Court in doing its job efficiently.

Appellate judges and court attorneys have limited time and energy to devote to reading your brief. If you want them to read it, get something out of it, use it while writing the opinion, and have a favorable opinion of you and your client while going through the experience of reading your brief, you should do everything you can to make that experience as easy and pleasant as possible. Among other things, try to:

- Structure the argument so that it can be easily followed and understood. The human mind

cannot process and retain unstructured information. Even brilliant thoughts, if spilled out onto the page in a rambling stream of consciousness, will be lost on the reader. Structure your thoughts, present them in a logical order, and give the reader signals to make your structure clear though the use of headings and subheadings.

- Write with simplicity and clarity. Those two qualities are not the same—it is possible for an argument to be simple, but still unclear, and it is possible (though quite difficult) to make a complex argument clear. But simplicity and clarity often go hand in hand, and the writer should strive for both. It is virtually impossible for a writer to accurately judge the clarity of her own work. When she reads it she is reminded of the thought she had when writing it, and that connection is clear in the mind of the person who conceived it. Having others read what you have written is the only reliable way to determine whether the meaning is clear and whether misunderstanding is possible. If one reader reads something the wrong way it is possible that a reader on the court will have the same response. Try to write and re-write with the goal of minimizing all possibilities of misunderstanding.

  "*The nicest thing about Simplicity is its useful wisdom, the what-there-is-to-eat variety—wisdom you can get at.*" The Tao of Pooh, by Benjamin Hoff, p. 18.

- Write prose that flows, analytically and lyrically. The goal should be a product that the reader can read from beginning to end without stopping, without having to re-read a sentence because the meaning is unclear, without having to go back and re-read prior portions of the prose to make sense of the current sentence, and without having the feeling that something is jarringly out of context. An entire brief that flows is easy to read; but it is extremely difficult to write. A product of that sort requires a lot of work.

  ". . . [A]*ll knowledge is vain save when there is work. . . .*" The Prophet, by Kahlil Gibran, p. 28.

- Strive for brevity. Most readers of briefs would rather be doing something other than reading briefs. Even when reading a good brief, there is exultation in completion, and unnecessary length delays that feeling. In choosing words, constructing a sense, crafting a paragraph, or drafting an argument, remember that shorter is often better. It may not satisfy your ego as much, but it will be appreciated by your reader.

  "*Now one rather annoying thing about scholars is that they are always using Big Words that some of us can't understand . . . and one sometimes gets the impression that those intimidating words are there to keep us from understanding. That way, the Scholars can appear Superior, and will not likely be suspected of Not Knowing Something.*" The Tao of Pooh, by Benjamin Hoff, p. 28.

- Create a product that is easy on the eyes. Make sure there is ample whitespace on the page. Make liberal use of spacing. Choose fonts that are comfortable to look at, and large enough to be read by readers with declining vision. Make sure the document filed with the court is clean, and free of distracting errors.

In short, create a product that is easy to read and easy to understand, that flows smoothly from one thought to the next, and that does not feel like too much of an impositon on the reader.

D. Assist the Court in doing its job in a manner that it may find persuasive.

"*It is not so much a matter of what you do as how you do it, not so much the content as the style of action adopted. It is easy enough to see this in leading or persuading other people, for one and the same communication may have quite opposite results according to the style or feeling with which it is given.*" This Is It, by Alan Watts, p. 54.

There are no tricks to persuading an appellate court. You simply need to present the most logical, compelling argument, and do so in a credible and professional manner. It is a wonderful thing for a lawyer to be passionate about the plight of his client. But if you are truly passionate about obtaining a favorable result for your client, you will reign in the passionate prose in your briefwriting. If the reader is already inclined to agree with you, she may be entertained by vigorous attacks on the other side or emotional wailing about the end of the world as we know it. But if she already agreed with you, then you have not advanced the ball with her in any kind

of meaningful way. On the other hand, if the reader is leaning against you and sympathetic o the other side, she will be offended by your strong language —she certainly will not be persuaded to change their mind. And if the reader is undecided, she probably will wonder why you have to resort to histrionics rather than calmly rational reasoning, and become concerned that there must be something wanting in your argument.

Nevertheless, there is something to be said for writing with conviction and confidence. If you don't sound like you are convinced by an argument, the Court is not likely to be. Courts expect lawyers to be advocates to a certain extent, and if you write as if you are afraid to take a position, the reader will believe that there is no position to take. So you need to write with both reason and passion.

> "*For reason, ruling alone, is a force confining; and passion, unattended, is a flame that burns to its own destruction. Therefore let your soul exalt your reason to the height of passion, that it may sing; and let it direct your passion with reason, that your passion may live through its own daily resurrection, and like the phoenix rise above its own ashes.*" The Prophet, by Kahlil Gibran, p. 56.

Legal writing is much more persuasive when the writer writes with wisdom rather than with cleverness. Cleverness is shallow, insubstantial, and trivializing. It often results in failed attempts at humor, or annoyingly technical "gotcha" arguments that the reader is likely to perceive as something you resort to because you don't have any good arguments.

> "*Cleverness, after all, has its limitations. Its mechanical judgments and clever remarks tend to prove inaccurate with passing time, because it doesn't look very deeply into things to begin with.*" The Tao of Pooh, by Benjamin Hoff, p. 37.

Wisdom is deeper, more honorable, and makes the reader feel like he is a part of something good and noble. A wise argument is not only substantively sound, but it also explains why it is the right thing to do.

> "*It's rather significant, we think, that those who have no compassion have no wisdom. Knowledge, yes; cleverness, maybe; wisdom, no. A clever mind is not a heart. Knowledge doesn't really care. Wisdom does.*" The Tao of Pooh, by Benjamin Hoff, p. 128.

Another important element in persuasion is credibility. If the reader believes you are credible, they will be receptive to believing what you say and being persuaded by your position. If you lose credibility with that reader, everything you say will be viewed with skepticism, and must be verified before being accepted as true. An appellate lawyer's reputation for credibility may take years to cultivate. It can be lost in a single sentence. The only way to avoid that consequence is to be meticulously accurate and scrupulously honest in everything you write.

IV. What Happens When You Don't Give Your Audience What It Needs.

If you fail to provide judges and court attorneys with the information they need, the consequences will depend on the individual and the circumstances. In some instances they may assume that you have not provided supporting record citations or legal authorities because they do not exist. In many instances, they will expend the additional effort to search the record or do the legal research themselves. Not knowing your record or this particular area of the law as well as you should, they may not find what you make them look for. Even if they do, the extra effort you have made them go to as part of their job because you did not do your job may very well cause resentment, frustration, and a loss of respect and credibility. Those things, by themselves, are not likely to cause a decisionmaker to consciously change the outcome of a case. In a close case, however, the cumulative effect of those factors could erect an unconscious barrier that you should try to avoid.

One way to illustrate what happens when you fail to give your audience what it needs is to look at some excerpts from some actual pre-submission memos in the Fourth Court of Appeals, in which court attorneys commented on the failure of briefs to provide what the court needed. (In each of these excerpts, emphasis is added by bold-faced type to more clearly illustrate the point. The emphasis is not in the original, but the text is.) The pre-submission memos are important documents in the appellate process, because, often, the first thing a judge reads about your case is this memorandum prepared by a court attorney. That all-important first impression could be a negative one if your brief contains any of the following deficiencies.

If you fail to write with simplicity and clarity the pre-sub memo may contain something like this:

> In its tenth issue, A contends "the trial court err[ed] in granting summary judgment as to B

because he was not a party to the Ellis County Lawsuit or the underlying lawsuits involved in the Ellis County Lawsuit." A does not separately argue this point and **it is not clear to me exactly what it means**. **If it means** that B may not urge collateral estoppel with respect to issues fully litigated by A in the Ellis County case because B was not a party to that litigation, A is incorrect. *See Sysco Food Services*, 890 S.W.2d at 802 (mutuality of parties required only with respect to party against whom collateral estoppel is asserted).

> However, **A could also be arguing** that the Ellis County court did not declare that A had a duty to defend B in claims arising out of the fire and thus the collateral estoppel argument does not support the trial court's judgment in B's favor. This argument also fails. The Ellis County court's declaration that A was obligated to defend C was based on its resolution of the disputed coverage issue. B may urge collateral estoppel with respect to the Ellis county court's holding that claims arising out of the fire are covered and not excluded. The trial court's declaration that A has a duty to defend B necessarily follows.
>
> * * *
>
> In issues 8-10, A states the apparent authority instruction in the charge was defective, the definition of "sales price" in each of the damages issues should not have been given, and the court should have submitted the damages questions tendered by A. **However, A argues these three issues together** and the only substantive arguments he makes are that (1) there should not have been any reference to "apparent authority" in the charge because there was no evidence to support it and (2) the instruction on apparent authority was incomplete, thus rendering it defective. **To the extent the "Issues" raise other complaints, A has waived them by failing to brief them**.

If you fail to help the court identify the relevant evidence in a lengthy record, the pre-sub memo may contain comments like this:

> Defendants principally argue there was no evidence of a meeting of the minds or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means. In this case, **doing a no evidence review will be especially tedious because the reporter's record is 26 volumes and A has provided the court very little guidance**. Liberally construing its brief, A contends there is circumstantial evidence from which it may be inferred that defendants knew they were buying "stolen" property and committed acts that assisted C in carrying out his scheme; a meeting of the minds can be inferred from their knowledge plus their acts. **A's entire argument on this point, including record references is**:
>
> > Each one of the defendants in this case purchased property at such low prices that they knew that the property was stolen. RR Vol 14, pp 93-94. They helped form the collusion of the acts of C by paying C in cash, checks directly to him, not requiring invoices and receipts, and not contacting A's corporate office. RR Vol 13, pp 88-117.
>
> **[I]f the only evidence to support submission is that cited in A's brief, I recommend the panel overrule this point**.

If you don't give the court the basics, the pre-sub memo may note something like this:

> The contractual arbitration clause does not invoke either the Texas Arbitration Act ("TAA"), TEX. CIV. PRAC. & REM. CODE ANN. § 171.001, et seq. (Vernon Supp. 1999), or the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1, et seq. (West 1999), and **the parties have not attempted to establish which Act governs**.[1]

[1] B conclusorily states in footnote 3 of its petition for writ of mandamus that "[t]he contract at issue in this case affects interstate commerce," but provided us with no argument or record references. C does not address the issue at all.

If you fail to address potentially dispositive issues, the pre-sub memo may so indicate:

> I **have listed this issue first because it is potentially dispositive** and the parties should address it at oral argument. . . . The four active defendants all pled res judicata —that A's judgment in the adversary proceeding against C in bankruptcy court precludes this suit. However, . . . **A did not address it in its brief, nor did it file a reply brief**.
>
> . . . B essentially argues that A should have sued all the alleged co-conspirators in the same suit. Having obtained a judgment against C, defendants' alleged co-conspirator, on the same facts, A is barred from suing again. If . . . B has accurately cited the federal caselaw, **the panel may be able to affirm on this ground instead of wading through A's numerous issues**.
>
> * * *
>
> A's third issue states the fee award to B is not supported by the pleadings. The only argument on this issue in its brief is:
>
> > Defendant B could not possibly incur any attorney's fees in defending the claim under the Texas Theft Liability Act because his counter claim did not come until after the claims under the Texas Theft Liability act had been nonsuited.
>
> Appellant's Brief p. 13. B did not file a counterclaim. Rather, B prayed for fees in his answer, which was filed while A's TTLA claim was still pending, and B's trial pleading contained a prayer for fees. **The only potential issue A has is that the prayer for fees is insufficient to support the judgment for fees pursuant to the TTLA. However, A completely fails to brief the issue**. Moreover, absent a special exception, the prayer for fees in B's answer is sufficient to support the judgment. *See Bullock v. Regular Veterans Ass'n*, 806 S.W.2d 311, 314-15 (Tex. App.—Austin 1991, writ ref'd) (general prayer for award of fees without reference to anything authorizing award is sufficient to support judgment for fees in the absence of special exception).

If you are not honest with yourself and the court about the record, the pre-sub-memo will undoubtedly note those deficiencies:

> In its petition for writ of mandamus A **devotes more space to attacking B's initial requests for production than Judge X's rulings, which significantly narrowed the requests**. To help the panel evaluate the complaints, I attach a document that compiles each of the seven requests, together with the related objection, Judge X's ruling, and the grounds for A's mandamus challenge.
>
> . . .
>
> ***Undue Burden***
>
> A complains the trial court's order regarding request for production number xx is unduly burdensome. . . . As B points out, **A did not make this argument to Judge X and offered no evidence of the burden required** to comply with either the initial request or Judge X's order. **A party complaining** a discovery request is unduly burdensome **has the burden** to produce evidence in support of its complaint. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999). **A failed to do so.**
>
> . . .
>
> ***Invasion of Privacy***
>
> Again, A **did not make this argument to Judge X and did not present any evidence** regarding the content of its personnel files at the discovery hearing. In the absence of any evidence supporting its privacy contention, Judge X did not abuse his discretion in ordering production of . . .
>
> . . .
>
> Request No. xx Judge X ordered the production of: Copies of A's . . . reports from [date] to the present.
>
> It is hard to evaluate whether this order is overly broad because **there is nothing in the record about these reports:** e.g., how often

they are made, what they consist of, whether there is one report generated for all A's stores or whether each store generates a report, etc. **Since it is A's burden to support its objections with evidence, I would hold there was no abuse of discretion**.

* * *

A offered X to testify as to A's claimed damages. **Contrary to what defendants' briefs say**, X testified on the record, outside the presence of the jury, about what his testimony would be. Thus error was preserved.

* * *

C states generally that much of the discovery, particularly many of the financial documents produced, would not have been available to B in arbitration. B generally states it would have been. However, the record contains only a very few documents C actually produced. Moreover, **neither party provides us any argument or information about the type and extent of discovery that in fact would be available in arbitration**.[1]

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[1] Rule 10 of the American Arbitration Association Commercial Arbitration Rules gives the arbitrator discretion in "large or complex cases" to "arrange for the production of relevant documents and other evidence."

If you are not honest with the court about the law, that will be reflected in the pre-sub memo as well:

Both parties **cite numerous cases** they contend support their respective positions. **I do not believe any of the cases resolves the question** in this case.

* * *

The council members' principal argument is that the council had a duty to review the constitutionality of the petition and reject it on that ground. They contend *Glass* authorizes them to reject the petition once they determined the proposed referendum would "undo" a "binding Contract" and thus "clearly violate[] the contract and anti-retroactivity clauses of the United States and Texas Constitutions." ***Glass* expressly holds the opposite.**

. . .

The council members rely heavily on *City of Galveston v. Trimble*, 241 S.W.2d 458 (Tex. Civ. App.—Galveston 1951, writ ref'd n.r.e.). The facts of *Trimble* are very similar to those in this case. Residents filed a mandamus proceeding against city officials to compel them to either repeal or set for a vote a public housing cooperation agreement and the city council's resolution approving execution of the agreement. The court holds the effect of the resolution "would be to impair the obligations of the City's existing contract, which appears to be a valid and subsisting one; hence, it would be invalid, under well-settled authorities." 241 S.W.2d at 460. *Trimble* has never been cited and was decided before *Glass*. Further, the court in *Trimble* relied in part on *McCarty v. Jarvis*, 96 S.W.2d 564 (Tex. Civ. App.—Fort Worth 1936, writ dismissed), for this holding. *McCarty* was overruled in relevant part by the supreme court in *Glass*. *Glass*, 244 S.W.2d at 654-55. *Trimble* is also distinguishable . . .

If you have not provided the court with what it needs from the record or the applicable law, both will be noted in the pre-sub memo:

A's position in the trial court and on appeal is that the note required B to send notices of default, intent to accelerate, and acceleration before she filed suit; because she didn't, she is not entitled to prevail on her claim; further, by failing to do so, she "breached the Note", thus excusing A from further performance. Moreover, it claims that when suit was filed on October 4, it was not in default of the October 1 payment because B had consistently accepted late payments thus waiving timely payment. . . .

The note, on its face, does not expressly or impliedly require notices be sent before suit is filed. **Notably, A never cites to any specific provision of the note, although it repeatedly asserts B "breached the Note**." The note and the caselaw A cites do require B to send notice of default and opportunity to cure and notice of

> intent to accelerate before she may accelerate and recover the accelerated balance; however, **A cites no authority, and I have found none, for the proposition that notices must be sent before suit is filed**. . . . As to A's argument that B's conduct was a breach of the note that excused it from further performance, B did not sign the Note and it does not impose any obligations on her, thus as a matter of law, she could not breach it. The Note simply imposes conditions precedent to B's right of recovery. It is undisputed these conditions were met before the motion for summary judgment was filed and heard. A's argument that B waived timely payment and it was thus not in default on October 4, 1999, is irrelevant in light of its admission that at the time of the summary judgment hearing in March 2000, it made no payments since September 1999. I therefore recommend the panel hold there are no genuine issues of material fact and B was entitled to judgment as a matter of law on her claim. *See* Tex. R. Civ. P. 166a(c).

V. Conclusion

There is no secret to writing a winning brief every time. Every case is different, and every brief is different. There is no universal blueprint for writing a winning brief. There are no magic words that should used in every brief, and no secrets to get into the mind of the appellate decision-maker to entice them to vote your way. The best thing you can do to become an effective briefwriter is to cultivate the attitude of a learned and conscientious colleague of the Court, trying to assist the Court in reaching a decision that correctly states the law for the bench and bar and fairly resolves the dispute between the parties. At all times try to put yourself in the role of an appellate judge or court attorney, reading a stack of briefs to prepare for drafting a pre-submission memo, hearing oral argument, or writing an opinion. Think about what you would find helpful, easy to read, and persuasive. And then write something that fulfils those goals, and gives the Court what it needs.

An effective brief does not require brilliance or eloquence. It can be constructed with tools that we all have in our toolbox.

> "*The masters of* . . . [*briefwriting*] . . . know the Way, for they listen to the voice within them, the voice of wisdom and simplicity, the voice that reasons beyond Cleverness and knows beyond Knowledge. That voice is not just the power and property of a few, but has been given to everyone. Those who pay attention to it are often treated as exceptions to a rule, rather than as examples of the rule in operation, a rule that can apply to anyone who makes use of it." The Tao of Pooh, by Benjamin Hoff, pp. 154-55.

APPENDIX A

MEMORANDUM

FOURTH COURT OF APPEALS
San Antonio, Texas

To: Justice Rickhoff, Justice Lopez, and Justice Duncan
From: Susan Nassar
Subject: Presubmission Memo: *[Appellant] v. [Insurance Company]*, No. [redacted]
to be argued [redacted] at **9:00 a.m.**
Date: [redacted], 2000

[Appellant] and [Indemnity Insurer] appeal the trial court's judgment granting [Insurance Company's] motion for summary judgment. *I recommend* [redacted]

FACTUAL AND PROCEDURAL BACKGROUND

On July 22, 1997, [Appellant] was injured in an automobile accident caused by [Insured]. At the time, [Insured] was insured by [Insurance Company]. Two days after the accident on July 24, 1997, [Insurance Company] issued [Appellant] a check for $500.00. The following language is stamped on the front and back of the check:

> FINAL SETTLEMENT OF ANY AND ALL CLAIMS FOR BODILY INJURY WHETHER KNOWN OR UNKNOWN ARISING FROM ACCIDENT ON _____.

Inserted in the blank is the handwritten date 07/22/97. [Appellant] signed and cashed the check on July 29, 1997.

Shortly before or after settling with [Insurance Company], [Appellant] filed a worker's compensation claim with [Indemnity Insurer] has paid [Appellant] a total of $52,981.51. In a letter dated January 27, 1998, approximately six months after [Appellant] filed his worker's compensation claim, [Indemnity Insurer] notified [Insurance Company] of the claim, requesting reimbursement for the benefits paid. [Insurance Company] did not respond to this request or [Indemnity Insurer's] subsequent requests for reimbursement over the next year and a half.

In July of 1999 [Appellant] sued [Insurance Company] for its insured's negligence. [Appellant] sought to recover additional damages for injuries he sustained in the automobile accident. In his original petition, he argued the settlement was not final because: (1) the final settlement language on the check was inconspicuous; (2) at the time he did not know the extent of his injuries, and (3) he did not know he was waiving all potential claims.

[Indemnity Insurer] intervened in the suit and [Insurance Company] moved for summary judgment in response top both claims. [Insurance Company] argued both [Appellant's] claim was barred by accord and satisfaction and, therefore, [Indemnity Insurer] had no right to subrogation. [Insurance Company] further argued it was not liable to [Indemnity Insurer] because [Insurance Company] had no notice of [Indemnity Insurer's] compensation lien when it entered a final settlement agreement with [Appellant]. The trial court granted [Insurance Company's] motion. [Appellant] and [Indemnity Insurer] appealed.

ACCORD AND SATISFACTION

In his sole point of error, [Appellant] argues a fact issue exists as to whether [Insurance Company] settled his claim in good faith as required by section 3.311(a) of the Uniform Commercial Code. [redacted]

Standard of Review

This court review an order granting a Rule 166a(c) motion for summary judgment de novo. *See Valores Corporativos, S.A. de C.V. v. McLane Co.*, 945 S.W.2d 160, 162 (Tex. App.—San Antonio 1997, writ denied). We uphold a Rule 166a(c) summary judgment only if the summary judgment record establishes there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law on the ground set forth in the motion. TEX. R. CIV. PROC 166a(c) In deciding whether the summary judgment evidence raises a genuine issue of material fact, we view as true all evidence favorable to the respondent and indulge every reasonable inference and resolve all doubts in its favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The movant has the burden to show that there exists no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Id.* All evidence which favors the non-movant is taken as true and every reasonable inference is indulged and all doubts are resolved in favor of the non-movant. *Id*.

Discussion

a. Common Law

As the summary judgment movant, [Insurance Company] had the burden of establishing its affirmative defense of accord and satisfaction. To have a valid accord and satisfaction. To have a valid accord and satisfaction under common law, the evidence must show:

> (1) a new contract, express or implied, was created in which the parties specifically and intentionally agreed to discharge an existing obligation by way of a lesser payment, which was tendered and accepted
>
> (2) the parties agreed that the amount paid fully satisfied the entire claim
>
> (3) there was mutual assent to the agreement
>
> (4) there was a legitimate dispute between the parties and an unmistakable communication that the payment of a lesser sum was upon the condition that acceptance would constitute satisfaction of the underlying obligation.
>
> (5) the communication accompanying the payment of the reduced sum was so clear, full and explicit that it is not susceptible of any other interpretation, and
>
> (6) the offer was accompanied with acts and declarations the creditor is bound to understand

Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 865 (Tex. 2000); *Jenkins v. Henry C. Beck Co*., 449 S.W.2d 454, 455 (Tex. 1969).

Here, [Appellant] and [Insurance Company] both refer to and discuss the common law elements of accord and satisfaction. Therefore, both seem in agreement that common law should apply in the present case. However, in his response to [Insurance Company's] motion for summary judgment, [Appellant] argues the Uniform Commercial Code should also apply.

b. Uniform Commercial Code

Section 3.311 of the Uniform Commercial Code was enacted in 1995 and became effective January 1, 1996. It applies to accord and satisfaction when payment of some amount less than the full amount claimed is made by tendering a check. This section follows the common law rule and some variations. TEX. BUS. & COM. CODE ANN. § 3.311 cmt. 3 (Vernon Supp. 1999). For a claim to be discharged, section 3.311 requires the "person against whom a claim is asserted" to prove:

(1) that the person in good faith tendered an instrument to the claimant as full satisfaction of the claim;

(2) the amount of the claim was unliquidated or subject to a bona fide dispute;

(3) the claimant obtained payment of the instrument; and

(4) the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

TEX. BUS. & COM. CODE ANN. § 3.311(a)-(b) (Vernon Supp. 1999). Good faith for purposes of this section is defined as not only honesty in fact, but also as the "observance of reasonable commercial standards of fair dealing," the latter being an objective standard. *See id.* at cmt. 4.

Here [Insurance Company] attempted to discharge its obligation by tendering to [Appellant] a check for $500. Therefore, [Insurance Company] had the burden of proving these conditions were met. In its motion for summary judgment [Insurance Company] neither nor provided any evidence it settled [Appellant's] claim in good faith or that the claim was subject to a bona fide dispute. Neither party, though, argues the claim was not subject to a dispute.

On appeal, [Insurance Company] argues section 3.311 and its good faith requirement should not apply to the case at hand because there is no case law in which courts have applied the statute. For support, [Insurance Company] lists several cases, some of which deal with settlement by check, where no reference is made to section 3.311. Therefore, [Insurance Company] argues good faith is not an element of accord and satisfaction in Texas. According to [Insurance Company], the duty of good faith should only apply when a fiduciary duty exists because to hold otherwise would create a heightened duty standard in the third party insurance context similar to that already required in first party insurance settlements. [Insurance Company] further urges that a contrary interpretation of section 3.311 would defeat the statutory purpose of encouraging informal dispute resolution by full satisfaction checks. Alternatively, [Insurance Company] urges the panel should presume the check was offered in good faith if it decides to apply section 3.311 and its good faith requirement.

In researching the issue, I too was unable to find any case applying this section of the Uniform Commercial Code. For whatever reason, the applicability of section 3.311 has neither been raised by litigants nor discussed by courts in cases where settlement was made by check. The fact that no court has interpreted the statute, though, does not make it any less authoritative.

SUBROGATION RIGHTS OF WORKER'S COMPENSATION CARRIER

Subrogation rights are derivative. *In re Romero*, 956 S.W.2d 659, 661 (Tex. App.—San Antonio 1997). "[V]iability of the insurer's subrogation rights ... depends on whether they have matured, *i.e.*, whether the insurer has paid all or a part of its insured's loss at the time the insured's claim is dismissed." *Id.* In other words,

> an insurer acquires no subrogation rights *until it pays the loss,* and that it then acquires only such rights against the tortfeasor as the insured had *at that time*, so that where the insured has effectively settled his claim and released his cause of action against the tortfeasor, the insurer can acquire no subrogation right against the tortfeasor *when it later pays the claim*.

Id. (quoting 16 MARK S. RHODES, COUCH CYCLOPEDIA OF INSURANCE § 194 (rev. ed. 1983)) (emphasis added).

Here, [Insurance Company] contends [Indemnity Insurer] has no right to subrogation because its lien or subrogation interest was created after [Insurance Company] fully and finally settled all of [Appellant]'s claims against [Insurance Company] and [Insurance Company]'s insured, [Insured]. [Insurance Company] also argues it is not liable to [Indemnity Insurer] because [Insurance Company] neither had nor received notice of [Indemnity Insurer's] lien at the time of the settlement agreement with [Appellant]. In response, [Indemnity Insurer] maintains that any release executed by [Appellant] did not operate to release [Indemnity Insurer's] subrogation claim against [Insured] and the State & County. [Indemnity Insurer] further argues [Insurance Company's] affirmative defense is barred by fraud and estoppel. [Indemnity Insurer], therefore, seeks reimbursement for the worker's compensation claim paid and for attorney's fees.

I was unable to find any evidence in the record of *when* [Indemnity Insurer] actually paid [Appellant] for his loss. There is also some discrepancy as to when [Appellant] filed the worker's compensation claim, i.e., before or after [Insurance Company] settled with [Appellant].

As for [Insurance Company]'s alternative defense of no notice, I was unable to find any case law requiring a worker's compensation carrier to provide notice of its lien at the time a claim is filed, and [Insurance Company] cites no authority for this defense. Likewise, [Indemnity Insurer] noted in its brief that there is no such statutory or case law requirement.

CONCLUSION

[redacted]

APPENDIX B

MEMORANDUM

FOURTH COURT OF APPEALS
San Antonio, Texas

To: Justice Rickhoff, Justice López, and Justice Duncan
From: Beth Crabb
Subject: Presubmission Memo: No. 04-00-00198-CV, *Brimex, Ltd. v. Warm Springs Rehabilitation Foundation, Inc*. **to be argued Tuesday, November 28, 2000**.
Date: July 31, 2003

This is an appeal from a summary judgment in favor of the defendant in a breach of contract and conspiracy to defraud case. My tentative recommendation is that the panel affirm on the grounds that Warm Springs conclusively established no contract was formed and that Brimex produced no evidence of one or more elements of conspiracy to defraud.

FACTUAL AND PROCEDURAL BACKGROUND

In April 1995, Warm Springs Rehabilitation Foundation, Inc. (Warm Springs) began negotiations with Physical Rehabilitation and Therapy Associates, L.L.C. (PRTA) d/b/a South San Physical Therapy to purchase 51% of PRTA's stock. PRTA was owned by Jeff Pottenger (50.1%) and Brimex, Ltd. (49.9%) Carl Gamboa is a partner in and managing agent of Brimex. The negotiations were conducted by Jack Foster for Warm Springs, Gamboa for Brimex, and Pottenger. In August 1, 1995, Pottenger, Gamboa, and Foster signed a letter of intent outlining the proposed agreement (copy attached). The letter of intent broadly outlined the terms of the sale the conditions to be met before any closing. Closing was to occur no later than November 15, 1995. The letter also included the following provisions:

> 4. The parties agree to use their best efforts as soon as possible after the date hereof to prepare, execute and deliver such documents and agreements as are necessary or appropriate to effectuate the transaction contemplated hereby. …
>
> 8. This Letter of Intent may be abandoned or terminated at any time prior to the execution and delivery of a definitive agreement by Purchaser, Seller and/or PRTA at the option of any party hereto. …
>
> 9.…[I]t is agreed between Purchaser, Seller and PRTA that (I) this letter is not intended to create or constitute a legally binding obligation between Purchaser, Seller and PRTA, and (ii) Purchaser, Seller or PRTA shall not have any liability to the other party until a definitive agreement and other related documents are prepared, executed and delivered by and between Purchaser, Seller and PRTA.

On December 4, 2000, Pottenger, Gamboa, and Foster signed an amendment to the letter of intent, which provides in part:

> While closing is to occur on or before January 31, 1996 and the purchase is subject to final approval by the full Board of Directors and subject to the satisfactory completion of the following conditions, [Warm Springs] will seek final approval of the full Board of Directors on or before December 15, 1995. If final approval is received from the Board of Directors on or before December 14, 1995 and [PRTA] also ratifies the sale, the Letter of Intent and this Amendment to the Letter of Intent will

> become binding on all parties. If approval is not received on or before December 15, 1995 from either party the Letter of Intent and this Amendment to the Letter of Intent will terminate, unless extended in writing by both sides.

(Copy attached) The conditions included several warranties to be made by Brimex and Pottenger and the completion of due diligence and confirmation of value by Ernst & Young.

The Warm Springs Board of Directors met December 14, 1995 and approved making a binding offer to purchase a 51% interest in PRTA at a specified price — $357,000. On December 15, 1995, Foster met with Gamboa and Pottenger and communicated the offer. In Foster's subsequent communications to the Board he states he met with Gamboa and Pottenger on December 15 and they did not accept the offer. Gamboa, however, states in his affidavit:

> The offer of $357,000 by Jack Foster was accepted by Jeff Pottenger and myself. The aspect of possibly increasing the amount to be paid with additional documentation did not detract from the meeting of the minds which had occurred as to offer of $357,000. This was firm.

Gamboa testified in deposition that he agreed to the $357,000 purchase price; however, he and Foster also agreed that Foster would look into whether Warm Springs would include more recent accounts receivable in their evaluation of PRTA, and thus increase the purchase price. He also testified the purchase price could go up if PRTA could document a lower figure for long-term debt than that used by Warm Springs to calculate the $357,000 offer. In fact, when Gamboa and Pottenger met a few days later to discuss distribution of the proceeds between themselves, they assumed a much lower debt figure and thus higher net equity and a much higher purchase price.

On December 19, 1995, Foster, Gamboa, and Pottenger signed a memo that "serve[s] to extend our existing letter agreement until 5:00 P.M. Friday, December 22, 1995." (Copy attached). Sometime between December 19 and December 22, Pottenger met alone with Foster and stated he was no longer willing to sell his stock and asked whether Warm Springs would be interested in restructuring the deal as an asset purchase agreement. Consequently, on December 22, Foster sent Pottenger and Gamboa a second amendment to the letter of intent, which states that it supersedes both the December 4 amendment and the December 15 extension. Among other things, it states that the parties "agree to study a structural change in the proposed transaction … by which an asset sale may be substituted for an acquisition of stock" and stated all "all monetary offers previously extended by [Warm Springs] or PRTA are hereby waived." The letter was signed and agreed to by Foster and Pottenger, but was never signed by Gamboa or anybody else for Brimex. Negotiations continued in one form or another until mid 1996; however, no sale was ever consummated.

Brimex sued Warm Springs in December 1997, alleging breach of contract and conspiracy to defraud. As to the breach of contract claim, Brimex alleged (1) on December 14, 1995, the Warm Springs Board of Directors approved the purchase of 51% of PRTA for $357,000; (2) on December 15, Foster made a binding offer in the amount of $357,000; (3) Gamboa and Pottenger accepted the offer "and it [was] further agreed upon that the offer may be increased with additional documentation of lower debt figures and higher accounts receivables." Brimex contends that as a result of these events and pursuant to the letter of intent and its amendment, the letter of intent became binding on all parties and a contract was formed. Brimex contends Warm Springs' December 22 letter proposing a new structure for the deal and waiving previous offers was a breach of the contract. Brimex also contends the December 4 amendment to the letter of intent contained an implied promise that neither party would do anything to delay or prevent the other from performing his part of the agreement and Warm Springs violated this promise. Finally, Brimex contends Warm Springs' breach legally excuses Brimex

from performing the conditions for closing. Brimex also alleged that Warm Springs would not have backed out of the December 15 agreement but for its "secret" discussions with Pottenger on the 19th or 20th, and these discussions constituted a conspiracy to defraud Brimex.

Warm Springs moved for summary judgment on the breach of contract claim on the grounds that (1) no contract was ever formed, (2) there was no breach by Warm Springs because it was impossible for Brimex to perform the alleged contract (in light of Pottenger's refusal to sell his shares), and (3) the express conditions precedent to performance did not occur. Warm Springs made a no evidence motion as to each element of the conspiracy to defraud claim. The trial court granted the motion without stating its reasons.

BREACH OF CONTRACT

Brimex argues there is at least a fact issue regarding its and Pottenger's acceptance of the offer Foster made for Warm Springs on December 15. And, if the offer was accepted, a contract was formed and Warm Springs' subsequent conduct constituted a breach. Brimex further argues that its inability to perform was a result of Warm Springs' wrongful conduct and Warm Springs may therefore not escape liability on that ground. Finally, Brimex contends it is legally excused from performing the other conditions precedent to closing by Warm Springs' breach.

Warm Springs argues the summary judgment record conclusively established the letter of intent never became binding and no contract was formed. It is undisputed that the Warm Springs Board approved a binding offer at a specified price of $357,000. For the letter of intent to become binding, Brimex and Pottenger had to "approve" the offer on or before December 15 or the letter of intent would terminate, unless extended in writing. Although Gamboa's affidavit states he and Pottenger accepted the offer and there was a "meeting of the minds," the next sentence in his affidavit and Gamboa's deposition testimony make absolutely clear that all he agreed to was that $357,000 would be the *minimum* purchase price. Gamboa wanted to raise the purchase price, in part by producing documentation that PRTA's long-term debt was lower than estimated. This is not an acceptance of the offer made by Warm Springs. *See Gasmark, Ltd. v. Kimball Energy Corp.*, 808 S.W.2d 925, 928 (Tex. App.—Fort Worth 1994, no writ) (acceptance that is not identical to offer or that modifies a term of the offer is not an acceptance, but a counteroffer). Everything else in the record supports the conclusion there was no acceptance of the $357,000 offer on December 15 that created a binding contract: Gamboa and Pottenger met around December 17 to discuss how to divide the proceeds and used figures that assumed the price would go up to $448,000; on December 19, Gamboa, Pottenger, and Foster signed a memorandum extending the letter of intent to December 22; and Foster reported to Warm Springs board that the $357,000 offer had been rejected and that Gamboa and Pottenger would be submitting documentation of PETA's debt and accounts receivable to justify an increased price.

It is undisputed that no agreement was reached between the parties between December 15 and the extended deadline of December 22. Thus, if the panel holds the summary judgment evidence conclusively establishes there was no acceptance on December 15, the judgment for Warm Springs on the breach of contract claim should be affirmed.

CONSPIRACY TO DEFRAUD

> "A 'conspiracy to defraud' on the part of two or more persons means A common purpose, supported by a concerted action to defraud, That each has the intent to do it, and that it is common to each of them, and that each has the understanding that the other has that purpose."

Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854,857 (Tex. 1968) (quoting *Bramley v. Chattanooga Speedway & Motordrome Co.*, 138 Tenn. 534, 198 S.W. 775, 776 (1917)).

Warm Springs filed a no evidence motion for summary judgment as to the conspiracy to defraud claim, contending Brimex had no evidence to support any of the elements of the claim. Brimex' evidence of a conspiracy is that on December 19 or 20, Pottenger told Foster he was no longer willing to sell his stock, that the two discussed restructuring the deal as an asset purchase agreement, and that Gamboa was not privy to these discussions. Brimex also contends a conspiracy is evidenced by the fact Foster faxed Pottenger a confidentiality agreement on December 19. The document is an unsigned copy of a confidentiality agreement signed by Pottenger and Gamboa in March 1995, and there is no explanation in the record as to why it was sent. Nevertheless, Brimex argues the conspiracy "is obvious" - "Warm Springs and Pottenger decided to work together, to the exclusion of Brimex." (Brimex brief p. 34).

Brimex contends that the fraud, or the effort to defraud, is Warm Springs' December 22, 1995 letter in which it offers to restructure the deal. The cases it cites concern fraudulent inducement claims and confidential relationships, neither of which are present in this case. I must confess I do not understand Brimex' argument on this cause of action. However, Brimex has offered evidence of nothing more than Pottenger's refusal to go forward on the terms that had been discussed and Warm Springs' attempt to continue negotiations in light of that fact. There is no evidence of a fraudulent misrepresentation or omission by Warm Springs. I therefore recommend the panel affirm the summary judgment on this cause of action.