PROTECTING YOUR CHARACTERIZATION AND VALUATIONS CLAIMS: AVOIDING WAIVER OR ADMISSION IN INVENTORY, DISCOVERY RESPONSES AND TESTIMONY

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I. INTRODUCTION

When Heather & Lynn asked me to do this presentation, I said, "why"? Is it really relevant to Family law litigators? Turns out it is a very important topic which has not hereto for been written on.

Just as we all know to carefully plead our case because we can't get relief for our client unless we properly plead it, it is equally important that we not preclude our client's recovery by waiving it. In the family law context, the most notable areas susceptible to waiver are our discovery responses which include requests for disclosure, our sworn inventories and our witnesses's testimony.

The fortunes of our client can turn on the characterization of property as community, separate, or mixed character and on the valuation of an asset. Once the lawyer and staff have done the heavy lifting to trace an asset so as to establish its character or obtained a favorable opinion of valuation from a credible expert, it would be unthinkable (and most likely MALPRACTICE) if commission or omission by the lawyer resulted in being unable to put on the required evidence. By the same token, if opposing counsel has waived a claim by commission or omission, it is incumbent upon you to make the necessary legal objections so as to preclude the opposing party from putting on his/her evidence of characterization or valuation.

This topic is both offense and defense and can be so subtle as to catch the practitioner off guard.

II. DISCOVERY

To understand the problem of admission and waiver, we need to refresh ourselves with the applicable rules.

The author would like to acknowledge extensive reliance on O'Connor's Texas Rules, Civil Trials (2007), for the discovery portion of this paper.

A. Request for Admissions

Request for admissions are narrowly drawn questions that call for the responding party to either admit or deny a specific fact. Their primary function is to simplify trials by eliminating matters that there is no real controversy about bu that may be difficult or expensive to prove. Natural Gas Pipeline Co. v. Pool, 30 S.W.3d 639, 652 (Tex.App.-Amarillo 2000), rev'd on other grounds, 124 S.W.3d 188 (Tex.2003).

Request for admissions must be in writing. TRCP 198.1. They may be served anytime after suit is filed, TRCP 190.2(c)(1), 190.3(b)(1), and the deadline to serve request for admissions is 30 days before the end of the discovery period. TRCP 198.1. The answers to request for admissions must be in writing, TRCP 198.2(a), signed by either the lawyer or the party, TRCP 191.3(a), and need not be verified. Guzman v. Carnevale, 964 S.W.2d 311, 313-14 (Tex.App.-Corpus Christi 1998, no pet.).

Generally, a party has 30 days after the date of service of the request for admissions to serve a response. TRCP 198.2(a). There are two ways to extend the time for responding, (1) by Rule 11 agreement extending the time, or (2) a party may ask the court to extend the time to respond only if the motion is made before the date to answer. Once the time to respond expires, it is too late to ask the court for more time to serve answer to request for admissions. Cherry v. North Am. Lloyds, 770 S.W.2d 4, 5 (Tex.App.-Houston [1st Dist.] 1989, writ denied). To avoid the effect of the deemed answers, the defaulting party must file a motion to strike, withdraw, or amend the deemed admissions. Id.

The response to a request for admissions must (1) admit, (2) specifically deny, (3) set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter, (4) object, (5) assert a privilege, or (6) move for a protective order. TRCP 198.2(b)(responses 1-5); Reynolds v. Murphy, 188 S.W.3d 252, 261 (Tex.App.-Fort Worth, 2006 pet denied)(response 6). If the court determines that a response does not comply with the requirements of TRCP 198, it may (1) deem the matter admitted or (2) require an amended answer. TRCP 215.4(a). A party can refuse to admit or deny on the ground it lacks information or knowledge to admit or deny only if the party states (1) it made a reasonable inquiry, and (2) the information know or easily obtained by the party is insufficient to enable the party to admit or deny the request. TRCP 198.2(b). Once the party acquires information responsive to the answer, it must supplement its answer.

Requests are automatically deemed admitted as a matter of law on the day after the answers are due if no answers, objections, or assertions of privilege are served. TRCP 198.2(c); see Marshall v. Vise, 767 S.W.2d 699, 700 (Tex.1989). The trial court does not have the discretion to refuse to deem the requests admitted. Barker v. Harrison, 752 S.W.2d 154, 155 (Tex.App.-Houston [1st Dist.] 1988, writ dism'd). The

court does however, have the authority to permit a party to amend or withdraw its admissions. Marshall v. Vise, 767 S.W.2d 699, 700 (Tex.1989). The court may permit amendment or withdrawal when the moving party shows (1) good cause, (2) that the party relying on the responses will not be unduly prejudiced, and (3) that the withdrawal will serve the purpose of legitimate discovery and the merits of the case. TRCP 198.3; Stelly v. Papania, 927 S.W.2d 620, 622 (Tex.1996).

(1) Good Cause: The party must state good cause, explaining why it did not timely serve its answer to the requests for admissions. TRCP 198.3(a); Wheeler v. Green, 157 S.W.3d 439, 442 (Tex.2005).
(2) No Prejudice: The party must state that the other party will not be unduly prejudiced by the striking (or amending) of the deemed admissions. TRCP 198.3(b); Wheeler, 157 S.W.3d at 442. Undue prejudice depends on whether withdrawing admission will delay the trial or significantly hamper the other party's ability to prepare for it. E.g. Wheeler, 157 S.W.3d at 443.
(3) Presentation of merits will suffer: The party against whom the admission were deemed should state that if the admissions are not struck, presentation of the merits will suffer because the case would be decided on deemed (but perhaps untrue) facts. Wheeler, 157 S.W.3d at 443 n.2; see TRCP 198.3(b)("presentation of the merits of the action will be subserved").

The party filing the motion to strike deemed admissions or withdraw admissions should attach an affidavit detailing the facts that support the excuses and explanations for all three elements above. See e.g. Ramsey v. Criswell, 850 S.W.2d 258, 259-60 (Tex.App.-Texarkana 1993, no writ). The party should attach the answers it would have served (or amended answers) in response to the requests for admissions, and request a hearing on the motion.

1. Using Admissions as Evidence

When a party intends to use the other party's response to request for admissions in trial, that party should file them with the clerk. See TRCP 191.4(c)(2). Admissions made by parties in response to request for admissions that are on file with the court do not need to be introduced into evidence to be properly before the trial and appellate courts. Red Ball Motor Freight v. Dean, 549 S.W.2d 41, 43 (Tex.App.-Tyler 1977, writ dism'd). If the trier of fact returns findings that contradict a judicial admission, the admission must be accepted as controlling. Beutel v. Dallas Cty. Flood Control Dist., 916 S.W.2d 685, 694 (Tex.App.-Waco 1996, writ denied). A request for admission, once admitted or deemed, is a judicial admission, and a party cannot introduce conflicting testimony over an objection. Marshall v. Vise, 767 S.W.2d 699, 700 (Tex.1989). A party can waive its right to rely on the other party's admissions. When the admitting party attempts to offer evidence that contradicts the admissions, the party relying of the admissions must object, or it will waive its right to rely on the binding effect of the admissions. Marshall, 767 S.W.2d at 700. If controverting evidence is introduced without objection, the admissions are no longer conclusive, but they are still evidence. Parkway Hosp., Inc. v. Lee, 946 S.W.2d 580, 587-88 (Tex.App.-Houston [14th Dist.] 1997, writ denied), disapproved on other grounds, Roberts v. Williamson, 111 S.W.3d 113 (Tex.2003).

The trial court has broad discretion to grant or refuse a party leave to withdraw actual or deemed admissions and substitute answers. Stelly v. Papania, 927 S.W.2d 620, 622 (Tex.1996). The trial court's decision will be set aside on appeal only on a showing of a clear abuse of discretion. Stelly, 927 S.W.2d at 622.

B. Interrogatories

Interrogatories are used to find out the specific legal and factual contentions supporting the other party's claims or defenses. See generally, Griesel, The "New" Texas Discovery Rules: Three Years Later, Advanced Evidence & Discovery Course, State Bar of Texas CLE, ch.2, §XI, p.24 (2002).

An interrogatory may ask whether the party makes specific legal or factual contentions and may ask the party to state its legal theories and to describe, in general, the factual bases for the party's claims or defenses. TRCP 197.1. The party must respond to interrogatories in writing, TRCP 197.2(a), and each interrogatory must be answered separately. Orkin Exterminating Co. v. Williamson, 785 S.W.2d 905, 910 (Tex.App.-Austin 1990, writ denied).

Each interrogatory must be answered fully and the party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. TRCP 193.1. The sufficiency of the answers to any set of interrogatories must be decided on a case-by-case basis. Alexander v. Barlow, 671 S.W.2d 531, 533 (Tex.App.-Houston [1st Dist.] 1983, writ ref'd n.r.e.). The Court will treat an evasive or incomplete answer as a failure to answer. TRCP 215.1(c).

When a party refuses to file answers to interrogatories, or files evasive and incomplete responses, the party seeking the discovery may ask the court to dismiss the suit, render a default judgment, exclude evidence, or impose other sanctions. See TRCP 215.1(b)(3)(A)(failure to serve a response), TRCP 215.1(b)(3)(B) (failure to answer particular interrogatories; see e.g. Swain v. Southwestern Bell Yellow Pages, 998 S.W.2d 731, 732-33 (Tex.App.-Fort Worth 1999, no pet.)(plaintiff not permitted to testify about damages because he refused to respond to interrogatory about damages.).

1. Verification of Responses Required

The party must sign most answers to interrogatories under oath. TRCP 197.2(d). An affidavit verifying the answers to interrogatories must be unqualified and cannot be made "to the best of my knowledge." See Ebeling v. Gawlik, 487 S.W.2d 187, 189 (Tex.App.-Houston [1st Dist.] 1972, no writ).

2. Two Exceptions to Verification

For the purpose of the scope of this paper, it is important for the practitioner to note the two exceptions to the rule that requires a party to sign and verify its answers to interrogatories under oath.

First, a party is not required to verify its answer when the answer states it is based on information obtained from other persons. TRCP 197.2(d). In the case of valuation of property, if a party's answer relies for instance on an appraiser's report, that would seem to be information obtained from other persons, and therefore that answer would not need to be verified. The problem would arise then for the party seeking to rely on that response as an admission during the trial of the case.

Second, a party is not required to sign or verify its answer to an interrogatory that asks about persons with knowledge of relevant facts, trial witnesses, and legal contentions. TRCP 197.2(d). Again, does this preclude a party from using the response, for example that property is community rather than separate, as an admission by the party answering the interrogatories?

3. Using Interrogatories as Evidence

Interrogatories are considered evidence once they are admitted into evidence by a ruling of the court. Cornell v. Cornell, 570 S.W.2d 22, 23 (Tex.App.-San Antonio 1978, no writ). A party's answers to interrogatories are not hearsay. See TRE 801(e)(1)(A)(inconsistent with trial testimony), TRE 801(e)(2)(admission by party-opponent).

There are three steps to introducing the answers to interrogatories into evidence:

1. The interrogatories and answers must be identified, and the best procedure is to mark the interrogatories with an exhibit number.
2. The interrogatories and answers must be formally offered into evidence.
3. The court must admit them into evidence. Once the answers are read into evidence, they become testimonial evidence. Eubanks v. Eubanks, 892 S.W.2d 181, 181-82 (Tex.App.-Houston [14th Dist.] 1994, no writ). Interrogatories that are not admitted into evidence cannot be considered in support of the judgment. Sammons Enters. v. Manley, 540 S.W.2d. 751, 757 (Tex.App.-Texarkana 1976, writ ref'd n.r.e.).

Supplanted answers to interrogatories are not valid answers and cannot be used as evidence, however, can be used to impeach the new answers in some cases. See Thomas v. International Ins. Co., 527 S.W.2d 813, 820 (Tex.App.-Waco 1975, writ ref'd n.r.e.). However, supplanted answers that inquire about either a party's legal theories or damages cannot be used for impeachment. TRCP 197.3.

C. Request for Disclosure

For the purposes of this paper, regarding Characterization and Valuation claims, the two requests contained in the Request for Disclosure that are relevant are the request for a party's contentions and the request for damages.

1) Contentions: A party may ask for the legal theories and, in general, the factual bases of the responding party's claims or defenses. TRCP 192.3(j), 194.2(c). These requests are similar to so-called "contention interrogatories" and may be used for the same purpose. TRCP 194 cmt.2. TRCP 194.2(c) is intended to require disclosure of a party's basic assertions made in prosecution or defense of claims. TRCP 194 cmt 2.

Practice tip: When responding to a contention request, the parties should review their pleadings and include all of their legal theories and the factual bases for them. If a legal theory or factual basis is omitted, the court may limit the subject matter on which the party can present evidence. See e.g. National Family Care Life Ins. Co. v Fletcher, 57 S.W.3d 662, 668 (Tex.App.-Beaumont 2001 pet denied).

2) Damages: A party may ask for the amount and any method of calculating economic damages. TRCP 194.2(d). A respondent in the same suit would be required to disclose any grounds for contesting the damages calculations. TRCP 194 cmt 2. If a party cannot demonstrate its method of calculation, the court

may limit the damage the plaintiff can recover. See Butan Valley v. Smith, 921 S.W.2d 822, 832 (Tex.App.-Houston [14th Dist.] 1996, no writ). While a specific value placed upon a piece of property by a party may not be damages per se, it would seem to be included either under the damages request, including the method of calculation, or pursuant to the contentions request, and the method of calculation would be necessarily included in the factual basis for the valuation.

A party must provide a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. TRCP 193.1

1. Using Disclosures as Evidence

A response to a request for disclosure under TRCP 194.2(c)(legal theories) or TRCP 194.2(d)(damages) that has been changed by an amended or supplemental response is not admissible and cannot be used for impeachment. TRCP 194.6. The purpose of this provision is to encourage parties to disclose and discuss their basic legal and factual assertions early in the case. Griesel, The "New" Texas Discovery Rules: Three Years Later, Advanced Evidence & Discovery Course, State Bar of Texas CLE, ch 2, p.19 (2002).

When a party's response to the requests is late, the trial court can exclude the information or testimony that was not timely disclosed. TRCP 193.6(a), see e.g. Ersek v. Davis & Davis, P.C., 69 S.W.3d 268, 273 (Tex.App.-Austin 2002, pet denied). If a party serves a late response to the requests, the trial court can also look to TRCP 215.3 for sanctions-that is, postpone the trial and impose appropriate sanctions to compensate the nonoffending party for any wasted expenses in preparing for trial. See TRCP 215.3; see also TRCP 193.6(c)(court may grant a continuance). When a party's response to the requests does not furnish all the information required by TRCP 194, the trial court can exclude the testimony regarding the omitted information. See e.g. Vingcard A.S. v. Merrimac Hospitality Sys., 59 S.W.3d 847, 856 (Tex.App.-Fort Worth 2001, pet.denied)(although P identified its expert, it did not provide mental impressions and opinions; thus, court should have excluded expert's opinion)

D. Discovery Supplementation

If the court signs a pretrial order governing discovery, the parties must comply with its terms. Werner v. Miller, 579 S.W.2d 455, 456 (Tex.1979). The burden to supplement is on the party responding to written discovery; the party requesting discovery has no burden to request supplementation. TRCP 193.5(a). When in doubt whether to supplement, a party should lean in favor of supplementing because the court may exclude the information if it is not properly supplemented. TRCP 193.6(a); Alvarado v. Farah Mfg., 830 S.W.2d 911, 913-14 (Tex.1992); Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex.1989).

A party must supplement a discovery response in the following instances:

1. The party obtains information that reveals its response to discovery was incomplete or incorrect when made. TRCP 193.5(a)
2. The party discovers its response to discovery, though complete and correct when made, is no longer complete or correct. TRCP 193.5(a) see Alvardo, 830 S.W.2d at 917; see Boothe, 766 S.W.2d at 789.

A discovery request for information other than the identification of witnesses must be supplemented in writing unless the information was made known in writing, on the record at a deposition, or through other discovery responses. TRCP 193.5(a)(2). When a party's retained testifying expert changes or modifies her opinion the party must supplement the expert's deposition testimony or written report with the expert's mental impressions or opinions and the basis for them. TRCP 195.6; Vincard A.S. v. Merrimac Hospitality Sys., 59 S.W.3d 847, 856 (Tex.App.-Fort Worth 2001 pet. denied). Supplementation is required when the court orders it or the parties agree to it. See TRCP 191.1; see, e.g. Cole v. Huntsville Mem'l Hosp., 920 S.W.2d 364, 376 (Tex.App.-Houston [1st Dist.] 1996 writ denied).

It is not necessary to supplement responses to written discovery requests for most discovery matters if the additional or corrective information was made known to the other party (1) in writing, (2) on the record a t a deposition, or (3) through other discovery responses. TRCP 193.5(a)(2); City of Paris v. McDowell, 79 S.W.3d 601, 606 (Tex.App.-Texarkana 2002, no pet.). Supplementation by other means, as defined in TRCP 193.5(a)(2), applies only to "other information" and does not apply to supplementation of witness information listed in TRCP 193.5(a)(1).

1. Deadlines to Supplement Answers

    1. Under the Texas Rules of Civil Procedure:

        a. A party must supplement or amend its answers to written discovery "reasonably promptly" after the party

discovers the need to do so. TRCP 193.5(b); Wigfall v. TDCJ, 137 S.W.3d 268, 273 (Tex.App.-Houston [1st Dist.] 2004, no pet). Although there is a presumption that a supplemented discovery response made less than 30 days before trial is not reasonably prompt, the converse is not true - a supplemented discovery response made more than 30 days before trial is not necessarily reasonably prompt. Snider v. Stanley, 44 S.W.3d 713, 715 (Tex.App.-Beaumont 2001, pet. denied).

Caution: One court has held that if a party responded to a request for disclosure of experts with "no experts at this time," the party cannot designate an expert for the first time after the deadline in TRCP 195.2 (90 days before end of discovery period for plaintiff, 60 days for defendant). Ersek v. Davis & Davis, P.C., 69 S.W.3d 268, 270-71 (Tex.App.-Austin 2002, pet. denied).

b. A party may supplement its discovery responses as late as 30 days before trial. TRCP 193.5(b);
c. To supplement discovery responses less than 30 days before trial, a party must show good cause for the late supplementation or show that it will not unfairly surprise or prejudice the other parties. TRCP 193.6(a), (b); Rutledge v. Staner, 9 S.W.3d 469, 472 (Tex.App.-Tyler 1999, pet. denied). There is a presumption that a supplemental or amended response made less than 30 days before trial is not made "reasonably promptly". TRCP 193.5(b). If the party does not carry its burden, the court may exclude the evidence or grant a continuance to allow the other parties to conduct discovery on new information disclosed in the supplementation. TRCP 193.6(a), (c).

2. By Court order or agreement:

A party must supplement its answers to written discovery according to the modified deadlines in any court order or agreement between the parties. See TRCP 191.1(discovery procedures can be modified by Court order or agreement). See e.g., Mack v. Suzuki Motor Corp., 6 S.W.3d 732, 733 (Tex.App.-Houston [1st Dist.] 1999, no pet.)

3. When trial reset:

When the trial setting is reset more than 30 days after the original trial date, the resetting extends the original discovery deadlines to permit the parties to supplement answers to discovery. H.B. Zachry Co. v. Gonzalez, 847 S.W.2d 246 (Tex.1993).

Supplemental or amended answers to written discovery should be made in the same form as the original answers. TRCP 193.5(b); State Farm Fire & Cas.Co. v. Morua, 979 S.W.2d 616, 618 (Tex.1998). If a party supplements discovery less than 30 days before trial, and the trial court admits the untimely disclosed evidence over the opposing party's objection, to obtain a reversal on appeal the objecting party must show that the trial court's error probably caused the rendition of an improper judgment. TRAP 44.1 (a)(1); Bott v. Bott, 962 S.W.2d 626, 628 (Tex.App.-Houston [14th Dist.] 1997, no pet.).

III. ESTOPPEL V. ADMISSION

As a preliminary matter, it is important to make the distinction between judicial estoppel and a judicial admission.

A. Judicial Estoppel

1. What is Judicial Estoppel?

The doctrine of judicial estoppel "precludes a party from adopting a position inconsistent with one that it maintained successfully in an earlier proceeding". Phillips v. Phillips, __ S.W.3d __ (Tex.App. - El Paso, 2009), citing Pleasant Glade Assembly of God v. Schubart, 264 S.W.3d 1, 6 (Tex.2008). The elements required for judicial estoppel are: 1) a sworn, inconsistent statement made in a prior judicial proceeding; 2) the party who made the statement successfully maintained the prior position; 3) the prior statement was not made inadvertently or by mistake, fraud, or duress; and 4) the statement was deliberate, clear, and unequivocal. In The Interest of M.M.O., 981 S.W.2d 72, 84 (Tex.App.-San Antonio 1998, no pet). Contradictory positions taken in the same proceeding may raise issues of judicial admission but do not invoke the doctrine of judicial estoppel. Phillips v. Phillips, __ S.W.3d __ (Tex.App. - El Paso, 2009), citing Pleasant Glade

Assembly of God v. Schubart, 264 S.W.3d 1, 6 (Tex.2008).

B. Judicial Admission

1. What Is a Judicial Admission?

A judicial admission is an assertion of fact, not plead in the alternative, in the live pleadings of a party. Holy Cross Church of Christ in God v. Wolf, 44 S.W.3d 562, 568 (Tex.2001). A party's testimonial declarations that are contrary to his position are considered "quasi-admissions". Phillips, supra citing Duncan v. F-Star Management, L.L.C., ___S.W.3d ___, 2008 WL 3872869 (Tex.App.-El Paso Aug. 21, 2008) at *6. Quasi-admissions are distinct from true judicial admissions, which are formal waivers of proof usually found in pleadings or the stipulations of the parties. Id.

A judicially admitted fact is established as a matter of law, and the admitting party may not dispute it or introduce evidence contrary to it. Dutton v. Dutton, 18 S.W.3d 849, 853 (Tex.App.- Eastland, 2000, pet denied).

Five conditions must have occurred for a party's admission to be conclusive against him: (1) the declaration relied upon must have been made in the course of a judicial proceeding; (2) the declaration was contrary to an essential fact embraced in the theory of recovery or defense asserted by the party; (3) the statement was deliberate, clear, and unequivocal; (4) giving conclusive effect to the declaration would not run contrary to public policy; and (5) the declaration related to a fact upon which a judgment for the opposing party was based. Dutton, 18 S.W.3d at 853; Citing U.S. Fid. & Guar. Co., v. Carr, 242 S.W.2d 229 (Tex.Civ.App-San Antonio 1951 writ ref'd); Lee v. Lee, 43 S.W.3d 636, 641-42 (Tex.App.-Fort Worth, 2001).

A judicial admission is a formal waiver of proof that dispenses with the production of evidence on an issue and bars the admitting party from disputing it. Lee, 43 S.W.3d at 641 Dowelanco v. Benitez, 4 S.W.3d 866, 871 (Tex.App.-Corpus Christi 1999, no pet.). As long as the statement stands unretracted, it must be taken as true by the court and jury; it is binding on the declarant and he cannot introduce evidence to contradict it. Smith v. Altman, 26 S.W.3d 705, 709 (Tex.App.-Waco 2000, pet. dism'd w.o.j.). This rule is based on the public policy that it would be unjust to permit a party to recover after he has sworn himself out of court by a clear, unequivocal statement. Lee at 641; Dowelanco at 871. Counsel's statements on behalf of a client may serve as judicial admissions. In re M.M.O., 981 S.W.2d 72, 84 (Tex.App.-San Antonio 1998, no pet).

A judicial admission is waived when evidence contrary to the purported admission is heard without objection on that ground. Phillips v. Phillips, __ S.W.3d __ (Tex.App. - El Paso, 2009), citing Duncan, 2008 WL 3872869 at *6.

2. An Example of What Is Not Judicial Estoppel or Judicial Admission.

In Phillips v. Phillips, __ S.W.3d __ (Tex.App. - El Paso, 2009), the spouses married in February of 2001 and husband filed for divorce in December of 2003. Wife answered and filed a counter-petition, alleging fault grounds. Wife's live pleadings at trial sought a disproportionate division of the community estate and she asserted claims for (1) constructive fraud, (2) reimbursement, (3) economic contribution, and (4) attorney's fees. Wife also joined husband's law firm alleging theories of alter ego and filed a personal injury claim against husband for assault. Trial of the matter was bifurcated. During a pretrial hearing in December 2004, the trial judge advised counsel that she intended only to submit characterizations issues to the jury, as all other contested issues at that point in time were purely advisory. Wife filed amended pleadings on April 20, 2005 and the jury trial began on May 16, 2005. Following a five day trial, the jury found that husband had committed constructive fraud against the community estate and that wife's one half interest in the community had been short changed in the amount of $404,407. The jury found against the wife on the assault and reimbursement claims, characterized two assets as husbands separate property, and determined that wife should pay all of husbands attorneys fees. Issues related to economic contribution and alter ego were not submitted.

The trial court then conducted a two day bench trial in September 2005. The trial judge considered additional claims for reimbursement which had not been submitted to the jury, additional characterization issues, offsets and credits, and the ultimate division of the community estate. Wife's counsel did not object when husband introduced evidence pertaining to his claims for offset and introduced additional evidence pertaining to her reimbursement claims. In the final decree, the trial court accepted the jury's findings and rendered judgment that husband committed fraud on the community estate and that he owed $404,407 on this claim, subject to other awards and offsets.

Wife appealed and maintained that the doctrine of judicial estoppel and judicial admission barred husband's claims for offset. The court of appeals held that judicial estoppel did not apply because even though the trial was bifurcated, it was one proceeding.

Concerning the judicial admission, the appeals court held that husband's statements during the bench trial were consistent with the position he took before the jury. Husband didn't want wife to "pay" him, but he certainly wanted an offset against whatever relief she obtained. In Jury Question 8, he sought an offset against the reimbursement claims wife submitted. Because wife did not recover on her claims of reimbursement, husband received no offset to those claims. Then during the bench trial, husband sough an offset against the constructive fraud judgment. The court noted that even a judicial admission is waived when evidence contrary to the purported admission is heard without objection on that ground and that wife's counsel lodged no objection.

3. What Are Some Examples of a Judicial Admission?

In Taylor v. Taylor, No. 02-05-435-CV (Tex.App.-Fort Worth, 2007)(memo op.;8-31-07), husband and wife were married on May 12, 1986. They owned two tracts of real property in Fort Worth. They lived in one of the tracts known as the Chimney Rock property which wife had acquired before the marriage. On October 29, 1986, wife executed a general warranty deed transferring a one half interest in the Chimney Rock property to husband. The parties separated in August 1999 and wife filed for divorce on November 17, 2003. At trial, wife testified that her sole purpose in executing the deed was for husband's convenience in dealing with subcontractors working on the property to repair fire damage, and according to wife, she did so at husband's request. Wife testified that it was not her intention to make a gift to him of any of the property at that time. The trial court granted the divorce on November 14, 2005 and signed the final decree on February 9, 2006. The trial court awarded the Chimney Rock property to the wife as her separate property based upon a finding that the husband judicially admitted that the Chimney Rock property was the wife's separate property in Court pleadings, discovery, and in prior testimony in Court hearings in the case. Husband appealed the property division.

Applying the five conditions of a judicial admission, the Fort Worth court of appeals found husband's admissions that the Chimney Rock property was the wife's separate property were made during the course of a judicial proceeding by (1) acknowledging in at least one pretrial hearing that the property was wife's separate property, (2) in his sworn inventory and appraisement, and (3) in his response to interrogatories.

It should be noted by the practitioner that the appeals court also placed some emphasis on the fact that a majority of the husband's pretrial discovery **requests** were aimed at matters essential to his claim for reimbursement and economic contribution to the community estate for expenditures made on the Chimney Rock property.

The admission that the property was the wife's separate property was contrary to his assertion that the property was held by husband and wife jointly as tenants in common and, therefore, that he was entitled to a one-half undivided interest as his separate property. The appeals court found that his prior inconsistent statements were deliberate, clear, and unequivocal citing the fact that his inventory and interrogatory responses were sworn before a notary public.

The court found that husband should not be allowed to maintain consistently under oath that property belonged to the wife as her separate property, then argue at trial that he owned half as his separate property.

What could he have done?

1. He could have pled his claim for reimbursement and economic contribution to the community estate and, in the alternative, that he owned a one-half undivided separate property interest in the Chimney Rock property;
2. He could have amended his inventory and timely supplemented his interrogatory responses to reflect a different characterization of the Chimney Rock Property;
3. He could have filed a motion for continuance, if the time for supplementation had passed, to seek leave to amend his inventory and interrogatory answers, and amend his petition.

A case with a similar fact pattern to the Taylor case had a different result. Magness v. Magness, 241 S.W.3d 910 (Tex.2007), Wife owned a home prior to marriage with husband. After marriage, the parties continued to live in the home and refinanced the mortgage. During the refinancing process, wife executed a deed transferring a one half interest in the home to husband. During trial, wife testified she signed the deed as part of the refinancing process and did not intend to make a gift to husband. Husband did not testify about whether wife made him a gift of a half interest in the home. The Trial court found each owned a one half interest in the home as their separate property. Wife appealed contending the trial court abused its discretion in awarding one half to husband as separate property because there was factually insufficient evidence to support the finding wife made a gift to husband. The court found the trial court did

not abuse its discretion in awarding husband one half interest as his separate property and affirmed the trial court's judgment. What makes this interesting is that, in a footnote, the Court stated that the wife argued on appeal that husband's sworn inventory in which he listed the home as community property was a judicial admission by husband that he has no separate property interest in the home. The court noted that the wife did not argue in the trial court that husband had judicially admitted the home was not his separate property, and therefore, the court found that wife waived this argument on appeal. Id. fn 1.

What could she have done?

1. Argued during the trial that the husband had judicially admitted that he owned no separate property interest in the property as a result of listing the property as community in his sworn inventory;
2. Objected during trial to any evidence presented by the husband intended to support a separate property claim by husband.

Another case in which a judicial admission by a party was waived by the other party is Dahl v. Dahl, No. 05-07-01338-CV (Tex.App.-Dallas 2009)(memo op.; 4-2-09). In the Dahl case, based upon the testimony during trial of the husband, the trial court characterized a piece of real property as community property and divided it between husband and wife. The wife appealed claiming that the real property was her separate property.

In reversing the trial court and finding the real property was the wife's separate property, the court found that the husband was only witness at trial. He admitted that in July 1997 wife made the entire down payment for the property at that time borrowing against her 401(k). The parties were married in September 1998. He further testified that he did not "pay a dime" for the house at the time of the purchase. In short, the only evidence presented at trial relevant to the inception of title was husband's own testimony that the property was purchased before the parties were married and that the wife supplied the down payment. This undisputed evidence established that the property was separate property.

Husband argues that the trial court's characterization is supported by a judicial admission in wife's petition for divorce. In the petition, wife alleged that "petitioner and respondent possess and own community property which requires a division of the marital estate, including, but not limited to, their residence . . . " Husband argues that this statement is a judicial admission as to the proper characterization of the property. The court stated that "we have held, however, that a party waives a judicial admission by introducing evidence on the disputed issue. Id. Citing Dallas Transit Co. v. Young, 370 S.W.2d 6, 11 (Tex.App.-Dallas 1963, wirt ref'd n.r.e.); accord Indus. Disposal Supply Co. v Perryman Bros. Trash Serv., Inc., 664 S.W. 2d 756, 764 (Tex.App.-San Antonio 1983, writ ref'd n.r.e.); see also Houston First Am. Sav. v Musick, 650 S.W.2d 764, 769 (Tex.1983). Husband's own testimony at trial established that the property was separate property, so he waived wife's judicial admission, if any.

What could he have done?

1. Testify that the property was community property and requested division of the property based upon the judicial admission in the wife's pleadings that the property was community property;
2. Object to any evidence offered by wife in contradiction of her pleadings;
3. Move for directed verdict on the characterization of that particular piece of property.
4. Avoid testimony that was inconsistent with wife's judicial admission.

In the case of Lee v. Lee, 43 S.W.3d 636 (Tex.App.-Fort Worth, 2001), a probate case, counsel for appellant stated he had no objections to an amended inventory and appraisement being filed which listed certain cd's as community property. Appellants neither challenged the amended inventory nor asked the trial court to reconsider it. During the hearing to approve the inventory, the trial court asked appellant's counsel if he agreed "that once [appellee's counsel] has filed the amended inventory showing the modifications as agreed upon here today [concerning two pieces of real property], that the Court may go ahead and approve the inventory?" Counsel responded, "I do, your honor.". This statement, when read in context of the hearing, is a clear and unequivocal approval of the inventory and the characterization of the CD's as community property. This is contrary to appellant's defense in this case that the accounts were given to them by decedent, and therefore, were not part of the community property estate. The statement does not destroy, but in fact supports, appellee's theory of recovery. Likewise, holding that this statement is a judicial admission supports the public policy stated above.

One result of the admission was that the appellants lost their contention that the trial court erred in granting summary judgment because appellee's

motion failed to overcome the legal presumption that decedent acted without fraud in making a gift of community assets. The Court states that they have already concluded appellant's judicially admitted cds were community estate property and that absent a showing that the property is outside of the community estate, the issue of fraud on the community never arises.

What could he have done?

1. Challenge the amended inventory listing the CDs as community property;
2. Request that the Court reconsider the amended inventory;
3. Not agree that the Court approve the inventory with the incorrect characterization of the CDs.

In Peck v. Peck, 172 S.W.3d 26 (Tex.App.-Dallas 2005), the case involved the characterization of a disability insurance policy taken out by the husband at the bank's insistence when he borrowed money to open a dental practice during the marriage. Husband contends the trial court erred in characterizing the disability insurance benefits as community property and dividing future payments between the parties. Wife asserts that husband judicially admitted at trial that the disability policies were community property, estopping him from contending otherwise.

Husband's own attorney said in opening statement that under Texas Law, the disability policy "would be considered a community asset," and asked the court to use its discretion in dividing that asset. During the wife's case in chief, husband was called to testify, and he stated he did not agree the disability policy was community property, regardless of what the law was. During husband's case in chief, his exhibit A was offered as a summary of his testimony of his proposal for division of the parties' community estate. In the exhibit, husband proposed the insurance disability benefits be divided equally between the parties for three years or until he is unable to practice dentistry, whichever comes first, and that Husband then receive all the benefits. He also testified consistent with that part of the exhibit. Husband's Exhibit E, his amended inventory and appraisement, also stated the disability policy benefits were community property. During closing argument, Husband's attorney stated "So granted it is a piece of community property, but . . . this court has the discretion to make an equitable distribution of the property . . ." After trial, husband filed a brief on the issue of the disability policy which stated "the evidence shows that the disability policy was purchased during the marriage, with community funds, and is therefore community property."

The five requirements were met because (1) the admissions were made during the course of a judicial proceeding, (2) the admissions are contrary to the essential fact now argued by Husband that the policies are his separate property, (3) the admissions were deliberate, clear, and unequivocal in that they were prepared and made with the assistance and approval of counsel, (4) giving effect to the admissions of the community character of the disability policy benefits would be consistent with the public policy that a party should not be permitted to recover when he has sworn himself out of court by a clear and unequivocal statement, and (5) the admissions support judgment for Wife.

Except for one contrary statement in his testimony, Husband made no assertion that the disability insurance policies were his separate property until after the trial court entered its initial divorce decree.

Because Husband had judicially admitted the policies were community property during trial in his testimony, exhibits, opening statement, and closing argument, as well as in his post trial brief on the issue of the disability policies, this issue was conclusively proven, and Husband was barred from asserting otherwise.

The result was that the Court found Husband's argument that the court's incorrect characterization of the disability insurance benefits resulted in the court's failing to make a just and right division of the marital estate lacked merit and the court overruled Husband's issue in that regard.

What could he have done?

1. Not argue in opening statement, closing statement, exhibits and his testimony that the disability policies were community property;
2. Move for leave to amend his inventory during trial.

In Roosevelt v. Roosevelt, 699 S.W.2d 372 (Tex.App.-El Paso 1985, writ dism'd), prior to trial, wife filed a sworn inventory and appraisement in which she listed twenty nine items of jewelry as her separate property. She also listed eighteen items of jewelry as community property. Husband appealed the trial court's award to wife of all of her jewelry as separate property. The court noted that it would appear that as to those items which were listed as community property the sworn inventory and appraisement was a judicial admission as to the characterization of that property which would be accepted as true by the court and binding upon the

party making it. The court noted that while proof was offered on certain of the more valuable items listed as separate property to show that they were in fact separate property, no evidence was offered to establish that all those items listed as community property were in fact separate property, and such evidence would not have been admissible, with a proper objection, in view of the judicial admission that those listed items were community property. The court noted that while the husband's attorney indicated that he might have had no objection to the wife receiving all of her jewelry, he never indicated that it should be classified as separate property rather than partly separate and partly community as shown in the inventory and appraisement, and the court sustained the husband's complaint about the trial court's erroneous characterization of the wife's jewelry.

What could she have done?

1. Classified all the jewelry as separate property in her inventory;
2. Reached an agreement with husband regarding the jewelry since husband's attorney indicated she could have had all the jewelry;
3. Offered proof of character even though contrary to her inventory if husband didn't make proper objection.

IV. INVENTORY & APPRAISEMENTS

The author would like to acknowledge extensive reliance on O'Connor's Family Law Handbook (2009), for the Inventory and Appraisement portion of this paper.

The most common method for discovering each spouse's assets and liabilities is a court ordered inventory and appraisement. O'Connor's Family Law Handbook 2009 at page 631. Not filing a sworn inventory and appraisement or conducting other forms of discovery before agreeing to a property division may be considered malpractice. Ballesteros v. Jones, 985 S.W.2d 485, 495 (Tex.App.-San Antonio 1998, pet. denied). Think of all the information/evidence contained in our client's inventories. Characterization critical to your case is delineated in both the community property section and the separate property section. Because of its importance to your client's position on valuation and especially characterization, extreme care should be taken to build, refine and revise the inventory within the designated trial deadlines.

Remember, the form, manner, and substance of the inventory and appraisement can be specified by the court or local rules. See Tex.Fam.Code §6.502(a)(1). Most courts require the spouses to use the inventory and appraisement form that is provided in the State Bar Family Practice Manual. See 1 State Bar of Texas, Texas Family Law Practice Manual, Form 7-1 (2d ed. 1996 & Supp.2008).

A. Contents

a. The inventory and appraisement should specifically identify all of the spouse's marital assets and liabilities.
b. The inventory and appraisement should characterize all of the spouses' assets and liabilities.
c. The inventory and appraisement should assign a value to each asset and liability listed, separate or community.

Assigning a value is as important as the characterization of the assets and liabilities in supporting any judgment rendered in the case. See Baggett v. Baggett, No. 05-06-01428-CV (Tex.App.-Dallas 2008, no pet)(memo op.;4-23-08)(trial court could not make findings on just and right division of property because many items in the inventory and appraisement did not state a value.

B. Admissibility

The inventory and appraisement is essentially each spouse's opinion about the identity, character, and value of his or her property. See Handley v. Handley, 122 S.W.3d 904, 908 (Tex.App.-Corpus Christi 2003, no pet.). Because the inventory and appraisement is made outside of court and is generally offered into evidence to prove the truth of the matter asserted (i.e. the character and value of the property), it is generally considered hearsay under the Texas Rules of Evidence. See TRE 801(d). There are, however, several ways in which the inventory and appraisement can be introduced into evidence:

a. An exception to the hearsay rule is a statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document. TRE 803(15).
b. A spouse can admit the inventory and appraisement of the opposing spouse as an admission by a party opponent which falls outside the hearsay exception. TRE 801(e)(2); and
c. The contents of voluminous writings, recordings, or photographs that cannot conveniently be examined in court can be presented in the form of a chart, summary, or

calculation pursuant to TRE 1006. To lay the proper predicate for the admission of an inventory and appraisement under Rule 1006, a spouse seeking admissibility must establish that the underlying records were voluminous, were made available to the opposing party for inspection and use in cross examination, and were otherwise admissible. Id. Welder v. Welder, 794 S.W.2d 420, 429 (Tex.App.-Corpus Christi 1990, no writ).

C. Legal Effect

The legal effect of an inventory and appraisement depends on whether it is filed with the trial court and admitted into evidence.

a. An inventory and appraisement that is filed with the court and properly admitted into evidence constitutes a judicial admission on behalf of the party filing it. Roosevelt v. Roosevelt, 699 S.W.2d 372, 374 (Tex.App.-El Paso 1985, writ dism'd.
b. An inventory and appraisement that is filed with the trial court but is not admitted into evidence cannot be considered as evidence of the property's character or value. Barnard v. Barnard, 133 S.W.3d 782, 789 (Tex.App.-Fort Worth 2004, pet. denied);

1. Importance of filing sworn inventory AND admitting it into evidence

In the case of Nowzaradan v. Nowzaradan, No. 01-05-00094-CV (Tex.App.-Houston [1st Dist.] 2007)(memo op.: 2-8-07), The husband appealed a property division rendered by final divorce decree. The Husband challenged the award of two IRA accounts to the wife as her separate property, (she identified them in her inventory and appraisement as her separate property), contending they were community property, as he had characterized them in his inventory and appraisement. The husband contended that the community presumption applied to the two accounts because wife produced no evidence at trial about the accounts and therefore did not meet her evidentiary burden to establish the separate property nature of the accounts. That's the general rule, right? The appeals court noted that though each party filed a pretrial inventory and appraisement, the trial court's findings confirmed that the husband did not **verify** his filing and did not assign specific values to five assets. The appeals court stated that the husband's contentions ignore that wife identified the two accounts as her separate property in her **sworn**, second amended inventory and appraisement. Wife filed this document before trial, in compliance with the trial court's orders and local rules, and it was admitted into evidence at trial, but husband did not file a sworn inventory and appraisement to controvert wife's filing. Because wife's inventory and appraisement was both **properly sworn and admitted into evidence**, the document constituted probative evidence, sufficient to overcome the community property presumption, that the two accounts were wife's separate property. The court also found that the record affirmatively negated husband's contention that wife failed otherwise to establish the separate character of the funds in the accounts because wife and her sister testified that the funds derived from an inheritance and from payments to her as a trust beneficiary from the estate of her parents in addition to providing expert opinion testimony and documentary evidence to support her claim. Taking together wife's sworn inventory and appraisement and the evidence that she presented at trial, and also considering that husband did not controvert her sworn, separate property claim, the court held that the evidence supported the trial court's recognizing the two challenged IRA accounts as wife's separate property and that wife had overcome the community property presumption. Husband's challenge to the trial court's property division also attacked allocations and values for items of personalty and certain liabilities, as follows: a bank account, awarded to husband; the Mercedes Benz, awarded to husband; the furnishings of the home, awarded to wife; proceeds from a life insurance account, awarded to husband; and loans to individuals and businesses, assigned for collection to husband. The court found that husband had waived his challenges, which essentially repeated his trial contentions concerning these portions of the community estate. As recited in the trial court's findings, the husband **did not submit a sworn inventory and appraisement** and, as a consequence, was **not permitted to controvert** any values stated in wife's sworn inventory and appraisement. The trial court admitted wife's sworn inventory into evidence and the husband did not challenge either the admission of the inventory or the trial court's prohibition against controverting the wife's inventory.

What could he have done?

1. Properly verified his inventory filed with the court
2. Admitted his sworn inventory as evidence in the case.
3. Assigned values to property listed in his inventory. (Still needed to file sworn inventory and have it admitted as evidence)

2. Can the trial court and/or appellate court take judicial notice of a sworn inventory not introduced into evidence?

   Depends on which court you are in!

In Tschirhart v. Tschirhart, 876 S.W.2d 507 (Tex.App.-Austin 1994, no writ), The husband appealed a disproportionate division of the community estate and in his brief to the appeals court, he relied in part, on values he placed on property in his sworn inventory and appraisement. The court noted that although the inventory was **filed** with the district clerk, it was never introduced into evidence at trial. The wife contended that, because it was not admitted into evidence, the court could not consider husband's inventory as evidence of the values of the community property. The court notes that two other courts of appeals have addressed the issue of whether an inventory filed with the clerk but not admitted into evidence at trial may be considered on appeal. In Poulter v. Poutler, 565 S.W.2d 107, 110 (Tex.Civ.App.-Tyler 1978, no writ) and Bokhoven V. Bokhoven, 559 S.W.2d 142, 143-44 (Tex.Civ.App.-Tyler 1979, no writ), the Tyler court of appeals has analogized inventories to written interrogatories and held that an inventory must be **admitted** into evidence to be considered on appeal. However, the Houston court of appeals in Vannerson v. Vannerson, 857 S.W.2d 659, 670-71 (Tex.App.-Houston [1st Dist.] 1993, writ denied), held that where the trial court's conclusions of law refer to an inventory not admitted into evidence, the inventory may be considered evidence because the trial court could have taken **judicial notice** of it. The court in Tschirhart declined to follow the Houston court of appeals and held that the court cannot take judicial notice of the truth of statements in an inventory filed in a divorce proceeding. They went on to hold that an inventory and appraisement is analogous to a pleading, and that although the inventory is sworn, it provides no basis for the property valuations. Furthermore, absent introduction of the inventory into evidence, cross-examination regarding its contents may be overlooked entirely or, if conducted, may be of limited value. The court thus held that unless a party's inventory is formally admitted into evidence at trial, that party may not rely on the inventory as evidence on appeal and accordingly, the court did not consider husband's inventory as evidence of property values. Husband also requested the appeals court to consider statements in the "proposed disposition of issues" - often referred to as "pretrial statements" prepared by each party, however, the court found that like husband's inventory, these pretrial statements were not introduced into evidence at trial.

What could he have done?

1. Introduced his sworn inventory as evidence at trial;
2. Introduced the pretrial statements into evidence at trial.

The above illustrates the problem for the practitioner due to the inconsistency of the holdings of various courts of appeal. A case in point from the Eastland court of appeals is Dutton v. Dutton, 18 S.W.3d 849 (Tex.App.-Eastland 2000, pet. denied). In this case husband and wife were married from 1984 to 1998. In 1995, wife's parents conveyed 150 acres of land to wife and husband, who executed a promissory note to wife's parents which was forgiven in 1996. The parties built a house on the property and made other improvements. Wife filed a sworn inventory and appraisement in which she listed the property as her separate property and introduced her inventory and appraisement into evidence at the final hearing. Wife also testified about the acquisition of the property, that it belonged to her father's family, that her father grew up on the property, that the property was her "inheritance", that her father "wanted to see her be able to use it while he was alive", that she had husband's name put on the property because she "felt pressured" and that she "didn't feel like she would ever be able to use it if his name wasn't on it". She maintained at trial that her parents intended the property as a gift to her alone. Husband also filed a sworn inventory and appraisement with the trial court and listed the property as community property. Husband **did not** introduce his inventory and appraisement into evidence but he did dispute the wife's characterization of the property in his testimony. Even though husband stated that "the land was a gift to both of us", the record reflected that, at trial, husband was contending that the property was community to rebut wife's assertion that it was her separate property. After the parties rested and closed, the trial court said "I'm going to have to give this some thought and review each party's inventories". Finding that the property was community property, the trial court awarded the entire property to wife. Husband appealed arguing that he had a separate property interest in the property because it was a joint gift to him and wife. The court of appeals noted that neither in his pleadings nor at trial did husband contend that the property was partly his separate property and that the court simply found that the property was community property as husband had asserted in his sworn inventory and appraisement. The appeals court also stated that husband should have made the trial court aware, at some point, of the complaint he now

presents on appeal. The court went on to uphold the trial court's ruling in view of husband's inventory and appraisement and of his failure to preserve error. The court agreed with wife that husband's characterization of the property as community property in his inventory and appraisement constituted a **judicial admission** barring him from asserting that he had a separate property interest in the property. The court went on to state that the trial court could take judicial notice of the contents of its files citing Vannerson, supra, and that "this court may take judicial notice, even if no one requested the trial court to do so and even if the trial court did not announce that it would do so". The court stated that the trial court and the appeals court can take judicial notice of the fact that husband made an admission in his inventory, that the trial court announced that it would consider "each party's inventories", that husband did not attempt to contend at trial that the property was anything but community property, and that husband did not withdraw the statement made in his inventory.

What could he have done?

1. Attempted to withdraw his inventory and appraisement or otherwise amended it prior to trial
2. Attempted to contend at trial that the property was partly separate property (however, with the risk that wife would object to testimony in contravention of inventory and appraisement);
3. Obtained an agreement before trial to exchange but not file the inventories!

V. CONCLUSION

As these cases have pointed out, we need to carefully view all our inventories, request for disclosures, testimony and written discovery with the idea in mind that opposing counsel is going to be scrutinizing them to help his/her client and to hurt your client's case. We must strive to maintain consistent positions in our pleadings, discovery and inventories or risk being unable to put on proof essential to our case. Conversely, if we are vigilant, we may be able to defeat opposing party's valuation or characterization with his/her own "words", thus enhancing the recovery for our client!