TRIAL BY AGREEMENT
January 11, 2011
DBA Business Litigation Luncheon

I. Whether you call it federalism, strict constructionism or tort reform, the legal movement that dominated our jurisprudence since the early 80s is alive and well after the drubbing that Democrats took in the elections of 2010.

A. With the capture of so many state legislatures, there's talk about adoption of the English loser-pays rule and the elimination of contingent fees.

B. With the adjournment of the last session of Congress leaving 43 Obama nominees to the federal bench in limbo, unconfirmed, hopes for a fresh federal judiciary have been dashed, at least for now.

C. And with several judges ruling that provisions of Obama-care are unconstitutional, there's not much room to hope that new laws are going to create new

lawsuits. According to today's Dallas Morning News, the only kinds of lawsuits our Governor and Attorney General deem non-frivolous are the ones they file challenging federal regulation of anything.

D. In a word, I no longer start my talks on making trials faster and cheaper with a prediction that a renaissance of trial law is about to dawn.

E. Nevertheless, although it sometimes feels like I am teaching younger lawyers how to hunt dinosaurs, I still hang onto the idea that making trials less expensive and the result more predictable, is the only way I can put a finger in the damn.

1. So I continue to preach to my partners and associates and to groups like this the virtues of efficient, stress-free litigation and the importance of making jury trial comprehensible to juries.

2. And I want to start by telling you what I've learned from trying cases for over 40 years.

II. In a nutshell, here is what I want all lawyers working with me to know:

A. 95% of what happens in pretrial is not outcome determinative: flipping a coin is probably as good a way as any to resolve what most litigators spend most of their time fighting about.

B. What is good for the other side is not necessarily bad for you.

C. Judges don't want to resolve disputes between lawyers and what offends them most is the "tit for tat" justification for being disagreeable.

D. The most impressive names on any trial lawyer's list of references are the lawyers who she has opposed in the past. There is nothing more gratifying than being

hired by someone you sued in the past: it means you were tough without being obnoxious.

E. Fighting over what doesn't matter distracts you from what does.

III. These are difficult lessons to teach in a time when there are vanishing trials.

A. Young lawyers find increasingly that the only place they can be advocates is the deposition conference room.

B. And turning the cheek is a bitter pill to swallow when the other side is paid by the hour to fight about everything.

C. I used to say that the good news on the subject of vanishing trials is all the legislation that has been passed by Congress that will undoubtedly create new causes of action and a populist movement that is

urging lawmakers to keep the courthouse doors open. Now that's in doubt.

D. On the second front, hourly billing, the good news is all the talk about starting to pay lawyers for result, not effort; predictions about the death of hourly billing.

IV. So now let me begin at the beginning: securing pretrial agreements right up front.

A. Our firm's use of the Susman Pretrial Agreements started a decade ago.

1. For longer than that we've had a piece on our website, frequently revised, entitled How SG Handles Cases. It lays out our view that less is often more in terms of discovery and that being lean is a virtue but being mean is not.

2. But we soon realized that it takes two to tango and that no matter how lofty our goals, it

wouldn't work unless we could convince the other side to cooperate.

3. Hence, the genesis of the Pretrial Agreements, which are constantly revised, as I will point out today

4. The key here is that you need to attempt to reach these agreements before battle starts, because in the heat of battle what is good for you may be perceived as bad for the other side. Our firm represents half plaintiffs and half defendants, so these Agreements are intended to be neutral and not benefit either side.

5. As we go through them, I urge your questions and constructive feedback. Each of you probably has a good idea that we should incorporate into these.