SANCTIONS ON REVIEW
(APPEAL AND MANDAMUS)

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ULTIMATE MOTIONS PRACTICE
September 20, 2013
Austin

CHAPTER 6.2

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Board Certified: Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-2014); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-2005)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

One of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2010)
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003) for significant contributions to the practice of family law in Texas
Association for Continuing Legal Excellence Best Program Award for *Enron: The Legal Issues* (2002)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, June 1997 & June 2004
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2011); Appellate Law (2007-2011)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas:

- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009 & 2011)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)

---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)

---*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)

---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)

---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)

---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)

---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE ARTICLES AND SPEECHES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Property Puzzles: 30 Characterization Rules, Explanations & Examples (2009); Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010)

SBOT's **Marriage Dissolution Course**: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997-1998); Making and Meeting Objections (1998 & 1999); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000 & 2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law

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Sanctions on Review (Appeal and Mandamus)

by

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I. INTRODUCTION. This Article discusses the conditions for imposing court-ordered sanctions, and reviewing them on appeal or by mandamus. It does not address rules or statutes that permit parties to recover attorney's fees and costs for a plaintiff or a defendant outside the context of sanctions.

In Texas litigation, trial courts can grant sanctions based upon: Tex. R. Civ. P. 13 (TRCP), TRCP 18a(h), TRCP 21b, TRCP 166a (h), TRCP 215, Chapter 9 of the Texas Civil Practice and Remedies Code (TCP&RC), Chapter 10 of the TCP&RC, and the court's inherent power to sanction. Appellate courts can grant sanctions based on Tex. R. App. P. 45 & 62 (TRAP), and TRAP 52.11.

TRCP 13 applies to a frivolous "pleading, motion, or other paper," and "fictitious suits." TRCP 18a(h) permits the court to impose a sanction when denying a motion to recuse a judge. TRCP 21b permits a court to impose a sanction for a party's failure to serve a copy of a pleading, plea, motion or other application to the court on other parties in accordance with TRCP and 21a. TRCP 166a(h).applies to summary judgment affidavits that are presented in bad faith or solely for the purpose of delay. TCP&RC ch. 9 applies to "[t]he signing of a pleading" in a tort case. TCP&RC ch. 10 applies to "the signing of a pleading or motion" in civil cases generally. TRCP 215 applies to the failure to comply with a variety of obligations relating to pre-trial discovery. The court's inherent power to sanction applies to behavior that interferes with a core function of the judiciary. TRAP 45 & 62 apply to frivolous appeals in the courts of appeals and Texas Supreme Court, respectively. TRAP 52.11 applies to sanctions imposed by appellate courts in original proceedings (i.e., mandamus). Presumably, appellate courts also have the inherent power to sanction.

II. SANCTIONS UNDER TEX. R. CIV. P. 13. TRCP 13 is the mainstay authority for granting sanctions for frivolous law suits. TRCP 13 provides:

> The *signatures* of *attorneys or parties* constitute a certificate by them that they *have read* the pleading, motion, or other paper; that to the best of their *knowledge, information, and belief* formed *after reasonable inquiry* the instrument is not *groundless and brought in bad faith* or *groundless and brought for the purpose of harassment*. Attorneys or parties who shall bring a *fictitious suit* as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they *know to be groundless and false*, for the purpose of *securing a delay of the trial* of the cause, shall be held guilty of a *contempt*. If a pleading, motion or other paper is *signed* in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. [Emphasis added.]
>
> Courts shall *presume* that pleadings, motions, and other papers are filed in *good faith*. No sanctions under this rule may be imposed except for *good cause*, the particulars of which must be *stated in the sanction order*. *"Groundless"* for purposes of this rule means *no basis in law or fact* and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule. [Emphasis added.]

Tex. R. Civ. P. 13.

Key concepts to note about TRCP 13 are:

- attorneys and parties who sign
- pleading, motion, or other paper
- must read the instrument before signing
- to the best of their knowledge, information, and belief
- formed after reasonable inquiry
- not groundless and brought in bad faith
- not groundless and brought for the purpose of harassment

• fictitious suit as an experiment to get an opinion of the court
• make statements in pleading which they know to be groundless and false
• for the purpose of securing a delay of the trial of the cause
• shall be held guilty of a contempt
• upon motion or upon its own initiative
• after notice and hearing
• shall impose an appropriate sanction
• available under Rule 215-2b
• upon the person who signed it, a represented party, or both
• presume good faith
• good cause
• the particulars must be stated in the sanction order
• "Groundless" means no basis in law or fact
• general denial is o.k.
• does not apply to the amount requested for damages.

Failure to Read. Rule 13 requires the signing attorney or signing party to read the instrument before they sign it. *See Keever v. Finlan*, 988 S.W.2d 300, 313 (Tex. App.--Dallas 1999, pet. denied) (failure to read affidavit before signing it was sanctionable).

Pleadings, Motions, Papers. Rule 13 applies only to pleadings, documents and other papers. *See Tarrant Restoration v. TX Arlington Oaks Apts.*, Ltd., 225 S.W.3d 721, 733 (Tex. App.–Dallas 2007, pet. dism'd w.o.j.). *Accord*, *Skelley v. Hayden*, 2001 WL 856610, *2 (Tex. App.--Dallas 2001, no pet.) (unpublished) (Rule 13 and Tex. Civ. Prac. & Rem. Code ch. 10 apply only to documents filed with a court).

Reasonable Inquiry. "Reasonable inquiry means the amount of examination that is reasonable under the circumstances of the case." *Monroe v. Grider*, 884 S.W.2d 811, 817 (Tex. App.—Dallas 1994, writ denied); *accord*, *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.--Houston [14th Dist.] 2002, no pet.). Note that the inquiry is into both the *legal* and *factual* basis for the claim. *See Lake Travis Independent School Dist. v. Lovelace*, 243 S.W.3d 244, 254 (Tex. App.–Austin 2007, no pet.). In *Robson v. Gilbreath*, 267 S.W.3d 401, 407 (Tex. App.--Austin 2008, pet. denied), the appellate court said: "A party cannot avoid rule 13 sanctions by claiming he was not actually aware of the facts making his claim groundless when he has not made reasonable inquiry . . . ." In *Khoshnoudi v. Bird*, 2000 WL 1176587, *8 (Tex. App.--Dallas 2000, pet. denied) (unpublished), the appellate court said: "a trial court can impose sanctions for a party's or his counsel's failure to inquire into the facts after he is on notice the facts are not what he believes."

Groundless and Bad Faith. "A party cannot obtain rule 13 sanctions unless the party proves that the claims are groundless and that the opposing party brought the claim in bad faith or to harass the party." *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.–Houston [14 Dist.] 2000, no pet.). "Because Peltier failed to establish bad faith or harassment as a motive for filing the petition, Rule 13 sanctions would not be warranted even if Dike's petition was groundless." *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 191 (Tex. App.--Texarkana 2011, no pet.).

What Constitutes Groundless. "Groundless" is defined in Rule 13 as having "no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." Courts are divided on whether the ruling on the merits of a claim is the measure for groundless. The Austin Court of Appeals has said: "A trial court may not base rule 13 sanctions on the legal merit of a pleading or motion. . . . Merely filing a motion or pleading that the trial court denies does not entitle the opposing party to rule 13 sanctions." *Lake Travis Independent School Dist. v. Lovelace*, 243 S.W.3d 244, 254 (Tex. App.–Austin 2007, no pet.); *accord, D Design Holdings, L.P. v. MMP Corp.*, 339 S.W.3d 195, 204 (Tex. App.--Dallas 2011, no pet.) ("Filing a motion or pleading that the trial court denies does not entitle the opposing party to rule 13 sanctions"). However, in *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 184 (Tex. App.--Texarkana 2011, no pet.), the court said: "Groundlessness turns on the legal merits of a claim." *See Hartman v. Urban*, 946 S.W.2d 546, 552 (Tex. App.–Corpus Christi 1997, no writ) (a claim that a professional engineer has a duty to the purchaser of a lot to use reasonable care in the preparation of a plat that is filed for record was not frivolous). In *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 900 (Tex. App.--Houston [14th Dist.] 2002, no pet.), the court said: "judges should consider the complexity of the claim and underlying statute."

Objective Test For Groundless. Courts have discussed the objective component of the grounds for Rule 13 sanctions. "To determine if a pleading was groundless, the trial court uses an objective standard: did the party and counsel make a reasonable inquiry into the legal and factual basis of the claim?" *In re United Servs. Auto. Ass 'n*, 76 S.W.3d 112, 116 (Tex. App.--San Antonio 2002, orig. proceeding); *accord*, *Great Western Drilling, Ltd. v. Alexander*, 305 S.W.3d 688, 698 (Tex. App.--Eastland 2009, no pet.). However, whether an instrument was groundless also involves a determination of whether an instrument had no basis in law or fact, which is a separate objective inquiry.

Evaluate Groundless at Time of Filing. "To determine if a pleading was groundless, that is, filed for an improper purpose, the trial court must objectively ask whether the party and counsel made a reasonable inquiry into the legal and factual basis of the claim at the time the suit was filed." *Lake Travis Independent School Dist. v. Lovelace*, 243 S.W.3d 244, 254 (Tex. App.–Austin 2007, no pet.).

What Constitutes Bad Faith."'Bad faith' is not simply bad judgment or negligence, but means the conscious doing of a wrong for dishonest, discriminatory, or malicious purpose." *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67, 71 (Tex. App.—El Paso 1994, writ denied).

Subjective Test For Bad Faith. Courts have discussed the subjective component of the grounds for Rule 13 sanctions. Several cases say that sanctions for frivolous pleadings require proof of the offender's state of mind. *R.M. Dudley Const. Co., Inc. v. Dawson*, 258 S.W.3d 694, 710 (Tex. App.--Waco 2008, pet. denied) ("The party moving for sanctions must prove the pleading party's subjective state of mind"); *Estate of Davis v. Cook*, 9 S.W.3d 288, 298 (Tex. App.--San Antonio 1999, no pet.) ("While Rule 13 fails to define 'bad faith' and 'harassment,' case law interpretation holds that to prevail on a claim of 'bad faith' under the rule, a party must demonstrate that the claim was motivated by a malicious or discriminatory purpose"). The issue of "bad faith" and "for the purpose of harassment" relates to the state of mind of the filing party or lawyer.

Belief vs. Knowledge. The first sentence of Rule 13 involves the signer's "knowledge, information, and belief." There is a difference between *knowing* something, and *having information* about something, and *believing* something. Whether someone knew or believed something when signing an instrument involves a subjective assessment regarding the signer's state-of-mind; whether the signer had information about something is an objective assessment. Knowledge also appears in the second sentence of Rule 13, regarding making a statement in a pleading that the signer *knows* to be groundless and false. This is a subjective assessment of the signer's knowledge at the time of signing. For this provision to apply, it is necessary to show first that a statement in a pleading is groundless or false, and then also that the signer knew that the statement was groundless and false. In addition, it must be shown that the signer knowingly made the groundless and false assertion for the purpose of securing a delay of the trial. Ascertaining this purpose also involves a subjective assessment of the signer's motive. All of these subjective assessments could collide with a privilege, such as the attorney-client privilege, the work product privilege, the doctor-patient privilege, etc. How these privileges play out in the sanctions hearing and affect the burden of producing evidence is not sufficiently explored in the case law.

Contempt. A claim that the signer had knowledge that an assertion was groundless and false, which is punishable by contempt, raises a question of the privilege against self-incrimination. If contempt is a potential remedy being sought, it would seem that a Fifth Amendment privilege could be invoked. Also, there is an elevated burden of persuasion for contempt proceedings that expose a person to incarceration. *Hicks v. Feiock*, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429–30, 99 L. Ed.2d 721 (1988) (to incarcerate someone, proof must be beyond a reasonable doubt).

Harass. "'Harass' is used in a variety of legal contexts to describe words, gestures, and actions that tend to annoy, alarm, and verbally abuse another person. Black's Law Dictionary 717 (6th ed.1990)." *Elkins v. Stotts–Brown*, 103 S.W.3d 664, 669 (Tex. App.--Dallas 2003, no pet.).

Findings. In *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.--Houston [14th Dist.] 2002, no pet.), a trial court's assessment of sanctions, under Rule 13, was reversed because the order imposing sanctions contained numerous conclusory findings but no factual particulars. In *Rudisell v. Paquette*, 89 S.W.3d 233, 237 (Tex. App.--Corpus Christi 2002, no pet.) (a Rule 13 case), the court articulated four reasons why the particulars are important:

> In reviewing an award of sanctions, we ordinarily look to the particulars of good cause set out in the sanction order. . . . This particularity requirement serves several important purposes. First, it ensures that the trial court is held accountable and adheres to the standard of the rule. . . . Second, it requires the trial court to reflect carefully on its order before imposing sanctions. . . . Third, it informs the offending party of the particular conduct warranting sanction for the purpose of deterring similar conduct in the future. . . . And fourth, it enables the appellate court to review the order in light of the particular findings made by the trial court. . . . [Citations omitted.]

III. SANCTIONS UNDER TRCP 18a(h). TRCP 18a(h) permits the judge hearing a recusal motion to award sanctions upon denying the motion. TRCP 18a(h) reads:

> (h) Sanctions. After notice and hearing, the judge who hears the motion may order the party or attorney who filed the motion, or both, to pay the reasonable

> attorney fees and expenses incurred by other parties if the judge determines that the motion was:
>
> > (1) groundless and filed in bad faith or for the purpose of harassment, or
> >
> > (2) clearly brought for unnecessary delay and without sufficient cause.

TRCP 18a(h)(1) echoes the standard in TRCP 13. There is a slight wording difference in that TRCP 13 explicitly pairs groundless with an improper motive ("groundless and brought in bad faith or groundless and brought for the purpose of harassment"), whereas TRCP 18a(h)(1) mentions "groundless" only once but the sentence structure suggests that it is paired with both "bad faith: and "harassment." TRCP 18a(h)(2) deviates from TRCP 13, in that Rule 13 applies to statements made in pleadings that the lawyer or client "know to be groundless and false, for the purpose of securing a delay of the trial of the cause," while TRCP 18a(h)(2) allows sanctions when the motion to recuse was "clearly brought for unnecessary delay and without sufficient cause without any requirement that there be statements that are groundless or false." Missing from TRCP 18a(h)(2) is the Rule 13 requirement of a subjective awareness that statements in the pleadings are groundless and false. Instead, Rule 18a(h)(2) used the concept of "without sufficient cause." Note also that TRCP 18a(h)(2) requires both a motive to delay and the absence of sufficient cause. It is also noteworthy that the portion of TRCP 13 that correlates to TRCP18a(h)(2) provides both a sanctions remedy and a contempt remedy, while TRCP 18(h)(2) provides only a sanctions remedy and not a contempt remedy. Undoubtedly the definition of "groundless" in TRCP 13 carries over to TRCP 18a(h)(1). However, Rule 18a(h)(2) does not indicate how similar "without sufficient cause" is to "groundless," but presumably something different is intended or the word "groundless" would have been used in Rule 18a(h)(2). Another difference between the two rules is the measure of the sanction. TRCP 13 allows "an appropriate sanction available under Rule 215-2b," whereas TRCP 18a(h)(2) provides for an award of "reasonable fees and expenses."

Sanctions of $350 were upheld in an unsuccessful recusal in *Ellis v. J.E. Merit Constructors, Inc.*, 2000 WL 35729199, *6 (Tex. App.--Corpus Christi 2000, no pet.). In the case of *In re H.M.S.*, 349 S.W.3d 250, 256-57 (Tex. App.–Dallas 2011, pet. denied), the court of appeals upheld the assessment of sanctions against a party who moved to recuse the trial judge and then subpoenaed the trial judge as well as the court reporter, a deputy clerk, and a district clerk. The sanctions were awarded to the County for having to send a county attorney to represent the subpoenaed witnesses. Since TRCP 18a(h) only permits the award of fees and expenses to other parties, the court of appeals rested its affirmance of awarding sanctions to a non-party on the trial court's exercise of inherent power to sanction. In *Palais Royal, Inc. v. Partida*, 916 S.W.2d 650, 654 (Tex. App.--Corpus Christi 1996, orig. petition), the appellate court upheld sanctions consisting of attorneys' fees of $4,800, plus the striking of motions related to the effort to disqualify the judge.

IV. SANCTIONS UNDER TRCP 21b. TRCP 21b provides:

> Rule 21b. Sanctions for Failure to Serve or Deliver Copy of Pleadings and Motions
>
> If any party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for an order in accordance with Rules 21 and 21a, the court may in its discretion, after notice and hearing, impose an appropriate sanction available under Rule 215-2b. [FN1]

The provision was adopted on April 24, 1990, eff. Sept. 1, 1990. The case of *Ezeoke v. Tracy*, 349 S.W.3d 679, 685 (Tex. App.–Houston [14th Dist.] 2011, no pet.), held that imposition of sanctions under TRCP 21b, for failing to serve copies of pleadings, would be evaluated on a two-pronged inquiry: whether a nexus exists between the sanctions and the wrongful conduct, and whether the sanction was excessive. These are the measure of "just" sanctions developed under *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917-18 (Tex. 1991); See Section VII.C below.

V. SANCTIONS UNDER TRCP 166a(h). Under TRCP 166a(h), in a summary judgment proceeding the court may impose sanctions if it appears "to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith *or* solely for the purpose of delay." Upon such a determination, the courts "shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt." Note the disjunctive connector used in the Rule That means that either bad faith or a purpose of delay, standing alone, supports sanctions. Note that the sanction are limited to expenses "caused" by the affidavit(s), and contempt. Rule 166a(h) does not authorize the court to strike an affidavit that the court thinks was filed in bad faith. *Thompson v. City of Corsicana Housing*

Authority, 57 S.W.3d 547, 556-57 (Tex. App.--Waco 2001, no pet.). In *Optimum Asset Management, Inc. v. Cito Intern., Inc.*, 1998 WL 261784, *5-6 (Tex. App.--Dallas 1998, pet. denied) (unpublished), the appellate court upheld a sanction under TRCP 166a(h) where a witness admitted on deposition to having signed a summary judgment affidavit without reading it first. In *Bexar Appraisal Dist. v. Dee Howard Co.*, 1997 WL 30884, *4 (Tex. App.–San Antonio, writ denied) (unpublished), the appellate court rejected a contention that the trial court had abused its discretion by refusing to grant sanctions under TRCP 166a(h).

VI. SANCTIONS UNDER THE TEX. CIV. PRAC. & REMEDIES CODE CHS. 9 & 10. The Texas Legislature entered the sanctions fray in 1987 with Chapter 9 of the Texas Civil Practice and Remedies Code. The Legislature followed up by adopting Chapter 10 in 1995. The Texas Supreme Court Advisory Committee attempted to write rules of procedure to implement Chapters 9 and 10 but was unable to do so and gave up on the task.

A. CHAPTER 9. "Chapter 9 only applies to actions in which a claimant seeks (1) damages for personal injury, property damage, or death, or (2) damages from any tortious conduct." *Armstrong v. Collin County Bail Bond Bd.*, 233 S.W.3d 57, 61 (Tex. App.–Dallas 2007, no pet.); *accord*, *Sprague v. Sprague*, 2012 WL 456936, *13 (Tex. App.–Houston [14 Dist.] 2012, pet. pending) (Chapter 9 of the Civil Practice and Remedies Code provides for sanctions in cases involving a tort claim or a claim for damages based upon personal injury, property damage, or death). The court-ordered sanction part of Chapter 9 does not apply to proceedings in which TCP&RC Chapter 10 or Tex. R. Civ. P. 13 apply. TRCP&RC § 9.012 (h); *Low v. Henry* 221 S.W.2d 609, 614 (Tex. 2007).

1. The Statute. The statute reads:

Sec. 9.001. DEFINITIONS.

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, third-party plaintiff, or intervener, seeking recovery of damages. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.

(2) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief.

(3) "Groundless" means:
(A) no basis in fact; or
(B) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(4) "Pleading" includes a motion.

Added by Acts 1987, 70th Leg., 1st C.S., ch. 2, Sec. 2.01, eff. Sept. 2, 1987.

Sec. 9.002. APPLICABILITY.

(a) This chapter applies to an action in which a claimant seeks:

(1) damages for personal injury, property damage, or death, regardless of the legal theories or statutes on the basis of which recovery is sought, including an action based on intentional conduct, negligence, strict tort liability, products liability (whether strict or otherwise), or breach of warranty; or

(2) damages other than for personal injury, property damage, or death resulting from any tortious conduct, regardless of the legal theories or statutes on the basis of which recovery is sought, including libel, slander, or tortious interference with a contract or other business relation.

(b) This chapter applies to any party who is a claimant or defendant, including but not limited to:
(1) a county;
(2) a municipality;
(3) a public school district;
(4) a public junior college district;
(5) a charitable organization;
(6) a nonprofit organization;
(7) a hospital district;
(8) a hospital authority;
(9) any other political subdivision of the state; and
(10) the State of Texas.

(c) In an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

Sec. 9.003. TEXAS RULES OF CIVIL PROCEDURE.

This chapter does not alter the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.

Sec. 9.004. APPLICABILITY.

This chapter does not apply to the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) or to Chapter 21, Insurance Code.

SUBCHAPTER B. SIGNING OF PLEADINGS.

Sec. 9.011. SIGNING OF PLEADINGS.

The signing of a pleading as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, the pleading is not:

(1) groundless and brought in bad faith;

(2) groundless and brought for the purpose of harassment; or

(3) groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation.

Sec. 9.012. VIOLATION; SANCTION.

(a) At the trial of the action or at any hearing inquiring into the facts and law of the action, after reasonable notice to the parties, the court may on its own motion, or shall on the motion of any party to the action, determine if a pleading has been signed in violation of any one of the standards prescribed by Section 9.011.

(b) In making its determination of whether a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall take into account:

(1) the multiplicity of parties;

(2) the complexity of the claims and defenses;

(3) the length of time available to the party to investigate and conduct discovery; and

(4) affidavits, depositions, and any other relevant matter.

(c) If the court determines that a pleading has been signed in violation of any one of the standards prescribed by Section 9.011, the court shall, not earlier than 90 days after the date of the determination, at the trial or hearing or at a separate hearing following reasonable notice to the offending party, impose an appropriate sanction on the signatory, a represented party, or both.

(d) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if, before the 90th day after the court makes a determination under Subsection (a), the offending party withdraws the pleading or amends the pleading to the satisfaction of the court or moves for dismissal of the pleading or the offending portion of the pleading.

(e) The sanction may include one or more of the following:

(1) the striking of a pleading or the offending portion thereof;

(2) the dismissal of a party; or

(3) an order to pay to a party who stands in opposition to the offending pleading the amount of the reasonable expenses incurred because of the filing of the pleading, including costs, reasonable attorney's fees, witness fees, fees of experts, and deposition expenses.

(f) The court may not order an offending party to pay the incurred expenses of a party who stands in opposition to the offending pleading if the court has, with respect to the same subject matter, imposed sanctions on the party who stands in opposition to the offending pleading under the Texas Rules of Civil Procedure.

(g) All determinations and orders pursuant to this chapter are solely for purposes of this chapter and shall not be the basis of any liability, sanction, or grievance other than as expressly provided in this chapter.

(h) This section does not apply to any proceeding to which Section 10.004 or Rule 13, Texas Rules of Civil Procedure, applies.

Sec. 9.013. REPORT TO GRIEVANCE COMMITTEE.

(a) If the court imposes a sanction against an offending party under Section 9.012, the offending party is represented by an attorney who signed the pleading in violation of any one of the standards under Section 9.011, and the court finds that the attorney has consistently engaged in activity that results in sanctions under Section 9.012, the court

shall report its finding to an appropriate grievance committee as provided by the State Bar Act (Article 320a-1, Vernon's Texas Civil Statutes) or by a similar law in the jurisdiction in which the attorney resides.

(b) The report must contain:

(1) the name of the attorney who represented the offending party;

(2) the finding by the court that the pleading was signed in violation of any one of the standards under Section 9.011;

(3) a description of the sanctions imposed against the signatory and the offending party; and

(4) the finding that the attorney has consistently engaged in activity that results in sanctions under Section 9.012.

Sec. 9.014. PLEADINGS NOT FRIVOLOUS.

(a) A general denial does not constitute a violation of any of the standards prescribed by Section 9.011.

(b) The amount requested for damages in a pleading does not constitute a violation of any of the standards prescribed by Section 9.011.

2. Period to Cure. Section 9.012(d) permits a party to avoid a sanction under Chapter 9 if the party withdraws the pleading within 90 days of when the court determines that the pleading violates the standards of Section 9.011, *Signing of Pleadings.* TRCP 13 has no such grace period, so that the court can impose sanctions for a frivolous pleading under Rule 13 even when Section 9.012 would not allow it. *Booth v. Malkan*, 858 S.W.2d 641, 644 (Tex. App.--Fort Worth 1993, writ denied.

B. CHAPTER 10. Chapter 10 of the TCP&RC provides for sanctions in civil cases generally. This Chapter was added eight years after Chapter 9 was promulgated. Chapter 10 applies to all civil litigation, and it has in practice supplanted Chapter 9, because Chapter 9 does not apply to any situation where Chapter 10 or TRCP 13 apply.

1. The Statute. Chapter 10 reads:

Sec. 10.001. SIGNING OF PLEADINGS AND MOTIONS.

The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Added by Acts 1995, 74th Leg., ch. 137, § 1, eff. Sept. 1, 1995.

Sec. 10.002. MOTION FOR SANCTIONS.

(a) A party may make a motion for sanctions, describing the specific conduct violating Section 10.001.

(b) The court on its own initiative may enter an order describing the specific conduct that appears to violate Section 10.001 and direct the alleged violator to show cause why the conduct has not violated that section.

(c) The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney's fees incurred in presenting or opposing the motion, and if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

Sec. 10.003. NOTICE AND OPPORTUNITY TO RESPOND.

The court shall provide a party who is the subject of a motion for sanctions under Section 10.002 notice of the allegations and a reasonable opportunity to respond to the allegations.

Sec. 10.004. VIOLATION; SANCTION.

(a) A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.

(b) The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated.

(c) A sanction may include any of the following:

(1) a directive to the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court; and

(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees.

(d) The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2).

(e) The court may not award monetary sanctions on its own initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party or the party's attorney who is to be sanctioned.

(f) The filing of a general denial under Rule 92, Texas Rules of Civil Procedure, shall not be deemed a violation of this chapter.

Sec. 10.005. ORDER.

A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.

Sec. 10.006. CONFLICT.

Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter.

2. Notice and Opportunity to be Heard. TCP&RC §10.003 requires a court to provide the target of a sanctions motion with "notice of the allegations and a reasonable opportunity to respond." "A trial court must hold an evidentiary hearing to make the necessary factual determinations about the party's or attorney's motives and credibility." *R.M. Dudley Const. Co., Inc. v. Dawson*, 258 S.W.3d 694, 709 (Tex. App.–Waco 2008, pet. denied). However, to preserve appellate complaint about lack of notice, the party claiming lack of notice must complain at the hearing about lack of adequate notice, and object to the hearing going forward, and/or move for a continuance. *Low v. Henry*, 221 S.W.3d 609, 618 (Tex. 2007).

3. Improper Purpose. TCP&RC § 10.001 allows a sanction where a pleading is presented for any improper purpose. The Texarkana Court of Appeals has said: "We construe the phrase 'improper purpose' as the equivalent of 'bad faith' under Rule 13." *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 183-84 (Tex. App.--Texarkana 2011, no pet.).

4. Subjective State of Mind. Some courts have said that "[t]he party moving for sanctions must prove the pleading party's subjective state of mind." *Dawson*, 258 S.W.3d at 710 (involving Chapter 10 sanctions); compare *with Thielemann v. Kethan*, 2012 WL 159949, *6 (Tex. App.--Houston [1st Dist.] 2012, no pet.) (Rule 13). This idea needs to be explored. In *Low v. Henry*, 221 S.W.3d 609, 617 (Tex. 2007), the Supreme Court said, in a Chapter 10 sanction case, that the parties seeking sanctions against the plaintiff's lawyer were "not required to specifically show bad faith or malicious intent, just that Henry certified that he made a reasonable inquiry into all of the allegations when he did not and that he certified that all the allegations in the petition had evidentiary support, or were likely to have evidentiary support." This language in *Low v. Henry* indicates that sanctions can be imposed for a violation of a single ground of TCP&RC § 10.001. In other words, a party seeking sanctions under Chapter 10 does not have to show that a party or lawyer violated all subparts of Section 10.001. It is only necessary to show that one of the subparts to Section 10.001 was violated.

5. Lack of Reasonable Basis in Law. TCP&RC § 10.001 allows a court to sanction for filing pleadings that lack a reasonable basis in law. *Unifund CCR Partners v. Villa*, 299 S.W. 3d 92, 97 (Tex. 2009). Section 10.001 provides that "each claim, defense, or other legal contention in the pleading or motion" must be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Each claim asserted in the alternative must have a reasonable basis in fact and law. *Low v. Henry* 221 S.W.3d 609, 614 (Tex. 2007). The fact that a claim was reversed on appeal does not of itself

indicate that the claim was not warranted. The case of *Ubinas-Brache v. Dallas County Medical Society*, 261 S.W.3d 800, 804 (Tex. App.–Dallas 2008, pet. denied), although not a Chapter 10 sanctions case, is instructive. A physician sued the Dallas County Medical Society for improperly expelling him. After the doctor obtained a favorable verdict and judgment, the court of appeals reversed based on the defendant Society being immune under the Texas Medical Practices Act. The statute provides that it does not apply to instances of malice; however, the doctor did not plead or prove malice. He did, however, argue that the statute violated the Open Courts provision of the Texas Constitution. On remand, the defendant sought to recover fees under state and federal law that permitted recovery of defense costs if the suit was frivolous or brought in bad faith, or was unreasonable or without foundation. *Id*. 802-03. The defendant argued that the plaintiff's failure to allege and prove malice, the only exception recognized by the statute, showed that his claims were frivolous, etc. *Id* at 805. The appellate court disagreed, saying that the claim that the statute was unconstitutional was not frivolous. While the sanction statutes in question are not the ones studied in this Article, the case is instructive regarding an argument for the establishment of new law.

6. Lack of Reasonable Basis in Fact. TCP&RC § 10.001 allows a court to sanction for filing pleadings that lack a reasonable basis in fact. *Unifund CCR Partners v. Villa*, 299 S.W. 3d 92, 97 (Tex. 2009). The party seeking sanctions must show that a reasonable inquiry into the allegations in the pleading would have disclosed "that not all the allegations in its pleadings had or would likely have evidentiary support" and that the plaintiff "did not make a reasonable inquiry before filing suit." *Unifund*, 299 S.W. 3d at 97. A party is not required to have evidence to support each factual allegation at the time the lawsuit is filed. *Low v. Henry*, 221 S.W.3d. 609, 622 (Tex. 2007).

TCP&RC § 10.001 has four subparts joined conjunctively (with an "and"). To establish an affirmative proposition under the statute, all four subparts must be proven, i.e., (i) no improper purpose, (ii) warranted by law or extension of the law, (iii) evidentiary support and (iv) each denial is supported by evidence or is reasonably based on lack of information. However, to *negate* the four-pronged conjunctive test under Section 10.001 it is only necessary to negate one of the four prongs.[1] A trial court is required to presume good faith in filing a motion, response, or pleading. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). This places the burden of negating the first prong of Section 10.001 on the party seeking sanctions. However, even with good faith, the four-pronged requirement of Section 10.001 can be defeated by showing that any of the other three prongs have failed. Thus, in *Low v. Henry* sanctions were supported by proof that the lawyer certified that he had made a reasonable inquiry into all the allegations in his pleading when he had not, and that he certified that all allegations had evidentiary support, or were likely to have evidentiary support, when some of the allegations did not. *Id.* at 617.

7. The Amount of the Sanction. TCP&RC § 10.007(c) permits a court to order the payment of a fine or to order payment of reasonable expenses, including attorney's fees incurred as a result of the pleadings or motion. Monetary sanctions cannot be excessive. See Section XIII below.

Under Chapter 10 the court may order sanctions paid to a party based on reasonable expenses, including attorney's fees incurred as a result of the pleadings or motion. Or the court can order a penalty paid to the court. The Supreme Court has ruled that in setting either type of sanction the court should "consider relevant factors in assessing the amount of the sanction." *Low v. Henry*, 221 S.W.3d 609, 620-21 (Tex. 2007). The Supreme Court suggested, as a guide, a 1988 ABA report listing factors to consider in imposing sanctions. *Id*. at 62. The Court also noted that Tex. Const. art I §13 prohibits excessive fines. *Id*. at 620 n.4. This constraint exists independently of the due process clause, where the sanction is a fine paid to the court.

VII. DISCOVERY SANCTIONS UNDER TEX. R. CIV. P. 215. The Court has said that "the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what facts reveal, not by what facts are concealed." *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984). In keeping with this view, TRCP 215 permits a trial court to compel discovery and impose discovery-related sanctions for failure to comply with discovery requirements. However, using a rule of exclusion to enforce a duty of disclosure can sometimes defeat this ultimate purpose of discovery. That is, sanctions that destroy a party's right to present evidence can lead to a result that is based on procedure and not based on the merits of the claims. The case law thus imposes limits on the court's authority to suppress

[1] If the elements of a proposition are *disjunctively* joined (connected by an "or"), in order to negate the proposition it is necessary to disprove each element; if the elements of the proposition are *conjunctively* joined (connected by an "and"), the proposition can be defeated by negating any one of the elements.

evidence as punishment for failing to meet discovery obligations.

A. TEXT OF RULE 215. Rule 215 provides:

> **215.1 Motion for Sanctions or Order Compelling Discovery.**
>
> A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:
>
> (a) Appropriate court. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.
>
> (b) Motion.
>
> (1) If a party or other deponent which is a corporation or other entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or
>
> (2) if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:
>
> (A) to appear before the officer who is to take his deposition, after being served with a proper notice; or
>
> (B) to answer a question propounded or submitted upon oral examination or upon written questions; or
>
> (3) if a party fails:
>
> (A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or
>
> (B) to answer an interrogatory submitted under Rule 197; or
>
> (C) to serve a written response to a request for inspection submitted under Rule 196, after proper service of the request; or
>
> (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196;
>
> the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.
>
> When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.
>
> If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6.
>
> (c) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.
>
> (d) Disposition of motion to compel: award of expenses. If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.
>
> If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.
>
> If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.
>
> In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award

expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.

(e) Providing person's own statement. If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h), the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.

215.2 Failure to Comply with Order or with Discovery Request.

(a) Sanctions by court in district where deposition is taken. If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) an order that the matters regarding which the order was made or any other designated acts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

(c) Sanction against nonparty for violation of Rules 196.7 or 205.3. If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.

215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.

If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.

215.4 Failure to Comply with Rule 198

(a) Motion. A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion.

(b) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses.

(a) Failure of party giving notice to attend. If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

(b) Failure of witness to attend. If a party gives notice of the taking of an oral deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

215.6 Exhibits to Motions and Responses.

Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

B. FAILURE TO DISCLOSE; FAILURE TO SUPPLEMENT.

1. Failure to Cooperate with Discovery Procedures. TRCP 215(b) lists the failures to cooperate with discovery procedures that can lead to sanctions: (i) a business entity fails to designate a representative to appear for deposition; (ii) a deponent fails to appear for deposition and answer questions after proper notice; (iii) a party fails to answer written interrogatories, fails to respond in writing to a request for inspection, or fails to respond to a request for production. If any of these failures occur, a party can file a motion to compel compliance or for the court to impose sanctions or both. It is *not* necessary to obtain a court order and have it violated before seeking sanctions. In evaluation discovery responses, evasive answers are treated like no answer. Tex. R. Civ. P 215.1(c).

2. Failure to Disclose. The standard sanction for failing to disclose information that was requested through pretrial discovery methods is to exclude the evidence when offered by the non-producing party. However, this sanction is effective only when the party in possession fails to disclose and then tries later to use the information in their case. Exclusion is no motivator for compliance when the evidence is adverse to the party who fails to produce the evidence upon request. In that instance, exclusion works to the benefit of the party thwarting discovery.

a. Witnesses and Documents. In *Alvarado v. Farah Manuf. Co., Inc.*, 830 S.W.2d 911 (Tex. 1992), the Supreme Court upheld the exclusion of a fact witness, based on a failure to disclose. In *Sprague v. Sprague*, --- S.W.3d ----, 2012 WL 456936, *10 (Tex. App.--Houston [14 Dist.] 2012, n.p.h.), the court of appeals upheld the exclusion of expert witness testimony based on failure to meet a disclosure deadline set for an expert report. In *Schein v. American Restaurant Group, Inc.*, 852 S.W.2d 496, 497 (Tex. 1993), the court recognized that "[i]f a party does not comply with a discovery request . . . , the party may be prohibited from introducing a requested document or evidence at trial." When evidence is excluded

as a discovery sanction, the proponent of the evidence must be sure to make an *offer of proof* in order to complain on appeal. *See* Tex. R. Evid. 103(a)(2),(b).

b. Failure to Disclose Legal Theories. TRCP 194.2(c) requires a party, upon request, to disclose " the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial) . . ." Nonetheless, some courts of appeals have not embraced a rule of exclusion based on the failure to disclosure theories of liability in discovery responses, where they have been disclosed in pleadings. In *Concept Gen. Contracting, Inc. v. Asbestos Maint. Servs., Inc.*, 346 S.W.3d 172, 180 (Tex. App.–Amarillo 2011, pet. denied), the court of appeals held that "properly pled claims for affirmative relief, as opposed to withheld evidence, are not abandoned or waived by a party's failure to expressly identify those claims in a response to a request for disclosure." *See also, Bundren v. Holly Oaks Townhomes Ass'n, Inc.*, 347 S.W.3d 421, 431 (Tex. App.--Dallas 2011, pet. denied) ("appellees did not waive the right to request that the trial court consider all applicable law by failing to specifically identify relevant statutes in their discovery responses").

c. Failure to Disclose Damage Calculations. TRCP 194.2 requires a party, upon request, to disclose "the amount and any method of calculating economic damages . . . ." In *Robinson v. Lubbering*, 2011 WL 749197, *3 (Tex. App.--Austin 2011, no pet.) (memorandum opinion), the court of appeals affirmed a trial court that JNOV'd a jury verdict, where the plaintiff did not timely disclose or supplement his basic damages contentions in response to requests for disclosures.

3. Failure to Supplement Discovery Responses. Prior to January 1, 1999, the duty to supplement was set out in TRCP166b(6)(a), which provided an affirmative duty to supplement answers to discovery requests if an answer is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading. Old TRCP 166b read in part:

> **6. Duty to Supplement.** A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than thirty days prior to the beginning of trial unless the court finds that a good cause exists for permitting or requiring later supplementation.
>
> a. A party is under a duty to reasonably supplement his response if he obtains information upon the basis of which:
>
> . . .
>
> (2) he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading . . . .

Under Old TRCP 166b(5)(b), a party was "obligated to designate any expert it expects to call and to disclose the substance of his testimony as soon as practicable, but at least thirty days before trial."

Effective January 1, 1999, TRCP166b was deleted and new TRCP 193.5 went into effect. Under TRCP 193.5, a duty to amend or supplement arises "if a party learns that the party's response to written discovery was incomplete or incorrect when made . . . ." If the written discovery sought information other than the identification of witnesses, the duty to supplement arises . . . unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses. Tex. R. Civ. P. 193.5. The supplemental response is due "reasonably promptly after the party discovers the necessity for such a response." Tex. R. Civ. P. 193.5(b). Because the supplementation duty changed on January 1, 1999, cases decided under the old supplementation duty may not apply to issues arising under the new duty, in some particulars.

4. Failure to Update Expert Disclosure. There is both a duty, on proper request, to disclose experts' opinions, and a duty to supplement them when they change. The final supplementation obligation occurs thirty days prior to trial. Tex. R. Civ. P. 193.5(b) (supplementation within 30 days of trial is presumed not to have been made reasonably promptly). However, there is a limited ability for experts to change their opinions even after that. In *Exxon Corp. v. West Texas Gathering Co.*, 868 S.W.2d 299, 304 (Tex. 1993), the Supreme Court said:

> In this burgeoning technological age, modern trial practice increasingly involves complex factual issues requiring elaborate expert proof. In order to be prepared adequately for trial, both sides must be fully aware of the nature of both their own evidence and that of the opposing parties, and our procedural rules requiring full supplementation of discovery responses are designed to ensure this result. To that end, Texas Rule of Civil Procedure 166b(6)(b) requires parties

to reveal the "substance of the testimony concerning which [their] expert witness is expected to testify" no less than 30 days before trial, and Rule 166b(2)(e) permits discovery of the mental impressions and opinions held by, and the facts known to, the expert. This information must be supplemented no less than 30 days before trial if it is no longer true and complete, and the failure to amend renders the substance misleading. Tex. R. Civ. P. 166b(6)(a).

Our rules do not prevent experts from refining calculations and perfecting reports through the time of trial. The testimony of an expert should not be barred because a change in some minor detail of the person's work has not been disclosed a month before trial. The additional supplementation requirement of Rule 166b(6) does require that opposing parties have sufficient information about an expert's opinion to prepare a rebuttal with their own experts and cross-examination, and that they be promptly and fully advised when further developments have rendered past information incorrect or misleading.

5. Must Obtain Ruling on Discovery Sanction Before Trial Starts. The Supreme Court has held "the failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct." *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993). *Accord*, *Mandell v. Mandell*, 214 S.W.3d 682, 691 (Tex. App.--Houston [14 Dist.] 2007, no pet.) ("by waiting until the eve of trial to file his motion, David waived his complaints on the exclusion of evidence"). This deadline does not apply to problems that arise or are first exposed after trial has started.

6. Undisclosed Parties Have a Right to Testify. In *Smith v. Southwest Feed Yards*, 835 S.W.2d 89, 90 (Tex. 1992), the Supreme Court held that a trial court abused its discretion in refusing to allow a party to testify because he had failed to list himself as a potential witness in interrogatory answers. In a Concurring Opinion, Justice Hecht observed that the constitutional limits on discovery sanctions applied to exclusion of a party's testimony. *Id.* at 94. Justice Hecht noted that, without his own testimony, the party could not present a viable defense, with the result that the plaintiff recovered judgment not because its claim was meritorious, but because the defendant failed to list himself as a potential witness. *Id.* at 95. This outcome was, he said, condemned in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991). Subsequent courts have held that a court may not exclude the testimony of a party-witness who was not identified in discovery. *In re B.A.B.*, 124 S.W.3d 417, 421 (Tex. App.–Dallas 2004, no pet.); *Avary v. Bank of America, N.A.*, 72 S.W.3d 779, 787 (Tex. App.–Dallas 2002, pet. denied). TRCP 193.6 now excepts named parties from exclusion. Tex. R. Civ. P. 193.6(a).

7. The Good Cause and Lack of Surprise Exceptions. TRCP 193.6(a) permits the introduction of material or information or testimony that not timely disclosed, if: (1) there was good cause for failure to timely make, amend, or supplement the discovery response, or (2) the failure to timely make, amend, or supplement the discovery response will not "unfairly surprise or unfairly prejudice the other parties." TRCP 193.6(a) became effective on January 1, 1999. Prior to that time, the sole exception to the rule of exclusion was a showing of good cause for failing to timely disclose or timely supplement. *See* old TRCP 215.5. The rule change has been seen as a reduction in the burden of a party who is seeking to introduce a witness. *Elliott v. Elliott*, 21 S.W.3d 913, 922 n7 (Tex. App.--Fort Worth 2000, pet. denied); *Tri-Flo International, Inc. v. Jackson*, 2002 WL 31412532, *2 (Tex. App.--Corpus Christi 2002, no pet.) (not designated for publication). For this reason, pronouncements from pre-1999 cases, about the exclusion of evidence based solely on failure to show good cause, should be used with caution on account of the addition of the unfair surprise/unfair prejudice exception in 1999. Appellate cases regarding "good cause" usually involve the failure to disclose a witness. *See Alvarado v. Farah Manufacturing Co., Inc.*, 830 S.W.2d 911, 914 (Tex. 1992) (decided under prior discovery rules). "Inadvertence of counsel is not good cause for failure to adhere to discovery deadlines." *Sprague v. Sprague*, --- S.W.3d ----, 2012 WL 456936, *10 (Tex. App.--Houston [14 Dist.] 2012, pet. pending), citing *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex. 1992).

In *Best Industrial Uniform Supply Co., Inc. v. Gulf Coast Alloy Welding, Inc.*, 41 S.W.3d 145, 148 (Tex. App.–Amarillo 2000, pet. denied), the court reversed a trial judge for refusing to allow the plaintiff to call a new credit manager who replaced a credit manager who quit, even though the identify of the new employee was not supplemented until a week before the hearing to disallow the witness. There was no showing that the defendant would be unfairly prejudiced or surprised by the failure to disclose the witness. *Id.* at 149.

8. Destruction of Evidence. Normally, destruction of evidence is a matter that is addressed through a spoliation instruction. In *Trevino v. Ortega*, 969 S.W.2d 950, 960 (Tex. 1998), the Supreme Court recognized two different levels of severity of such instructions:

> Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of presumptions. . . . The first and more severe presumption is a rebuttable presumption. This is primarily used when the nonspoliating party cannot prove its prima facie case without the destroyed evidence. . . . The trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. . . . This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires. . . . [Citations omitted.]

However, in *Cire v. Cummings*, 134 S.W.3d 835, 836 (Tex. 2004), the Supreme Court held that the plaintiff's destruction of critical audiotapes made the case sufficiently exceptional that the trial court could go beyond a spoliation instruction and instead order death penalty sanctions. *Id.* at 843. This raises the question of when the duty to preserve arises. See Section XIX below.

9. Post-Judgment Discovery Sanctions. In *Stromberger v. Turley Law Firm*, 251 S.W.3d 225 (Tex. App.–Dallas 2008, no pet.), nearly four years after the judgment was signed, the judgment creditor filed a motion for sanctions, complaining of the judgment debtor's repeated failure to appear for a post-judgment deposition and to produce subpoenaed records. The court imposed monetary sanctions of $5,000 on the judgment debtor under TRCP 215.1. The judgment debtor appealed. The court of appeals reversed the sanction on the grounds that there was no evidence correlating the $5,000 amount to any harm. The appellate court took for granted that the mere filing of a motion for sanctions invested the trial court with the jurisdiction to award post-judgment discovery sanctions. This case suggests that the rule, that sanctions cannot be imposed after the trial court loses plenary power over the judgment, does not apply to post-judgment discovery. See Section XXII.

C. "DEATH PENALTY" SANCTIONS.

1. What Constitutes a "Death Penalty" Sanction? The issue of "death penalty" sanctions first arose to prominence in the context of a judge striking a party's pleadings for failure to cooperate with the deposition process. *See TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 915-16 (Tex. 1991). However, the Supreme Court, in *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991), indicated that "death penalty" analysis extends beyond the striking of pleadings to the exclusion of essential evidence as a discovery sanction:

> Sanctions which terminate or inhibit the presentation of the merits of a party's claims for decision are authorized by Rule 215. These include **exclusion of essential evidence**, striking pleadings, dismissal and default. Rule 215, paragraph 2b(3), (4), (5). The effect of such sanctions is to adjudicate claims or defenses, not on their merits, but on the manner in which a party or his attorney has conducted discovery. We recognize that severe sanctions are sometimes necessary to prevent an abusive party from thwarting the administration of justice by concealing the merits of a case. However, such sanctions must be reserved for circumstances in which a party has so abused the rules of procedure, despite imposition of lesser sanctions, that the party's position can be presumed to lack merit and it would be unjust to permit the party to present the substance of that position before the court. [Emphasis added.]

Thus, a "death penalty sanction" includes any preclusive ruling that results in a party's inability to prove his case. So, it is said that the exclusion of evidence that prevents a decision on the merits of a case is a death penalty sanction governed by *TransAmerican* standards. *Best Industrial Uniform Supply Co., Inc. v. Gulf Coast Alloy Welding, Inc.*, 41 S.W.3d 145, 148 (Tex. App.–Amarillo 2000, pet. denied); *accord*, *State v. Target Corp.*, 194 S.W.3d 46, 52 n. 6 (Tex. App.–Waco 2006, no pet.) ("a due process analysis under *TransAmerican* . . . is appropriate when application of the discovery rules results in merits-preclusive or death-penalty sanctions").

a. Liability. A sanction that dismisses a claim without ruling on the merits, or that renders a "default" judgment without ruling on the merits, amounts to a "death penalty" ruling on the issue of liability.

b. Unliquidated Damages. Ordinarily, a party who obtains a default judgment on an unliquidated claim is not required to prove liability but still is required to prove the unliquidated damages in a trial on damages. Tex. R. Civ. P. 243. On June 22, 2012, the Texas Supreme Court held that a trial court has discretion to prohibit a

defendant, whose pleadings are stricken for discovery abuse and who has suffered a default judgment, from participating in the ensuing trial on unliquidated damages. *Paradigm Oil, Inc. et al. v. Retamco Operating Inc.*, No. 10-0997 (Tex.) (2012 WL 2361725). In its unanimous decision authored by Justice David M. Medina, the Supreme Court reiterated its prior rulings saying that sanctions must be "just," meaning a direct relationship between the offending conduct and the sanction imposed, and that the sanction must not be excessive. *Id*. at *10. Although refusing to permit a party to participate in trial could be warranted in some situations, since the evidence needed to prove damages in this case was available, prohibiting the defendant from participating in the damage phase of the trial was an abuse of discretion requiring reversal. *Id*. at *14.

There are instances where the spoliation affects the ability to prove damages, not the ability to prove liability. The reader with a long memory may recall studying in law school the famous English case of *Armory v. Delamirie*, 1 Sess. Cas. K.B. 505 (King's Bench, 1722). In that case, a boy who was a chimney sweep found a jewel and took it to Paul De Lamerie's jewelry store to sell it. De Lamerie's apprentice removed the stone, ostensibly to weigh it, then offered the boy a small sum of money in return. When the boy declined the offer, the apprentice refused to return the stone to the chimney sweep. Somehow the chimney sweep found a lawyer and sued. The judge instructed the jury, absent production of the stone by the defendant, to value the missing diamond as if it were a "jewel of the finest water." In *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721-22 (Tex. 2003), the Texas Supreme Court recognized the principle of *Armory v. Delamirie* as a species of spoliation instruction, but ruled that it was reversible error to give such an instruction when the defendant destroyed evidence at a time when it had no duty to maintain the evidence.

c. Exemplary Damages. "[T]o sustain an award of additional damages in a default judgment, appellees must both plead knowing conduct and present evidence that the extent of appellant's knowledge warrants additional damages." *Herbert v. Greater Gulf Coast Enterprises, Inc.*, 915 S.W.2d 866, 872-73 (Tex. App.--Houston [1st Dist.] 1995, no writ). A good argument can be made that a sanction cannot permit the recovery of exemplary damages without meeting the requirements for imposing exemplary damages. *See* Tex. Civ. Prac. & Rem. Code § 41.003(a), *Standards for Recovery of Exemplary Damages*.

2. Sanctions Must be Just (Direct Relationship). In *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991), the Supreme Court held that due process of law requires that such a discovery sanction be "just." The Court expressed the "justness" requirement in several ways, including the requirement that there must be a direct relationship between the offensive conduct and the sanction imposed. *Id*. This is sometimes called the "nexus" requirement. See Section XI.

3. Sanctions Must be Just (Punish the Offender). In *TransAmerican* the Court also said that "the sanction should be visited upon the offender," so that the trial court must attempt to determine whether the discovery failure is attributable to counsel, or to the party, or both. *Id*. at 917. A party should not be punished for its counsel's conduct "unless the party is implicated apart from having entrusted its legal representation to counsel." *Glass v. Glass*, 826 S.W.2d 683, 687 (Tex. App.–Texarkana 1992, writ denied). Sanctions were reversed and a new trial granted in *Spohn Hospital v. Mayer*, 104 S.W.3d 878, 882-83 (Tex. 2003), where the record did not reflect that sanctions inhibiting presentation of the merits of a case were imposed upon the persons responsible for the discovery abuse.

4. Sanctions Must be Just (Not Excessive). The *TransAmerican* requirement of "justness" provides that the punishment imposed must not be excessive, and that the punishment must fit the crime. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991).

5. Sanctions Must be Just (Consider Less Stringent Sanctions First). The court must consider less stringent sanctions before imposing death penalty sanctions. The trial court abuses its discretion if "the sanction it imposes exceeds the purposes that discovery sanctions are intended to further." *TransAmerican*, 811 S.W.2d at 918. The Court based its ruling on both the Texas Rules of Civil Procedure and constitutional limitations on the power of courts, and the constitutional right of parties to a hearing on the merits of his cause. *Id*. at 918. The Supreme Court noted in *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992):

> [L]esser sanctions must first be tested to determine whether they are adequate to secure compliance, deterrence, and punishment of the offender. [Emphasis added].

Accord, *GTE Communications Systems Corp. v. Tanner*, 856 S.W.2d 725, 730 (Tex. 1993) ("[c]ase determinative sanctions may be imposed in the first instance only in exceptional cases . . .).

6. Presumption that Claims or Defenses Lack Merit. In *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex.1991), the Court said:

> Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit. . . . However, if a party refuses to produce material evidence, despite the imposition of lesser sanctions, the court may presume that an asserted claim or defense lacks merit and dispose of it. . . . . Although punishment and deterrence are legitimate purposes for sanctions, . . . they do not justify trial by sanctions . . . ." [Citations omitted.]

See Williams v. Akzo Nobel Chemicals, Inc., 999 S.W.2d 836, 845 (Tex. App.--Tyler 1999, no pet.) ("Appellants did not refuse to provide discovery. That their original answers were incomplete or even intentionally evasive is not such an obstruction of discovery to justify the conclusion that their claims lacked merit without more.").

7. Flagrant Bad Faith or Callous Disregard. "Sanctions which are so severe as to preclude presentation of the merits of the case should not be assessed absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules." *TransAmerican* 811 S.W.2d at 918. *See Morgan v. Verlander*, 2003 WL 22360942, *5 (Tex. App.--El Paso 2003, pet. denied) (pleadings were properly stricken as discovery sanction where defendant fabricated evidence and tried to tamper with evidence of third party that was under subpoena).

VIII. INHERENT POWER TO SANCTION. The Texas court of appeals initially developed the principle that Texas courts have the inherent power of a court to impose sanctions without the authority of either a Rule or a statute. *See* e.g., *In the Interest of K.A.R.*, 171 S.W.3d 705 (Tex. App.–Houston [14th Dist.] 2005, no pet.); *McWhorter v. Sheller*, 993 S.W.2d 781, 788-89 (Tex. App.–Houston [14th Dist.] 1999, pet. denied); *Metzger v. Sebek*, 892 S.W.2d 20, 51 (Tex. App.–Houston [1st Dist.] 1994, writ denied); *Greiner v. Jameson* 865 S.W.2d 493, 499 (Tex. App.–Dallas 1993, writ denied); *Kutch v. Del Mar College*, 831 S.W.2d 506, 509 (Tex. App.--Corpus Christi 1992, no writ).

The line of Texas cases involving inherent power to impose sanctions started with *Kutch*, where the trial court dismissed a case because the plaintiff failed to replead after the court granted special exceptions. In *Kutch*, the court of appeals looked to the U.S. Supreme Court case of *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), which had held that federal courts have the inherent power to sanction for bad faith conduct during litigation. The *Kutch* court found the U.S. Supreme Court case to be "persuasive authority for the proposition" that "Texas courts have inherent power to sanction for bad faith conduct during litigation." *Kutch*, 831 S.W.2d. at 509. The *Kutch* court noted that the U.S. Supreme Court cautioned that this power "should be used only with great restraint and discretion." *Id*. The *Kutch* court also recognized "certain limitations" to the inherent power to sanction. *Id*. at 510. Looking to Texas Court of Criminal Appeals' precedent, the *Kutch* court said that the inherent power to impose sanctions relates to "core functions of the judiciary, which are: hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgments and enforcing that judgment." *Id*. The *Kutch* court said, at p. 510:

> Accordingly, for inherent power to apply, there must be some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise of one of these powers.

Accord, McWhorter, 993 S.W.3d at 789. The *Kutch* court recognized other limitations on the exercise of inherent power to impose sanctions. The court said: "The amorphous nature of this power, and its potency, demands sparing use." *Id*. The *Kutch* court recognized "that the legislature's law-making powers may operate to limit certain exercises of inherent power." *Id*. The court also noted that: "Due process limits a court's power to sanction." *Id*. at 511. The court said that "a court's 'implicit' power to sanction was governed by the justness or appropriateness standard which was later developed in *Transamerican*," referring to *Transamerican Natural Gas v. Powell*, 811 S.W.2d 913 (Tex. 1991). *Kutch*, 831 S.W.2d at 511. This *Transamerican* standard requires that "a direct relationship must exist between the offensive conduct and the sanction imposed," meaning that "the sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party" and "that the sanction should be visited upon the offender." *Transamerican*, 811 S.W.2d at 917. This requires that the court "attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or both." *Id. Transamerican* said that "a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation." *Id*. And "just sanctions must not be excessive. The punishment should fit the crime." The court "must consider the availability of less stringent sanctions and whether such lesser standards would fully promote compliance." *Id*.

As noted in *Kutch*, the core functions of the judiciary are hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment, and enforcing that judgment. *Id*. at 510. *See McWhorter*, 993 S.W.3d at 789 (sanction reversed where there was no evidence of significant interference with a core judicial function).

In *In re Reece,* 341 S.W.3d 360, 367 (Tex. 2011), the Supreme Court held that perjury committed in a deposition was not punishable by contempt because it did not rise "to the level of actually obstructing the Court in the performance of its duties." While the scope of contempt power and the inherent power to sanction are based on different articulations of a court's power, they protect the same interest. In *Reece*, Justice Guzman's majority opinion suggests that lying during a deposition could be addressed by discovery sanctions. This perspective suggests that issues relating to depositions are ordinarily not susceptible to sanctions based on inherent power. *Id*. at 368.

In *Sprague v. Sprague*, 2012 WL 456936, *13 (Tex. App.–Houston [14 Dist.] 2012, n.p.h.), the appellate court reversed the trial court's imposition of a monetary sanction under inherent power, where the trial court issued no findings, despite their being requested, and where the evidence did not support a finding that a party had engaged in bad-faith abuse of the judicial process.

A series of family law cases have addressed the imposition of sanctions for a litigant's failure to pay interim fees awarded under the Family Code. *In re N.R.C.*, 94 S.W.3d 799 (Tex. App.–Houston [14th Dist.] 2002, pet. denied) (court of appeals reversed a trial court for striking all of a parent's fact witnesses for failing to pay interim fees to an attorney ad litem); *Saxton v. Daggett*, 864 S.W.2d 729, 734 (Tex. App.--Houston [1st Dist.] 1993, orig. proceeding) (mandamus issued where court struck father's pleadings for failure to pay interim fees); *Baluch v. O'Donnell*, 763 S.W.2d 8,10 (Tex. App.–Dallas 1988, orig. proceeding) (mandamus issued where trial court struck party's pleadings pursuant to TRCP 215(2)(b) as sanctions to enforce an order directing the relator to pay interim attorneys' fees to his spouse's attorneys).

IX. BAD FAITH. TRCP 13 says that "[c]ourts shall presume that pleadings, motions, and other papers are filed in good faith." In *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.–Houston [14th Dist.] 2000, no pet.), the court of appeals reversed Rule 13 sanctions because there was no evidence of bad faith. The Court said: "Bad faith does not exist when a party exercises bad judgment or negligence; it is the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes." In *Ubinas-Brache v. Dallas County Medical Society*, 261 S.W.3d 800, 804 (Tex. App.–Dallas 2008, pet. denied), the court said: "Bad faith is not simply poor judgment or negligence but means consciously doing wrong for dishonest, discriminating, or malicious purpose." In *McWhorter v. Sheller*, 993 S.W.2d 781, 789 (Tex. App.–Houston [14 Dist.] 2005, no pet.), the Fourteenth Court of Appeals reversed a sanction based on inherent power when evidence of bad faith was missing. Under *Kutch*, a finding of bad faith is necessary to impose sanctions under the trial court's inherent power. *Id*. at p. 510.

X. BURDEN OF PROOF AND EVIDENCE. TRCP 13 provides that "[c]ourts shall presume that pleadings, motions, and other papers are filed in good faith." The party seeking sanctions bears the burden of overcoming the presumption that pleadings and other papers are filed in good faith. *Low*, 221 S.W.3d at 614 (Chapter 10 sanctions). Presumably the presumption applies only in the trial court, and on appeal is replaced by a presumption that the sanction order is valid.

Although Rule 13 and the case law based on Chapter 10 discuss a presumption of good faith, there are other bases for sanctions besides good faith and bad faith. Who has the burden of production and persuasion in the trial court on elements of sanctions other than bad faith? The answer is pretty clear that the party seeking sanctions has the burden of proof on all elements of a claim for sanctions, based on the general principle that a party seeking relief must prove an entitlement to that relief. *See GTE Communications Systems Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) ("A party seeking sanctions has the burden of establishing his right to relief"). In instances where the trial court is sua sponte considering the imposition of sanctions, presumably the party who might benefit from the sanctions would have the burden of producing evidence. The trial court's conducting a sanctions hearing in an inquisitorial mode might present due process of law issues, if an objection is raised.

A trial court can take judicial notice of the case file in ruling on a sanctions motion. *Tex-Ohio Gas, Inc. V. Mecom*, 28 S.W.3d 129, 139 (Tex. App.–Texarkana 2000, no pet.); *Trussell Ins. Services, Inc. v. Image Solutions*, 2010 WL 5031100, *3 (Tex. App.–Tyler 2010, no pet) (memorandum opinion) (under TRCP 13, Chapter 10, and the Insurance Code). "However, the pleading alone cannot establish that the represented party or its attorney brought their case in bad faith or to harass." *R.M. Dudley Const. Co., Inc. v. Dawson*, 258 S.W.3d 694, 709 (Tex.

App.–Waco 2008, pet. denied) (under both Rule 13 and ch. 10).

"Evidence must be admitted under the rules of evidence at the evidentiary hearing for a trial court to consider it in a sanctions context." *Dawson*, 258 S.W.3d at 710. In *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997), the court held that unsworn statements by attorney were not evidence. In the case of *In re Butler*, 987 S.W.2d 221, 225 (Tex. App.–Houston [14th Dist.] 1999, orig. proceeding),the appellate court gave evidentiary weight to unsworn statements of counsel when the opposing party failed to object to the lack of an oath and it was evident that the lawyer was testifying without having taken the oath. In *Alejandro v. Bell*, 84 S.W.3d 383, 393 (Tex. App.–Corpus Christi 2002, no pet.), sanctions were reversed for lack of evidentiary support; a letter attached to the motion for sanctions that was not admitted into evidence was no evidence.

XI. NEXUS. In *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007) (involving Chapter 10 sanctions), the Supreme Court said: "To determine if the sanctions were appropriate or just, the appellate court must ensure there is a direct nexus between the improper conduct and the sanction imposed." *Accord*, *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003). The line of authority dates back to the discovery sanction case of *TransAmerican Natural Gas Corporation v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991), where the Court said:

> [A] direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. The trial court must at least attempt to determine whether the offensive conduct is attributable to counsel only, or to the party only, or to both. This we recognize will not be an easy matter in many instances. On the one hand, a lawyer cannot shield his client from sanctions; a party must bear some responsibility for its counsel's discovery abuses when it is or should be aware of counsel's conduct and the violation of discovery rules. On the other hand, a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation. The point is, the sanctions the trial court imposes must relate directly to the abuse found.

See Braden v. South Main Bank, 837 S.W.2d 733, 738 (Tex. App.–Houston [14th Dist.] 1992, writ denied). In *Spohn Hospital v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003), the Supreme Court said that there must be "a direct nexus among the conduct, the offender, and the sanction imposed."

XII. TRIAL COURT FINDINGS.

A. WHEN FINDINGS ARE REQUIRED.

1. Rule 13. TRCP 13 expressly requires the court to include findings in its order when imposing sanctions under that Rule. Tex. R. Civ. P. 13 ("[n]o sanctions may be imposed, except for good cause, the particulars of which must be stated in the sanction order"). The Fourteenth Court of Appeals has ruled that where a trial court fails to specifically describe the sanctionable action in either the sanctions order or the findings of fact, a Rule 13 sanction is unenforceable. *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.–Houston [14th Dist.] 2000, no pet.); *accord*, *Loya v. Loya*, 2011 WL 5374199, *5 (Tex. App.--Houston [14th Dist.] 2011, no pet.) (involving both TRCP 13 & TCP&RC ch.10).

2. Discovery. As to discovery sanctions, the Supreme Court noted, in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 n. 9 (Tex. 1991):

> It would obviously be helpful for appellate review of sanctions, especially when severe, to have the benefit of the trial court's findings concerning the conduct which it considered to merit sanctions, and we commend this practice to our trial courts. *See Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 882-883 (5th Cir.1988). Precisely to what extent findings should be required before sanctions can be imposed, however, we leave for further deliberation in the process of amending the rules of procedure.

The Supreme Court said that it would look to the rule-making process to determine what findings would be required for the imposition of discovery sanctions; however, such a rule has never been adopted for discovery-related sanctions.

3. Chapter 10. TCP&RC § 10.005 requires the court to "describe in an order . . . the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed." Tex. Civ. Prac. & Rem. Code Ann. § 10.005. In *Rivera v. Countrywide Home Loans, Inc.*, 262 S.W.3d 834, 842 (Tex. App.–San Antonio 2008, no pet.), a TCP&RC ch. 10 sanction award of attorney's

fees was reversed due to the trial court's failure to state the grounds upon which sanction were awarded.

4. Inherent Power. By definition there is no rule associated with imposing sanctions based on inherent power, so there is no rule requiring findings when sanctions are imposed based upon inherent power. However, some courts have required findings to support sanctions based on inherent power. *See Greiner v. Jameson*, 865 S.W.2d 493, 499 (Tex. App.--Dallas 1993, writ denied) (sanctions based on inherent power must be supported by evidence and findings).

5. Oral Comments by the Judge. Oral comments from the bench do not constitute findings of fact and conclusions of law. *In re W.E.R.*, 669 S.W.2d 716 (Tex. 1984); *Roberts v. Roberts*, 999 S.W.2d 424, 440 (Tex. App.--El Paso 1999, no pet.). In *Loya v. Loya*, 2011 WL 5374199, *4,(Tex. App.–Houston [14th Dist.] 2011, no pet.), oral statements by the trial judge were ignored in reversing for failure to issue findings to support Chapter 10 sanctions.

B. FINDINGS ARE NOT BINDING. Even though findings may be required, the Supreme Court has declared that the appellate court is not bound by the trial court's findings. *American Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006).

XIII. AMOUNT OF MONETARY SANCTIONS. The amount of a sanction is in the trial court's discretion. *Unifund CCR Partners v. Villa*, 299 S.W. 3d 92, 97 (Tex. 2009) (under TCP&RC ch. 10).

A. DISCOVERY SANCTIONS. In *Braden v. South Main Bank*, 837 S.W.2d 733, 738 (Tex. App.--Houston [14 Dist.] 1992, pet. denied), the court made the following observation about a $10,000 monetary sanction for resisting discovery:

> In *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex.1991), the Supreme Court held that a sanction imposed for discovery abuse should be no more severe than necessary to satisfy its purposes. 811 S.W.2d at 917. Thus, the court reasoned, trial courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance. *Id.*

This Court went on to say that "[a] trial court abuses its discretion in imposing discovery sanctions if the sanctions imposed are not just. . . . Whether sanctions are just is measured by two standards: (1) a direct relationship must exist between the offensive conduct and the sanction imposed; and (2) just sanctions must not be excessive." *Id.* at 741. *Compare with* TCP&RC § 10.004 (any attorney's fee sanction awarded for frivolous pleadings and motions must be in the amount of reasonable expenses, including reasonable attorney's fees, incurred because of the filing of the pleading or motion), and TRCP 215.1(d) ("to pay . . . the reasonable expenses incurred in obtaining the order, including attorney's fees . . ."; "the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance . . ."). The court in *Braden v. South Main Bank* found that "there is nothing in the record showing any connection between the $10,000 awarded and any harm suffered by the Bank as a result of the alleged discovery abuse. . . . The record does not reflect that $10,000 was anything more than an arbitrary amount." The Fourteenth Court went on to say:

> We hold that when a trial court assesses a monetary sanction, there must be some evidence in the record linking the amount awarded to harm actually suffered by the party seeking sanctions. The sanction imposed is not just because there is no direct relationship between the offensive conduct and the sanction imposed.

Braden v. South Main Bank, 837 S.W.2d at 741. In *Stromberger v. Turley Law Firm*, 251 S.W.3d 225, 227 (Tex. App.–Dallas 2008, no pet.), the Dallas Court of Appeals reversed a TRCP 215.1 sanction of $5,000 where there was no evidence of the attorneys' fees incurred as a result of the objectionable behavior. The Court said:

> When a monetary sanction is the type of sanction imposed, the sanctionable conduct alone does not prescribe the amount of the sanction. To review the decision of the amount of the monetary sanction imposed by examining *only* the conduct giving rise to the sanction would permit a 'wavering standard of subjectivity' unrestrained by law or statute. [Emphasis in the original]

The Court cited to its prior decision in *Ford Motor Co. v. Tyson*, 943 S.W.2d 527, 535 (Tex. App.–Dallas 1997, orig. proceeding), where it held that a monetary sanction under TRCP 215, that is not tied to any evidence and where the basis for the amount is unknown, amounts to an *impermissible arbitrary fine*. *See Hanley v. Hanley*, 813 S.W.2d 511, 521 (Tex. App.–-Dallas 1991, no writ) (trial court's award of $50,000 in discovery sanctions, that was not tied to any harm resulting from discovery abuse, was reversed).

B. RULE 13 AND CHAPTER 10 SANCTIONS. The Fourteenth Court of Appeals affirmed sanctions of $1.37 million in a tort suit, awarded to institutional defendants against the plaintiff but not his lawyers, in *Nath v. Texas Children's Hospital*, 2012 WL 2430466 (Tex. App. [14th Dist.] 2012, n.p.h.). In that case, the Fourteenth Court of Appeals cited its own earlier case of *Falk and Mayfield, L.L.P. v. Molzan*, 974 S.W.2d 821, 827 (Tex. App.–Houston [14th Dist.] 1998, pet. denied), for the proposition that "[t]he degree of discretion afforded by the trial court is . . . greater when sanctions are imposed for groundless pleadings than when imposed for discovery abuse. "*Nath* at *8. The Fourteenth Court of Appeals also relied on the non-exclusive list of factors given by the Texas Supreme Court in *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). In *Low v. Henry* the Supreme Court dropped a footnote in which they mentioned the American Bar Association's list of factors to consider in Fed. R. Civ. P. 11 sanctions, which were previously listed in Justice Raul Gonzalez's Concurring Opinion in *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 920 (Tex. 1991) (Gonzalez, J., concurring):

a. the good faith or bad faith of the offender;
b. the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense;
c. the knowledge, experience, and expertise of the offender;
d. any prior history of sanctionable conduct on the part of the offender;
e. the reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;
f. the nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;
g. the relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;
h. the risk of chilling the specific type of litigation involved;
i. the impact of the sanction on the offender, including the offender's ability to pay a monetary sanction;
j. the impact of the sanction on the offended party, including the offended person's need for compensation;
k. the relative magnitude of sanction necessary to achieve the goal or goals of the sanction;
l. burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;
....
n. the degree to which the offended person's own behavior caused the expenses for which recovery is sought....

Low v. Henry, 221 S.W.3d at 620 n. 5.

XIV. NON-MONETARY SANCTIONS. In *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991), the trial court ordered both parties' attorneys to perform ten hours of community service for the Child Protective Services Agency of Harris County. The Supreme Court deferred enforcement until the end of the case. In *Braden v. South Main Bank*, 837 S.W.2d 733, 742 (Tex. App.–Houston [14th Dist.] 1992, writ denied), the appellate court upheld the sanction against this.

XV. ATTORNEY'S FEES. There is authority that an award of attorney's fees as a sanction under TRCP 13 does not have to be supported by evidence of reasonableness. *In re A.S.M.*, 172 S.W.3d 710, 718 (Tex. App.–Fort Worth 2005, no pet.). However, even TRCP 13 sanctions must be reasonable in comparison to the harm done. *See Glass v. Glass*, 826 S.W.2d 683, 687 (Tex. App.–Texarkana 1992, writ denied). There is reason to require proof of the amount of attorneys fees incurred in connection with sanctions based on inherent power, because that power should be used "with great restraint and discretion," and should see only "sparing use." *Kutch*, 831 S.W.2d 510-511.

XVI. SANCTIONING PARTIES. The decision to sanction a party alone, or in combination with the party's attorney, involves considerations that go beyond sanctioning only the attorney. One of the *TransAmerican* criteria for a "just" sanction is that "the sanction should be visited upon the offender." *Id.* at 917.

In *Glass v. Glass*, 826 S.W.3d683, 687 (Tex. App.–Texarkana 1992, writ denied), the appellate court said that the court should not punish a party for his/her lawyer's acts or omissions without some indication of complicity on the part of the client. However, the court of appeals in *Monroe v. Grider*, 884 S.W.2d 811, 819 (Tex. App.–Dallas 1994, writ denied), indicated that Rule 13 permits the court to sanction a represented party for his/her lawyers' violation of Rule 13. In that case, however, the party's signing responses to requested admissions without making reasonably inquiries was sufficient to show the party's personal involvement.

An instructive case to study is *Nath v. Texas Children's Hospital*, 2012 WL 2430466, *12 (Tex. App.–Houston [14th Dist.] 2012, n.p.h.), where sanctions exceeding $1 million were visited upon the client and not the lawyers. In that case, the Court of Appeals attached the trial court's Findings of Fact and Conclusions of Law as an appendix to the appellate court's Opinion. These findings are a model for a lawyer attempting to support sanctions against

a party in some future case. And the reasons stated by the trial judge for imposing sanctions on the litigant might serve as a basis to distinguish *Nath* and to show why sanctions against the litigant are not warranted in some future case. The trial court recites the following factors that supported imposing sanction on Dr. Nath personally:

1) Dr. Nath's counsel persisted in doing discovery regarding another doctor's health, despite the trial court ruling that those health issues were not germane to the litigation and were better addressed through the Board of Medical Examiners. In particular, Dr. Nath was present when his attorney was repeatedly questioned a third doctor, in his deposition, about the first doctor's alleged health issues. *Id.* at *18. Also, Dr Nath submitted his own affidavit in opposition to a motion for summary judgment and in the affidavit Dr. Nath goes into detail about the other doctor's health. Also, prior to mediation, Dr. Nath's attorney sent a letter to the defendant hospital, threatening to expose this doctor's health issue and contact prior patients if the case did not settle. *Id.* at *17-18.

   The trial court concluded that Dr. Nath attempted to leverage the potential embarrassment arising from Nath's inquiries into a "tool to extract a financial advantage in litigation." *Id.* at *19.

2) The Trial Court several times mentions its own personal observations of Dr. Nath at hearings. *Id.* at *17, 18, 19. This puts the appellate court in a box, since the personal observations of the judge cannot be objectively evaluated to the extent they are not specified by the Trial Court and to the extent that the behavior is not reflected in the Reporter's Record (e.g., body language, tone of voice, overheard whispering, demeanor, etc.).

3) The Trial Court found that Dr. Nath took a "personal, participatory role in this litigation." *Id.* at *18. The Court also found that Dr. Nath was "knowledgeable about the law and legal issues" because he had "previously studied the law." *Id.* at *18.

4) Dr. Nath's summary judgment affidavit incorporated "virtually the entire contents of his Fifth Amended Petition" and expanded on the theories in that petition. *Id.* at *18. The Trial Court found this reflected that Dr Nath "fully authorized, adopted, and ratified" the claim made in the petition. *Id.* at *18.

5) Dr. Nath's counsel sought to delay trial so that Dr. Nath could attend the depositions of two doctors, on the ground that his attendance was "vital" to help direct the questioning. *Id.* at *18.

6) Dr. Nath personally spoke to a doctor-witness prior to his deposition. This was evidence of Dr. Nath's personal involvement. *Id.* at * 18.

7) The Trial Court noted a pattern of abusive litigation by Dr. Nath, including a lawsuit against two doctors in Maryland, a lawsuit against a former partner in an MRI venture, a lawsuit against a former partner (the one whose health Nath tried to put in issue), a federal court suit over his home, and a lawsuit against two members of the Texas Medical Board, which is seeking to revoke Dr. Nath's license to practice medicine. *Id.* at *18.

8) Dr. Nath grossed $6 million in 2006, and owned an $8 million home.

There are other factors supporting sanctions that are outlined in the trial court's findings.

XVII. SANCTIONING ATTORNEYS. In *Braden v. Downey*, 811 S.W.2d 922, 930 (Tex. 1991), an attorney was sanctioned for discovery abuse and ordered to perform ten hours of community service before the end of the case. The Supreme Court granted mandamus requiring the trial judge to delay the performance of the sanctions until the sanctions could be reviewed on appeal. Upon later appeal, this sanction was affirmed. *Braden v. South Main Bank*, 837 S.W.2d 733 (Tex. App.–Houston [14th Dist.] 1992, writ denied), *cert. denied sub nom Shulze v. South Main Bank*, 508 U.S. 908 (1993). In *Kugle v. Daimler Chrysler Corp.*, 88 S.W.3d 355 (Tex. App.–San Antonio 2002, pet. denied) (en banc), the court of appeals upheld $865,000 in monetary sanctions against three lawyers who tampered with witnesses in connection with an traffic death in Mexico. In *In re K.A.R.*, 171 S.W.3d 705, 715 (Tex. App.–Houston [14th Dist.] 2005, no pet.), the appellate court upheld the award of $13,000 in attorneys' fees as sanctions against a party's attorney for not appearing at court-ordered mediation without advance notice of cancellation. The authority for the sanction was the court's inherent power to sanction. A court's ability to sanction an attorney is not inhibited simply because the attorney is no longer representing a party at the time a sanction is imposed. *Law Offices of Robert D. Wilson v. Texas University-Frisco, Ltd.*, 291 S.W. 3d 110, (Tex. App.–Dallas 2009, no pet.).

XVIII. SANCTIONING NON-PARTIES. In *In re Suarez*, 261 S.W.3d 880, 884 (Tex. App.–Dallas 2008, orig. proceeding), court of appeals held that a trial court acted without personal jurisdiction or authority for sanctioning non-parties for allegedly violating a subpoena, and that its sanctions order was therefore void. However, TRCP 215.1 authorizes sanctions against non-parties who fail to comply with subpoenas to appear at deposition and answer questions, or subpoenas to produce records.

XIX. SPOLIATION OF EVIDENCE. "Spoliation"is "the improper destruction of evidence relevant to a case." *Buckeye Retirement Co., LLC v. Bank of America, N.A.*, 239 S.W.3d 394, 401 (Tex. App.--Dallas 2007, no pet.).

A. THE REMEDY. When a party has destroyed evidence, a court has discretion to give a spoliation instruction to the jury. In *Trevino v. Ortega*, 969 S.W.2d 950, 960 (Tex. 1998), the Supreme Court recognized two different levels of severity of such instructions:

> Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of presumptions. . . . The first and more severe presumption is a rebuttable presumption. This is primarily used when the nonspoliating party cannot prove its prima facie case without the destroyed evidence . . . . The trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. . . . This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires. . . . [Citations omitted.]

Spoliation can also lead to the dismissal of claims or defenses. The Supreme Court affirmed the dismissal of a plaintiff's claim based on the plaintiff's destruction of key evidence, that the court had ordered produced, in *Cire v. Cummings*, 134 S.W.3d 835, 836 (Tex. 2004). The Supreme Court found that the plaintiff's destruction of critical audiotapes make the case sufficiently exceptional that the trial court could go beyond a spoliation instruction and instead order death penalty sanctions. *Id.* at 843.

B. WHEN DOES THE DUTY TO PRESERVE EVIDENCE ARISE? Justice Baker noted in his Concurring Opinion in *Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex. 1998) (Baker, J., concurring): "Upon a spoliation complaint, the threshold question should be whether the alleged spoliator was under any obligation to preserve evidence. A party may have a statutory, regulatory, or ethical duty to preserve evidence." Justice Baker continued:

> The first part of the duty inquiry involves determining when the duty to preserve evidence arises. While there is no question that a party's duty to preserve relevant evidence arises during pending litigation, courts have been less clear about whether a duty exists prelitigation. See Tex.R. Civ. P. 215. A number of courts recognize the need for a duty to preserve evidence prelitigation. *See*, e.g., *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1158–59 (1st Cir.1996); *Dillo*n, 986 F.2d at 267; *Welsh*, 844 F.2d at 1241–42, 1246–48; *Capellupo*, 126 F.R.D. at 551; Fire Ins. Exch., 747 P.2d at 914. I agree with these courts. A party should not be able to subvert the discovery process and the fair administration of justice simply by destroying evidence before a claim is actually filed. See Fire Ins. Exch., 747 P.2d at 913.
>
> The next question then is at what point during prelitigation does the duty arise. Courts that have imposed a prelitigation duty to preserve evidence have held that once a party is on "notice" of potential litigation a duty to preserve evidence exists. See *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir.1992); *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 153 (D.Mass.1997); *ABC Home Health Servs., Inc. v. IBM Corp.*, 158 F.R.D. 180, 182 (S.D.Ga.1994); *Turner*, 142 F.R.D. at 72–73; *Computer Assocs. Int'l, Inc. v. American Fundware*, 133 F.R.D. 166, 169 (D.Colo.1990); *Capellupo*, 126 F.R.D. at 551; *Wm. T. Thompson Co.*, 593 F.Supp. at 1455; *Fire Ins. Exch.*, 747 P.2d at 914; *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 419 (Utah Ct.App.1994). Most courts have not elaborated on the concept of notice. But, a few courts have determined that a party is on notice of potential litigation when the litigation is reasonably foreseeable. *See Blinzler*, 81 F.3d at 1159 (stating that the defendant was aware of circumstances that were likely to give rise to future litigation and that a reasonable fact finder could conclude that the defendant was on notice that evidence was relevant to likely litigation); *Rice v. United States*, 917 F.Supp. 17, 20 (D.D.C.1996) (finding that the defendant was on notice of potential litigation

> because it was aware of circumstances that were likely to give rise to future litigation); *White v. Office of the Public Defender*, 170 F.R.D. 138, 148 (D.Md.1997) ("[P]arties have been deemed to know that documents are relevant to litigation when it is reasonably foreseeable that a lawsuit will ensue...."); *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 24 (E.D.N.Y.1996) (stating that sanctions are appropriate when the defendant "knew or should have known that the destroyed evidence was relevant to pending, imminent, or reasonably foreseeable litigation"); see also Jamie S. Gorelick et al, Destruction of Evidence §§ 1.22, 3.1 (1989); Donald H. Flanary, Jr. & Bruce M. Flowers, Spoliation of Evidence: Let's Have a Rule in Response, 60 Def. Couns. J. 553, 555–56 (1993); Steffen Nolte, The Spoliation Tort: An Approach to Underlying Principles, 26 St. Mary's L.J. 351, 371–72 (1995).

Id. at 955-56. Justice Baker's position was endorsed by the Dallas Court of Appeals, in *Buckeye Retirement Co., LLC, Ltd. v. Bank of America, N.A.*, 239 S.W.3d 394, 401 (Tex. App.–Dallas 2007, no pet.).

The Texas Supreme Court articulated the applicable standard in *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 723 (Tex. 2003)–that a defendant has a duty to preserve evidence when "it knew, or should have known, that there was a substantial chance there would be litigation and that the [evidence] would be material to it."

Federal courts have been more wide-ranging in their rulings about when a duty to preserve evidence arises. In *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D. N.Y. 2003), the U.S. District Judge Shira A. Scheindlin wrote that "anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary."

Determining a duty to preserve evidence is particularly troublesome when it comes to routine destruction of emails and other electronically-stored information (ESI). In 2006, the U.S. Congress adopted what is now FRCP 37(e). Rule 37(e) provides:

> (e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Some people consider Rule 37(e) to be a "safe harbor" provision that protects businesses or persons who destroy ESI pursuant to a routine record retention/destruction policy if they later find themselves in litigation. Timothy J. Carroll and Bruce A. Radke, *Federal Rules of Civil Procedure Concerning E-Discovery Impact* (2010). <http://www.busmanagement.com/article/Federal-Rules-of-Civil-Procedure-Concerning-E-Discovery-Impact>. However, the language of the Rule and the comments by the Advisory Committee do not reflect that FRCP 37(e) is a completely safe "safe harbor" when it comes to intentionally destroying data or allowing data to be lost. *See* Richard R. Orsinger, *21st Century Discovery and Evidence: Electronically Stored Information*, State Bar of Texas NEW FRONTIERS IN FAMILY LAW (2010), <http://www.orsinger.com/PDFFiles/21st-Century-Discovery-and-Evidence.pdf>.

XX. OBTAIN RULING BY START OF TRIAL. It was noted in Section VII.B.5 above that sanctions for discovery problems known prior to trial must be ruled on prior to trial or they are waived. This rule was extended to sanctions under TCP&RC ch. 10 in *Trussell Ins. Services, Inc. v. Image Solutions*, 2010 WL 5031100, *4 (Tex. App.–Tyler 2010, no pet.) (memorandum opinion).

XXI. EFFECT OF NON-SUIT. TRCP 162 reads as follows:

> At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. Notice of the dismissal or non-suit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order.
>
> Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

"A plaintiff's right to take a nonsuit is important and firmly rooted in the jurisprudence of our state. Rule 162 should be liberally construed in favor of the right to take a

nonsuit." *Aetna Cas. & Sur. Co. v. Specia*,849 S.W.2d 805, 806-07 (Tex. 1993). The Rule provides that "[a] dismissal under this rule shall have no effect on any motion for sanctions . . . ." However, some sanctions do go away when the suit is dismissed. *Aetna Cas. & Dur. Co. v. Specia* provides:

> Whether a discovery sanction survives a nonsuit depends upon the nature of the sanction involved.FN3 If a sanction is aimed at insuring a party is afforded a fair trial and not subjected to trial by ambush, the reason for imposing the sanction no longer exists after a party takes a nonsuit. . . . due to the importance of a plaintiff's right to nonsuit and the nature of the sanction involved in this case, we conclude that a sanction excluding witnesses for failure to supplement a proper discovery request does not survive a nonsuit.

One court held that the fact that a party nonsuited a claim is not, standing alone, evidence of bad faith. *Dike v. Peltier Chevrolet, Inc.*, 343 S.W.3d 179, 193 (Tex. App.--Texarkana 2011, no pet.); *accord*, *Vickery v. Gordon*, 2012 WL 3089409, *8 (Tex. App.–Houston [14th Dist.] 2012, no pet.) (memorandum opinion).

XXII. POWERS END WHEN PLENARY POWER ENDS. A court cannot issue an order imposing sanctions after its plenary power has expired. *Unifund CCR Partners v. Villa*, 299 S.W. 3d 92, 95 (Tex. 2009) (Chapter 10 sanctions); *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 n. 2 (Tex. 1996) (Rule 13 sanctions); *Law Offices of Robert D. Wilson v. Texas University-Frisco, Ltd.* 291 S.W.3d 110, 113 (Tex. App.–Dallas 2009, no pet.) (Rule 13 sanctions); *Sims v. Fitzpatrick*, 288 S.W.3d 93, 105-06 (Tex. App.–Houston [1st Dist.] 2009, no pet.) (inherent power to sanction). If a motion for sanctions is pending when a final judgment is signed, the trial court has until its plenary power expires to grant sanctions. After that, the court loses jurisdiction to grant sanctions. *Mantri v. Bergman*, 153 S.W.3d 715, 718 (Tex. App.–Dallas 2005, pet. denied).

TRCP 162, *Dismissal or Non-Suit*, provides that a dismissal "under this rule shall have not effect on any motion for sanctions . . . ." In *Unifund*, the defendant's motion for sanctions was filed before the plaintiff dismissed its suit, and the dismissal order did not specify that the motion for sanctions was disposed of by the dismissal order. The Supreme Court evaluated the dismissal order and concluded that it did not reference or dispose of the sanctions motion. *Id.* at 96. The dismissal order was therefore interlocutory, and the thirty-day period of plenary power did not begin to run. *Id*. In contrast, the sanction order did provide that the order was final and appealable, so the plenary-power clock began to run from the signing of the sanctions order.

TRCP 162 applies only when a motion for sanctions is filed before the non-suit is taken. *Scott & White Memorial Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996). A non-suited party can still file a motion for sanctions after judgment and while the trial court still has plenary power over the case. *Manning v. Enbridge Pipelines (East Texas) L.P.*, 345 S.W.3d 718, 728 (Tex. App.–Beaumont 2011, pet. denied) (under TRCP 13 & TCR&RC ch. 10). However, the sanctions order must be issued before the court loses plenary power. In *In re Fackrell* 2010 WL 3232250 (Tex. App-Tyler 2010, no pet.) (memorandum opinion), the appellate court held that an amended motion for sanctions, filed within 30 days of a non-suit, gave the trial court an extended period of plenary power to consider the sanction request.

In *Law Offices of Robert D. Wilson v. Texas University-Frisco, Ltd.*, 291 S.W. 3d 110, (Tex. App.–Dallas 2009, no pet.), the trial court maintained plenary power to issue sanctions when the sanctions request was severed from the main cause, even though the judgment was signed in the main cause.

XXIII. APPELLATE REVIEW. Sanctions can be reviewed by appeal or in some instances mandamus. A request for sanctions is not an independent cause of action. *Mantri v. Bergman* 153 S.W.3d 715, 717 (Tex. App.–Dallas 2005, pet denied); *Trussell Ins. Services, Inc. v. Image Solutions*, 2010 WL 5031100, *2 (Tex. App.–Tyler 2010, no pet), so it should be appealed along with the final judgment or appealed alone, if the final judgment is not being appealed.

A. APPEAL OF SANCTIONS.

1. Perfecting Appeal. The Supreme Court, in *Braden v. Downey*, 811 S.W.2d 922, 928 n. 6 (Tex. 1991), indicated that sanctions can be reviewed on appeal of the final judgment. This is true regardless of whether the sanction is included in the final judgment or in a separate order. It could sometimes be the case that only the sanction order is appealed, not the underlying final judgment. The appeal of the sanction order would be perfected by filing a notice of appeal and specifying the sanction order as subject to attack on appeal. In *Braden v. Downey*, the attorney sought mandamus against sanctions that were levied against the client and the attorney, without naming himself as relator. The Supreme Court brushed that issue aside, and addressed the sanction against the attorney, while saying that it was not deciding whether, in an *appeal*

of an attorney-sanction, the lawyer would have to perfect a separate appeal. *Id.* at 928. Caution dictates that the lawyer list himself/herself as a relator in the mandamus petition and that the lawyer file a separate notice of appeal if appealing a sanction against him or her.

2. Preservation of Error. Rule 324 does not require complaints about sanctions to be raised in a motion for new trial. Tex. R. Civ. P. 324. One Court of Appeals held that complaining about sanctions in a motion for new trial is not a prerequisite to attacking a sanctions award on appeal. *McCain v. NME Hospital, Inc.*, 856 S.W.2d 751, 756 (Tex. App.–Dallas 1993, no writ). However, the Supreme Court, in *Low v. Henry*, 221 S.W.3d 609, 618 (Tex. 2007), held that an attorney waived his complaint, that the sanctions findings were too vague, by including that complaint for the first in a non-timely motion to modify judgment. In *Tex-Ohio Gas, Inc. V. Mecom*, 28 S.W.3d 129, 135 (Tex. App.–Texarkana 2000, no pet.), a complaint, that findings supporting sanctions were not particularized, was waived due to failure to complain in the trial court. In *Robson v. Gilbreath*, 267 S.W.3d 401, 407 (Tex. App.--Austin 2008, pet. denied), the court held that "because Robson did not object to the form of the sanctions order, he has waived any objection to the absence of a bad faith or harassment finding." In *Nath v. Texas Children's Hospital*, 2012 WL 2430466 (Tex. App.--Houston [14th Dist.] 2012, n.p.h.), the appellate court found that certain arguments against sanctions were waived because they were not presented to the trial court. *See Nath, supra* at *9 & *10. And in *Low v. Henry*, 221 S.W.3d at 618, the Supreme Court said it was necessary to preserve a complaint about lack of advance notice of a sanctions hearing by calling the court's attention to the lack of notice, or objecting to the hearing going forward, and/or moving for a continuance. The Rules of Appellate Procedure provide that an appellant can attack the sufficiency of the evidence in a bench trial for the first time on appeal, without taking any steps to preserve complaint in the trial court. Tex. R. App. P. 33.1(d). *See McCain*, 856 S.W.2d at 756 (appellant can attack sufficiency of the evidence to support Rule 13 sanctions for the first time on appeal).

In sum, caution dictates that all complaints about a sanctions order be raised in the trial court, except for a claim of legally or factually insufficient evidence.

3. Abuse of Discretion. In an appeal from the granting of sanctions, the appellate court reviews the trial court's imposition of sanctions for an abuse of discretion. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007) (regarding TRCP 13 and TCP&RC ch. 10). The abuse of discretion standard also applies to the trial court's refusal to impose sanctions. *In re C.Z.B.*, 151 S.W.3d 627, 636 (Tex. App.--San Antonio 2004, no pet.); *accord, Richmond Condominiums v. Skipworth Commercial Plumbing, Inc.*, 245 S.W.3d 646, 660 n. 9 (Tex. App.--Fort Worth 2008, no pet.) ("It appears that this [abuse of discretion] standard of review is applicable whether the appellate court is reviewing the imposition of sanctions (which is almost always the case) or a decision not to impose sanctions").

In deciding whether the trial court abused its discretion, "[a]n appellate court may reverse the trial court's ruling only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable." *Low v. Henry*, 221 S.W.s3d at 614. "In determining whether the trial court abused its discretion, we review the record in the light most favorable to the trial court's action." *Spellmon v. Collins*, 970 S.W.2d 578, 580 (Tex. App.–Houston [14th Dist.] 1998, no pet.). "We may not substitute our judgment for that of the trial court." *Law Offices of Windle Turley, P.C. v. French*, 164 S.W.3d 487, 491 (Tex. App.--Dallas 2005, no pet.).

When it comes to deciding what law applies or in applying that law to the facts of the case, the trial court has no discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (saying that a trial court's failure to correctly analyze or apply law constitutes abuse of discretion). "[A] court abuses its discretion . . . if it bases its sanction order on a clearly erroneous assessment of the evidence." *Rodriguez v. MumboJumbo, L.L.C.*, 347 S.W.3d 924, 926 (Tex. App.–Dallas 2011, no pet.). An appellate court will overturn a trial court's discretionary ruling "only when it is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Appleton v. Appleton*, 76 S.W.3d 78, 86 (Tex. App.–Houston [14th Dist.] 2002, no pet.).

The case of *Ubinas-Brache v. Dallas County Medical Society*, 261 S.W.3d 800, 805 (Tex. App.–Dallas 2008, pet. denied), represents an anomaly. There the defendant moved by summary judgment for the imposition of sanctions. The court of appeals said that it would review the imposition of sanctions according to standard summary judgment review, not by an abuse of discretion standard. Sanctions were sought by counterclaim and summary judgment in *Trussell Ins. Services, Inc. v. Image Solutions*, 2010 WL 5031100, *2 (Tex. App.–Tyler 2010, no pet). The court of appeals considered the counterclaim to be a motion for sanctions. And the Court said that the plaintiff's "nonevidentiary" summary judgment hearing "should have proven to be an impotent vehicle by which to challenge the counterclaim for sanctions." However, the plaintiff was not faulted for treating the sanctions

request as a plead-for cause of action. The appellate court ruled that the defendant waived its request for sanctions by participating in a non-evidentiary hearing in which its sanctions request was denied. *Id*. at *4.

4. Scope of Appellate Review. The appellate courts say that, in reviewing a decision to grant or not grant sanctions, the appellate court examines the *entire record*, including findings of *fact and conclusions of law*, and considers the evidence in the *light most favorable* to the trial court's ruling, drawing all reasonable inferences in favor of the trial court's decision. *American Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam). In *McCain v. NME Hospitals, Inc.*, 856 S.W.2d 751, 756 (Tex. App.–Dallas 1993, no writ), the attack was that the evidence was legally insufficient to support sanctions and the court of appeals applied the conventional "no evidence" (legal sufficiency) standard of appellate review.

Generally, a reviewing court cannot reverse a trial court's sanctions order in the absence of a statement of facts from the sanctions hearing. *Browne v. Las Pintas Ranch, Inc*., 845 S.W.2d 370, 374 (Tex. App.--Houston [1st Dist.] 1992, no writ). Because the appellate court reviews the entire record, if the entire record is not taken up on appeal it would seem that the appellate court could not reverse the sanction order. This seems odd if the sanction results from a particular event that is fully developed in a separate sanction hearing. There may be a place here for a partial Reporter's Record under TRAP 34.6(c), which requires that a statement of the points or issues to be presented on appeal be included in the request for a partial Reporter's Record. The appellate court must presume that the partial record contains the entire record for purposes of considering the listed issues or points. TRAP 34.6(c)(4).

5. Presumption on Appeal. While there is a presumption of good faith in the trial court, see Section IX, and the burden of proof is on the party seeking sanctions to prove all the elements of a sanction claim, on appeal the abuse of discretion standard entails a presumption on appeal that the trial court's decision was correct.

6. Supporting Evidence. A sanction must be supported by evidence. See Section X above. In *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 139 (Tex. App.--Texarkana 2000, no pet.), Rule 13 sanctions were reversed when the trial court did not conduct any evidentiary hearing and did not take judicial notice of any items in the case file.

7. Must View From Perspective of When The Pleading was Filed. For Rule 13 sanctions, the trial court must examine the facts and circumstances in existence at the time the pleading was filed to determine whether Rule 13 sanctions are proper. *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 896 (Tex. App.--Houston [14th Dist.] 2000, no pet.). The same is true for Chapter 10 sanctions. *Anderson v. Kasprzak*, 2012 WL 2159360, *6 (Tex. App.--Houston [1st Dist.] 2012, no pet.).

8. Lack of Findings. Sanctions based on Rule 13, Chapter 10, or inherent power, must be supported by findings. See Section XII above. Absent particular, non-conclusory findings, sanctions based on these grounds will be reversed. *See Rudisell v. Paquette*, 89 S.W.3d 233, 237 (Tex. App.--Corpus Christi 2002, no pet.) (a Rule 13 case); *Rivera v. Countrywide Home Loans, Inc.*, 262 S.W.3d 834, 842 (Tex. App.–San Antonio 2008, no pet.) (a Chapter 10 case); *Greiner v. Jameson*, 865 S.W.2d 493, 499 (Tex. App.--Dallas 1993, writ denied) (sanctions based on inherent power). Discovery sanctions do not have to be supported by findings. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 n. 9 (Tex. 1991).

9. When the Legal Basis for the Sanction is Unclear. In *Low v. Henry*, 221 S.W.3d 609,614 (Tex. 207), the Supreme Court determined that sanctions were imposed under Chapter 10 since (i) Chapter 9 did not apply as a result of the fact that Chapter 10 and Rule 13 did apply; (ii) the sanctions imposed were not authorized under Rule 13; and (iii) because the court order specified Chapter 10 as the basis for the sanctions. Sometimes it is not possible to determine from the sanctions order what legal basis for sanctions was invoked by the trial court. Ordinarily oral comments made by the judge at the conclusion of trial are not considered to be findings in support of the judgment. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984) (per curiam). There is good reason to apply that same rule to sanction orders that must contain recitals of findings that support the imposition of sanctions, like Tex. R. Civ. P. 13 (particulars of good cause must be stated in the order), and Tex. Civ. Prac. & Rem. Code § 10.005 (the order must describe the conduct that violated the statute and must explain the basis for the sanction imposed). See Section XII above. *See Loya v. Loya*, 2011 WL 5374199, *4 (Tex. App.–Houston [14th Dist.] 2011, no pet.) (oral comments by judge did not fulfill Chapter 10 requirement).

If the order does not recite the legal basis for sanctions, and there are no separate findings and conclusions on point, then you can perhaps look to the motion or the evidence or the arguments of counsel to ascertain the legal

basis for the sanction. If that fails, the appellate lawyer can base the appeal on an attack that Rule 13 and Chapter 10 will not support sanctions due to the lack of findings. This argument lead to reversal in *Hughes v. Aames Funding Corp.*, 2000 WL 1919705, *2 (Tex. App.–San Antonio 2000, no pet.), when the San Antonio Court of Appeals reversed a pleading-related sanction award where the trial court gave no basis for its sanctions, and made no findings to support the imposition of sanctions. The court said:

> Here, as in *GTE Communications Sys. Corp. v. Curry*, 819 S.W.2d 652 (Tex. App.–San Antonio 1991, no writ), the order merely imposes sanctions; it does not find that good cause exists for such impositions; it does not find that the pleadings filed by the Hughes were groundless and filed for the purpose of delay or harassment, or were made in bad faith; and, more fatally, it does not state any facts or particulars of the good cause. Therefore, the order is defective because it does not comply with the mandatory requirements of Rule 13 and Section 10.005. This defect warrants reversal because it probably prevented the appellants from properly presenting their case to this Court. Tex. R. App. P. 44.1(a).

Chapter 9 can be ruled out as a basis for sanctions if the case is one to which Chapter 10 or Rule 13 apply. *Low v. Henry*, 221 S.W.3d at 614. If the sanction is a monetary award that is not based on expenses, court costs, or attorney's fees, then Rule 13 can be eliminated as a basis since Rule 13 sanctions must be based on expenses, court costs, or attorney's fees. *Id.* at 614.

This approach by process of elimination can be extended. If Chapter 9 can be ruled out because Chapter 10 or Rule 13 apply, and if Chapter 10 and Rule 13 cannot be relied upon because there are no findings, and if discovery can be ruled out because the objectionable behavior was not discovery-related, and if inherent power cannot suffice because the behavior did not interfere with a core function, no basis is left to sustain the sanction. This process-of-elimination approach would not work if the sanctions might have been discovery sanctions, since findings are not required to support discovery sanctions. See *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991).

10. Differentiate Whether to Sanction From What the Sanction Shall Be. In *Davis v. Rupe*, 307 S.W. 3d 528, 530-31 (Tex. App.–Dallas 2010, no pet.), the court of appeals noted that an order of sanctions involves two issues: whether to sanction and what sanction to impose.

B. MANDAMUS FOR SANCTIONS. Mandamus for sanctions requires a showing of an abuse of discretion and the lack of an adequate remedy at law.

1. Abuse of Discretion. Mandamus will issue with regard to a sanction only where an abuse of discretion is shown. *In re Christus Health*, 276 S.W.3d 708, 709-10 (Tex. App.--Houston [1st Dist.] 2008, orig. proceeding). The standard of review for abuse of discretion in a sanction-related mandamus is the ordinary one. *In re Gupta*, 263 S.W.3d 184, 192 (Tex. App.--Houston [1st Dist.] 2007, orig. petition) ("a trial court abuses its discretion if it issues a discovery sanction in an arbitrary or unreasonable manner, or without reference to guiding rules and principles").

2. No Adequate Remedy at Law. As with other mandamus relief, mandamus relating to sanctions requires a showing that the trial court abused its discretion *and* that appeal is not an adequate remedy.

TRCP 215.1 says that a discovery related sanction "order shall be subject to review on appeal from the final judgment." This affords a legal remedy that would preclude mandamus. Nonetheless, mandamus is available to review a discovery-related sanctions order when appeal is not an adequate remedy. Where death penalty sanctions have been granted, but an appealable order has not been signed, appeal is not an adequate remedy. In *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991), the Supreme Court said:

> Whenever a trial court imposes sanctions which have the effect of adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but which do not result in rendition of an appealable judgment, then the eventual remedy by appeal is inadequate. Specifically, in this case TransAmerican does not have an adequate remedy by appeal because it must suffer a trial limited to the damages claimed by Toma. The entire conduct of the litigation is skewed by the removal of the merits of TransAmerican's position from consideration and the risk that the trial court's sanctions will not be set aside on appeal. Resolution of matters in dispute between the parties will be influenced, if not dictated, by the trial court's determination of the conduct of the parties during discovery. Some award of damages on Toma's counterclaim is likely, leaving TransAmerican with an appeal, not on whether it should have been liable for those damages, but on whether it should have been sanctioned for discovery abuse. This is not an effective appeal.

Mandamus is also available where a monetary sanction is so great that it impairs a party's ability to continue the litigation, unless the sanction is delayed until the end of the case. *See Braden v. Downey*, 811 S.W.2d 922 (1991) ("If the imposition of monetary sanctions threatens a party's continuation of the litigation, appeal affords an adequate remedy only if payment of these sanctions is deferred until final judgment is rendered and the party has the opportunity to supersede the judgment and perfect his appeal").

In *In re Braden*, 960 S.W.2d 834, 838 (Tex. App.–El Paso 1997, orig. proceeding), the court of appeals granted mandamus to set aside discovery related sanction of $6,000 in attorneys' fees, because "by failing to provide a date certain as to when the sanctions were payable and by failing to make express written findings as to why the sanctions do not have a preclusive effect, the trial court has effectively prevented the Relators' from having an adequate remedy by appeal."

XXIV. SANCTIONS IN APPELLATE COURTS.

A. SANCTIONS REGARDING APPEALS. Two Rules of Appellate Procedure provide for the appellate court to award sanctions in connection with an appeal, one for the courts of appeals and the other for the Supreme Court.

1. In the Courts of Appeals. TRAP 45 authorizes courts of appeals to award sanctions in appeals. The Rule reads:

> TRAP 45. Damages for Frivolous Appeals in Civil Cases
>
> If the court of appeals determines that an appeal is frivolous, it may — on motion of any party or on its own initiative, after notice and a reasonable opportunity for response — award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals.

TRAP 45 became effective on September 1, 1997. The law before and after the change was discussed in *Hunt v. CIT Group/Consumer Finance, Inc.*, 2010 WL 1508082, *8 n. 14 (Tex. App.--Austin 2010, pet. denied):

> Rule 45 took effect on September 1, 1997. It replaced former rule 84 and broadened appellate courts' ability to award sanctions by omitting language in the former rule authorizing the award of "damages 'for delay' only if we found 'that an appellant ha[d] taken an appeal for delay and without sufficient cause.'" *Smith v. Brown*, 51 S.W.3d 376, 380 (Tex. App.--Houston [1st Dist .] 2001, pet. denied). Courts construed this language to require a finding that the appeal was taken in bad faith. *Id.* Most courts that have considered the issue have concluded that a showing of bad faith is no longer required. *Texas State Taekwondo Ass'n v. Lone Star State Taekwondo Ass'n*, No. 08-01-00403-CV, 2002 WL 1874852, at *2 (Tex. App.--El Paso Aug.15, 2002, no pet.) (not designated for publication) (collecting cases and holding sanctions appropriate under either standard in case involving enforceable Rule 11 agreement waiving parties' right to appeal outcome of binding summary jury trial).

In *London v. London*, 349 S.W.3d 672, 675-76 (Tex. App.--Houston [14 Dist.] 2011, no pet.), the court said:

> If an appeal is frivolous, the appellate court may award the prevailing party just damages. Tex. R. App. P. 45. To determine if an appeal is frivolous, we review the record from the viewpoint of the advocate and decide whether there were reasonable grounds to believe the case could be reversed. *Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex. App.--Houston [14th Dist.] 2011, pet. filed) (en banc). Because the question of whether there were reasonable grounds for such a belief is an objective one, an appeal can be frivolous even absent bad faith. *Id.* at 781. After reviewing the record from the viewpoint of Jeffrey's counsel, we conclude that there were reasonable grounds to believe that this court could reverse the trial court's order.

In *Pantlitz v. Sikkenga*, 2011 WL 5116464, *5 (Tex. App.--Houston [1st Dist.] 2011, no pet.), the First Court of Appeals said:

> We apply an objective test to determine whether an appeal is frivolous and conduct a full examination of the record and all the proceedings from the viewpoint of the advocate. *Smith*, 51 S.W.3d at 381. The goal of this inquiry is to determine whether the advocate had reasonable grounds to believe that the trial court's judgment should be reversed. *Id.* We exercise prudence and caution and deliberate most carefully before awarding damages under rule 45. *Id.* We award sanctions in truly egregious circumstances. *Goss v. Houston Cmty. Newspapers*, 252 S.W.3d 652, 657 (Tex. App.--Houston [14th Dist.] 2008, no pet.).

In *D Design Holdings, L.P. v. MMP Corp.*, 339 S.W.3d 195, 205 (Tex. App.--Dallas 2011, no pet.), the Dallas Court of Appeals cited four factors indicating that an appeal is frivolous:

> Four factors that tend to indicate an appeal is frivolous are (1) the unexplained absence of a statement of facts, (2) the unexplained failure to file a motion for new trial when it is required to successfully assert factual sufficiency on appeal, (3) a poorly written brief raising no arguable points of error, and (4) the appellant's unexplained failure to appear at oral argument.

2. In the Supreme Court. TRAP 62 authorizes the Supreme Court to award sanctions in appeals. The Rule reads:

> TRAP 62. Damages for Frivolous Appeals
>
> If the Supreme Court determines that a direct appeal or a petition for review is frivolous, it may — on motion of any party or on its own initiative, after notice and a reasonable opportunity for response — award to each prevailing party just damages. In determining whether to award damages, the Court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals or the Supreme Court.

There are no cases decided under TRAP 62.

B. SANCTIONS REGARDING ORIGINAL PROCEEDINGS. TRAP 52.11 says:

> 52.11. Groundless Petition or Misleading Statement or Record
>
> On motion of any party or on its own initiative, the court may — after notice and a reasonable opportunity to respond — impose just sanctions on a party or attorney who is not acting in good faith as indicated by any of the following:
>
> (a) filing a petition that is clearly groundless;
> (b) bringing the petition solely for delay of an underlying proceeding;
> (c) grossly misstating or omitting an obviously important and material fact in the petition or response; or
> (d) filing an appendix or record that is clearly misleading because of the omission of obviously important and material evidence or documents.

TRAP 52.3, *Form and Contents of Petition*, contains subdivision (j) which provides:

> (j) *Certification.* The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

This certificate requirement sets up a possible sanction for the attorney filing the petition in the original proceeding.

Sanctions were granted in *In re ADT Security Services, S.A. de C.V.* 2009 WL 260577 (Tex. App.–San Antonio 2009, orig. proceeding), where the appellate court concluded that "ADT filed a record that is clearly misleading because of the omission of obviously important documents . . . ," that led the appellate court to grant a stay that it would not have granted had it seen the full record. The offending party, and its attorneys, were ordered to pay $7,575.00 to the opposing party.

The party who suffered the sanctions would be the relator in a mandamus proceeding. *Braden v. Downey*, 811 S.W.2nd 922, 928 n. 6 (Tex. 1991), suggests that the attorney should also be named as a relator if sanctions were assessed against both the attorney and the client.