AGENDA
NOVEMBER 19-20, 1993
SCAC MEETING

INDEX

REPORT OF

TEXAS SUPREME COURT

TASK FORCE ON SANCTIONS

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Texas Supreme Court Task Force on Sanctions:

Lisa Blue
Herbert Boyland
Honorable Scott A. Brister
Carlyle H. Chapman, Jr.
Elizabeth Ann Crabb
Charles Herring, Jr. - Chairman
Russell H. McMains
Luke Soules (ex officio)
Elizabeth G. Thornburg
Robert A. Valadez

Volunteer participants:

Bruce W. Bowman, Jr., Samuel L. Boyd, William A. Brewer, III, Gerald J. Brown, George Chandler, Dennis K. Drake, Sharon M. Easley, William R. Edwards, William R. Edwards, III, Charles Gandy, Dewey J. Gonsoulin, Benjamin L. Hall, III, Jett Hanna, Thomas R. Harkness, Thomas M. Harlan, Honorable Joe Hart, David W. Holman, James H. Holmes, III, Tommy Jacks, Don Jackson, Byron C. Keeling, Kevin J. Keith, Harris E. Kerr, J. Mark Mann, Stephen R. Marsh, Honorable Scott McCown, Richard Mithoff, David J. Nagle, Steven D. Naumann, Harold W. Nix, Honorable Eileen F. O'Neill, Charles W. Oldham, George (Tex) Quesada, James B. Ragan, Roger Rider, Earl Rutledge, Luke Soules, Frank R. Southers, Chris A. Stacy, Professor John F. Sutton, Jr., Mary Wolf

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I. INTRODUCTION

This Report presents the conclusions and recommendations of the Task Force on Sanctions, which the Texas Supreme Court appointed on June 19, 1991. The Report reflects not only the work of the ten members of the Task Force, but also input from forty-one other lawyers and judges who participated on an advisory basis, as well as hundreds of other Texas lawyers and judges who responded to a questionnaire sent out by the Task Force.

Over the past few years, Texas sanctions practice has been the subject of substantial critical commentary.[1] A central theme of such criticism is that the sanctions rules have evolved to a form that has encouraged, rather than discouraged, pretrial gamesmanship and procedural manipulation, often resulting in technical, outcome-determinative adjudications that were fundamentally inconsistent with the underlying objective of the rules set out in Texas Rule of Civil Procedure 1: "to obtain a just, fair, equitable and impartial adjudication of the rights of

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[1] See, e.g., David W. Holman & Byron C. Keeling, Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure, 42 Baylor L. Rev. 405 (1990) (hereinafter "Holman & Keeling); Allen B. Rich, Certified Pleadings: Interpreting Texas Rule 13 in Light of Federal Rule 11, 11 Rev. Litig. 59 (1991) (hereinafter "Rich"); William Kilgarlin, Sanctions for Discovery Abuse: Is The Cure Worse Than the Disease?, 54 Tex. B.J. 658 (1991); Tommy Jacks, An Open Letter to the Texas Supreme Court, 25 Texas Trial Lawyers Forum 3 (1991); Charles Herring, Jr., The Rise of the "Sanctions Tort," Tex. Law., January 28, 1991 at 22; cf. Judge Sam D. Johnson, Thomas M. Contois, and Byron C. Keeling, The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions, 43 Baylor L. Rev. 647 (1991) (hereinafter "Johnson, Contois & Keeling").

litigants under established principles of substantive law." Cases were legion in which trial courts levied "death penalty sanctions"[2] by granting default judgments or dismissals, striking pleadings, or striking critical lay or expert witnesses. The high success rate for pretrial sneak attacks has encouraged increasingly sophisticated maneuvering, set-ups, and machinations. Courts, attorneys and litigants have spent too much time, money, and other resources on sanctions proceedings, and too often procedural determinations have substituted for adjudications on the merits.

The Task Force received essentially the same input from the 251 lawyers and judges who responded to its published questionnaire. Seventy-five percent of the lawyers and 74% of the judges agreed that the current sanction rules result in too much time and money spent on sanctions practice. Sixty-seven percent of the lawyers and 65% of the judges also agreed that the current rules actually encourage Rambo tactics. Overall, 75% of both lawyers and judges concluded that Texas sanctions rules should be modified.

In the Task Force's view, the Texas Supreme Court's decisions in TransAmerican Natural Gas Corp. v. Powell[3] and

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[2] "Death penalty sanction" is "a term adopted by the legal community to describe a sanction imposed by the trial court which, in effect, eliminates a claim, counterclaim, or defense and precludes a decision on the merits of the party's claim, counterclaim, or defense." Goff v. Branch, 821 S.W.2d 732, 738 n.3 (Tex. App. -- San Antonio 1991, writ denied).

[3] 811 S.W.2d 913 (Tex. 1991).

Braden v. Downey[4] were extremely important and salutary developments in Texas sanctions practice. Those decisions, combined with the Court's appointment of this Task Force, represented a major effort by the Court to address some of the most serious problems that have developed in Texas sanctions practice. Several of the changes recommended by the Task Force seek to codify in the rules the teachings of TransAmerican and Braden.

The Task Force analyzed closely the two most important Texas Rules of Civil Procedure containing sanctions provisions, Rule 13, dealing with groundless pleadings, and Rule 215, dealing with discovery sanctions. The Task Force also reviewed the other sanctions provisions appearing in Rules 18a(h), 21b, 120a, 166a(h), 203, and 269(e). In sum, the Task Force recommends major revisions of Rule 13; replacement of Rule 215 with a new Rule 166d and with amendments to Rule 166b(6); repeal of Rules 18a(h), 21b, 166a(h), and 203; partial repeal of Rule 269(e); and creation of a new rule governing motions to disqualify attorneys, Rule 12a.

The Task Force's final proposals for each of the rules appear in the following Appendices:

RULES	APPENDIX
12a	C
13	B
18a(h)	G-1

[4] 811 S.W.2d 922 (Tex. 1991).

21b	G-2
120a	G-3
166a(h)	G-4
166b(6)(b)	D
166b(6)(e)	E
166b(6)(d) (replacing Rule 215(5))	F
166d (replacing Rule 215(1)-(4), (6))	A
203	G-6
269(e)	G-7

The Task Force recognizes that no single formulation or language in any particular rule is ideal. Often changes that solve one problem create another. Drafting almost any sanctions rule requires balancing rights and remedies, procedural protections and litigation efficiencies. Thus, in many instances the Task Force has considered several alternatives, each of which has advantages and disadvantages, and frequently two or more of the alternatives appear almost equally desirable.

Recognizing that ultimately the Texas Supreme Court must draft the rules, the Task Force offers these proposals only as suggestions for consideration by the Court and its Rules Advisory Committee. The Report attempts to explain in some detail the rationale for particular changes and to discuss various options the Task Force has considered. In most instances the Task Force is less concerned with the specific wording of the proposed changes than with the underlying concepts and rationale embodied in the proposals.

Part II of this Report describes in more detail the methodology and research of the Task Force, and Part III summarizes the responses to the Task Force's questionnaire. In Parts IV-VIII, the Task Force recommends several specific changes to the rules: Part IV recommends replacement of Rule 215(1)-(4) and (6) with proposed Rule 166d, which deals with discovery sanctions; Part V recommends amendment to Rule 13, which deals with groundless pleadings; Part VI recommends amendment of Rule 166b(6)(b) and Rule 215(5), which deal with disclosure of and exclusion of witnesses and evidence; Part VII recommends adoption of proposed Rule 12a to establish standards and procedures for motions to disqualify attorneys; and Part VIII recommends repeal of various minor sanctions provisions found in Texas Rules of Civil Procedure 18a(h), 21b, 120a, 166a(h), 203, and 269(e). Part IX discusses sanctions under the inherent powers doctrine, Part X analyzes suggestions for modifying appeal procedures for sanctions orders, and Part XI identifies some of the legal malpractice insurance issues affecting sanctions practice.

II. THE TASK FORCE AND ITS WORK

The Task Force on Sanctions first met on August 21, 1991. In addition to the ten members of the Task Force, forty-one other lawyers and judges personally participated in the Task Force efforts on a volunteer basis.[5] The Task Force conducted public meetings, with Task Force members and several volunteer

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[5] Appendix L lists Task Force members and volunteer participants.

participants attending each meeting and a court reporter recording the proceedings.

In the course of its research, the Task Force collected, Bates-stamped and distributed to Task Force members and other participants over 1400 pages of materials, including proposed drafts of rules, court decisions, articles, rules from other jurisdictions, bibliographies, proposed federal rule amendments, surveys, and correspondence from interested persons and groups.[6] The Task Force also conducted a comparative study of sanctions rules and statutes in various other states and jurisdictions. As discussed in the following section, the Task Force published and distributed a sanctions questionnaire, and received over 251 responses from Texas lawyers and judges. The Task Force also reviewed the work to date of the United States Judicial Conference's Standing Committee on Rules of Practice and Procedure (which is a part of the Judicial Conference's Advisory Committee on Civil Rules) concerning various current proposals to amend the Federal Rules of Civil Procedure, particularly with respect to sanctions practice under Federal Rules 11 and 37. (On September 21, 1992, the Judicial Conference adopted proposed amendments to forward for further review by the United States Supreme Court and Congress.)

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[6] A list of the materials distributed appears in Appendix M.

Additionally, the Task Force analyzed in some detail the ABA Section of Litigation's Standards and Guidelines for Rule 11 practice, published in June 1988.[7]

III. RESULTS OF THE TASK FORCE QUESTIONNAIRE

In an effort to solicit input from lawyers and judges concerning sanctions practice in Texas, the Task Force published a questionnaire in the December 16, 1991 issue of the Texas Lawyer. At the same time the Task Force sent the questionnaire to all Texas district judges. One hundred twelve judges and 139 lawyers responded, a total of 251 respondents. A copy of the questionnaire and a compilation of the responses appear in Appendix J.

Although the survey was unscientific, the answers are informative, particularly concerning questions on which both lawyer and judge respondents indicated overwhelming agreement. The Task Force had some concern that the lawyer respondents might be unrepresentative of lawyers generally or that only lawyers who

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[7] American Bar Association Section of Litigation, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 101-30 (1988) (hereinafter "ABA Standards"). Although the ABA Standards deal with Rule 11, which addresses frivolous-pleadings sanctions rather than discovery sanctions, many of the considerations are the same. See, e.g., TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 (Tex. 1991) (Gonzalez, J., concurring) ("In my opinion, the ABA guidelines developed for determining when to assess sanctions under Federal Rule 11 are instructive whenever sanctions are imposed or denied under Texas Rule 215."). The text of the ABA Standards appears in Appendix K. The principal author of the ABA Standards was Gregory Joseph, who also has written the leading treatise on sanctions practice in federal court, Sanctions: The Federal Law of Litigation Abuse (1989 & Supp. 1992) (hereinafter "Joseph").

were intensely dissatisfied with the present sanctions system would respond to the questionnaire. No doubt that concern is valid to some extent, but the large number of judges who responded, and more importantly, who agreed with lawyer respondents on many issues, gave the Task Force some measure of comfort that the questionnaire at least served to identify major points of dissatisfaction among the practicing bar and bench. In several instances, the questionnaire results confirmed concerns expressed by commentators.

Areas of Agreement Among Lawyer and Judge Respondents

Sanctions issues on which large majorities (greater than 60%) of lawyers and judges agreed (combining the response categories of "agree" and "strongly agree") included the following, with the percentages of agreement indicated:

* Too much time, money. The current sanctions rules result in too much time and money spent on sanctions practice (lawyers 75%, judges 74%).

* The Rules encourage Rambo. Current rules encourage Rambo tactics (lawyers 67%, judges 65%), and fail to discourage Rambo tactics (lawyers 80%, judges 70%).

* Change the rules. The rules regarding sanctions should be modified (lawyers 75%, judges 75%).

* Consolidate the rules. Texas has too many sanctions rules; sanctions provisions should be consolidated (lawyers 76%, judges 68%).

* Require trial court findings. The rules should require that a trial judge state into the record specific reasons when imposing sanctions (lawyers 97%, judges 59%). (Most lawyers (58%) also felt that judges should state such findings when deciding not to impose sanctions, but most judges (61%) disagreed.)

* Make sanctions discretionary. The current mandatory language ("shall impose sanctions") should be changed to make the imposition of sanctions discretionary, even if

the court finds some type of violation (lawyers 72%, judges 92%).

* Include conference requirement. The rules should require attorneys to confer before seeking sanctions, as is now required before filing discovery motions under Rule 166b(7) (lawyers 87%, judges 93%).

* Include a "safe harbor." With respect to frivolous pleadings, the rules should have a "safe harbor" provision that would allow a party or lawyer to avoid sanctions by withdrawing the pleading after receiving notice of a claim that the pleading is frivolous (lawyers 71%, judges 77%).

* Require oral hearings. Trial courts should conduct oral hearings before imposing sanctions (lawyers 93%, judges 87%).

* Client notice before ultimate sanctions. Before ultimate sanctions (dismissal, default, etc.) are imposed, the client should receive actual notice (lawyers 86%, judges 75%).

* Include comments. The rules should include a comments section, similar to the federal rules or some of the Texas Rules of Civil Evidence (lawyers 87%, judges 81%).

* Mandating professional courtesy. The rules should specifically mandate professional courtesy (lawyers 67%, judges 81%).

* Persons sanctionable. Courts should be able to impose sanctions against parties (lawyers 89%, judges 95%), against lawyers (lawyers 89%, judges 100%), and against law firms (lawyers 61%, judges 76%).

* No ADR requirement. The rules should not require alternative dispute resolution before a party seeks sanctions (lawyers 66%, judges 77%).

* Reduce witness/evidence exclusion. The rules providing for witness/evidence exclusion should be liberalized: (1) to state expressly that a trial court may grant a continuance as an alternative to evidence/witness exclusion (lawyers 67%, judges 69%); (2) to permit a named party to a lawsuit to testify without being listed in answers to interrogatories (lawyers 86%, judges 93%); and (3) to permit a party to call as a witness any witness listed in any other party's interrogatory responses (lawyers 81%, judges 77%).

* Allow immediate appeals of severe sanctions. The rules should allow for immediate appeals of "severe sanctions" (lawyers 80%, judges 58%).

Additionally, on a related issue not strictly pertinent to sanctions practice, lawyers and judges agreed that Texas should provide an alternative accelerated docket to permit certain cases to proceed to trial quickly with a minimum of discovery, motions, and expense (lawyers 71%, judges 73%). Some federal courts are experimenting with such "rocket dockets," which allow parties by agreement to forgo expensive, time-consuming pretrial discovery and motion practice, and the respondents also appeared to favor such experimentation in state courts.

Lawyers v. Judges

On a few issues, the lawyer and judge respondents took significantly different positions. Not surprisingly, those differences related to judicial power, abuse of discretion, and appeals. A majority of lawyers (58%) felt that current sanctions rules provide judges with too much discretion; an even larger majority of judges (84%) disagreed with that statement. Similarly, a large majority of lawyers (81%) disagreed with the proposition that current sanctions rules provide judges "too little discretion"; a bare majority of judges (51%) felt they had too little discretion.

As noted above, most lawyers and judges agreed that the rules should require judges to state findings into the record when imposing sanctions. The lawyer respondents would go further, however; 67% would require a trial judge to make written findings of fact and conclusions of law. Undoubtedly

recognizing that most Texas judges lack adequate funding for secretarial and support staff, judges disagreed with the written findings proposal by an even larger margin (83%).

While most lawyers and judges agreed that some limited form of immediate appellate review is necessary with respect to any order imposing "severe" sanctions, lawyers, by a very narrow margin of 51%, wanted a broader, interlocutory appeal right of any sanctions order, while judges disagreed (69%) with creation of such an appeal right.

Other Agreements

By narrower margins than the items above (less than 60% approval), lawyer and judge respondents agreed on several other issues.

* Two-step requirement for discovery sanctions. Sanctions for discovery abuse should be permissible only after a court has issued an order compelling discovery and the order has been violated (lawyers 65%, judges 52%).

* Use of masters. Judges should be allowed to appoint a master to resolve discovery disputes (lawyers 58%, judges 70%). (Both groups opposed having masters resolve sanctions issues, though judges were almost evenly divided on this question (lawyers 62%, judges 50% to 49%).)

* Eliminate expert designation deadlines. The deadline in Rule 166b(6) that expert witnesses be identified "as soon as is practical, but in no event less than thirty (30) days" before trial except on leave of court should be eliminated; if a party or the court wants to set a deadline, that should be done by pretrial order (lawyers 57%, judges 51%).

* Reduce automatic exclusion of witnesses/evidence. As to the automatic exclusion of evidence of witnesses for failure to provide proper discovery response supplementation (absent a showing of good cause), the rules should be amended:

  - to allow more discretion for trial courts to admit such evidence/witness (lawyers 58%, judges 78%);

to specify what constitutes good cause to admit such evidence/witness (lawyers 72%, judges 57%);

to provide that a showing that the adverse party will not be prejudiced by the evidence/witness constitutes good cause for admission of the evidence/witness (lawyers 56%, judges 64%).

In most instances in which lawyer and judge respondents strongly agreed on sanctions issues, the Task Force has recommended corresponding changes in the rules.

IV. DISCOVERY SANCTIONS -- PROPOSED RULE 166d

A. Proposed Rule 166d -- Summary

The Task Force proposes substantial changes to current Rule 215, which deals with discovery sanctions. The most obvious change, but one of the least important, is to renumber the rule as Rule 166d, merely to move the rule closer to the general rules for pretrial discovery.[8] Overall, the goals of the Task Force's proposed revisions in Rule 166d are: to incorporate the

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[8] Current Rule 215 is in subsection B of section 9 of Part II of the rules; the title of section 9 is "Evidence and Depositions" and the title of subsection B is "Depositions." Section 8 is entitled "Pretrial Procedure" and contains the general scope of discovery rule (Rule 166b); under the rules' existing organization, section 8 appears to be a more logical place for this rule. Nonetheless, the Task Force does not consider the precise location of the rule to be particularly important, and recognizes that the Task Force on Revision of the Texas Rules of Civil Procedure is likely to recommend a more comprehensive reorganization of the rules.

The Task Force version of proposed Rule 166d also is renamed "Discovery Violations," changed from the current title of Rule 215, "Abuse of Discovery; Sanctions." Again, this change is relatively minor. Because proposed Rule 166d deals with more than just sanctions, and because the very word "sanctions" can have implications for whether a monetary award is covered by legal malpractice insurance, the Task Force has recommended the new caption. See discussion in Part XI, below.

principles of TransAmerican Natural Gas Corp. v. Powell[9] and Braden v. Downey;[10] to simplify and shorten the rule;[11] and to provide procedures to reduce some of the pretrial gamesmanship that has developed under current Rule 215.

Proposed Rule 166d reads as follows:

RULE 166d. DISCOVERY VIOLATIONS

1. **Procedure.** If a person or entity fails in whole or in part to respond to or supplement discovery, or abuses the discovery process in seeking or resisting discovery, the court may grant relief as set forth below.

(a) Motion. Any person or entity affected by such failure or abuse may file a motion specifically describing the violation, and may attach any necessary exhibits including affidavits, discovery, pleadings, or other documents. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. Motions or responses made under this rule shall be filed and served in accordance with Rules 21 and 21a. Nonparties affected by the motion shall be served as if parties. The motion shall contain the certificate required by Rule 166b(7).

(b) Hearing. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions requesting relief provided by paragraph 2. The court shall base its decision upon (i) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and (iii) testimony if the hearing is oral.

(c) Order. An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanction would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

2. **Relief.** The court may compel or quash discovery as provided by Rule 166b. In addition, so long as the amount involved is not substantial, the court may award the prevailing person or entity reasonable expenses necessary in connection with the motion, including attorney's fees. The court may presume the usual and customary fee in connection with the motion is not substantial, unless circumstances or

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[9] 811 S.W.2d 913 (Tex. 1991).

[10] 811 S.W.2d 922 (Tex. 1991).

[11] Current Rule 215 contains 1841 words; proposed Rule 166d contains 804 words.

an objection suggests such award may preclude access to the courts. An award of expenses that is substantial is governed by paragraph 3(c). If a motion is granted in part and denied in part, the court may apportion expenses in a just manner. The court may enter these orders without any finding of bad faith or negligence, but shall not award expenses if the unsuccessful motion or opposition was substantially justified, or other circumstances make an award of expenses unjust.

3. **Sanctions.** In addition to or in lieu of the relief provided above, the court may enter an order imposing one or more of the sanctions set forth below. Any sanction imposed must be just and must be directed to remedying the particular violations involved. A sanction should be no more severe than necessary to satisfy its legitimate purposes.

(a) Reprimanding the offender publicly or privately;

(b) Disallowing further discovery in whole or in part;

(c) Assessing a substantial amount in expenses, including attorney's fees, of discovery or trial;

(d) Deeming certain facts or matters to be established for the purposes of the action;

(e) Barring introduction of evidence supporting or opposing designated claims or defenses;

(f) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;

(g) Granting the movant a monetary award in addition to or in lieu of actual expenses;

(h) Requiring community service, pro bono legal services, continuing legal education, or other services; or

(i) Entering such other orders as are just.

4. **Compliance.** Monetary awards pursuant to paragraphs 3(c) or 3(g) shall not be payable prior to final judgment, unless the court makes written findings or oral findings on the record stating why an earlier assessment of the award will not preclude access to the court. Sanctions pursuant to paragraph 3(h) shall be deferred until after an opportunity for appeal after final judgment. Otherwise, orders under this rule shall be operative at such time as directed by the court.

5. **Review.** An order under this rule shall be deemed to be part of the final judgment, and shall be subject to review on appeal therefrom. Any person or entity affected by the order may appeal in the same manner as a party to the underlying judgment.[12]

Proposed Rule 166d has five parts: (1) Procedure, including particular requirements for motions, hearings, and orders; (2) Relief, including compelling discovery, protective orders under Rule 166b, and awards of expenses when the amount is "not substantial"; (3) Sanctions, including a listing of specific

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[12] The complete text of the rule, with the proposed accompanying Comment, appears in Appendix A. As discussed below, the Task Force proposal for amending Rule 13 continues and expands the cross-reference that appears in that rule, so that Rule 13 would incorporate most of the procedural portions of Rule 166d.

sanctions that a court may impose; (4) Compliance, setting out the effective time for orders; and (5) Review. The Task Force also recommends moving current paragraph (5) of Rule 215 ("Failure to respond to or supplement discovery") to become part of the general "duty to supplement" provision in Rule 166b(6).[13]

Paragraph (1) of proposed Rule 166d begins with a single, general sentence designed to replace the several confusing, itemized paragraphs in current Rule 215 that set forth various categories of prohibited conduct for which sanctions or other relief may be imposed. Subparagraph (a) sets out the content and service requirements for a motion for sanctions. Subparagraph (b) requires an oral hearing, unless waived, before imposition of sanctions or substantial expenses, and also specifies the materials on which a court is to base its decision. Subparagraph (c) sets out the requirements for a Rule 166d order, including a specific findings requirement, and also lists the categories of persons against whom such an order may be entered.

Paragraph (2) deals with orders compelling discovery, orders quashing discovery, and protective orders under Rule 166b. It also permits a simplified procedure for orders that merely award non-substantial expenses, including attorney's fees, rather than sanctions.

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[13] This change, and additional revisions recommended to discovery supplementation procedures, are discussed in Part VI below.

Paragraph (3) specifies the types of sanctions that a court may impose and incorporates the TransAmerican principle that a sanction must be no more severe than necessary to satisfy its legitimate purposes.

Paragraph (4) sets out the timing requirements for orders, including the requirements of Braden v. Downey.[14]

Paragraph (5) provides that a sanctions order is deemed to be a part of a final judgment, subject to review on appeal, and provides for appeal by any person or entity affected.

B. Rule 166d -- Specific Issues

Several specific issues in proposed Rule 166d merit brief discussion. In order of the sections below, they are:

1. Violations
2. Motions
3. Oral Hearing
4. Order; Trial Court Findings
5. Relief and Sanctions
   a. Relief, "Non-Substantial" Expenses
   b. Sanctions
      (i) Purposes of Sanctions
      (ii) Least Severe Sanction
      (iii) Types of Sanctions
      (iv) Mitigating/Aggravating Factors
   c. Sanctions Discretionary
6. Compliance
7. Review; Appeal
8. Comments
9. Masters
10. Alternative Dispute Resolution
11. Notice to Client
12. Mandating Professional Courtesy
13. Violations of Rule 169

1. Violations

The first sentence of proposed Rule 166d(1) is brief: "If a person or entity fails in whole or in part to respond to or

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[14] 811 S.W.2d 922 (Tex. 1991).

supplement discovery, or abuses the discovery process in seeking or resisting discovery, the court may grant relief as set forth below." This provision is intended to replace the lengthy, somewhat confusing itemization that appears in current Rule 215. Several categories of prohibited conduct are identified in Rule 215 in paragraphs (1)(b), (2), (3), (4), and (5). This sentence is intended to replace all of those provisions.

Rule 215's current listing of prohibited conduct is lengthy and at times unclear. As with most lists, the effort to compile an exhaustive collection of all possible violations invariably omits some conduct that should be included in the list; commentators have noted various additional violations that could be added to current Rule 215. Partly in recognition of this fact, the 1984 amendments to Rule 215 added paragraph (3), which is itself a broad "abuse of discovery" provision. Arguably, that paragraph embraces all of the other conduct specified in other parts of Rule 215.[15] The only reason that the current language in Rule 215(3) does not replace all of the other specified violations is that paragraph (3) of Rule 215 purports to limit somewhat the categories of sanctions that are available under Rule 215(2)(b).[16]

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[15] "As a general proposition, [under Rule 215] any abuse in either failing to make discovery or in resisting discovery is grounds for a motion. The grounds expressly listed for seeking sanctions or an order to compel are apparently nonexclusive." Dan Price, Discovery Sanctions, in State Bar of Texas Prof. Dev. Program, 1 Advanced Civil Trial Course, G-22 (1992).

[16] Paragraph (3) of Rule 215 allows all of the sanctions authorized by Rule 215(2)(b) except for subparagraphs (6), (continued...)

In any event, as made clear in the Comment to the proposed rule, the intent of the simple language in Rule 166d(1) is to embrace all forms of discovery abuse, while avoiding an exhaustive itemization.

A possible objection to the Task Force approach in Rule 166d(1) is that it is too broad and general and does not provide adequate notice of prohibited conduct. As noted above, however, the proposed language essentially tracks existing paragraph (3) of Rule 215. Further, the Task Force proposal for the Comment to the rule would state expressly that the language does not eliminate or reduce the specific categories of violations currently itemized in Rule 215, and would enumerate those categories.[17]

Another possible objection to the proposed language is that although the structure of current Rule 215 is cumbersome, it reflects a complex, specific analysis of particular types of conduct and particular types of sanctions to address such conduct. In fact, however, the broad language of paragraph (3) of current Rule 215 defeats any such contention.

The Task Force proposal for Rule 166d contains careful procedural protections, including requirements for specific

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[16](...continued)
concerning contempt, and subparagraph (7), which simply deals with sanctions for a party who refuses to comply with an order under Rule 167a (physical and mental examinations of persons). Paragraph (3) also does not expressly incorporate the introductory language of paragraph (2)(b), to the effect that the court may make "such orders in regard to the failure as are just, and among others the following."

[17] See Appendix A.

motions, oral hearings, trial court findings, etc.; it also incorporates the least-severe-sanction doctrine of TransAmerican. Consequently, in the Task Force's view, the amended rule should provide substantial protection against judicial abuse in the imposition of improper or inappropriate sanctions.

The Task Force considered, but does not recommend, two alternatives that address the violations provision of the rule. The first approach seeks to define somewhat differently the general category of what constitutes "abusing the discovery process." For example, one alternative phrasing reads: "Engages in conduct primarily to delay unreasonably the discovery process, or to harass or to maliciously injure another person or entity. . . ."[18] At the other end of the spectrum were recommendations presented to the State Bar's Committee on

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[18] By comparison, the 1990 New York State Bar Association's "Report of Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts" recommended a focus on "abusive conduct," defined as conduct "undertaken or omitted primarily to delay or prolong unreasonably the resolution of the litigation or to harass or maliciously injure another." Rule 3.02 of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from "tak[ing] a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter." Comment 2 to Rule 3.01 states that a pleading is frivolous if "it is made primarily for the purpose of harassing or maliciously injuring a person." Current Federal Rule 26(g) provides that the signature of the attorney or party constitutes a certification, in part, that the request, response, or objection is "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," and is not "unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation."

Administration of Justice to add specific categories of prohibited conduct, creating a lengthy laundry list of "abuse of discovery."[19] For the reasons discussed above, the Task Force rejected as unworkable and as unduly limiting the effort to create an exclusive listing.[20] The Task Force prefers the general statement of prohibited conduct, with a Comment to the rule noting the categories previously identified in Rule 215, but without further limiting trial courts.

2. Motions

Proposed Rule 166d(1)(a) deals with the form, contents, and service of the motion. Recognizing that persons other than parties to a lawsuit may be affected by discovery abuse, the provision allows "any person or entity affected" to file a motion.[21] Subparagraph (1)(a) also adds language requiring the movant to "specifically describ[e]" the alleged violation to ensure adequate notice to the respondent.[22] The rule allows

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[19] Copies of materials the Task Force received from the Committee on Administration of Justice, including the proposed redraft of Rule 215 from Shelby Sharpe, appear in Appendix O.

[20] For example, under one such laundry list, the final item is itself general: "If the court finds that a party is resisting discovery or if the court finds that any discovery request or answers or responses thereto are frivolous, oppressive, harassing, non-responsive or made for purposes of delay . . . ." See Appendix O.

[21] Similarly, current Rule 21[illegible](1) allows motions by "[a] party . . . and all other persons affected thereby."

[22] Neither Rule 13 nor Rule 215 contains language requiring specificity in a motion alleging violations. Although Rule 13 currently requires "notice and hearing" before imposition of sanctions, one commentator has criticized the "creative interpretation" some Texas courts have given those provisions, (continued...)

the movant to attach necessary exhibits to the motion, as Rule 215(6) currently permits. The rule also incorporates the conference requirement stated in Rule 166b(7).[23]

Proposed Rule 166d requires the filing of a motion before the court may impose sanctions. In effect, this eliminates the current practice under Rule 215(2)(b) and (3), which allow the court to impose sanctions sua sponte, even if no motion is filed. The rationale for this change is twofold. First, the Task Force agrees with the strong sentiment expressed by Texas lawyers (75%) and judges (74%) who responded to the questionnaire that our judicial system is now spending too much time and money on sanctions practice. If the supposedly offensive conduct does not sufficiently motivate the person affected to file a motion, or if the offended person decides for other reasons that sanctions are not an appropriate or desirable remedy to seek, a strong argument can be made that a court should not interject itself to generate such collateral sanctions proceedings. Second, as a practical matter, if a

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[22](...continued)
such as in finding adequate notice contained in a prayer for relief or notice received at the hearing itself. Rich, supra note 1, at 73-74.

[23] By large margins (lawyers 87%, judges 93%), respondents to the Task Force questionnaire indicated that the rule should require attorneys to confer before seeking sanctions. While placing this requirement in Rule 166d(1)(a) is somewhat repetitious with respect to discovery motions, the Task Force recommendation for Rule 13 incorporates this and other procedural provisions of proposed Rule 166d. See Part V, below. Thus, including this language in Rule 166d assures that a conference is necessary before any type of sanctions motion is filed, whether concerning discovery or pleadings.

judge observes conduct that he or she decides constitutes discovery abuse (and that is not independently punishable as contempt), the court can simply "invite" or encourage the filing of such motion, and in all probability a person injured by the conduct then will file the motion.

3. Oral Hearing

Proposed Rule 166d(1)(b) requires an oral hearing, unless waived by the parties, prior to imposition of sanctions under paragraph (3). As discussed below, the rule does not require the hearing before an award of "non-substantial" expenses under paragraph (2). The pertinent language reads:

> *Hearing*. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions requesting relief provided by paragraph 2. The court shall base its decision upon (i) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and (iii) testimony if the hearing is oral.

Thus, the Task Force's approach is to adopt the middle ground between requiring an oral hearing in every case and allowing imposition of sanctions without hearings.

Despite the possible additional burden of an oral hearing, the Task Force concluded that the imposition of sanctions is a sufficiently severe step with potentially serious consequences[24] that a person should have the right to a

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[24] The Task Force received several individual reports concerning the devastating impact of some sanctions orders. One example was the "Memorandum of Professor Barry Nakell Regarding Nature of Sanctions," in Robeson v. Britt, No. 89-06-CIV-3-H (continued...)

hearing, including the right to present evidence, before imposition of sanctions. By large margins (lawyers 93%, judges 87%), respondents to the Task Force questionnaire agreed that trial courts should conduct oral hearings before imposing sanctions. Further, as the Texas Supreme Court noted in TransAmerican, "the imposition of very severe sanctions is limited . . . by constitutional due process."[25]

Subparagraph (1)(b) allows those involved to waive the hearing, and no hearing is necessary for motions seeking relatively minor relief of non-substantial expenses provided by paragraph (2).

The final sentence of subparagraph (1)(b) requires that the court base its decision upon "(i) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and

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[24](...continued)
(E.D.N.C. Aug. 30, 1991), which stated in part: "[T]he sanctions have . . . crushed [Nakell]. . . . [T]he emotional impact upon him has been catastrophic. . . . The prospect of having to pay such a fine . . . was a source of great distress to Barry and his family. Worse was the public implication that he, a lawyer known for ethics and altruism, had been convicted of being capricious and unethical. This shook Barry, his family, and all who admired him. Rabbi Friedman adds: 'For Barry Nakell to be subjected to such negative public attention for these many months was a devastating punishment for him. . . . Not only did Professor Nakell's activity as a respected leader of the Jewish community diminish because of his embarrassment and the drain on his energies . . . , he even stopped attending the Saturday morning bible study group at which he was a regular.' . . . 'Professor Nakell has also had to undergo therapy to ameliorate the effects of this nightmarish ordeal.'" (Friedman Aff. ¶¶ 5, 7, 9; Braun Aff. ¶ 6)."

[25] 811 S.W.2d 913, 917 (Tex. 1991).

(iii) testimony if the hearing is oral." The Task Force considered, but rejected, a proposal adopting an affidavit procedure patterned after summary judgment practice under Rule 166a or the modified affidavit procedure under Rule 120a special appearance practice. Again, because of the potential seriousness of any imposition of sanctions, and because parties generally do not need to engage in discovery directed to the sanctions motion itself, the Task Force concluded that an oral hearing, with the right to present live testimony, was the preferable procedure.[26]

4. Order; Trial Court Findings

Paragraph (1)(c) of proposed Rule 166d contains the requirements for a court order that either grants relief under paragraph (2) or grants sanctions under paragraph (3). Paragraph (1)(c) reads:

> *(c) Order.* An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanction would preclude a

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[26] ABA Standard (M)(4) sets out a discretionary standard for when to conduct a hearing, but emphasizes the importance of a hearing if an issue of bad faith arises: "The court, in its discretion, shall determine whether to hold a hearing on sanctions under consideration. A hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender. A hearing is appropriate whenever it would assist the court in its consideration of the sanctions issue or would significantly assist the alleged offender in the presentation of his or her defense." ABA Standards, supra note 7, 121 F.R.D. at 128.

> decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

Paragraph (1)(c) continues the distinction between orders that impose non-substantial expenses under paragraph (2) and orders that impose sanctions under paragraph (3). Both types of orders must be in writing. An order imposing sanctions under paragraph (3), however, also must either "contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanction would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules." Thus, unless a court's award is limited to non-substantial expenses, the rule requires either written findings or oral findings on the record.

This findings requirement follows the Texas Supreme Court's suggestion and rationale in TransAmerican:

> 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. . . . 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.[27]

As the court further explained in Chrysler Corp. v. Blackmon:

> Written findings that support the decision to impose such sanctions have at least three salutary effects: 1) such findings aid appellate review, demonstrating that the trial court's discretion was guided by a reasoned analysis of the purposes sanctions serve and the means of accomplishing those purposes according to the TransAmerican and Braden standards; (2) such findings help assure the litigants, as well as the judge, that the decision was the product of thoughtful judicial deliberation; and (3) the articulation of the court's analysis enhances the likely deterrent effect of the sanctions order.[28]

The findings requirement should be a restraining influence on what some observers have viewed as the hair-trigger imposition of sanctions. Required findings should make it less likely that trial courts will impose, or that appellate courts will affirm, unjust or inappropriate sanctions, and more likely that legitimate sanctions will be upheld on appeal without the

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[27] 811 S.W.2d at 919 n.9. Rule 13 already contains a findings requirement. See, e.g., GTE Communications Sys. Corp. v. Curry, 819 S.W.2d 652 (Tex. App. -- San Antonio 1991, no writ) ("No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. . . . The requirement that the court state its findings in the order is in lieu of the traditional findings of fact and conclusions of law which normally are filed in a trial on the merits in a non-jury case. These findings enable the appellate court to review the order in light of the facts found by the trial court. Without the findings required by rule 13, effective review of the sanctions is unavailable because the sanctioned party would be unable to overcome the presumption that the trial court found necessary facts in support of its judgment."). Some previous Texas decisions have been criticized for failing to comply with Rule 13's particularity requirement and for sometimes ignoring it completely. See Rich, supra note 1, at 75-79. See also the discussion of Rule 13, Part V below.

[28] 36 Tex. Sup. Ct. J. 76, 83 (Oct. 14, 1992).

necessity of remanding to require further development of the record.

The findings mandated by the proposed rule require that the trial court and litigants focus specifically upon the conduct meriting sanctions and the justifications for any court decision imposing sanctions. The third category of findings -- "why a lesser sanction would be ineffective" -- tracks the Supreme Court's language in TransAmerican[29] directing the trial court to consider lesser sanctions. The fourth category of findings -- "the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules" -- also derives from TransAmerican, and this applies if the court chooses to impose a death penalty sanction, that is, a sanction that would preclude a decision on the merits of a claim or defense.

The findings provision adopted is similar to that recommended by Judge Sam Johnson, of the Fifth Circuit and formerly of the Texas Supreme Court, and his coauthors in their recent articles on Federal Rule 11.[30] The Task Force agrees

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[29] "A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

[30] Johnson, Contois & Keeling, supra note 1 at 647; Judge Sam D. Johnson, Byron C. Keeling, & Thomas M. Contois, The Least Severe Sanction Adequate: Reversing the Trend in Rule 11 Sanctions 54 Tex. B.J. 952 (1991) (hereinafter "Johnson, Keeling & Contois"). The specific findings language that Judge Johnson and his coauthors recommended for Rule 11 included: "(1) what (continued...)

with Judge Johnson's observation that while, at first glance, it may seem somewhat burdensome to require district courts to consider each of these issues and to note their conclusions for the record, for several reasons such a requirement is well-justified:

> First, the bother is not that great: the factors listed are the factors a district court ought to consider in any event when imposing sanctions; all that is required here is that the court make a record of its deliberations. Second, given the potential size and effect of Rule 11 sanctions, a certain amount of care is warranted in the imposition of sanctions. Third, factual findings on each of these . . . issues would encourage federal district courts to consider more seriously the least sanction adequate doctrine, a doctrine which, if fully implemented, would eliminate the worst of the problems with the present rule. Fourth, requiring findings on each of these . . . issues is necessary if federal appellate courts are to review the imposition of sanctions more closely, to prevent abuses of the rule.[31]

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[30](...continued)
pleading, motion, or other paper is in violation of Rule 11, (2) why it is in violation, (3) what factors the court considered in choosing an appropriate sanction, (4) what sanctions, if any, were considered and rejected, and (5) why the court believes that the sanction imposed is the least severe sanction necessary to deter similar misconduct." Id. at 957.

By comparison, ABA Standard (N)(1), supra note 7, 121 F.R.D. at 128, provides: "Unless it is otherwise apparent from the record, the trial court should include an identification of each pleading, motion or other paper held to violate the Rule, a specification of the nature of the violation and an explanation of the manner in which the sanction was computed or otherwise determined."

As of this writing, the most recent proposed amendments to Federal Rule 11 contain this findings language: "When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed."

[31] Johnson, Keeling & Contois, supra note 30, at 957-58.

The Task Force questionnaire responses strongly endorsed a requirement that a trial judge state into the record specific reasons when imposing sanctions (lawyers 97%, judges 59%).

Although a majority of the lawyer respondents (67%) would have required that judges make written findings of fact and conclusions of law when imposing sanctions, a larger majority of judicial respondents disagreed (83%). Because most state judges lack adequate funds for secretarial staffing to type written findings, and because of the volume of sanctions hearings, the Task Force concluded that oral findings stated into the record should suffice, though of course the rule also permits the trial judge to include written findings in the sanctions order if the judge chooses to do so.[32]

Paragraph (1)(c) makes clear that a court may impose sanctions or other relief against a party, attorney, law firm,[33] or other person or entity whose actions necessitated the motion. This reflects the strong agreement among lawyers

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[32] Cf. Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76 (Oct. 14, 1992) ("[W]e do not wish to unnecessarily burden our trial courts by requiring them to make written findings in all cases in which death penalty sanctions are imposed. First, the benefit of the trial court's explanation in the record of why it believes death penalty sanctions are justified may be sufficient to guide the appellate court. Second, written findings are not needed in the vast majority of relatively uncomplicated cases or even more complex cases involving only a few issues pertinent to the propriety of death penalty sanctions.")

[33] Interpreting Federal Rule 11, the United States Supreme Court held that a law firm was not vicariously liable for the conduct of its lawyers. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989). The current draft of the proposed amendments to Federal Rule 11 would reverse that result, expressly permitting imposition of sanctions against law firms, as well as individual attorneys.

and judges who responded to the Task Force questionnaire that courts should be able to impose sanctions against: parties (lawyers 89%, judges 95%); lawyers (lawyers 89%, judges 100%); and law firms (lawyers 61%, judges 76%).[34]

The Task Force considered, but rejected, a suggestion that the rule require findings when the court decides not to impose sanctions. Although the Task Force received complaints that some trial courts have not imposed sanctions in cases when sanctions were clearly warranted, requiring the trial court to make findings even in the absence of any misconduct seems to the Task Force to be overly burdensome.

5. Relief and Sanctions

a. Relief, "Non-Substantial" Expenses

Paragraph (2) of proposed Rule 166d initially recognizes the authority under Rule 166b for orders compelling discovery and quashing discovery. As stated in the Comment, Rule 166d is not intended to change the procedures, standards, or substantive law regarding such orders, and Rule 166b shall control such matters.

Paragraph (2), however, also provides a simplified procedure for a court to award a prevailing party reasonable expenses,

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[34] The reference to non-parties (i.e., "against the party . . . or other person or entity") expands somewhat the availability of sanctions. Current Rule 215 allows motions for sanctions by parties and "all other persons affected," but appears to allow only certain categories of sanctions against non-parties. In many instances, of course, particular sanctions will be inapplicable to non-parties under proposed Rule 166d (e.g., striking pleadings). The Task Force concludes that the trial court should have discretion to determine appropriate sanctions against non-parties who abuse the discovery process.

including attorney's fees, "necessary in connection with the motion." As long as the amount of the award is "not substantial," the hearing requirement in paragraph (1)(b) and the findings requirement in paragraph (1)(c) do not apply. Current Rule 215(1)(d) also authorizes an award of expenses upon disposition of a motion to compel. Both versions of the rule permit the court to apportion expenses in a just manner.

Proposed Rule 166d authorizes the simplified procedure only if the amount is "not substantial," and the Comment makes clear that that standard considers both the amount of the award and the financial resources of the persons or entity involved. If the amount would be substantial measured by either reference, the additional procedural protections apply.

The proposed rule also allows the court to presume that the usual and customary attorney's fee in connection with the motion is not substantial, unless circumstances or an objection suggests such an award may preclude access to the courts.[35]

The simplified procedures are designed for routine orders ~~compelling or quashing discovery, and for~~ granting minimum awards of expenses, typically attorney's fees, in conjunction with such motions.

The Task Force considered a variety of options concerning what amount of expenses award should trigger the procedural

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[35] Cf. In the Matter of the Estate of Kidd, 812 S.W.2d 356, 359 (Tex. App. -- Amarillo 1991, writ denied) (under Tex. Civ. Proc. & Rem. Code § 38.004(2), trial court could take "judicial notice of usual and customary attorney's fees attributable to the discovery dispute. A rebuttable presumption exists that usual and customary attorney's fees are reasonable. . . . § 38.003.").

protections of a hearing and findings. As with many rule standards, the range of possible options runs from standards that are certain but possibly arbitrary and inflexible, to standards that are flexible but possibly ambiguous. An obvious objection to the "substantial amount" test is that, at least in the abstract, it may appear vague and ambiguous. In fact, however, the effect of a monetary award of expenses inevitably will vary depending upon the financial resources of the person liable. While an award of $1000 or more might be relatively insignificant for a large corporation, a much smaller sum might be beyond the financial resources of an indigent litigant. The Task Force considered specifying an amount certain, such as $250, $500, or $1000, as a threshold level for the findings and hearing requirements, but opted for the more flexible standard because of the unavoidably relative nature of financial impacts.

In one sense, the Task Force's approach is mid-range between an absolute standard (e.g., $1000) and the absence of clear due process guidance that exists in the current federal system. In determining whether a hearing is necessary, for example, the Advisory Committee Notes to Federal Rule 11 simply offer this Delphic comment: "The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration."[36]

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[36] The ABA Standards provide a thirteen-point blizzard of not particularly illuminating specific factors to consider in determining what due process requires: (continued...)

As a practical matter, the Task Force's recommended standard means that in all cases of significant sanctions a hearing will be necessary, unless waived by the persons involved. Certainly trial judges should err on the side of caution and conduct a hearing whenever there is any doubt about the matter.

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[36](...continued)

"The procedure employed may vary with the circumstances, provided that due process requirements are satisfied. Among the factors that the court considers in fashioning a procedure to insure due process are:

a. the severity of the sanction under consideration;
b. the interests of the alleged offender in having a sanction imposed only when justified;
c. the risk of an erroneous imposition of sanctions relative to the probable value of additional notice and hearing;
d. the interest of the court in the efficient use of the judicial system, including the fiscal and administrative burdens that additional procedural requirements would entail;
e. whether the sanctions at issue were sought by a party or are being considered sua sponte by the court;
f. if the sanctions were sought by a party, the type of sanction sought;
g. the type of sanction under consideration by the court;
h. whether the alleged offender was notified, or is otherwise aware, that sanctions are under consideration, and the nature of those sanctions;
i. whether the sanction under consideration rests on a factual finding, such as a finding of bad faith on the part of the alleged offender;
j. whether the judge imposing or considering the sanction presided over the proceedings and is the same judge before whom the offense was committed;
k. whether the alleged offender has been provided an opportunity to be heard before sanctions issued;
l. whether the alleged offender will be provided an opportunity to be heard after sanctions issued;
m. whether counsel, client or both are the target of the proposed sanction, and the impact of the sanctions proceedings on the attorney-client relationship."

ABA Standard (M)(3), supra note 7, 121 F.R.D. at 127-28.

The ABA Standards do make clear, however, that a hearing is "ordinarily required" before imposition of any sanction based upon a finding of "bad faith." ABA Standard (M)(4), id. at 128.

Another approach that the Task Force considered but rejected was not to require hearings or findings for any order that simply awarded attorney's fees or other reasonable expenses in connection with the motion. In practice, however, pretrial motions can be very expensive. For example, in one reported Texas case the trial judge awarded $150,000 as attorney's fees following a summary judgment hearing.[37] Such a large award is a serious matter, and beyond the ability of many litigants and even some lawyers to pay.[38]

Finally, continuing the practice under current Rule 215, in awarding the non-substantial expenses under paragraph (2) of proposed Rule 166d the court need not make a finding of "bad faith or negligence"; on the other hand, the court should not award expenses if the unsuccessful motion or opposition was "substantially justified, or other circumstances make an award of expenses unjust."[39]

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[37] GTE Communications Sys. Corp. v. Curry, 819 S.W.2d 652 (Tex. App. -- San Antonio 1991, no writ) (the court of appeals conditionally granted mandamus relief against the trial court's award on the ground that the trial court order failed to state the particulars of good cause, as required by Rule 13).

[38] As discussed below, malpractice insurance coverage may be unavailable to pay the award or to reimburse a party or lawyer who pays the award. See Part XI, below.

[39] Similarly, current Rule 215(1)(d) provides that upon disposition of a motion to compel, a court "shall after opportunity for hearing, require a party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay . . . the reasonable expenses incurred in obtaining the order, . . . unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

b. Sanctions

Paragraph (3) of Rule 166d itemizes sanctions that the court may enter after following the procedures prescribed in paragraph (1). Paragraph (3) also tracks the language of TransAmerican in stating that any sanction imposed must be "directed to remedying the particular violations involved, and should be no more severe than necessary to satisfy [the sanction's] legitimate purposes."[40]

Courts and commentators have identified several factors for a trial judge to take into account in determining an appropriate sanction, including the following: (1) the purposes for which sanctions are imposed; (2) the types of sanctions available; (3) the principle that a sanction should be no more severe than necessary; and (4) mitigating or aggravating factors.[41] The Task Force's proposed Comment to Rule 166d deals with each of these factors.

(i) Purposes of Sanctions

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[40] "[A] just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. . . . A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes." TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

[41] Cf. Joseph, supra note 7, at 216: "In exercising this discretion, the district judge takes into account several factors. These include: (1) the types of sanctions available; (2) the purpose (or purposes) . . . that the judge seeks to vindicate; (3) mitigating and aggravating factors that militate in favor of, or against, imposing a harsh (or lenient) sanction; (4) the least severe sanction that is adequate in the circumstances; and (5) whether it is appropriate to impose the sanction on counsel or client, or both."

As the proposed Comment to Rule 166d states, the legitimate purposes that a trial court may consider in awarding sanctions include the following:[42]

(1) specific deterrence of the offending party, or general deterrence of other litigants, from violating the rules;[43]

(2) punishing parties who violate the rules;[44]

(3) compensating, or remedying the prejudice caused to, the innocent party;[45] and

(4) securing compliance with the rules.

Depending upon the nature of the case and the violation, as well as the respective roles of parties and counsel, the deterrent, punitive, compensatory, or compliance aspects may have varying importance.

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[42] Compare ABA Standard (L)(5): "Among the purposes for which a court may impose Rule 11 sanctions are: (a) deterring dilatory or abusive litigation tactics by the same offender and others; (b) imposing punishment for deserving misconduct; (c) compensating an offended person for some or all of the reasonable expenses incurred by reason of the misconduct; (d) alleviating other prejudice to an offended person resulting from the misconduct, including prejudice to that person's litigation positions; and (e) streamlining litigation and bringing about economies in the use of judicial resources by curtailing frivolous and abusive practices." ABA Standards, supra note 7, 121 F.R.D. at 125.

[43] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991); Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986).

[44] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991); Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986).

[45] Cf. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) ("a just sanction must be directed . . . toward remedying the prejudice caused the innocent party").

(ii) Least Severe Sanctions

The Task Force endorses the Texas Supreme Court's salutary mandate in TransAmerican that the trial court should impose sanctions no more severe than necessary to satisfy legitimate purposes:

> [J]ust sanctions must not be excessive. The punishment should fit the crime. A sanction imposed . . . should be no more severe than necessary to satisfy its legitimate purposes. It follows that courts must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance.[46]

Rule 166d addresses that principle in two places. Paragraph (1)(c) requires as one of the specific findings that a trial court state "why a lesser sanction would be ineffective." Paragraph (3) states that any sanction imposed "should be no more severe than necessary to satisfy its legitimate purposes."[47]

As the Texas Supreme Court has emphasized, important due process considerations also apply to any imposition of "death penalty" sanctions:

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[46] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991); cf. Pelt v.Johnson, 818 S.W.2d 212, 216 n.1 (Tex. App. -- Waco 1991, no writ) ("We interpret this as equivalent to a rule that the court should impose the 'least severe sanction adequate' to accomplish the purpose of Rule 215.").

[47] Compare ABA Standard (L)(4): "In determining the appropriate sanction, the court considers which of the purposes underlying Rule 11 it seeks to implement and then imposes the least severe sanction adequate to serve the purpose or purposes." ABA Standards, supra note 7, 121 F.R.D. at 124; see also Johnson, Keeling & Contois, supra note 30 at 952 & n.6. & cases cited therein ("This 'least severe sanction adequate' requirement . . . implies the district courts should consider less severe alternatives to monetary sanctions.").

> The imposition of very severe sanctions is [also] limited . . . by constitutional due process. . . . 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.[48]

The Task Force received a comment questioning the difficulty of determining what is a "less stringent" sanction and what is a "more stringent" sanction. For example, the question was asked: Is reprimanding an offender publicly and imposing a substantial monetary award less severe or more severe than a sanction disallowing further discovery and barring introduction of certain evidence? The Task Force concluded that the question requires a factual inquiry, and the answer will vary from case to case; however, for the trial court to analyze the various sanctions options before selecting an appropriate sanction for the particular case well serves the purpose of this requirement.

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[48] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-18 (Tex. 1991) (emphasis added); cf. Pelt v. Johnson, 818 S.W.2d 212 (Tex. App. -- Waco 1991, no writ) ("The ultimate sanctions should be applied only 'when [the offending party] is guilty of actual bad faith in discovery abuses and great harm comes to [the other party] as a result.'") (quoting Hogan v. Beckel, 783 S.W.2d 307, 309 (Tex. App. -- San Antonio 1990, writ denied)); Hanley v. Hanley, 813 S.W.2d 511, 520 (Tex. App. -- Dallas 1991, no writ) ("Dismissal must be a sanction of last, not first, resort."). The pertinent langauge in the proposed rule refers simply to "flagrant bad faith or callous disregard"; the Task Force concluded that both categories should apply to parties and counsel, rather than analyzing bad faith only for parties and analyzing callous disregard only for counsel.

(iii) Types of Sanctions

In proposed Rule 166d the Task Force recommends some changes from current Rule 215's listing of permissible types of sanctions, primarily to simplify and clarify particular sanctions, but also to change somewhat the emphasis among available sanctions. The authorized sanctions under proposed Rule 166d(3) are:

(a) Reprimanding the offender publicly or privately;
(b) Disallowing further discovery in whole or in part;
(c) Assessing a substantial amount in expenses, including attorney's fees, of discovery or trial;
(d) Deeming certain facts or matters to be established for the purposes of the action;
(e) Barring introduction of evidence supporting or opposing designated claims or defenses;
(f) Striking pleadings or portions thereof, staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;
(g) Granting the movant a monetary award in addition to or in lieu of actual expenses;
(h) Requiring community service, pro bono legal services, continuing legal education, or other services; or
(i) Entering such other orders as are just.[49]

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[49] Cf. ABA Standard (L)(2):
Types of Sanctions: Among the types of sanction that the court, in its discretion, may choose to impose are:
a. a reprimand of the offender;
b. mandatory continuing legal education;
c. a fine;
d. an award of reasonable expenses, including reasonable attorneys' fees, incurred as a result of the misconduct;
e. reference of the matter to the appropriate attorney disciplinary or grievance authority;
f. an order precluding the introduction of certain evidence;
g. an order precluding the litigation of certain issues;
h. an order precluding the litigation of certain claims or defenses;
i. dismissal of the action;
j. entry of a default judgment;
k. injunctive relief limiting a party's future access to the courts; and

(continued...)

The nine specific sanctions listed in paragraph (3) of Rule 166d are not intended to change substantively the types of sanctions authorized under current Rule 215(2)(b). For simplicity and brevity, Rule 166d has minor language changes, but basically the subdivisions in Rule 215(2)(b) and in Rule 166d(3) correspond as follows:

Rule 215(2)(b) Provision	Rule 166d(3) Provision
(1)	(b)
(2)	(c)
(3)	(d)
(4)	(e)
(5)	(f)

Subparagraph (3)(i) of Rule 166d also contains a general authorization for "such other orders as are just," virtually

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[49](...continued)
1. censure, suspension or disbarment from practicing before the forum court, subject to applicable rules or statutes.

ABA Standards, supra note 7, 121 F.R.D. at 124; see also TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921-22 (Tex. 1991) (Gonzalez, J., concurring). Justice Gonzalez cited the same ABA Standard, and listed the same options, but omited items (k) and (l). The Task Force took the same approach, except that it also deleted item (e), reference to an appropriate attorney disciplinary grievance authority, because the current disciplinary rules in Texas for lawyers and judges make adequate provision for that action, independent of the Rules of Civil Procedure. See, e.g., Texas Disciplinary Rules of Professional Conduct, Rule 8.03 (requiring lawyers to report misconduct that raises a "substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects"); Texas Code of Judicial Conduct, Canon 3B(3) ("A judge should take or initiate appropriate disciplinary measures against a lawyer for unprofessional conduct of which the judge may become aware.").

identical to the same language that appears in Rule 215(2)(b).[50]

For clarification, Rule 166d(3) lists three other permissible sanctions, each of which appears to be authorized under the broad language of current Rule 215(2)(b): reprimands [subparagraph (3)(a)]; monetary awards [subparagraph (3)(g)]; and personal service [subparagraph (3)(h)].[51] The basis for each of these newly specified categories is discussed below.

Reprimand: Proposed Rule 166d identifies reprimand as the first listed sanction in order to emphasize the availability of this frequently overlooked alternative. Often in the past

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[50] The Task Force considered, but rejected, a suggestion to eliminate this general provision. Proponents of eliminating this provision argued that it is too vague and ambiguous, that it provides no guidance or notice to litigants or courts concerning what additional sanctions are permissible, and that if anyone can think of another proper sanction, the rule should specifically refer to it. The Task Force, however, found persuasive the Supreme Court's statement in Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991), that while the community service sanction imposed upon plaintiff's attorney was not specifically listed in the rule, "we do not criticize this type of creative sanction. . . . Although monetary sanctions unrelated to attorney fees and performance of community service are not among the possible sanctions enumerated in Rule 215, paragraph 2b, the rule generally authorizes a trial court to sanction discovery abuse by 'such orders . . . as are just.'" Although the Task Force concluded that the possible sanctions specifically listed in proposed Rule 166d will furnish ample latitude for the overwhelming majority of cases, nevertheless an exclusive list would prevent further experimentation and further evolution of sanctions practice as the experience of trial judges and lawyers increases. Providing a limited, exclusive list would prevent creative experimentation.

[51] The Task Force draft of Rule 166d omits the reference to contempt under subparagraphs (6) and (7) of Rule 215(2)(b) as a specific sanction for failure to obey court orders. That remedy does not appear to add to trial courts' existing contempt power for violations of court orders.

courts and parties have given too little consideration to alternatives to what is the most common sanction of all: an award of attorney's fees.[52] A mild verbal reprimand is among the "most lenient sanctions the court may impose,"[53] however, reprimands may vary from a "warm friendly discussion on the record" to a "hard-nosed reprimand in open court."[54]

Even a reprimand can have a serious impact,[55] and thus the procedural protections applicable under paragraph (3) sanctions also apply to reprimands. For example, the Texas Board of Legal Specialization's prescribed application form asks the question, "[H]ave you been . . . reprimanded . . . by a district court in Texas?" As one commentator described the potential for abuse of reprimands:

> Every lawyer knows that the "biggest sanction" imposed is being told that you are wrong. As a result of the sanctioning tool, however, courts step beyond the merits to attack lawyers. Characterizations such as beneath the level of "a first year law student," "wacky" and not of the level to cause the court to "applaud" are not atypical. This is base, mean language by judges whose interest in grinding an institutional ax overrides their responsibilities to the bar. Lawyers whose reputations

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[52] "An award of 'reasonable expenses,' including attorneys' fees, is the most common form of sanctions to issue for violation of Rule 11." Joseph, supra note 7, at 225.

[53] Joseph, supra note 7, at 218. Justice Gonzalez recognized reprimands as a permissible sanction in TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 (Tex. 1991) (quoting ABA Standard (L)(2)).

[54] Thomas v. Capital Security Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988) (en banc).

[55] Cf. Robinson v. National Cash Register Co., 808 F.2d 1119, 1131 (5th Cir. 1987) ("Sanctions should not be lightly imposed given the impact that they have on both the attorney's and party's reputations.").

and careers are at stake deserve more than exercises in adjectival flippancy.[56]

On occasion, courts have required that a sanctioned attorney circulate the court's reprimand to other lawyers in the firm.[57]

Nevertheless, reprimands have a proper place in the panoply of available sanctions, and in appropriate cases, can fulfill very useful educational and deterrent functions. The Task Force concludes that the rule should specifically refer to the availability of reprimands.

Monetary Award: Paragraph (3) of proposed Rule 166d authorizes two types of monetary sanctions: in subparagraph (c), assessing "a substantial amount" in expenses, including attorney's fees, of discovery or trial; in subparagraph (g), granting the movant a monetary award in addition to or in lieu of actual expenses.

The express authorization of a monetary award in paragraph (3)(g) puts to rest a matter that perhaps has been somewhat unclear under earlier Texas case law. In his concurring opinion in TransAmerican, Justice Gonzalez specifically concluded that a monetary "fine" was a permissible sanction under Rule 215:

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[56] George Cochran, Rule 11: The Road to Amendment, 8 Fifth Cir Rptr. 559, 563 (1991) (footnotes omitted).

[57] See, e.g., Traina v. United States, 911 F.2d 1155, 1158 (5th Cir. 1990) (affirming a trial court order that reprimanded an Assistant United States Attorney and required her to show a copy of the order to her supervisor and to certify to the court that she had done so).

"[T]he range of sanctions available to a trial court under Rule 215 . . . include[s]: . . . a fine."[58]

In federal court, a fine inures to the benefit of the government, rather than to the opposing party.[59] In Texas,

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[58] TranAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 (Tex. 1991). Justice Gonzalez noted that the decision in Owens-Corning Fiberglass Corp. v. Caldwell, 807 S.W.2d 413, 415 (Tex. App. -- Houston [1st Dist.] 1991), orig. proceeding), had concluded that trial courts lacked authority to impose "a monetary fine as a sanction for abuse of the discovery process" under Rule 215(3). Owens-Corning concluded that monetary awards were appropriate under the general reference of Rule 215(2)(b) -- "such orders . . . as are just" -- but were not authorized under the more limited language of Rule 215(3). 807 S.W.2d at 415. Justice Gonzalez also interpreted Braden v. Downey, 811 S.W.2d 922 (Tex. 1991), as holding that a trial judge has authority to assess a fine. 811 S.W.2d at 921 n.3; see also Kutch v. Del Mar College, Inc., 831 S.W.2d 506, 513 n.4 (Tex. App. -- Corpus Christi 1992, no writ) ("Lesser sanctions such as an order assessing a fine . . . might have resulted in compliance . . . ."); Hanley v. Hanley, 813 S.W.2d 511, 521 (Tex. App. -- Dallas 1991, no writ) (reversing a $50,000 monetary sanction, but noting that while Rule 215(2)(b) does not specifically list a monetary penalty among its options, "a trial court is not limited to the laundry list of specifically authorized sanctions. In fact, the rule was written to permit the trial court flexibility for creative resourcefulness."); Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273, 277 (Tex. App. -- Texarkana 1978, no writ) ("Although the right to impose monetary penalties . . . is not specifically mentioned, it seems that if the court, upon a party's disobedience, is empowered to immediately preclude the presentation of all that party's defenses and enter default judgment against him on the pleadings, it would alternatively have the right to impose periodic monetary penalties for his continuing disobedience, not to exceed the amount for which judgment could have been summarily entered.") In federal court, "[i]t is well settled that a fine may be an 'appropriate sanction' within the meaning of Rule 11." Joseph, supra note 7, at 221.

[59] Joseph, supra note 7, at 221. The committee notes to the currently proposed draft of the amendments to Federal Rule 11 provide that "if a monetary sanction is imposed, it should ordinarily be paid into the court as a penalty. However, under unusual circumstances, . . . deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also direct some or all of this (continued...)

however, allowing local courts to require payment of such fines to the court or the clerk might raise an appearance of impropriety by creating an incentive for courts to self-finance by collecting such fines. Hence, the Task Force has recommended monetary awards payable only to the injured movant.

Required Services: The Task Force recommends addition of the language in subparagraph (3)(h) in order to emphasize the availability of sanctions imposing requirements of specific performance, either for educational or community service purposes. In Braden v. Downey[60] the trial court had ordered, inter alia, that two of the attorneys perform community service for the Child Protective Services Agency of Harris County. The Supreme Court conditionally granted mandamus relief modifying the trial court's order to defer performance of the community service until after rendition of final judgment to allow an opportunity for appeal. The Court commented, however, that "[a]lthough . . . performance of community service [is] not among the possible sanctions enumerated in Rule 215, paragraph 2b, the rule generally authorizes a trial court to sanction discovery abuse by 'such orders . . . as are just.' We recognize that discovery abuse is widespread and we have given

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[59](...continued)
payment be made to those injured by the violation. . . . Accordingly, the rule authorizes the court . . . to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement."

[60] 811 S.W.2d 922 (Tex. 1991).

trial courts broad authority to curb such abuse."[61] At another point the Court stated that "we do not criticize this type of creative sanction . . . ."[62]

Justice Gonzalez, in his concurring opinion in TransAmerican, specifically stated that "mandatory continuing legal education" was a proper sanction under Rule 215.[63]

Thus, trial courts have broad authority for such creative sanctions, which often are preferable to strictly monetary awards.

(iv) Mitigating/Aggravating Factors

The Comment accompanying proposed Rule 166d lists certain mitigating and aggravating factors for a court to consider in determining an appropriate sanction in a particular case. Justice Gonzalez recommended a similar list in his concurring

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[61] Id. at 930.

[62] Id. Whether the community services required of the attorney for the Child Protective Service Agency of Harris County in Braden were legal services is not clear from the opinion, but federal courts have recognized the propriety of pro bono legal services as a sanction under Federal Rule 11. "Just as a court may directly penalize a lawyer financially for a violation of the Rule, it can achieve the same effect by ordering the lawyer to spend time for which he or she would otherwise be charging clients in the representation of pro bono litigants." Joseph, supra note 7, at 128-29 (Supp. 1992); see, e.g., Bleckner v. General Accident Ins. Co. of Am., 713 F. Supp. 642, 653 (S.D. N.Y. 1989) (ordering representation of pro se plaintiff because the attorney's violations wasted judicial resources; the court considered the sanction proper in order to compensate the federal judiciary for the losses resulting from the misconduct).

[63] 811 S.W.2d 912, 921 (Tex. 1991) (quoting ABA Standard (L)(2), supra note 7, 121 F.R.D. at 124).

opinion in TransAmerican;[64] both lists, in turn, derive from the ABA Standards.[65] In pertinent part the proposed Comment reads:

> In determining an appropriate sanction, a court may consider a variety of mitigating or aggravating factors, including:
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> (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) prior history of sanctionable conduct by the offender;
> (e) the reasonableness of any expenses incurred by the offended person as a result of the misconduct;
> (f) the prejudice 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 culpability;
> (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 person, 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) the burdens on the court system attributable to the misconduct, including consumption of judicial time, juror fees, and other court costs;
> (m) the degree to which the offended person attempted to mitigate any prejudice suffered;
> (n) the degree to which the offended person's own behavior caused any expenses for which recovery is sought;
> (o) the extent to which the offender persisted in advancing a position while on notice that the position had no basis in law or fact and was not warranted by existing law or a good faith argument

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[64] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 9 920-21 (Tex. 1991) (Gonzalez, J., concurring).

[65] See ABA Standard (L)(6), supra note 7, 121 F.R.D. at 1

for the extension, modification, or reversal of existing law.[66]

For the most part, the factors are self-explanatory, and as the proposed Comment makes clear, they are not meant to be an exclusive list. A few of the factors merit additional explanation.

• Good faith/bad faith of the offender: As discussed above, paragraph (2) of proposed Rule 166d permits a court to award non-substantial reasonable expenses necessary in connection the motion, and states that the court may do so without any finding of bad faith or negligence. Although the rule does not create an express willfulness prerequisite to the imposition of sanctions under paragraph (3), the offending party's good faith

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[66] Cf. Pelt v. Johnson, 818 S.W.2d 212, 216 (Tex. App. -- Waco 1991, no writ) ("Several factors are relevant to an inquiry concerning appropriateness of a sanction:

1. the exter- of the party's personal responsibility;
2. the preju ce to the adversary caused by the failure to . . . respond to discovery;
3. any history of dilatoriness;
4. whether the conduct of the party or the attorney was willful or in bad faith;
5. the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and
6. the meritoriousness of the claim or defense."); accord Hanley v. Hanley, 813 S.W.2d 511, 517-18 (Tex. App. -- Dallas 1991, no writ) (listing the same six factors as Pelt).

The Committee Notes to the currently proposed draft of Federal Rule 11 identify the following as proper considerations: "Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleadings, or only one particular count or defense; whether the party has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants."

or bad faith is a proper factor to consider in determining the nature and severity of the sanction to be imposed.[67] Moreover, the Texas Supreme Court has emphasized that 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."[68] Indeed, the court has created an express prerequisite of "flagrant bad faith" or "callous disregard" before ultimate sanctions may be imposed, and the proposed rule contains essentially the same language.[69] On the other hand, the absence of willfulness or bad faith, or a lesser degree of negligence, militates in favor of a lesser sanction.

• Prior history of sanctionable conduct: Only rarely should a court consider conduct apart from the case then pending before the court in determining whether to assess sanctions. A prior history of sanctionable conduct is pertinent chiefly in situations in which a lawyer or litigant has insisted on relitigating the same facts and issues repeatedly, especially when asserting a previously sanctioned position.[70]

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[67] The Advisory Committee Note to the 1983 amendment to Federal Rule 11 states: "The reference in the former text to willfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed."

[68] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991).

[69] Id.

[70] Cf. Joseph, supra note 7, at 244.

Risk of chilling effects: Because deterrence is a central purpose of sanctions,[71] the danger exists that improper sanctions will deter important litigation of a particular type or from a particular source. Representatives of the Texas legal aid community informed the Task Force that a common Rambo tactic is to seek sanctions against indigent clients or their legal aid counsel in civil rights cases.[72] Thus, particularly with respect to sanctions under proposed Rule 13, trial courts must be aware of that risk, and exercise appropriate care to avoid punishing or deterring creative advocacy. As Judge Weinstein once remarked:

> Sometimes there are reasons to sue even when one cannot win. Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge Plessy v. Ferguson was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to Brown v. Board of Education.[73]

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[71] See Part IV.B.5.b.i., above.

[72] Cf. Stephen Burbank, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, at 68-69 (American Judicature Society 1989) ("Probably no group of lawyers has been more concerned about the impact of amended Rule 11 on their clients and their practice than lawyers who specialize in plaintiffs' civil rights (including employment discrimination) law." The study found that plaintiffs and their counsel were sanctioned on motions in civil rights cases at a rate "considerably higher than the rate . . . for plaintiffs in non-civil rights cases.")

[73] Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 575 (E.D. N.Y. 1986), modified, 821 F.2d 121 (2d Cir.), cert. denied, 484 U.S. 918 (1987). The Advisory Committee Note to current Federal Rule 11 states in part: "The rule is not intended to chill an attorney's enthusiasm in pursuing factual or legal theories." Cf. Mass. Gen. Law Ch. 231 § 6F: "No finding shall be made that any claim . . . was wholly insubstantial, frivolous . . . solely because a novel or unusual argument or principle of law was advanced in support thereof."

•Impact on Offender: A recent Texas decision dramatized the importance of a trial court considering the impact of the sanction chosen on the offender, particularly with respect to substantial monetary awards. A highly publicized sanctions award in Houston assessed almost $1 million against a plaintiff's attorneys, who reported that they lacked both the financial wherewithal to pay the sanction and any insurance coverage, and thus were facing potential bankruptcy.[74]

A trial judge who accurately assesses a sanction's effect on the offender, based upon the offender's ability to pay the sanction, is in a better position to serve properly two of the underlying purposes of sanctions, to punish violations and to deter future violations. If a monetary sanction is to be financially devastating, the trial judge at least should be aware of that fact and should exercise appropriate care before reaching such a result. In Doering v. Union County Bd. of Chosen Freeholders,[75] for example, the court reversed an award of attorney's fees sanctions because the district judge had not considered the offender's ability to pay:

> While a monetary sanction, such as attorney's fees, is clearly an acceptable choice of deterrent, courts must be careful not to impose monetary sanctions so great

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[74] See, e.g., Mark Ballard, Losers Face $1M Fine for Trial Tactics, Tex. Law., May 25, 1992 at 1; Wall St. J., May 22, 1992 at 1; Gary Taylor, Texas Lawyers Hit With Record Sanctions, Nat'l L.J., June 1, 1992 at 2. By judgment of May 21, 1992, in Mark Metzger v. Judy Sebek, et al., No. 90-053676, Harris County, Texas, the trial court ordered the plaintiff, and plaintiff's two counsel, jointly and severally, to pay a total of $994,000 in sanctions.

[75] 857 F.2d 191, 196 & n.4 (3d Cir. 1988).

that they are punitive -- or that might even drive the sanctioned party out of practice. . . . Other proceedings such as disbarment exist to weed out incompetent lawyers.[76]

Culpability Determination: Conflict of Interest

In TransAmerican the Supreme Court emphasized that trial judges must attempt to determine whether the offensive conduct is attributable to counsel or client or both, and assess any sanction against the responsible person. Specifically, the court stated:

> In our view, whether an imposition of sanctions is just is measured by two standards. First, 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

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[76] Id.; see also Napier v. Thirty or More Unidentified Fed. Agents, 855 F.2d 1080, 1094 n.12 (3d Cir. 1988) ("Ability to pay is an appropriate consideration when determining the level of a sanction."); Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986) ("[I]t lies well within the district court's discretion to temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay."), cert denied, 480 U.S. 918 (1987); In re Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986) ("[T]he award entirely fails to consider Yagman's ability to pay such an immense sum which, in our view, is another factor relevant in determining reasonableness") modified, 803 F.2d 1085, cert. denied, 484 U.S. 963 (1987). Cf. Doe v. Keane, 117 F.R.D. 103, 107 (W.D. Mich. 1987) ("Rule 11 is to deter baseless litigation but not at the cost of the financial ruin of the parties or attorneys."). The Committee Notes to the currently proposed version of Federal Rule 11 include as one of the factors for the court's consideration "what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case" (emphasis added).

> 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.[77]

In short, trial courts must attempt to determine relative culpability and impose sanctions accordingly.[78] While errors of law often will be counsel's responsibility,[79] and matters

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[77] 811 S.W.2d 913, 917 (Tex. 1991) (emphasis added).

[78] See Pelt v. Johnson, 818 S.W.2d 212, 217 (Tex. App. -- Waco 1991, no writ) ("[I]n selecting an appropriate sanction, the relative culpability of a party and his attorney must be evaluated. . . . The record reveals that [the parties] relied on the advice of their attorney."); Glass v. Glass, 826 S.W.2d 683, 687 (Tex. App. -- Texarkana 1992, writ denied) (reversing sanctions awarded against a client for pleadings that her attorney filed; "Here, the punishment meted out is clearly for counsel's misconduct, namely the filing of pleadings in violation of Rule 13."); Hanley v. Hanley, 813 S.W.2d 511, 517-18 (Tex. App. -- Dallas 1991, no writ) (in reversing a trial court sanction order that struck pleadings, the court specifically considered "the extent of the party's personal responsibility," and concluded that "many of the actions complained about are actions that [the parties] took upon [their attorney's] instructions"); Jaques v. TEIA, 816 S.W.2d 129 (Tex. App. -- Houston [1st Dist.] 1991, no writ); see also ABA Standard (L)(3)(a): "Sanctions should be allocated among the persons responsible for the offending pleading, motion or other paper, based upon their relative culpability" and Standard (L)(6)(g): "Among the factors which the court may consider . . . in assessing the amount [of the sanction], are: . . . ~~g. [T]~~the relative culpability of client and counsel, and the impact on their privilege relationship of an inquiry into that area." ABA Standards, supra note 7, 121 F.R.D. at 124-25; cf. Westmoreland v. CBS, Inc., 770 F.2d 1168, 1178-79 (D.C. Cir. 1985) ("[T]he district court is in the best position to judge the relative responsibility of counsel and client, and to apportion the sanction accordingly.").

[79] See, e.g., Anschutz Petroleum Mktg. v. E.W. Saybolt & Co., 112 F.R.D. 355, 358 (S.D.N.Y. 1986) ("In the case at bar, [the] third-party complaint . . . was dismissed primarily on the basis of the legal insufficiency . . . , viewed against a background of essentially undisputed facts. . . . In these circumstances, prima facie responsibility for the Rule 11 violation falls upon

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of fact frequently will result from a client's representations, obviously those general divisions of responsibility will vary from case to case. For example, a client's in-house counsel may insist upon a particular legal argument that outside counsel, who signs the pleadings, may agree to reluctantly after appropriate cautionary advice. On the other hand, outside counsel's independent investigation or personal familiarity with the result of factual discovery may make him or her completely responsible for groundless factual representations. Similarly, in the discovery context, the decision to refuse to produce documents may be the result of erroneous legal advice from either in-house counsel or outside counsel, or may result from a client's insistent refusal after receiving appropriate warnings from counsel.

Thus, the determination of relative culpability may be complex and fact specific. A resulting danger is that the culpability determination may create a serious conflict of interest between attorney and client. The attorney and client may have directly opposing financial and other interests, depending upon the outcome of the culpability determination. Moreover, different types of awards may have different effects

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[79](...continued)
counsel . . . , who in contrast to their lay client are in a better position to assess the strengths or weaknesses of legal theories of recovery."); Borowski v. DePuy, Inc., 850 F.2d 297, 305 (7th Cir. 1988) ("Courts generally impose sanctions entirely on counsel when the attorney has failed to research the law or is responsible for sharp practice.").

on whether legal malpractice insurance coverage is available to pay the loss.[80]

Consequently, several federal decisions have emphasized that a conflict of interest arising from the culpability determination may necessitate separate counsel for the client in connection with the sanctions proceedings.[81] The rules, of course, should not seek to drive a procedural wedge between attorney and client, but discovery or an evidentiary hearing inquiring into their respective motivations and conduct can have that result. Not only may the attorney and client have different motivations in answering the question "Who was at fault?", but an evidentiary inquiry into the pertinent events

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[80] See Part XI, below. For example, under some legal malpractice insurance policies, a court assessment of a monetary award would not be covered, yet if the court dismissed or granted a default judgment, insurance coverage might apply.

[81] See e.g., Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1473 (2d Cir. 1988) (reversing sanctions against a client because the lawyer had not withdrawn from representation after the conflict became apparent; "the entire Rule 11 proceeding against [the client] was thoroughly tainted by the [law firm's] representation . . . notwithstanding a self-evident conflict of interest"), rev'd on other grounds sub nom. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989); Healey v. Chelsea Resources, Ltd., 947 F.2d 611, 623 (2d Cir. 1991) ("A potential for conflict is inherent in a sanctions motion that is directed against both a client and a lawyer, even when, as here, the two agree that an action was fully warranted in fact and law. . . . A sanctions motion attacking the factual basis for the suit will almost inevitably put the two in conflict, placing in question the attorney's right to rely on the client's representations and the client's right to rely on his lawyer's advice."); Eastway Constr. Co. v. City of New York, 637 F. Supp. 558, 570 (E.D.N.Y. 1986) (interests of client and attorney are directly adverse when the question is who is at fault, and the client will need new counsel); Cochran, supra note 56, at 568 ("If, as most Rule 11 motions are currently drafted, the role of the client is also at issue, there is a conflict of interest sufficient to require some courts to order disqualification.").

may risk disclosure of privileged information that otherwise would be protected by attorney-client or work product privileges.

There are no easy, complete solutions to this problem, but the proposed Comment to the rule suggests certain steps and policies for counsel and trial judges to keep in mind.[82] In some instances, counsel and client may have resolved the issue in advance. For example, if before making a particular discovery response counsel has advised against making the response and warned the client of the possible sanctions, and the client persists in instructions to make the response and agrees to assume the risk, then the problem may be solved by the time of the hearing. After a sanctions motion is filed, counsel and clients still may have an opportunity to resolve the matter before the hearing, though at that point the client may need independent legal advice. The court also should take reasonable

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[82] With respect to sanctions motions under Rule 13 attacking allegedly groundless pleadings, ordinarily the court should postpone determination of a sanctions motion until after a resolution of the merits by summary judgment, special exceptions, or trial. A conflict may still arise at that point, of course, when the court conducts the sanctions hearing, but at least the intrusion into the attorney-client relationship will have been minimized during the adjudication of the merits of the case. Deferring the ruling on other sanctions motions, or at least deferring the culpability determination, until final resolution of the case also may be desirable in many instances. The Committee Note to the currently proposed draft of Federal Rule 11 states: "The court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation."

steps to avoid unnecessary intrusion into the attorney-client relationship,[83] including limiting discovery and evidentiary inquiries concerning these issues.[84] The 1983 Advisory Committee note to Rule 11, for example, states:

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Protective orders under Rule 166b and in camera inspection by the court are additional measures available to protect against disclosure of information protected by attorney-client privilege, work product exemption, or other privileges.[85]

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[83] See ABA Standard (L)(3)(b): "In allocating sanctions between counsel and the client, the court takes into account the privileged nature of their relationship and avoids encroaching upon the attorney-client privilege or jeopardizing counsel's ability to act, and act effectively, for the client." ABA Standards, supra note 7, 121 F.R.D. at 124.

[84] Cf. ABA Standard (M)(5): "Except in extraordinary circumstances, discovery is not permitted on Rule 11 motions." ABA Standards, supra note 7, 121 F.R.D. at 128. But see City of Houston v. Harrison, 778 S.W.2d 916 (Tex. App. -- Houston [14th Dist.] 1989, orig. proceeding) (holding that a trial judge did not abuse his discretion in ordering that a lawyer be deposed for the purpose of determining what "reasonable inquiry" the lawyer performed prior to filing suit). As one commentator observed, "regardless of whether the information is privileged or not, the potential abuse of what might be termed 'Rule 13 discovery' is staggering." Rich, supra note 1, at 81-82.

[85] Cf. Joseph, supra note 7, at 499 (observing that in connection with the culpability determination, "While there is no easy solution to this dilemma [of disclosing/protecting privileged or confidential information], the court in exercising its discretion should be sensitive to it and should take care not to impinge unnecessarily on the attorney-client relationship.").

c. Sanctions Discretionary, Rather Than Mandatory

The Task Force recommends that discovery sanctions be discretionary rather than mandatory, even if a violation is found to exist. Current Texas rules vary on this point, with Rule 13 making sanctions mandatory and Rule 215 making certain expense awards mandatory but sanctions discretionary.

The Task Force's proposed language for Rule 166d is discretionary language (e.g., "the court may enter an order imposing one or more of the sanctions set forth below"). This change is in recognition of the fact that in some instances a clear, but minor and insignificant, violation may occur, and a trial judge might conclude that sanctions are inappropriate.[86] A substantial majority of lawyers (72%) and an even larger majority of judges (92%) responding to the Task Force questionnaire indicated that the imposition of sanctions should be discretionary rather than mandatory, even if the court finds some type of violation.[87]

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[86] See also Joseph, supra note 7, at 34-35 (Supp. 1992): "There are at least three reasons why the imposition of sanctions should be discretionary, not mandatory (hence, why 'shall' should be changed to 'may'). First, it would honestly reflect present practice. Sanctions are not always awarded despite a violation. Courts have . . . carved out exceptions for . . . 'de minimis' or 'technical' violations . . . . Second, this change would prevent mandatory sanctions from interfering with parties' settlement plans. . . . Third, . . . the judge does not presently have discretion to decide, in a marginal case, that the time and attention necessary to determine whether sanctions should be awarded in a particular case are not worth the effort."

[87] The currently proposed draft of Federal Rule 11 adopts the discretionary approach.

6. Compliance

Paragraph (4) of proposed Rule 166d sets out the timing for compliance with orders. In general, orders under the rule shall be operative at such time as the court directs. Two exceptions apply. First, in compliance with the Supreme Court's directive in Braden, monetary awards pursuant to paragraphs (3)(c) or (3)(g) are not payable prior to final judgment, unless the court makes written findings or oral findings on the record stating why an earlier assessment of the award will not preclude access to the court.[88]

The second exception tracks another holding from Braden, and applies to an order imposing sanctions in the form of directing personal performance of services or continuing legal education under paragraph (3)(h). The order must defer performance of such sanctions until after an opportunity for appeal after final judgment.[89]

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[88] Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991). In Braden, the court quoted from and adopted the Fifth Circuit's procedure set out in Thomas v. Capital Security Serv., Inc., 836 F.2d 866, 929 (5th Cir. 1988). The only difference between the Braden procedure and that in Rule 166d(4) is that the latter allows trial judges the option to make oral findings on the record rather than requiring written findings to be made on this point. See also Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76, 81-82 (Oct. 14, 1992).

[89] "Braden's attorney argues that if he is compelled to perform community service before an appealable judgment is rendered in the case, no relief on appeal can ever restore his time or make him whole. We agree. . . . If, however, the community service imposed . . . was not to be performed until the judgment in the case was final on appeal, Braden's attorney could fully obtain by appeal any relief to which he might be entitled." Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991).

7. Review; Appeal

Paragraph (5) of proposed Rule 166d provides that an order under this rule shall be deemed to be part of the final judgment and subject to review on appeal. The rule permits any person or entity affected by the order to appeal in the same manner as a party to the underlying judgment. Current Rule 215 similarly states that sanctions orders shall be subject to review on appeal from final judgment, and the only addition in Rule 166d is to make clear that any other person or entity affected by the order also may appeal.[90]

The Task Force also considered suggestions concerning interlocutory appeals, as discussed in Part X below.

8. Comments

Large majorities of lawyers (87%) and judges (81%) responding to the Task Force questionnaire agreed that the rules should include explanatory comments, similar to the comments accompanying the Federal Rules of Civil Procedure[91] and some of the Texas Rules of Civil Evidence.[92] The few comments included with the current Texas Rules of Civil Procedure serve primarily to identify portions of rules amended, without providing interpretive explanation or guidance.[93] None of the

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[90] The two appeal provisions in current Rule 215 appear in subparagraphs (2)(c) and (3).

[91] See, e.g., Fed. R. Civ. P. 11, 26, 37.

[92] See, e.g., Tex. R. Civ. Evid. 106, 801.

[93] Texas Supreme Court orders amending the rules contain language to the effect that "the comments appended to these (continued...)

current comments exceed two sentences in length. Particularly in light of the substantial revisions to the sanctions rules recommended by the Task Force, such explanatory comments seem particularly desirable to provide guidance to the bench and bar. Accordingly, the Task Force has included comments with the draft rules, including Rule 166d.[94]

9. Masters

The Task Force does not recommend any change in the rules to allow trial courts to appoint masters to deal specifically with sanctions issues. Although Task Force questionnaire respondents indicated agreement (lawyers 58%, judges 70%) that the rules should be amended to allow appointments of masters to resolve "any discovery disputes,"[95] the respondents opposed (lawyers 62%; judges 50% to 49%) a change allowing such appointments specifically to resolve sanctions disputes. Because another task force is dealing with discovery issues generally, the Task Force on Sanctions concluded that this issue is better left for that group to address.

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[93](...continued)
changes are incomplete, . . . They are included only for the convenience of the bench and bar, and they are not part of the rules." See, e.g., Order of April 24, 1990.

[94] By comparison, the Advisory Committee Notes to the 1983 amendments to Federal Rule 11 contain nineteen paragraphs of text. The Notes and Comments to Tex. R. Civ. Evid. 801 consist of five paragraphs, twenty-three sentences.

[95] See Simpson v. Canales, 806 S.W.2d 802 (Tex. 1991) (in a toxic tort case involving one plaintiff and eighteen defendants, the trial court abused its discretion under Tex. R. Civ. P. 171 in appointing a master to hear all pretrial discovery issues because the case did not involve the sort of exceptional circumstances required for a master appointment).

10. Alternative Dispute Resolution

The Task Force does not recommend that the sanctions rules contain any specific reference to alternative dispute resolution (ADR). Respondents to the Task Force questionnaire agreed (lawyers 66%, judges 77%) that the rules should not require ADR before a party may seek sanctions.

As discussed above,[96] proposed Rule 166d contains a conference requirement to assure that lawyers attempt to resolve disputed matters before filing sanctions motions.

11. Notice to Client

Task Force questionnaire respondents strongly agreed (lawyers 86%, judges 75%) that before ultimate sanctions (dismissal, default, etc.) are imposed, the client should receive actual notice. For two reasons, however, the Task Force has not recommended including any such reference in the text of the rules.

First, the Texas Supreme Court's clear directive in TransAmerican already requires that trial courts inquire into the respective roles of counsel and client: "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."[97] In many cases, therefore, that determination of

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[96] See Part IV.B.2, above.

[97] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991).

relative culpability will require notice to, and perhaps even testimony from, the client.[98]

Second, Rule 1.03 of the Texas Disciplinary Rules of Professional Conduct requires that a lawyer "keep a client reasonably informed about the status of the matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The possible imposition of sanctions against a client clearly is the type of matter that Texas lawyers already have an ethical obligation to communicate to clients.

The Task Force concluded that those existing duties of the court and counsel should serve to effect actual notice whenever necessary, without an additional, cumbersome, and possibly intrusive procedure requiring some sort of formal certificate from counsel that the client has received such notice. If any doubt exists, the trial judge can simply ask counsel whether the client is aware of the proceedings.

12. Mandating Professional Courtesy

The questionnaire respondents endorsed the proposition that the rules should specifically mandate professional courtesy (lawyers 67%, judges 81%), but the Task Force recommends against adding such language in the sanctions rules.

The Task Force strongly agrees that far too much time, effort, money, and court resources have been spent on sanctions

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[98] See the discussion of the culpability determination and possible resulting conflict of interest issues, Part IV.B.5.b.iv, above.

gamesmanship during the past few years. Nonetheless, the Task Force concludes that specific procedural reforms, such as those recommended in this Report, are a more direct and appropriate response than inserting a broad and unavoidably ambiguous "mandate" of "professional courtesy" into the civil procedure rules.

Moreover, similar requirements already appear in the "Texas Lawyer's Creed -- A Mandate for Professionalism," which the Texas Supreme Court and the Texas Court of Criminal Appeals adopted by joint order on November 7, 1989. One of the primary purposes of the Creed is to counteract abusive tactics in litigation, ranging from "lack of civility to outright hostility and obstructionism."[99] Although the Courts' order emphasized that parties should not "abuse" the Creed to "incite ancillary litigation," the order also expressly stated that, when necessary, courts have two additional bases to enforce compliance: "their inherent powers and rules already in existence."[100] To some extent the Creed overlaps in its purposes and textual provisions with the sanctions rules already in existence in the Texas Rules of Civil Procedure. Pertinent Creed provisions addressing the concern for professional courtesy include the following:

> "I will advise my client that civility and courtesy are expected and are not a sign of weakness." Article II.4

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[99] Joint Order of the Texas Supreme Court and the Court of Criminal Appeals, November 7, 1989.

[100] Id.

> "A client has no right to demand that I abuse anyone or indulge in any offensive conduct." Article II.6
>
> "A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct." Article III

As Texas lawyers develop increasing familiarity and experience with the Creed, this mechanism for encouraging, and when necessary enforcing, professional courtesy should serve to alleviate such practice deficiencies about as well as any other set of rules could do so. In any event, additional experience under the Creed seems desirable before resorting to comparable amendments in the Texas Rules of Civil Procedure. The Creed has been in effect for only three years, and thus remains very new and as yet underutilized by Texas lawyers.

13. Violations of Rule 169

Current Rule 215(4) specifies certain relief and procedures applicable if a party fails to admit the genuineness of any document or the truth of any matter requested under Rule 169 and if the party requesting the admissions thereafter proves such matter. The Task Force concluded that such language is unnecessary in light of the relief and sanctions provisions of proposed Rule 166d. Therefore, the Task Force recommends deletion of the following language:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 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 169(1), 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.

On the other hand, the Task Force recommends retention of the provision in current Rule 215(4) that provides for testing the sufficiency of answers or objections. That procedure seems more appropriate in Rule 169 than in the sanctions rule, and thus the Task Force recommends transferring that language to Rule 169, as shown in Appendix G-5. The last sentence of the Comment to proposed Rule 166d notes the deletion and the transfer.

V. SANCTIONS FOR GROUNDLESS PLEADINGS AND OTHER PAPERS -- RULE 13

A. Rule 13 -- Introduction

Rule 13, which generally addresses groundless pleadings and filings, is similar to Federal Rule 11.[101] Because of the massive amount of litigation[102] and decisional confusion that the federal rule has generated, the Task Force recommends

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[101] See, e.g., Rodriquez v. State Dept. of Highways & Public Transp., 818 S.W.2d 503, 504 (Tex. App. -- Corpus Christi 1991, no writ) (noting the "strong similarity between" the two rules).

[102] During the first eight years after the 1983 amendments to Rule 11, Lexis reported over 3000 Rule 11 decisions. Joseph, supra note 7, at 17-18 n.22, 27-28 & n.34 (Supp. 1992). One study suggests that the number of federal decisions under Rule 11 actually totals many times that figure. Id.

several changes to Rule 13 in order to avoid some of the problems that have developed in federal practice.

Reviewing the thousands of Rule 11 decisions to date, the author of the leading treatise on federal sanctions concluded that "inconsistency has been the hallmark of the Rule 11 jurisprudence."[103] Thus, the Task Force has attempted to study and learn from the federal rule, or as Henry Wheeler Shaw put it, "It's a wise man who profits by experience, but it's a good deal wiser one who lets the rattlesnake bite the other fellow." For the last year various federal court advisory committees and related groups have worked on amendments to Federal Rule 11, and the Task Force has monitored the development of those proposals as well.[104]

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[103] Joseph, supra note 7, at 17 (Supp. 1992). Examples abound of the unpredictability and chaotic results that appear in Rule 11 jurisprudence: "Two years after amendment, the Federal Judicial Center documented the proposition that on the same set of facts, almost half of judges surveyed would have sanctioned a complaint as frivolous which the other half determined not to violate the Rule. Courts of appeal now concede that they 'have been required with some regularity to reverse district court awards of sanctions.' Lawyers sanctioned by the district court for bringing 'frivolous' cases have secured reversals not only of sanctions but also on the merits. Cases abound in which appellate panels split on the issue of whether legal arguments are sufficiently frivolous to warrant sanctions. Identical arguments raised before the same district court are 'held in one case not to violate rule 11, but to "egregious[ly] violate it in the next" . . . .' Arguments found frivolous and sanctionable by a district court are, less than a year later, found meritorious by the United States Supreme Court." Cochran, supra note 56, at 561-62 (footnotes omitted).

[104] In response to the continuing Rule 11 controversy, the Advisory Committee on the Civil Rules of the United States Judicial Conference proposed amendments to Rule 11, which the Judicial Conference's Standing Committee on Federal Rules of Practice and Procedure is still circulating at this writing.
(continued...)

Fortunately, Texas has not yet suffered the volume of pleadings sanctions practice that has afflicted federal courts. In part, no doubt, this is because of the fact that until 1990, Rule 13 contained a ninety-day grace period, which made sanctions enforcement nearly impossible.

In sum, the Task Force's proposed amendments to Rule 13 would:

* add a "safe harbor" procedure, similar to the provision now under consideration for Federal Rule 11;
* eliminate the "fictitious suits" provision; and
* incorporate the same procedures (motion, hearings, findings, etc.) and sanctions proposed by the Task Force for Rule 166d.

The discussion below explains those changes, and the complete text of proposed Rule 13 and the accompanying Comment appear in Appendix B.

Initially, however, as discussed in the next section of this Report, the Task Force considered a more fundamental question: Is a frivolous or groundless pleadings rule necessary in Texas at all?

At this writing the federal court system is in the process of attempting to revise Federal Rule 11, and the Task Force also considered, but recommends against, waiting to adopt the same

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[104](...continued)
See, e.g., Johnson, Contois & Keeling, supra note 1, at 678; Rule 11 Reform, Nat'l L.J., May 25, 1992 at 12; Randall Samborn, Rule 11 Reforms Are Criticized, Nat'L L.J., May 25, 1992 at 3. The most recent version of the federal Committee's version of Rule 11, as of this writing, appears in Appendix I.

scheme as the federal rule. Current Federal Rule 11 is seriously flawed and highly controversial, and the extent to which the proposed amendments will solve the problems in federal practice under that rule remains uncertain.

The federal Judicial Conference of the United States has sent its proposal to the United States Supreme Court for its consideration, to be followed by review by Congress; thus, December 1, 1993, is the earliest possible date for a new federal rule to go into effect.

Rule 13, in its current version, differs from Federal Rule 11 in ways that already provide a measure of protection against some of the over-use or abuse experienced under the federal rule, including:

- Rule 13 requires that courts presume that papers are filed in "good faith."
- Rule 13 requires a showing of "good cause" before imposition of sanction, and requires that the sanctions order state "the particulars" of the good cause.
- The respective signature certifications of the rules differ. Part of Rule 11's certification is that the instrument is "well grounded" in fact and law. Rule 13's standard is easier for the pleader to meet: that the instrument is not "groundless," defined as having "no basis in law or fact." Thus, under state practice, a pleader satisfies the requirement if any basis exists in law or fact; under federal practice, a pleader must meet a much tougher standard, by demonstrating a "well-

grounded" basis. Additionally, Rule 13 has dependent certifications, which require that in order for a violation of the rule to exist, either the pleadings must be (1) groundless and in bad faith, or (2) groundless and for harassment. A pleading that is simply groundless, without being brought in bad faith or for purpose of harassment, is not sanctionable under Rule 13.

B. Need for A Frivolous Pleadings Rule

The Task Force received significant input, especially from the Texas legal aid community, questioning whether a frivolous pleadings sanctions rule is necessary or even appropriate.

In addition to complaints concerning the large quantities of legal and judicial resources devoted to litigation of collateral sanctions issues and concerning the confusing and inconsistent decisions under Federal Rule 11,[105] a major complaint against the federal rule is that courts have applied it more frequently against plaintiffs and particularly against plaintiffs in civil rights suits.[106]

Task Force member Beth Crabb, of Texas Rural Legal Aid, Inc., surveyed federal decisions under Rule 11 and observed:

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105 See note 103, above.

106 See, e.g., Cochran, supra note 56, at 567-68 & n.86; M. Tobias, Rule 11 & Civil Rights Litigation, 37 Buffalo L. Rev. 485 (1988).

> There are numerous cases such as Szabo[107] in which the district court and members of a circuit panel disagree as to whether an argument is not "merely losing" but "losing and sanctionable." Such cases have led a number of commentators to argue that a sanctions rule should be addressed to abusive conduct and litigation tactics, and not to grade the merits of legal arguments and punish those who, in the mind of the grader, flunk.

As she also pointed out, a number of commentators have concluded that "the basic assumption of the Rule [11], that 'frivolous' litigation is a significant problem, is incorrect."[108]

Despite the significant sentiment among many commentators and practitioners in favor of abolishing any frivolous or groundless pleadings rule, state or federal, the Task Force concludes that such an option is unavailable for Texas courts at

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[107] Szabo Food Servs., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), cert. dism'd, 485 U.S. 901 (1988). In Szabo the district court concluded that sanctions were inappropriate, but a two-to-one majority of a Seventh Circuit panel reversed, characterizing the losing argument as "wacky." That remark elicited this comment from the dissent: "The majority finds the due process claim here to be objectively frivolous and 'wacky' -- apparently because the claim is partially based on 'obscure cases,' and because it fails to cite, rather than strives to distinguish certain other cases. . . . The majority's 'wackiness' conclusion requires an analysis consuming five dense paragraphs and citing more than twenty cases -- a possible indicator that the result is not so blindingly obvious as to bring it reasonably within the ambit of Rule 11." Id. at 1085.

[108] See Cochran, supra note 56, at 574. A 1990 New York study committee reached this conclusion concerning that state's frivolous pleading provision: "The Committee found no empirical or other data to suggest that the problems confronting the New York State courts are caused by the bringing of frivolous complaints or other pleadings." New York State Bar Association, "Report of Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts" (March 20, 1990). In lieu of a frivolous pleadings rule, the Committee recommended prohibiting "abusive conduct," defined as "conduct . . . undertaken or omitted primarily to delay or prolong unreasonably the resolution of the litigation or to harass or maliciously injure another." Id. at 7.

this time. In 1987 the Texas Legislature effectively mandated the existence of such provisions,[109] adopting a groundless-pleadings statute; the Texas Supreme Court amendment to Rule 13, July 15, 1987, repealed the statutory provisions, amending Rule 13 to deal with the same issue.[110] Thus, absent further legislative action, a sanctions rule for groundless pleadings now appears to be legislatively mandated in Texas.

C. Safe Harbor

The Task Force has proposed a "safe harbor" provision for Rule 13:

> Motions under this rule shall be served at least twenty-one (21) days before being filed or presented to the court; if the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one (21) day period, the motion under this rule shall not be filed or presented to the court.

The Comment to the rule makes clear that if a motion is presented in violation of this requirement, it should be denied.

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[109] See Tex. Civ. Prac. & Rem. Code §§ 9.011-.014 (Vernon Supp. 1992). Section 9.011 provides: "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."

[110] See, e.g., Goad v. Goad, 768 S.W.2d 356, 358 (Tex. App. -- Texarkana 1989, writ denied), cert. denied, 493 U.S. 1021 (1990); The Texas Supreme Court's Order of July 15, 1987, effective January 1, 1988, provided as follows: "SB No. 5 [Acts 1987, 70th Leg., 1st C.S., ch. 2], Article 2. Trial; Judgment, Section 2.01. Subtitle A, Title 2, Civil Practice and Remedies Code, Chapter 9 "Frivolous Pleadings and Claims" otherwise to be effective September 2, 1987, insofar as it conflicts with this rule, is repealed pursuant to Tex. Const. Art. 5 § 31, and Tex. Gov. Code § 22.004(c)."

Respondents to the Task Force questionnaire strongly endorsed (lawyers 71%, judges 77%) such a "safe harbor" provision to allow a party or lawyer to avoid sanctions by withdrawing the offending paper after receiving the motion.

The Task Force language is very similar to that appearing in the current version of proposed amended Federal Rule 11.[111] The federal proposal is expected "to retard the growth of Rule 11 motion practice,"[112] and the Task Force expects the same result from such a provision in the state rule. This result also is consistent with the general sentiment expressed by Task Force questionnaire respondents (lawyers 75%, judges 74%) that current sanctions rules result in too much time and money spent on sanctions practice.

The Task Force intends the safe harbor provision to help limit the sanction rule's potential chilling effects, but recognizes that even a safe harbor procedure can be misused for tactical advantage. For example, by sending a notice of purported violation a litigant may force its opponent to undertake extensive activity in a 21-day period in order to assess the appropriate response. Also, the notice provision may increase rather than decrease the number of disputes if

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[111] The currently proposed federal language reads: "[The motion] shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." See Appendix I.

[112] Joseph, supra note 7, at 18 (Supp. 1992).

attorneys contest the notice's timing, clarity, and other technical matters. In addition, the procedure has a "threat and retreat" aspect. Because there is no requirement that a party follow a notice with an actual motion for sanctions, the potential exists for a sort of "Liar's Poker" in which a party threatens sanctions to attempt to frighten the opponent into abandoning a claim. The Task Force, of course, recommends that the Supreme Court monitor practice and experience under this safe harbor provision, if it is adopted, to determine whether such problems develop.

The Task Force considered an alternative proposal requiring only that a Rule 13 motion for sanctions have a certificate demonstrating (1) written notification to the respondent of a probable violation and the reasons therefor, and (2) that efforts to persuade the party voluntarily to withdraw or correct the paper were unsuccessful.[113] The Task Force concluded, however, that service of the actual motion would provide better and more clearly worded notice. Additionally, a party faced with the burden of preparing a motion that the opposing party could circumvent simply by withdrawing or modifying the challenged pleading might well conclude that the effort was not

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[113] An earlier, August 1991 version of the proposed revision to Federal Rule 11 also contained a similar certification requirement, which the most recent version has changed to requir actual service of the motion. See note 108, above. The August 1991 version provided in part: "On separate motion accompanied by a certificate from the movant reflecting that, although it notified in writing another party of a probable violation . . . and the reasons therefor, it was unsuccessful in persuading such other party voluntarily to withdraw or correct the claim, defens . . . ."

worthwhile, thereby averting entirely an unnecessary exchange of motion paperwork.

D. Deletion of Fictitious-Suits Provision

The Task Force recommends deleting the second sentence of current Rule 13; those provisions refer to "fictitious suits" and false statements made for delay:

> 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.

The fictitious suits language has no counterpart in Federal Rule 11.[114]

The last case to discuss the purpose of this part of Rule 13 cites its predecessor, former Rule 51.[115] The Rule 51 language read:

> Any attorney 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 a pleading presenting a state of case which he knows to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of contempt; and the court of its own motion, or at the instance of any party, will direct an inquiry to ascertain the facts.[116]

The court in Boyd v. Beville explained in dicta that "the spirit and intent of [this provision] were to enforce the observance of

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[114] The 1983 amendment to Federal Rule 11 deleted the rule's previous provision for striking pleadings and motions as sham and false. 1983 Advisory Committee Note to Federal Rule 11.

[115] See Boyd v. Beville, 91 Tex. 439, 44 S.W. 287 (1898).

[116] Id. at 290.

that sound and wholesome principle of pleading that allegations contained in pleas filed in court shall be true -- at least, that they shall not be false within the knowledge of the pleader."[117] The Beville decision applied Rule 51 to a case involving an amended petition filed to avoid an objection that a variance existed between an affidavit for attachment and the plaintiff's original petition, when the plaintiff and counsel knew that statements made in the amendment were false. The court held the amendment violated the "spirit" of Rule 51 even in the absence of a contention that the false pleading was for the purpose of delay.

Apparently no reported decisions have applied Rule 13 or Rule 51 to a fictitious lawsuit. As one commentator observed in recommending elimination of the provision:

> Since there has been no reliance on the present rule or the former rule on which it is based in eighty years, and since false pleading can be shown at a trial to work to the extreme disadvantage of the pleader, and the Court is not otherwise without means of holding such pleader in contempt, there would not seem a present reason to have such rule, and it is noted of course that there is no federal counterpart.[118]

Other language in the rule allows sanctions against the same conduct, and the express reference to the contempt remedy adds nothing meaningful to the remedies recommended by the Task Force in Rule 166d or existing independently in a trial court's contempt power.

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[117] Id.

[118] 25 B. Thomas McElroy, Civil Pretrial Procedure § 1139 (Texas Practice 1980).

E. Presenting Pleadings or Other Papers

The Task Force recommends changing Rule 13 to change the focus of the rule from the simple act of signing, to the more meaningful act of presenting the document to the court, whether by signing, filing, submitting, or later advocating. This change is as follows:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion, or other paper, an attorney or unrepresented party is certifying . . . .

This change adopts the language proposed in the current draft of Federal Rule 11,[119] and makes clear that if a litigant learns that a position ceases to have any merit, the litigant may not thereafter present or otherwise advocate those positions. For example, an attorney who signs a document not knowing that the document is groundless and in bad faith, but who later learns that it is, should not thereafter have immunity under the rule to continue advocating the position before the court.

Further, the change makes the rule applicable to documents that a party or attorney does not personally sign but, in effect, asks the court to rely upon by presenting the documents to the court. Current Rule 166a(h) adopts the "presentation" concept for affidavits in connection with summary judgment motions, and this general provision in Rule 13 would apply more broadly to other affidavits. It also would allow repeal of the separate sanctions provision in Rule 166a(h).[120]

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[119] See Appendix I.

[120] See discussion in Part VIII, below.

F. Issues Controlled by Rule 166d

1. General Procedures, Relief, and Sanctions

The discussion above concerning the procedure, compliance, and review provisions in proposed Rule 166d also applies to the Task Force's proposal for amended Rule 13. Paragraph (c) of proposed Rule 13 expressly incorporates those provisions:

> The procedure, compliance, and review provisions of Rule 166d shall govern motions and proceedings under this rule . . . .[121]

For the reasons previously discussed under proposed Rule 166d,[122] the Task Force also recommends changing the rule's current mandatory language ("shall impose") to discretionary language ("may award relief").

Incorporating these Rule 166d provisions into Rule 13 should make sanctions practice more consistent under the two rules. Additionally, although both TransAmerican and Braden were discovery cases decided under Rule 215, in general the salutary principles set forth in those decisions are equally applicable to Rule 13 proceedings.

2. Findings

The Task Force's proposal for Rule 13 incorporates the Rule 166d requirement of trial court findings.[123] This procedure not only provides consistency between the rules, but also increases the procedural protections provided by the findings

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121 See discussion of Rule 166d procedures in Part IV, above.

122 See Part IV.B.5.c, above.

123 See discussion in Part IV.B.4, above.

requirement in the current rule, which cases have applied somewhat inconsistently.[124]

G. Alternatives

The Task Force considered, but rejected, other amendments proposed for Rule 13. As discussed above, a New York State Bar Association report recommended changing the focus of that state's procedures from frivolous pleadings to "abusive conduct."[125]

As noted above, as of this writing the process of review and revision of Federal Rule 11 continues.[126] The most current version of the proposed amendments, as adopted by the Judicial Conference of the United States on September 21, 1992, and sent to United States supreme Court for its action, appears in Appendix I. Some of the most significant changes appearing in that version are:

- The rule adopts a discretionary standard, rather than the mandatory standard in the current rule, if the court determines that a violation exists.[127]

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[124] The pertinent language in the current rule reads: "No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order." Tex. R. Civ. P. 13. Compare Bloom v. Graham, 825 S.W.2d 244 (Tex. App. -- Fort Worth 1992, writ denied) (good cause and particularity requirements can be waived) with GTE Communications Sys. Corp. v. Curry, 819 S.W.2d 652 (Tex. App. -- San Antonio 1991, no writ) (granting mandamus relief against a $150,000 monetary sanction; "rule 13's requirement that the trial court state the particulars of good cause found for imposing sanctions is mandatory").

[125] See discussion in Part V.B, above.

[126] See discussion in Part V.A, above.

[127] See discussion in Parts IV.B.5.c and V.F, above.

- The certification created by signing a pleading or other paper has four parts; the signer is certifying to the best of the signer's knowledge, information and belief, formed after an inquiry reasonable under the circumstances that: (1) the paper is not presented for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"; (2) the legal contentions are supported by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law;[128] (3) the factual contentions have evidentiary support or "if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery";[129] (4) the denials of factual contentions are warranted on the evidence or if specifically so identified, are reasonably based on a lack of information or belief.[130]

- The rule allows sanctions against a law firm, as well as against individual attorneys, effectively reversing the holding of Pavelic & LeFlore v. Marvel Entertainment Group.[131] The rule states that "absent exceptional circumstances," a law

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[128] The Advisory Committee Notes explain that this change is to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. The previous language in Rule 11 referred to a "good faith argument," as does Texas Rule 13. Although recognizing that this theoretical problem also exists in Rule 13, on balance the Task Force does not recommend departing from the current Rule 13 standards.

[129] This "red flag" procedure has received substantial criticism on the ground that it invites motions for summary judgment or special exceptions. The Task Force does not recommend it.

[130] This provision is the defendant's equivalent of the preceding provision.

[131] 493 U.S. 120 (1989) (held: the 1983 version of Rule 11 does not permit sanctions against the law firm of an attorney who signed a groundless complaint). The Task Force's similar recommendation is discussed in Part IV.B.4, above.

firm "shall be held jointly responsible" for violations by its partners and employees.[132]

- The rule contains a safe harbor provision.[133]
- The rule expressly states that any sanction must be limited to what is "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[134]
- The rule is slightly more specific than the current rule in terms of the other sanctions that a court may impose, but it still lacks the specificity that the Task Force has proposed by recommending the incorporation of Rule 166d.[135]
- The rule prohibits monetary sanctions against a represented party for frivolous legal contentions.[136]
- Although the rule retains authorization for a court to award sanctions on its own initiative, it limits that right by requiring that a court first issue a show cause order, and by providing that the court may not do so if the parties have previously taken the voluntary dismissal or settled the claims.[137]

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[132] The Task Force views this mandate as inappropriate, especially in light of the proposed Comment to the rule concerning the required culpability determination.

[133] See discussion in Part IV.B.5.b.i, above.

[134] Texas courts have recognized that other purposes, in addition to deterrence, are valid considerations in imposing sanctions, and thus this provision appears inappropriate for Texas. See discussion in Part IV.B.5.b.i, above.

[135] See discussion in Part V.F, above.

[136] While this principle is reasonable as a general proposition, in some cases a sophisticated client (such as a lawyer/litigant or a corporation with in-house counsel supervising the litigation) may be the ultimate decision-maker responsible for including a groundless claim or defense. The Task Force concludes that the judge should retain discretion to determine the appropriate person or persons to be sanctioned.

[137] See discussion in Part IV.B.2, above.

- The rule contains a findings requirement; the court, when imposing sanctions, must "describe the conduct determined to constitute a violation of [the] rule and explain the basis for the sanction imposed."[138]

- The rule is inapplicable to the newly proposed federal procedure for disclosures, as well as to discovery requests and responses.

- The proposed Comment to the rule states that its procedures ordinarily should apply to sanctions imposed under inherent powers.[139]

Gregory Joseph also has suggested changing the certification in Rule 11 from the current certification that the pleading "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry . . . is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," to a simple certification that the contentions are not "frivolous," defined as "lacking any basis in fact or law or unsupported by a colorable argument for a change in the law."[140] Joseph's rationale for this proposal is twofold. First, he argues that while the "reasonable inquiry" test is ostensibly an objective (reasonable-person) test, the wildly inconsistent applications of Rule 11 in federal court demonstrate that the test has become subjective, with different judges looking at the same set of

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[138] The Task Force findings proposal is more specific. See discussion in Parts IV.B.4 and V.F, above.

[139] See discussion in Part IX, below.

[140] Joseph, supra note 7, at 39 (Supp. 1992). The Texas rule's definition of "groundless" is very similar to Joseph's standard.

facts and coming to different conclusions.[141] Second, Joseph argues that the Rule 11 analysis "ineluctably intrudes on the attorney-client relationship": the rule initially requires a reasonable pre-filing inquiry into fact and law, and then mandates a reasonable analysis of the results of that inquiry to determine whether the filed paper is warranted in fact and law. The first-stage focus creates a tactical opportunity for the opponent to drive a wedge between client and counsel by focusing on what counsel did in preparing to file the offending pleading.[142]

Although the objective "frivolousness" test proposed by Joseph has much to recommend it, at this time the Task Force does not conclude that such change is necessary in the Texas rule. As discussed above, sanctions are more difficult to obtain under Rule 13 than under Rule 11. Thus, the risk of abuse from trial courts construing the rule too "subjectively" appears much less likely under Texas practice.

Joseph's proposal is more attractive from the perspective of adopting an objective standard that reduces the danger of intrusion into the attorney-client relationship. Rule 13 has been criticized because the references to bad faith and harassment arguably create subjective factors that trial courts may apply to focus on the state of mind of the alleged

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[141] Id. at 28-29.

[142] Id. at 30-31.

offender.[143] As discussed above, however, in the sanctions context consideration of certain subjective elements is almost inevitable, at least when making the determination of an appropriate sanction.[144] To some extent courts can reduce the significance of this problem by first considering the objective aspects of whether the pleading is groundless, and only then, if necessary, focusing on the subjective aspects.[145]

Another criticism of Rule 13 arises from the dual certification, which differs from Federal Rule 11.[146] Under Rule 13, both as currently written and in the Task Force's proposal, the signer certifies that the instrument is not "groundless and filed in bad faith or groundless and filed for the purpose of harassment" (emphasis added). Although the rule's language has some ambiguity,[147] the Task Force agrees that the most logical reading of the rule is that in order for a violation of the rule to exist, either the pleading must be (1)

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[143] See Rich, supra note 1, at 82. The "groundless" factor in the rule is an objective standard. Id. at 64-65.

[144] See discussion of the factors to consider in determining an appropriate sanction, in Part IV.B.5.b.iv., above.

[145] If the rule were to be amended to adopt Joseph's objective approach, proposed paragraphs (a) and (b) might be modified to read as follows:

(a) By presenting to the court (whether by signing, filing, submitting, or later advocating) the pleading, motion, or other paper, an attorney or unrepresented party is certifying that it is not groundless.

(b) . . . "groundless" for purposes of this rule means lacking any basis in law or fact or unsupported by a colorable argument for a change in the law. . . .

[146] See, e.g., Rich, supra note 1, at 65-66.

[147] Id. at 65.

groundless and in bad faith, or (2) groundless and for harassment.[148] A pleading that is merely groundless, without being brought in bad faith or for purpose of harassment, is not sanctionable under Rule 13. These "dependent certifications" differ from Federal Rule 11, and this difference will make it more difficult under state practice to obtain sanctions under the rule than is true of current Federal Rule 11.[149] The Task Force disagrees, however, that this interpretation has a "profound and debilitating impact" on the rule.[150] Texas lawyers and judges responding to the Task Force questionnaire indicated strongly that the current sanction rules result in too much time and money spent on sanctions practice. The many thousands of sanctions decisions under Federal Rule 11 demonstrate a disproportionate allocation of resources of parties, lawyers, and judges to federal sanctions practice. Therefore, the fact that sanctions are more difficult to obtain under Texas Rule 13 than under the federal counterpart is not, in the Task Force's view, an undesirable distinction.

In any event, the Task Force has concluded that while subjective elements are almost inevitably a part of some sanctions motion determinations, trial courts can guard against

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[148] Id. at 65-66. The Comment to proposed Rule 166d makes clear that the dependent certification interpretation is correct.

[149] Under the current federal rule, the signer certifies that, based upon the reasonable inquiry, that the paper is well grounded in fact and is warranted by law, and that it is not interposed for any improper purpose.

[150] Rich, supra note 1, at 66.

undue intrusion into the attorney-client relationship and can control many of the potentially resulting problems. On balance, the advantages of the dual standard in Rule 13 outweigh the disadvantages.

VI. DISCLOSURE AND EXCLUSION OF WITNESSES AND EVIDENCE

The two rules that currently govern pretrial disclosure of witnesses, Rules 166b(6) and 215(5), were designed to serve the salutary purposes of preventing trials by ambush and facilitating settlements. In their current form, however, the rules have created several problems and received substantial criticism. "Enacted to promote fairness between the parties, the rules have often produced results that appear harsh and inequitable. Enacted to lessen court involvement and paper wars between parties, the rules have produced much of the opposite -- a rash of motions and hearings to exclude testimony and impose sanctions."[151] Accordingly, the Task Force recommends amendments to both rules. In sum, the proposed changes would:

- provide a specific, unambiguous deadline (thirty days before trial) for the disclosure of expert witnesses;

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[151] David W. Holman & Byron C. Keeling, Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166(b) and 215(5) of the Texas Rules of Civil Procedure, 42 Baylor L. Rev. 405, 406-07 (1990); see also Tommy Jacks, "An Open Letter to the Texas Supreme Court," supra note 1 at 3 ("In the [Texas Supreme] Court's efforts to prevent 'trial by ambush' by imposing stringent new standards for supplementing discover responses, a new and more dangerous monster has been set lo upon judges, lawyers, and litigants. We now have to conten routinely with tactics of pre-trial 'ambush-in-reverse.'").

- expressly authorize sanctions other than exclusion of undisclosed witnesses or evidence, including the remedy of continuance and an award of expenses;
- add a reference in the Comment to the rule concerning factors that a court may consider in determining whether "good cause" exists under Rule 215(5);
- add limited exemptions for party-witnesses.

Additionally, for purposes of organizational clarity, the Task Force recommends that the witness/evidence exclusion provision that now appears in Rule 215(5) be moved and renumbered as Rule 166b(6)(d), so that it will immediately follow the current provision on supplementation of witness and evidence.[152]

A. Rule 166b(6)(b)

Confusion and controversy have surrounded the provision of Rule 166b(6)(b) requiring designation of expert witnesses "as soon as is practical."[153] Accordingly, the Task Force recommends amendment of the rule to provide an unambiguous thirty-day deadline for the disclosure of expert witnesses:

> b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, ~~as soon as is practical, but in no event less than~~ **at least** thirty (30) days prior to the beginning of trial except on leave of court.

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[152] The Task Force recognizes that this suggestion is relatively unimportant, and that other task forces are likely to recommend a more comprehensive reorganization of the rules.

[153] See note 151, supra.

Under the current version of Rule 166b, a party must answer all specific discovery requests for the identity and location of expert witnesses and "persons having knowledge of relevant facts."[154] In addition, a party must supplement its earlier answers if it acquires information upon the basis of which it knows either of the following: (1) the answers were incorrect or incomplete when made; or (2) the answers, although correct or complete when made, are no longer true and complete and the failure to amend would mislead the questioning party.[155] Such supplementation is due "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."[156] Such supplementation applies to discovery responses pertaining to persons with knowledge of relevant facts. For expert witnesses, however, supplementation is required "as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court."[157]

The subtle difference between the deadline for disclosure of persons with knowledge of relevant facts and the deadline for disclosure of expert witnesses has confused practitioners and judges. The language of Rule 166b(6)(b) suggests that a trial court can impose sanctions for the failure to disclose experts

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[154] Tex. R. Civ. P. 166b(2)(d).

[155] Tex. R. Civ. P. 166b(6)(a).

[156] Tex. R. Civ. P. 166b(6).

[157] Tex. R. Civ. P. 166b(6)(b) (emphasis added).

even prior to thirty days before trial if it would have been practical for the offering party to disclose earlier than it did. There are problems with this conclusion, however. Requiring parties to disclose experts "as soon as is practical" is no standard at all: it does not give practitioners a reasonable idea of when they should disclose experts. In some cases parties have spent several days in hearings attempting to strike each other's experts, arguing about the timeliness of their respective expert designations. For that matter, the courts of appeals have split over the question whether a trial court may exclude the testimony of an expert disclosed more than thirty days before trial.[158]

In response to the Task Force questionnaire, 63% of the responding lawyers and 78.5% of the responding judges concluded that the "as soon as practical" language in Rule 166b(6)(b) either is "too vague" or "should be eliminated." The Task Force agrees, and recommends the language providing the clear thirty-day deadline above.

The Task Force considered other alternatives. One approach would be to eliminate completely any express time limit for the disclosure of expert witnesses, and leave the matter to counsel and the trial judge to impose a time limit through a Rule 166 pretrial calendar. Arguably, if the parties are not concerned enough to obtain a pretrial order setting deadlines for the

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[158] Compare Mother Frances Hosp. v. Coats, 796 S.W.2d 566, 570-71 (Tex. App. -- Tyler 1990, orig. proceeding) (generally no) with Builder's Equip. Co. v. Onion, 713 S.W.2d 786, 788 (Tex. App. -- San Antonio 1986, orig. proceeding) (yes).

designation of experts, the rules should not interfere with that assessment. On the other hand, the disadvantage of this approach is that it places still greater burdens upon the trial courts. While a pretrial disclosure calendar is helpful in almost any large, complex suit, it may be unnecessary additional paperwork in small or even medium-sized cases.

The Task Force also considered alternative deadlines for expert witness disclosure, such as forty-five days or sixty days before trial, rather than the thirty days. It can be argued that a thirty-day time, without the incentive/deterrent of an as-soon-as-is-practical standard, may mean that in many cases parties will wait until the very last possible date to designate experts, leaving inadequate time for remaining pretrial discovery before trial. Under the current rule, however, essentially the same type of last minute rush occurs at or near the thirty-day deadline. The Task Force concludes that if the parties want a period longer than thirty days, the pretrial order procedure remains available and is a better alternative. Moreover, lawyers already are familiar with the general thirty-day time limit that applies to other supplementation.

B. Proposed Rule 166b(6)(e)

Proposed Rule 166b(6)(e) addresses the problem that arises when a party who has designated a witness is dismissed from the suit less than thirty days before trial and no other party has designated such witness. Under current practice no other party could use the witness, even if no surprise is involved, and thus there exists the potential for abuse through timing settlements to silence certain witnesses. The proposed rule would change that result, allowing any other party to designate such witness within seven days of notice of such dismissal.

C. Proposed Rule 166b(6)(d) -- Former Rule 215(5)

The Task Force has addressed three areas of possible change in the evidence/exclusion provision, current Rule 215(5). (The proposal also would renumber this provision as Rule 166b(6)(d).) The changes include: specifying additional permissible sanctions; identifying, in a Comment, certain factors that may be considered in determining what is "good cause" sufficient to permit the admission of evidence in the absence of proper supplementation; exempting certain categories of witnesses from exclusion.

1. Permissible Sanctions

The Task Force recommends that proposed Rule 166b(6)(d) expressly permit, as alternatives to exclusion, the granting of a continuance, with discretion for the court to award expenses resulting from the continuance or other orders authorized by proposed Rule 166d:

> Unless the court makes a finding of good cause, a party who fails to make or supplement a discovery response shall not be entitled to present evidence that the party was under a duty to provide, or to offer the testimony of a witness other than a named party who has not been properly designated. The burden of establishing good cause is upon the party offering the evidence or witness, and good cause must be shown in the record. Notwithstanding the foregoing, the court may, in its discretion, grant a continuance to allow a response to be made or supplemented, and may condition such continuance upon payment of expenses related thereto by the party requesting the continuance or other orders pursuant to Rule 166d.

In response to the Task Force's questionnaire, 67% of the judges and 69% of the lawyers indicated that the rule should state expressly that a trial court may grant a continuance as an alternative to the exclusion of the evidence or witness.

In Alvarado v. Farah Mfg. Co.[159], the Texas Supreme Court succinctly identified the problem created by the fact that Rule 215(5) sets out exclusion as the sole remedy.

> The difficulty with the rule lies not so much in the requirement of strict adherence, but in the severity of the sanction it imposes for every breach. The consequences of the rule should not be harsher in any case than the vice the rule seeks to correct. The sole sanction should not be the exclusion of all evidence not properly identified in discovery; rather, as with other failure to comply with discovery, the trial court should have a range of sanctions available to it to enforce the rules without injustice.[160]

Despite the fact that the express language refers to only the exclusion remedy, the court concluded that trial courts currently have the discretion to grant continuances and impose appropriate sanctions:

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[159] 830 S.W.2d 911 (Tex. 1992).

[160] Id. at 915.

> We note, however, that the trial courts are not without power to prevent the enforcement of Rule 215(5) from operating as an injustice in a particular case. When a party has failed to timely identify evidence in response to discovery requests, the trial court has the discretion to postpone the trial and, under Rule 215(3), to impose an appropriate sanction upon the offending party for abuse of the discovery process. Such sanction may be used to compensate the non-offending party for any wasted expense in preparing for trial. Although the trial court should not allow delay to prejudice a non-offending party, the trial court should ordinarily be able to cure any prejudice by a just imposition of sanctions.[161]

The majority and dissenting opinions in Alvarado disagreed concerning the extent to which the majority's solution was consistent with the existing language and intent of Rule 215(5).[162] Thus, Alvarado indicates that, at the least, clarification of the rule might be advisable. That is the purpose of this proposed amendment.

2. Good Cause

The Task Force recommends addition of a statement in the Comment to proposed Rule 166b(6)(d) for the purpose of

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[161] Id. at 915-16. Tex. R. Civ. P. 70 correctly provides that if a continuance results from a party filing an amended or supplemental pleading at such time as to surprise the opposing party, the court may "in its discretion require the party filing such pleading to pay to the surprised party the amount of reasonable costs and expenses incurred by the other party as a result of the continuance, including attorney fees."

[162] The dissent stated that the majority's result meant that "apparently . . . trial courts are free to disregard the rule's plain language . . . . Nothing in Rule 215(5) suggests that a failure to supplement discovery should be cured by postponement of the trial and sanctions under Rule 215(3)." Id. at 919. The majority responded: "Contrary to the dissent's argument, we do not encourage trial courts to disregard or circumvent Rule 215(5). . . . While Rule 215(5) might be revised to better accomplish this result, it does not as written force a trial court to sanction a lesser offense with excessive severity." Id. at 916 n.5.

specifying certain factors that a trial court may consider in determining whether "good cause" exists for admission of evidence not properly provided or supplemented in discovery:

> Among the factors that the court may consider in determining whether good cause exists are the following:
>
> (1) the existence or absence of surprise to the opponent;[163]
> (2) the existence or absence of prejudice to the opponent, including delay or expense;[164]
> (3) the good faith of counsel or the party in attempting to supplement;[165] and
> (4) the importance of the undisclosed evidence or witnesses to the proponent's case.[166]
>
> The mere fact that the court may find that evidence exists establishing one or more of these factors does not necessarily compel a finding of good cause. These are proper factors for the court to consider, but the court has the discretion to determine what weight to give the factors in a particular case. Nor is this list exclusive of other factors that a court might consider.

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[163] See Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989) ("Although lack of surprise is not the standard, it may be a factor for the trial court to consider when weighing whether good cause exists for allowing the testimony of undisclosed witness."); Alvarado v Farah Mfg. Co., 830 S.W.2d 911 (Tex. 1992) (citing Gee for the proposition that while lack of surprise is not the standard, it may be a factor); cf. Smith v. Southwest Feed Yards, 35 Tex. Sup. Ct. J. 963, 965 (June 25, 1992), No. D-1503, 1992 WL 140839, at *2 ("[T]he constraints of Rule 215(5) may permit testimony by a party who is an individual not listed in response to a Rule 166b(2)(d) interrogatory, when identity is certain and when his or her personal knowledge of relevant facts has been communicated to all other parties, through pleadings by name and response to other discovery at least thirty (30) days in advance of trial.").

[164] Cf. Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915-16 (Tex. 1992) ("Although the trial court should not allow delay to prejudice the non-offending party, the trial court should ordinarily be able to cure any prejudice by a just imposition of sanctions."); Holman & Keeling, supra note 151, at 453.

[165] Holman & Keeling, supra note 151, at 452-53.

[166] Id. at 453.

One of the difficulties with the good cause requirement in current Rule 215(5) is that the rule contains absolutely no definition or guidance concerning what constitutes good cause. While the proposal discussed in the preceding section -- to clarify that trial courts have discretion to impose sanctions other than exclusion -- should ameliorate what sometimes has appeared to be the overly harsh effect of the rule, nonetheless the Task Force concludes that if the phrase "good cause" is to remain in the rule, some guidance should be provided to bench and bar concerning the meaning of the term.

Unfortunately, to date many litigants and attorneys have learned the hard way what is not good cause.[167] Responses to

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[167] See, e.g., Smith v. Southwest Feed Yards, 35 Tex. Sup. Ct. J. 963, 969 (June 25, 1992), No. D-1503, 1992 WL 140839, at *7 (Cornyn, J., dissenting) ("Eleven times before today, and as recently as three months ago, this court has considered the sufficiency of proffered evidence of good cause under Rule 215(5). In each case, until now, the court has not found good cause to allow the testimony of a previously undisclosed, incompletely disclosed, or untimely disclosed person with knowledge of relevant facts in the face of a proper discovery request. Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911 (Tex. 1992) (finding that requesting counsel's "awareness" of witness and deposition of her in another case was not good cause for admission of testimony, nor was counsel's intended use of witness for rebuttal purposes only); Rainbo Baking Co. v. Stafford, 764 S.W.2d 379 (Tex. App. -- Beaumont 1989), writ ref'd n.r.e. per curiam, 787 S.W.2d 41, 42 (Tex. 1990) (finding that counsel's expectation of settlement was not good cause); Sharp v. Broadway Nat. Bank, 784 S.W.2d 669, 671-72 (Tex. 1990) (per curiam) (finding that late designation of expert witness was not good cause, despite deposition of witness, no surprise and claim of unfairness at being able to call expert witness under the circumstances); Clark v. Trailways, Inc., 774 S.W.2d 644, 646 (Tex. 1989) (concluding that uniqueness of witness's knowledge did not constitute good cause), cert. denied, 110 S. Ct. 1122 (1990); McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72 (Tex. 1989); Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989) (per curiam) (finding that 'great harm' caused by inability to (continued...)

the Task Force questionnaire indicated that 72% of attorneys and 57% of judges supported amending current Rule 215(5) to specify the types of conduct or conditions that constitute "good cause." Further, 58% of lawyers and 78% of judges agreed that trial courts should have greater discretion to admit the testimony of undisclosed witnesses.

In theory, a court might consider several possible factors in determining good cause.[168] The Task Force, however, rejected most such factors, agreeing with the Supreme Court's caution in Alvarado that relaxing the good cause standard too much would undermine the rule:

> To relax the good cause standard in Rule 215(5) would impair its purpose. Counsel should not be excused from

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[167](...continued)
call witness was not good cause); Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989) (finding no good cause in the record); E.F. Hutton v. Youngblood, 741 S.W.2d 363, 364 (Tex. 1987) (finding that inadvertent, late decision about calling expert witness and opposing counsel's ability to cross-examine undisclosed witness on attorney's fees was not good cause); Gutierrez v. Dallas Indep. School Dist., 729 S.W.2d 691 (Tex. 1987); Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986) (per curiam) (failing to provide witness's address was not good cause, despite offer to allow deposition of witness and no surprise); Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243, 246-47 (Tex. 1985) (failing to supplement answers, true when given, was not good cause when party later learned of witness, but failed to supplement)."

[168] Holman and Keeling have suggested the following factors: good faith; length of trial; length of litigation; lack of surprise; lack of prejudice; communications with opposing counsel; pending motion for continuance; settlement negotiations; attempts to supplement; lack of communication from the opposing party; importance of the witness; uncontrollable circumstances; and fraud or estoppel. Holman & Keeling, supra note 151, at 452-56.

the requirements of the rule without a strict showing of good cause.[169]

Although the list of factors poses some risk of lengthy arguments and evidentiary hearings pertaining to each such factor and the relative importance of the factors, the Task Force concludes that some guidance is better than no guidance; such arguments and hearings occur now.

In sum, there appears to be no easy, comprehensive answer to the question, "How should the term 'good cause' be defined?" Reasonable minds and reasonable proposals may differ. One way or another, however, proposed Rule 166b(6)(d) should be amended to better inform judges and practitioners what the term "good cause" means.

At least one Task Force member would prefer to distinguish between "good cause" that justifies late supplementation on the one hand and the factors that a court should consider in deciding what sanction to employ on the other. Under such a system, the court would undertake three analytical steps. First, the court would determine whether discovery responses had been supplemented in a timely fashion. Second, if a party failed to supplement in the required time, the court would consider whether there was good cause for late supplementation. This step would involve consideration of the reasons that the discovery was not completed on time. Good cause at this step, then, would involve issues such as the party's diligence in

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[169] Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911, 915 (Tex. 1992).

locating a witness and notifying opposing counsel and the foreseeability that the witness' testimony would be necessary. The court might find at this step that a party had shown good cause for the late supplementation, in which case the evidence should be admissible at trial. Alternatively, the court might find that a party had not shown good cause for late supplementation. In the latter case, the court would go on to step three. This third step would require the court to decide whether to exclude evidence as a sanction or whether to grant a continuance to cure the problem. At this step, different factors would be relevant: the existence or absence of surprise to the opponent; the existence or absence of prejudice to the opponent, including delay or expense; and the importance of the undisclosed evidence or witnesses to the proponent's case. The current wording of Rule 215 made it impossible for the courts to analyze separately the reasons for late supplementation and its effects on the parties -- if "good cause" could not be found, the rule provided only for exclusion of the evidence. The proposed rule allows what are really two separate issues to be considered separately. Enacting this proposal would not require rewriting of the rule as the Task Force has proposed it, but only restructuring the section of the Comment that defines good cause.

3. Exemption of Certain Classes of Witness

The Task Force recommends adding language to proposed Rule 166b(6)(d) to exempt named parties from exclusion:

> Unless the court makes a finding of good cause, a party who fails to make or supplement a discovery response shall not be entitled to present evidence that the party was under a duty to provide, or to offer the testimony of a witness, other than a named party, who has not been properly designated.

As noted above, despite the Texas Supreme Court's consistently strict interpretation of Rule 215(5), several parties have run afoul of the rule's sanction, with the effect that either parties or party representatives have been barred from testifying because of failure to designate properly or timely.[170] Recent Supreme Court decisions have relaxed slightly the Rule 215(5) exclusion with respect to party witnesses.[171]

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[170] See, e.g., Smith v. Southwest Feed Yards, 35 Tex. Sup. Ct. J. 963, 968 (June 25, 1992), No. D-1503, 1992 WL 140839 (Hecht, J., concurring) ("[I]n the past two years we have received applications for writ of error in seven cases besides this one in which a party or a party's representative called to testify at trial was not timely identified in answer to interrogatories.").

[171] See, e.g., id., (an individual should not have been barred from testifying as a fact witness in his own defense for lack of proper designation, when the case was a simple suit on an account and the party was the sole individual defendant, the party gave notice of intent to testify seven days before trial in compliance with a pretrial order, the plaintiff pleaded that the individual defendant party was indebted to it, and in answer to interrogatories the defendant party made clear that he had personal knowledge of facts relevant to the lawsuit); Henry S. Miller Co. v. Bynum, 35 Tex. Sup. Ct. J. 1021, 1023 (July 1, 1992), No. D-0494, 1992 WL 148110 (trial court had discretion to find good cause to permit testimony of party who was not identified in interrogatory responses but had been deposed and was the only individually named party); Rogers v. Stell, 35 Tex. Sup. Ct. J. 1094, 1095 (July 1, 1992), No. D-2348, 1992 WL 148120 (undisclosed individual party witness should have been allowed to testify at trial when the party did not respond to or supplement a response to interrogatories seeking persons to be called at trial, but properly identified herself as a person with knowledge of relevant facts in answer to other interrogatories).

Large majorities of lawyers (85%) and judges (93%) responding to the Task Force questionnaire agreed that the rule should be amended to permit a named party to a lawsuit to testify without being listed in answers to interrogatories.

On the other hand, the Task Force recognizes the concern expressed in Smith v. Southwest Feed Yards[172] that allowing all parties to testify would create too large a loophole:

> Excluding every party from the identification authorized by Rule 166b(2)(d) would open a broad loophole encompassing every employee of an entity and every plaintiff in a large class action.

Thus, the proposed rule would exempt only named parties. Employees of an entity party or members of a large class who are not named personally would still have to be identified, thus closing this loophole. Further the Task Force proposes to include a statement in the Comment recommending use of Rule 166 to require designation of witnesses when a large number of named parties in the case would create undue confusion:

> Where the number of named parties creates uncertainty as to which will testify, the court should require designation pursuant to Rule 166(h).

The Task Force considered, but rejected, an exemption of a party's own attorney of record whose testimony is offered concerning the party's own attorney's fees. Proponents of such an exemption argue that as with party witnesses, such testimony should never really surprise the opposing party. Failure of a party's attorney to designate himself or herself as a witness on

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[172] 35 Tex. Sup. Ct. J. 963 (June 25, 1992), No. D-1503, 1992 WL 140839.

attorney's fees is almost always the result of sheer inadvertence, and exclusion may sometimes be unfair, though the current rule clearly requires that result.[173] Opponents felt that because such arguments might apply just as well to known medical expense witnesses or others, this exemption might appear to show undue favoritism to attorneys, and that other changes proposed by the Task Force should ameliorate the harshness of the current rule.

Another witness category suggested for exemption, but not accepted by the Task Force, is "a witness who was not designated by the offering party but was designated by another party and was deposed before trial with the party against whom the testimony is offered in attendance." The argument offered in support of this exception is that "it seems silly to refuse to allow testimony of a witness whom everyone has deposed simply because the person who wishes to offer the testimony failed to dot that particular 'i.'" A narrower variation of this option would limit it to the deposition testimony of such witness.

Another witness category suggested for exemption from the exclusion provision, but rejected by the Task Force, is the witness who has "previously testified at trial." This suggested exemption would address the situation that arises when a witness is called to testify by one party who properly disclosed the

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[173] See Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990) ("The fact that a witness will testify only about attorney fees does not excuse proper identification in discovery"); Cooke v. Dykstra, 800 S.W.2d 556 (Tex. App. -- Houston [14th Dist.] 1990, no writ).

witness, but then is subsequently called to testify by a party who did not identify the witness. The rationale for this possible exemption is to prevent a party from using the disclosure rules to keep its opponent from recalling a witness For example, if later testimony in a trial suggests that an earlier witness called by the plaintiff testified untruthfully, the defendant should be able to recall the earlier witness even though the defendant did not identify the witness as one of its experts or a person with knowledge of relevant facts. Although the current rule is perhaps not entirely clear in its application to this situation, the Task Force's understanding is that the opposing party would be able to recall the witness, in effect to continue its right of cross-examination, subject to the trial court's discretion. The cross-examination right would arise initially when another party that had properly designated the witness called the witness to the stand. Texas Rule of Civil Evidence 611 allows a party to cross-examine a witness "on any matter relevant to any issue in the case, including credibility,"[174] and thus the non-designating party would have the right to full cross-examination after another party called the witness to testify on direct examination. The Task Force agrees with the intent of this suggestion, but at this time does not recommend a change in the rule's language.

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[174] The state rule, of course, differs from Fed. R. Evid. 611, which initially limits cross-examination to "the subject matter of the direct examination and matters affecting the credibility of the witness," though the federal rule also allows the court, in its discretion, to permit inquiry into additional matters.

VII. DISQUALIFICATION OF ATTORNEYS -- PROPOSED RULE 12a

The Task Force proposes a new rule for the disqualification of lawyers, Rule 12a. Professor John F. Sutton, Jr., of the University of Texas Law School, suggested the new rule. The complete text of proposed Rule 12a and the explanatory Comment appear in Appendix C.

Motions to disqualify counsel are a common source of pretrial skirmishing. From the perspective of the attorney who is the target of such a motion, the range of potential, resulting "sanctions" can be costly indeed:

- a time-consuming, expensive (and sometimes uncompensated), and embarrassing (or at least uncomfortable) hearing;
- interjection of a source of potential divisiveness into the attorney-client relationship;
- loss of the client's representation, either temporarily in a particular matter, or permanently if the proceeding sufficiently injures the attorney-client relationship;
- a malpractice or other claim by the client for reimbursement of fees or for other damages associated with the disqualification hearing or prior representation.

The client, of course, may suffer corresponding categories of inconvenience and injury.

Courts disfavor motions to disqualify counsel.[175] The Texas Disciplinary Rules of Professional Conduct recognize that a conflict of interest objection raised by an opposing party "should be viewed with great caution . . . for it can be misused as a technique of harassment."[176] Nonetheless, the reality of current litigation practice is that many such motions are filed -- unfortunately, sometimes groundlessly and for harassment, as a Rambo tactic. Such conduct, of course, is sanctionable under Rule 13, and proposed Rule 12a would not change that result.

Yet despite the sometimes critical importance of such disqualification proceedings for both client and counsel, currently no rules exist setting forth either the substantive or procedural standards for disqualification.[177]

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[175] See, e.g., Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990) ("Disqualification is a severe remedy. . . . The courts must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory trial tactic.").

[176] Supreme Court of Texas, Rules Governing The State Bar of Texas art. X, § 9 (Texas Disciplinary Rules of Professional Conduct) (Vernon Supp. 1992), Rule 1.06 Comment 17; see also Texas Lawyer's Creed -- A Mandate for Professionalism, Art. III.19 (prohibiting a lawyer from seeking "disqualification unless it is necessary for protection of [the] client's lawful objectives or is fully justified by the circumstances").

[177] See, e.g., Texas Disciplinary Rules of Professional Conduct, Rule 3.08 Comments 9, 10 ("Rule 3.08 sets out a disciplinary standard and is not well suited to use as a standard for procedural disqualification. . . . This Rule may furnish some guidance in those procedural disqualification disputes where the party seeking disqualification can demonstrate actual prejudice to itself resulting from the opposing lawyer's service in the dual role. However, it should not be used as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice." (emphasis added)).

Faced with this gap in the rules, courts have referred to the Texas Disciplinary Rules of Professional Conduct "for guidance."[178] Because the Texas Disciplinary Rules of Professional Conduct are exactly that, rules for discipline rather than for disqualification, the guidance provided is often inadequate. Understandably, the disciplinary rules do not take into account all of the costs -- to the litigants, the lawyers, and the judicial system itself -- that result from applying the rules to an ongoing litigation matter to disqualify counsel. Nor, of course, do the disciplinary rules contain notice and hearing requirements or treat other procedural matters that are important for resolving motions to disqualify. For these reasons, a new rule of civil procedure is appropriate to resolve such issues.

Another reason to adopt a rule of civil procedure to deal with attorney disqualification is that the Texas Rules of Civil

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[178] Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 658 (Tex. 1990) ("While this rule [3.08] is not intended as a standard for procedural disqualification, it may provide guidance in those cases in which the movant can demonstrate actual prejudice as a result of the dual roles of lawyer and witness."); Ayres v. Canales, 790 S.W.2d 654, 656 n.2, 658 (Tex. 1990). In federal court, at least in the Fifth Circuit, the most recent decision rejects reliance solely upon the Texas Disciplinary Rules of Professional Conduct. See In re Dresser Indust., Inc., No. 92-2199, 1992 WL 200875, at *3 (5th Cir. 1992) ("The district court clearly erred in holding that . . . the Texas rules, which it adopted, are the 'sole' authority governing a motion to disqualify. Motions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law. . . . When presented with a motion to disqualify . . . we consider the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigants' rights.").

Procedure have proven far easier to amend than are the disciplinary rules. Even what were for the most part minor, technical, corrective amendments to the Texas Disciplinary Rules of Professional Conduct, effected by the Texas Supreme Court's Order of October 23, 1991, were the subject of some controversy.[179] Placing the attorney disqualification provision in the rules of civil procedure will allow the Supreme Court to modify the rule as necessary to adapt to evolving experience of the bench and bar.

At least one member of the Task Force, however, disagrees with the proposed rule. While sympathetic with the plight of attorneys faced with motions to disqualify, and understanding the cumbersome procedure required to amend the Texas Disciplinary Rules of Professional Conduct, this view first expresses concern that the rule of procedure might allow conduct prohibited by the Disciplinary Rules. Second, this viewpoint suggests that the mere existence of proposed Rule 12a might highlight the availability of motions to disqualify, generate

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[179] Justice Doggett observed in his concurring opinion: "A decision to accept the original recommendation that this court use the inherent power doctrine to impose professional conduct standards from the top down rather than from the bottom up through lawyer participation would seriously erode the process that worked so effectively to produce these rules. I write separately because today's action should not be viewed as a precedent by those who may desire to shortcut the referendum process on some future controversial, substantive change in the disciplinary rules. The only statutory authority for this court to promulgate disciplinary rules provides that this be accomplished 'under Section 81.024', the attorney referendum provision." Order for Amendments of the Texas Disciplinary Rules of Professional Conduct (Oct. 23, 1991) (Doggett, J., concurring).

disputes concerning the meaning of the rule, and result in more rather than less disqualification proceedings. Finally, this member finds some of the dual representation allowed by proposed Rule 12a to conflict with widely-accepted norms of professional conduct.

A majority of the Task Force, however, supports Rule 12a as proposed, and concludes that the frequency of this form of pretrial skirmishing (with very serious potential consequences for counsel and clients alike) and the current lack of disqualification standards and procedures militates in favor of adoption of this reasonable effort to balance the interests involved.

The Task Force suggests placing this new rule after Rule 12 and numbering it Rule 12a. Rule 12 also involves the disqualification of attorneys in litigation, setting forth the procedure for challenging an attorney's authority to act for a party.

In summary, proposed Rule 12a has the following organization and basic structure:

- Paragraph (1) makes clear that this rule and Rule 12 govern attorney disqualification.

- Paragraph (2) deals with a situation in which an attorney is representing multiple parties whose interests in the litigation are directly opposing in the pending matter.[180]

  This paragraph also introduces the "taint of trial" concept that continues throughout the rule

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[180] Compare Texas Disciplinary Rules of Professional Conduct, Rule 1.06(a) ("A lawyer shall not represent opposing parties to the same litigation.").

and that is defined in paragraph (15). Thus, while the corresponding provisions in the Texas Disciplinary Rules of Professional Conduct for purposes of discipline simply prohibit an attorney from representing opposing parties in the same litigation, for purposes of disqualification this rule tempers that prohibition by requiring not only that the prohibited conduct be present, but also that "for the attorney to continue to represent the party will taint the fairness of the trial." This allows the trial judge to adopt a more pragmatic perspective in applying conflict of interest rules and related principles in the litigation context, thereby reducing what might otherwise be unnecessary disruption to the litigation process.

- Paragraph (3) deals with a motion by a party who is currently represented by the attorney in another matter or who is a former client of the attorney.[181]

- Paragraph (4) allows intervention by a client or former client of the attorney for the purpose of moving to disqualify the attorney.

- Paragraph (5) sets out a screening procedure for law firms, under which the court may permit another attorney who practices with the disqualified attorney's firm to continue the representation under specified circumstances.

- Paragraph (6) provides for disqualification of an attorney who previously practiced in a firm with an attorney who is subject to disqualification, if the first attorney had obtained certain information protected by the attorney-client evidentiary privilege.

- Paragraph (7) deals with disqualifications arising from successive government and private employment.[182]

- Paragraph (8) deals with disqualifications arising from previous service as an adjudicatory official

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[181] Compare Texas Disciplinary Rules of Professional Conduct, Rule 1.09.

[182] Compare Texas Disciplinary Rules of Professional Conduct, Rule 1.10.

The Task Force recommends repeal of Rule 18a(h). The central purpose of the rule appears to be to allow sanctions for motions to recuse that are, in effect, groundless and in bad faith.[185] Such conduct already is punishable under Rule 13. Further, Rule 18a(h) is unclear, or at least cryptic, in terms of the procedures that apply for the imposition of sanctions. Apparently the determination of the motion to recuse and the imposition of sanctions may occur in the same hearing. The rule is procedurally vague in failing to specify such matters as: what type of hearing is necessary; what type of evidence the court is to consider; whether the movant must initially introduce evidence to show the true purpose of the motion or at least to show that it is not "solely for . . . delay"; what type of order the trial judge must enter; whether the ruling must be in writing or must contain any findings; what classes of persons may be sanctioned (i.e., whether sanction may be imposed against a party or counsel or both); and the meaning of the "sufficient cause" standard.

The Task Force proposal for Rule 13, which incorporates the procedures of Rule 166d, addresses all of those issues and adequately protects against abuse.

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[185] The "without sufficient cause" standard grants more discretion to impose sanctions than does the "groundless" standard. In fact, the "without sufficient cause" standard arguably grants judges too much discretion, allowing the judges to impose sanctions any time a motion to recuse fails (i.e., there was not sufficient cause to prevail). At least, the standard appears too vague. The second part of the standard, referring to "for the purpose of delay," appears to add little, in the context of a motion-to-recuse proceeding, to the bad faith standard of Rule 13.

VIII. OTHER RULES: Tex. R. Civ. P. 18a(h), 21b, 120a, 166a(h), 203, 269(e)

In addition to analyzing the major sanctions issues raised by Rules 13 and 215, the Task force has reviewed the other provisions in the Texas Rules of Civil Procedure that contain sanctions provisions: Tex. R. Civ. P. 18a(h), 21b, 120a, 166a(h), 203, 269(h). Most of those rules contain only brief mention of sanctions in specialized applications that are not directly related to pleadings or discovery sanctions. In accordance with the sentiment expressed in response to the Task Force questionnaire that Texas has too many sanctions rules, the Task Force recommends repeal of the sanctions portions of all of these rules. Most of these provisions add little, if anything, to the sanctions and procedures established by the Task Force's proposals for Rules 13 and 166d. Moreover, these minor sanction rules are rife with procedural ambiguities; reliance upon a consistent set of procedural protections and standards will simplify sanctions practice and eliminate traps for the unwary.

Tex. R. Civ. P. 18a(h): Rule 18a(h) addresses motions to recuse that are "brought solely for the purpose of delay and without sufficient cause." It reads:

> If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).

or as a law clerk to an adjudicatory official.[183]

- Paragraphs (9), (10), (11), and (12) deal with situations arising from an attorney potentially being a witness in the case.[184]

- Paragraph (13) contains a general discretionary provision, allowing the court to deny a motion filed under paragraphs (3) through (10) if the court finds that "in reasonable probability the fairness of the trial will not be tainted."

- Paragraph (14) sets out procedural aspects of motions to disqualify, including: requiring the movant to file such a motion promptly or risk waiver; establishing the burden of persuasion; authorizing an oral hearing on the motion upon written request; specifying the matters that the court may consider in making its determination; and requiring the order granting or denying the motion to state specifically the reasons for the court's decision.

- Paragraph (15) contains definitions, including such matters as: the screening procedures; substantial hardship; substantially related matter; and "taint of trial."

In general, then, proposed Rule 12a adopts a practical approach to attorney disqualification, making fairness and prejudice the touchstones of the analysis. The result gives trial judges substantial discretion in making the disqualification determination.

In the Task Force's view, proposed Rule 12a should provide guidance that has previously been lacking for lawyers and judges, and should reduce the incentive to use disqualification motions as tactical gambits.

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183 Compare Texas Disciplinary Rules of Professional Conduct, Rule 1.11.

184 Compare Texas Disciplinary Rules of Professional Conduct, Rule 3.08.

One possible objection to relying exclusively on Rule 13 as a basis for punishing improper motions to recuse is that Rule 18a(h) is designed to operate under the control of the judge rather than parties; that is, under Rule 18a(h) the judge decides whether to proceed with sanctions, without the necessity of any party's filing a motion. On the other hand, that is one of the problems with the rule: the rule is unclear concerning when and how the judge proceeds from the motion-to-recuse determination to the sanctions determination. Moreover, as discussed above in connection with Rule 166d, eliminating express reference to a sua sponte procedure probably has little or no practical significance; if a judge asks for or invites the filing of a motion for sanctions, the likelihood is very high that one or more parties will file such a motion.[186]

Alternatively, if Rule 18a(h) is not repealed, the Task Force recommends that the rule be amended to incorporate by reference the applicable procedural aspects of proposed Rule 166d.

Rule 21b: Rule 21b specifically addresses sanctions for failure to serve or deliver copies of pleadings or motions. The Task Force recommends repeal of Rule 21b. Again, repeal is consistent with the sentiment expressed in response to the Task Force questionnaire that too many sanctions rules exist.

With the liberalization of service methods under Rules 21 and 21a under the 1990 rule amendments, service is simpler and

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[186] See discussion in Part IV.B.2, above.

should be less of a problem than in the past. Moreover, in almost every instance of improper service, the motion or other instrument will contain a certificate of service, as required under both Rules 21 and 21a.[187] Because Rule 13 applies to any statement contained in any filed document, Rule 13 sanctions should apply to any groundless, bad faith statement in a certificate of service.

Alternatively, if the rule is not repealed, the Task Force recommends that the rule incorporate by reference the applicable procedural aspects of proposed Rule 166d.

Tex. R. Civ. P. 120a: Rule 120a contains an unnecessary cross-reference to Rule 13:

> Should it appear to the satisfaction of the court at any time that any such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

By its terms, this provision adds nothing to Rule 13. Current Rule 13 applies only to papers filed by parties and their attorneys. Thus, this provision in Rule 120a would not apply, for example, to groundless/bad faith Rule 120a affidavits of non-party affiants. The Task Force's proposal for Rule 13 is broader, and would reach such non-party affidavits. Thus this provision is both procedurally redundant and too narrow. The Task Force recommends repeal.

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[187] The certification provision in Rule 21 reads: "The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application." Rule 21a contains similar language.

Rule 166a(h): Rule 166a(h) addresses affidavits filed in bad faith or solely for delay in connection with summary judgment motions. The rule provides:

> Should it appear 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, the court 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.

This provision is identical to, and derived from, current Federal Rule 56(g).

The Task Force recommends repeal of this provision. If the Task Force recommendation is adopted for amending Rule 13 to broaden its application to papers "presented," instead of simply papers "signed," then Rule 13 will apply to affidavits presented in connection with summary judgment motions, and will provide protection against affidavits that are groundless and in bad faith or groundless and for harassment.

Similarly, the current version of the proposed amendments to the Federal Rules of Civil Procedure would repeal Rule 56(g); the federal committee's comment to that proposal concludes that Federal Rule 5b(g) is simply unnecessary in light of the proposed amendments to Federal Rule 11, which also contain the "presentation" proscription.

Rule 166a(h) contains a number of procedural ambiguities, such as: what is meant by the operative standard (i.e., "should it appear to the satisfaction of the court at any time"); whether a hearing is necessary before sanctions are imposed, and

if so, what type of hearing and what evidence the court is to consider; whether the court must enter an order imposing sanctions, and if so, whether the order must contain findings; etc. Thus, if Rule 166a(h) is retained, the Task Force recommends that the rule be amended to incorporate by reference the applicable procedural provisions of proposed Rule 166d.

Rule 203: Rule 203 provides for awards of expenses, including attorney's fees, if a party giving notice of a deposition fails to attend or if a witness fails to attend because of the fault of the party giving the notice.[188]

The Task Force recommends repeal of Rule 203. In cases in which such an award is justified under the current rule, proposed Rule 166d should provide adequate relief. Rule 203 also contains procedural ambiguities similar to those discussed above in connection with the other minor sanctions rules.

Rule 269(e): Rule 269(e) contains a sanctions reference of sorts:

> Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court.

(emphasis added).[189] The Task Force recommends repeal of the underlined language. Courts possess ample contempt power to control the conduct of counsel, and the rule's contempt reference in this one particular instance seems inadvisable and even misleading.

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[188] See Appendix H-6.

[189] The complete text of current Rule 269 appears in Appendix H-8.

IX. INHERENT POWERS

Because of the uncertainties concerning Texas courts' inherent powers to impose sanctions, the Task Force has not recommended, at this time, inclusion of any specific language addressing sanctions imposed under inherent powers. Depending upon how that doctrine develops, however, it may become necessary or desirable to adopt language making clear that the procedures applicable under proposed Rules 13 and 215 also govern sanctions imposed under that doctrine.

In the recent decision in Kutch v. Del Mar College,[190] the court of appeals held that even in cases in which no specific rule creates authority for sanctions, Texas courts "have inherent power to sanction for bad faith conduct." The court observed that the United States Supreme Court had reached a similar conclusion in Chambers v. NASCO,[191] which held that federal district courts have inherent powers to sanction abusive conduct not expressly covered by federal sanctions rules.[192] The court in Kutch stated:

> The power to compel compliance with valid orders incident to the administration of justice is fundamental, and closely related to the core functions of the judiciary. We expressly recognize this power today. Consequently, we hold that Texas Courts have the inherent power to sanction for abuse of the judicial process which may not be covered by rule or statute. This power includes the power to sanction appropriately

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[190] 831 S.W.2d 506 (Tex. App. -- Corpus Christi 1992, no writ).

[191] 111 S. Ct. 2123 (1991).

[192] Kutch v. Del Mar College, 831 S.W.2d 506, 509 (Tex. App. -- Corpus Christi 1992, no writ).

> for failure to comply with a valid court order incident to one of the core functions of the judiciary. . . . [T]he 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. . . . Inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with the traditional core functions of Texas courts.[193]

The Kutch decision relied in part on Mackie v. Koslow's,[194] which held that a "trial court had the power implicit under rule 166 to provide in his pretrial order that the refusal to participate in [a] status conference or the failure to file a timely joint status report would result . . . [in] dismissal, default, or other sanctions."

On the other hand, in an article published before the Kutch decision, one commentator argued that existing rules provide adequate sanction powers and that Texas courts should limit sanctions to those rules and not rely upon inherent powers.[195]

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[193] Id. at 510.

[194] 796 S.W.2d 700, 703 (Tex. 1990). See also Lassiter v. Shavor, 824 S.W.2d 667 (Tex. App. -- Dallas 1992, no writ) ("Courts possess all inherent powers for the enforcement of their lawful orders.").

[195] Kevin Risley, Why Texas Courts Should Not Retain the Inherent Power to Ignore Sanctions, 44 Baylor L. Rev. 253 (1992); cf. Texas Supreme Court, Order for Amendments of the Texas Disciplinary Rules of Professional Conduct (October 23, 1991) (Doggett, J., concurring) (stating that the Texas Supreme Court's "overuse of 'its inherent power' is inherently dangerous"). But see Joint Order of the Texas Supreme Court and the Texas Court of Criminal Appeals, November 7, 1989, adopting the "Texas Lawyer's Creed -- A Mandate for Professionalism": "[C]ompliance with [these] rules depends . . . finally when necessary by enforcement by the courts through their inherent powers and rules already in existence." (emphasis added).

In the absence of a controlling decision by the Texas Supreme Court, the scope and extent of Texas courts' inherent powers in the sanctions context remain uncertain.[196] One commentator has expressed the concern that if such general, inherent powers to sanction are upheld, as the court concluded in Kutch, "there are no objective standards for the imposition -- or appellate review -- of such sanction."[197] In Kutch, however, the court held that certain limitations apply to the inherent power to sanction, including: the need for "some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise" of one of its "core functions"; due process requirements for notice and hearing; and the principles set forth in TransAmerican.[198]

The Task Force recommends that if the Texas Supreme Court determines that the inherent powers doctrine provides an independent and significant basis for sanctions, the rules should be amended to apply to inherent powers sanctions the

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[196] See Risley, supra note 195, at 265. See generally J. D. Page & Doug Sigel, The Inherent and Express Powers to Sanction, 31 S. Tex. L. Rev. 43 (1990).

[197] Risley, supra note 195, at 255.

[198] Kutch v. Del Mar College, et al., 831 S.W.2d 506, 510-11 (Tex. App. -- Corpus Christi 1992, no writ).

procedures and standards recommended by the Task Force under proposed Rule 166d.[199]

X. APPEALS

Discovery sanctions usually are not appealable "until the district court renders a final judgment."[200] The Task Force does not recommend a change in the rules concerning the existing structure of appellate review of sanctions orders. Proposed Rule 166d(5), discussed above,[201] essentially continues the current approach to appeals from sanctions orders.

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[199] Similarly, in light of the United States Supreme Court's decision in Chambers v. NASCO, 111 S. Ct. 2123 (1991), allowing federal courts to rely upon inherent powers to sanction misconduct, Gregory Joseph has recommended amendment of Federal Rule 11 to make clear that its procedural protections apply to any sanctions motion, whatever the basis, and specifically including motions under inherent powers. His proposed amendment to Rule 11 would include this language: "A motion for sanctions under this rule or any other rule, statute, or the inherent power of the court shall be [subject to the rules's specified procedures]." Joseph, supra note 7 at 26-27, 32-33 (Supp. 1992). If the Texas Supreme Court determines that the sanctions rules should address sanctions under inherent powers, that result could be achieved by adding the following language as a separate new paragraph to proposed Rule 166d: "6. Inherent Powers. This rule shall govern motions for sanctions under the inherent powers of the court, and all proceedings related to such motions, including motions that challenge conduct other than discovery violations."

Alternatively, because Rule 166d deals with discovery sanctions and related matters, but inherent power sanctions as defined in Kutch reach non-discovery matters, it might be better or clearer to deal with inherent power sanctions in a separate rule, perhaps entitled "Inherent Powers Sanctions," that incorporates the applicable Rule 166d procedures.

[200] Braden v. Downey, 811 S.W.2d 922, 928 (Tex. 1991) (quoting Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986)).

[201] See Part IV.B.7, above.

As also discussed above, the Supreme Court's decision in Braden somewhat ameliorated the problem of certain sanctions appeals by requiring postponement of the effective date of specified types of orders. The "compliance" provision of proposed Rule 166d(4) incorporates those changes. See discussion in Part IV.B.6 above.

The Task Force recognizes that in response to the questionnaire, lawyers (80%) and judges (58%) agreed that the rules should allow for immediate appeals of "severe sanctions." Additionally, a narrow majority of lawyer respondents (51%) wanted a broader, interlocutory appeal right of any sanctions order, though judges strongly opposed (69%) such a right.

For three reasons, the Task Force does not recommend a further rule change to provide additional appellate review prior to final judgment. First, the Braden procedures incorporated in paragraph (4) of proposed Rule 166d address concerns for appellate review, as do the Supreme Court's holdings in recent cases dealing with mandamus review, discussed below. Second, the Texas Supreme Court has made clear its opposition to a general rule of immediate appellate review: "The judicial system cannot afford immediate review of every discovery sanction."[202] Sanctions often have a severe effect on both lawyer and client, and the broad-based sentiment of practitioners to assure effective and prompt appellate review is completely understandable. Nevertheless, creating an automatic

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[202] Braden v. Downey, 811 S.W.2d 922, 928 (Tex. 1991); accord Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992).

right of immediate appeal of all sanctions orders is neither feasible nor desirable.

Third, creation of an interlocutory appeal right would be difficult. Interlocutory appeals usually require express legislative authorization.[203]

The Task Force recognizes that in creating Rule 76a, concerning sealing court records, the Texas Supreme Court devised by rule amendment a mechanism for immediate appeals, or at least allowed certain appeals at an earlier stage than they would otherwise occur.[204] The procedural device used for Rule 76a was to "deem" that orders sealing or unsealing court records are automatically "severed from the case and a final judgment which may be appealed." Thus, Rule 76a(8) does not create a rule-made right of interlocutory appeal, but rather an automatically severed order, appealable as a final judgment.

In theory perhaps, sanctions orders could be treated in the same manner, that is, deeming them to be automatically severed and therefore final judgments. Traditionally, however, a claim is properly severable if: "(1) the controversy involves more

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[203] Cherokee Water Co. v. Ross, 698 S.W.2d 363, 365 (Tex. 1985) ("[U]nless there is a statute specifically authorizing an interlocutory appeal, the Texas appellate courts have jurisdiction only over final judgments."); Guillory v. Davis, 530 S.W.2d 870, 871 (Tex. Civ. App. -- Beaumont 1975, writ dism'd) ("[T]he rule is well recognized in Texas that an interlocutory order is not appealable unless specifically made so by statute.").

[204] Tex. R. Civ. P. 76a(8) ("Any order (or a portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order.").

than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues."[205] A sanctions issue would appear not to meet the first and second requirements, and in some cases may not meet the third requirement.[206] At least some sealing orders also may not meet the traditional severability requirements, however, so that may not be determinative. In some cases, such as in a suit brought to protect trade secrets, the issues raised in a discovery sanctions proceeding might appear more "independent" from the underlying cause of action than would be true of a sealing/unsealing proceeding in the same case.

Even if a Rule 76a approach were theoretically possible, such a right would add little of value to existing appellate review rights. A Rule 76a appeal is not automatically accelerated. Given the volume of sanctions appeals that inevitably would result, such a right likely would not create any significant benefit for the sanctioned party/appellant.

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[205] Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 1990).

[206] See Cass v. Stephens, 823 S.W.2d 731 (Tex. App. -- El Paso 1992, no writ ("The sanctions imposed are so intertwined with each other and with the claims retained in the main suit as to involve the same facts and issues. Under such circumstances, we hold that a severance of part of the sanctions . . . from the remaining sanctions and from the remaining claims was an abuse of discretion. In the absence of a valid severance, there is no final judgment before us.").

The other mechanism for review of sanctions orders is mandamus, which remains available in at least the three discovery contexts discussed in Walker v. Packer:[207] (1) when the appellate court would not be able to cure the trial court's error (such as when a trial court orders disclosure of privileged material, or compels production of patently irrelevant documents to an extent constituting harassment); (2) when a trial court's discovery error severely compromises a party's ability to present a viable claim or defense at trial (such as a sanctions order striking pleadings, dismissing an action, or granting default judgment); and (3) when the trial court disallows discovery and the missing documents cannot be made part of the appellate record, or the trial court after proper request refuses to make such documents a part of the record, rendering the reviewing court unable to evaluate the effect of the trial court's error on the record court.

The second of those categories effectively allows mandamus review of most severe sanctions orders. Earlier, in Braden,[208] the Court distinguished two prior rulings that refused mandamus review of discovery sanctions on the grounds that the right of appeal was an adequate remedy. In Street v. Second Court of Appeals,[209] the trial court had ordered that a party pay $1050 attorney's fees as discovery sanctions and that

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[207] 827 S.W.2d 833 (Tex. 1992).

[208] 811 S.W.2d 922 (Tex. 1991).

[209] 715 S.W.2d 638 (Tex. 1986).

the party's pleadings would be stricken if payment was not made within four days.[210] In Stringer v. Eleventh Court of Appeals,[211] the trial court had imposed $200 attorney's fees as sanctions. The Braden decision distinguished Street and Stringer, noting that the $10,000 monetary sanction in Braden was payable before any opportunity for supersedeas and appeal and was of such a magnitude as to raise "the real possibility that a party's willingness or ability to continue the litigation will be significantly impaired."

In TransAmerican, the Court held that when a trial judge imposes sanctions that have

> the effect of precluding a decision on the merits of a party's claims -- such as by striking pleadings, dismissing an action, or rendering default judgment -- a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment. If such an order of sanctions is not immediately appealable, the party may seek review of the order by petition for writ of mandamus. Although not every such case will warrant issuance of the extraordinary writ, this case does.[212]

Thus, the proposed rules, combined with currently available mandamus relief, would appear to provide adequate protection in most, if not all, cases of "severe sanctions." To the extent that some commentators feel that a broader appeal right is necessary, either by interlocutory appeal or mandamus, those

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[210] Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991).

[211] 720 S.W.2d 801 (Tex. 1986).

[212] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 920 (Tex. 1991).

remedies appear to require legislative action or further case law development by the Texas Supreme Court.

By comparison, the ABA Standards provide that an order imposing sanctions on a party is appealable after final judgment, but an order imposing sanctions on a non-party is immediately appealable.[213] With respect to non-parties, a provision automatically "deeming" a sanctions order to be severed and a final judgment, similar to the Rule 76a procedure, is perhaps more feasible and would follow the majority rule in federal court under Rule 11.[214] Moreover, a stronger argument can be made that non-parties should not have to wait until the parties resolve the litigation on the merits to challenge a sanctions order. Nevertheless, the interest of avoiding multiple, piecemeal appeals militates in favor of requiring even counsel and non-parties to wait for final judgment appeal of sanctions orders that are not otherwise reviewable by mandamus.

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[213] ABA Standard (P): "1. Parties. An order imposing sanctions upon a party is appealable upon the entry of judgment or a final decision adverse to that party. . . . 2. Non-Parties. An order imposing sanctions on counsel, or any other non-party to the underlying action, may immediately be appealed as a final order." ABA Standards, supra note 7, 121 F.R.D. at 130.

[214] Most federal courts hold that Rule 11 sanctions against counsel and non-parties are immediately appealable under the collateral order doctrine; however, discovery sanctions orders, or at least discovery orders imposing monetary sanctions, generally are not appealable until final judgment. See Joseph, supra note 7, at 303-06, 404, 501-02, 540-42; id. at 250 (Supp. 1992).

XI. LEGAL MALPRACTICE INSURANCE CONSIDERATIONS

The Task Force reviewed several cases that raised issues concerning the applicability of legal malpractice insurance in various sanctions contexts.[215] One court has referred to Federal Rule 11 as a "new form of legal malpractice,"[216] and no doubt many impositions of sanctions result in subsequent legal malpractice claims. Whether a client completely loses a claim or defense as a result of a dismissal or default judgment sanction, or whether the client is subjected to an order requiring payment of expenses or other monetary award, the client may seek to hold the lawyer responsible for the resulting losses. The Task Force recognizes the seriousness of the problem but has no specific recommendations for changes in the rules to respond to the legal malpractice insurance issues.

From the client's perspective, the culpability determination required by TransAmerican provides some relief,[217] in that the trial court must attempt to determine who is at fault, whether "counsel only, or . . . the party only or . . . both."[218] On the other hand, the lawyer against whom monetary sanctions are assessed personally, or who ends up having to reimburse the

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[215] See generally Andrew S. Hanen & Jett Hanna, Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues, 33 S. Tex. L. Rev. 75 (1992).

[216] Hays v. Sony Corp., 847 F.2d 412, 418 (7th Cir. 1988).

[217] See discussion in Part IV.B.5, above.

[218] TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991). Even successful opposition to a sanctions motion, of course, may result in substantial expenses, including attorney's fees, for a prevailing respondent.

client's losses, obviously would prefer to have insurance payment or reimbursement for such expenditures.

One obvious problem in tailoring the rules to address these matters is that legal malpractice insurance policies vary substantially and are subject to rapid change. Typical of the exclusions that appear in some current legal malpractice policies are the following:

> [1.] This policy does not apply to: [A]ny Claim based on or arising out of any fine or court-imposed monetary sanctions of any nature assessed against any Insured or Insured's client.
>
> [2.] This policy does not apply to: [C]laims which seek costs, interest, expenses and/or attorney's fees incurred in litigation based upon or arising out of an actual or alleged violation of Title 28 U.S.C. Sec. 1927, any similar federal or state statute or regulation, an order issued pursuant to any of the foregoing statutes, or otherwise imposed by law.[219]

Clearly these two different examples could have different insurance coverage results in Texas, depending upon the type of sanction imposed. In some instances, whether a court imposes a monetary award sanction or a sanctions order of dismissal or default judgment -- both of which might produce the same ultimate financial cost to the client -- may have very different results for purposes of insurance coverage.[220]

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[219] Hanen & Hanna, supra note 215, at 116.

[220] Whether a sanction arises from bad faith or malicious conduct also may be important under some intentional conduct exclusions. Cf. Hanen & Hanna, supra note 215, at 83-91; see, e.g., O'Connell v. Home Ins. Co., 1990 WL 137386, at *5 (D.D.C. September 8, 1990) ("The Policy is ambiguous as to whether Rule 11 sanctions are excluded from the Policy coverage. This Court does not adopt the view that all Rule 11 sanctions are meant to be punitive, or should be constituted as a fine or penalty."; the (continued...)

Depending on the type of conduct involved, the insurability issue may implicate public policy considerations.[221]

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[220](...continued)
court held that the policy in issue covered the costs sanctions arising from the Rule 11 violation.); Bar Plan v. Campbell, No. 57946, 1991 Mo. App. Lexis 1429 (September 17, 1991) ("[S]anctions may be imposed not only for deliberately wrongful acts but also for negligent conduct. . . . The policy before us is a malpractice policy intended to protect lawyers from the results of their negligent acts while acting in their capacities as attorneys. . . . It is not enough, therefore, to contend that the imposition of sanctions alone is sufficient to preclude coverage."; the court held coverage did not apply, under the applicable exclusion, because the court sanctioned the lawyer for "deliberately wrongful acts").

[221] See Note, Insuring Rule 11 Sanctions, 88 Mich. L. Rev. 344 (1989); Joseph, supra note 7, at 179 (Supp. 1992). As Gregory Joseph has observed, the most obvious, yet simplistic, consideration is that because sanctions are, at least in part, deterrent in nature, insurance perhaps should be foreclosed for the same reason that insuring punitive damages is generally precluded. Joseph, however, suggests five reasons why insuring against Rule 11 awards should not be precluded as a matter of public policy: "First, the principal deterrent effect of the Rule is not financial; it is reputational. Permitting insurance will not have any effect on the primary deterrent impact of the Rule. Second, to the extent that compensation to an injured party is an appropriate, if secondary, purpose of the Rule, permitting insurance will enhance the probability that the injured party receive recompense for out-of-pocket losses it suffers. Third, . . . [p]ermitting insurance to protect vicariously liable lawyers would not appear unfair or conflict with the purpose of Rule 11. Fourth, in the extraordinary case where the financial sanction is astronomically large, a serious question can be raised whether it serves the deterrent purpose of the Rule to bankrupt or to close the practice of an attorney for a Rule 11 violation. . . . Fifth, permitting insurance will raise the cost to all lawyers of practicing law and may thereby induce even careful lawyers to exert further care to avoid Rule 11 exposure." Id. at 179-80.

Some federal court sanctions orders have prohibited reimbursement from employer, client, or insurer. See, e.g., Derechin v. State Univ. of New York, 963 F.2d 513 (2d Cir. 1992); cf. Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 168 (D. Colo 1983) ("[P]ayment . . . shall not be reimbursed directly or indirectly from the funds, assets, or resources of [the defendant] itself"); Heuttig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519 (N.D. Cal. 1984) (ordering (continued...)

Legal malpractice insurance coverage for sanctions appears to be in the financial interest of both lawyers and clients. Nonetheless, because of the wide variety of legal malpractice insurance policies, because of unresolved public policy issues, and because insurance companies might attempt to "write around" any amended rule, the Task Force concludes that rule amendments addressing these issues are not now feasible. At this time, the Task Force simply urges the Texas Supreme Court and all Texas judges to be cognizant of the sometimes very harsh and personal financial reality of large monetary awards or death-penalty sanctions for both lawyers and clients.

XII. CONCLUSION

The Task Force on Sanctions has identified and addressed most, if not all, of the problems that have appeared in Texas sanctions practice during the last few years. The recommendations in this Report, if adopted, will substantially improve sanctions practice by providing simpler, more consistent, and more expeditious procedures, thereby saving time, money, and other resources for clients, lawyers, and courts alike.

On the other hand, these suggestions are no panacea. The best of rules, if misapplied or manipulated, will produce unsatisfactory results. Part of the problem in Texas has been

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[221](...continued)
sanctioned attorneys to certify that the client would not pay the sanction), aff'd, 790 F.2d 1421 (9th Cir. 1986).

the profit incentive created by the prospect of instant, total litigation success for the litigant who successfully lures an opponent into a sanctions trap. The Texas Supreme Court's landmark decision in TransAmerican has done much to undermine that unfortunate trend and to eliminate such unearned prizes.

The specific language and recommendations in this Report are by no means exclusive solutions to the specific sanctions problems addressed. To the contrary, a variety of reasonable alternatives exist, and indeed the Task Force has discussed many of those alternatives above.

In the final analysis, the Task Force also endorses Judge Johnson's plea for judicial tolerance in sanctions practice:

> Attorneys must not be held to unreasonably high standards of practice. The goal of our system of justice is not to perfect a model display of adversarial exchange, but to resolve disputes . . . as quickly and as cheaply as possible, with as little acrimony as possible. . . . Like judges, attorneys make mistakes. Tolerance is required.[222]

The members of the Task Force on Sanctions have appreciated the opportunity to work on this project and stand ready to provide any additional assistance or input that the Texas Supreme Court or the Court's Rules Advisory Committee deem appropriate.

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[222] Johnson, Contois & Keeling, supra note 1, at 675-76.

APPENDICES

The attached copies of the text of the current state and federal rules, and the excerpts from volume 121 of Federal Rules Decisions, are included with the kind permission and express authorization of West Publishing Company.

APPENDIX A

RULE 166d. DISCOVERY VIOLATIONS

RULE 166d. DISCOVERY VIOLATIONS

1. Procedure. If a person or entity fails in whole or in part to respond to or supplement discovery, or abuses the discovery process in seeking or resisting discovery, the court may grant relief as set forth below.

(a) Motion. Any person or entity affected by such failure or abuse may file a motion specifically describing the violation, and may attach any necessary exhibits including affidavits, discovery, pleadings, or other documents. The motion shall be filed in the court in which the action is pending, except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. Motions or responses made under this rule shall be filed and served in accordance with Rules 21 and 21a. Nonparties affected by the motion shall be served as if parties. The motion shall contain the certificate required by Rule 166b(7).

(b) Hearing. Oral hearing is required for motions requesting sanctions under paragraph 3, unless waived by those involved. No oral hearing is required for motions requesting relief provided by paragraph 2. The court shall base its decision upon (i) pleadings, affidavits, stipulations, and discovery results submitted with the motion, (ii) judicial notice taken of the usual and customary expenses including attorney's fees and the contents of the case file, and (iii) testimony if the hearing is oral.

(c) Order. An order under this rule shall be in writing. An order granting relief or imposing sanctions shall be against the party, attorney, law firm, or other person or entity whose actions necessitated the motion. An order imposing sanctions under paragraph 3 of this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (i) the conduct meriting sanctions, (ii) the reasons for the court's decision, (iii) why a lesser sanction would be ineffective, and (iv) if the sanction would preclude a decision on the merits of a party's claim, counterclaim, or defense, the conduct demonstrating that the party or the party's counsel has acted in flagrant bad faith or with callous disregard for the rules.

2. Relief. The court may compel or quash discovery as provided by Rule 166b. In addition, so long as the amount involved is not substantial, the court may award the prevailing person or entity reasonable expenses necessary in connection with the motion, including attorney's fees. The court may presume the usual and customary fee in connection with the motion is not substantial, unless circumstances or an objection suggests such award may preclude access to the courts. An award of expenses that is substantial is governed by paragraph 3(c). If a motion is granted in part and denied in part, the court may apportion expenses in a just manner. The court may enter these orders without any finding of bad faith or negligence, but shall not award expenses if the unsuccessful motion or opposition was

substantially justified, or other circumstances make an award of expenses unjust.

3. Sanctions. In addition to or in lieu of the relief provided above, the court may enter an order imposing one or more of the sanctions set forth below. Any sanction imposed must be just and must be directed to remedying the particular violations involved. A sanction should be no more severe than necessary to satisfy its legitimate purposes.

(a) Reprimanding the offender publicly or privately;

(b) Disallowing further discovery in whole or in part;

(c) Assessing a substantial amount in expenses, including attorney's fees, of discovery or trial;

(d) Deeming certain facts or matters to be established for the purposes of the action;

(e) Barring introduction of evidence supporting or opposing designated claims or defenses;

(f) Striking pleadings or portions thereof; staying further proceedings until an order is obeyed, dismissing with or without prejudice the action or any part thereof, or rendering a default judgment;

(g) Granting the movant a monetary award in addition to or in lieu of actual expenses;

(h) Requiring community service, pro bono legal services, continuing legal education, or other services; or

(i) Entering such other orders as are just.

4. Compliance. Monetary awards pursuant to paragraphs 3(c) or 3(g) shall not be payable prior to final judgment, unless the court makes written findings or oral findings on the record stating why an earlier assessment of the award will not preclude access to the court. Sanctions pursuant to paragraph 3(h) shall be deferred until after an opportunity for appeal after final judgment. Otherwise, orders under this rule shall be operative at such time as directed by the court.

5. Review. An order under this rule shall be deemed to be part of the final judgment, and shall be subject to review on appeal therefrom. Any person or entity affected by the order may appeal in the same manner as a party to the underlying judgment.

COMMENT

New Rule 166d renumbers former Rule 215, which is repealed, to move the rule closer to the general rules for pretrial discovery. The substantive amendments to the rule generally seek to simplify and shorten the rule, to incorporate the principles of TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), and Braden v. Downey, 811 S.W.2d 922 (Tex. 1991), and to establish procedures that reduce the pretrial gamesmanship that developed under the former rule.

Paragraph (1). The first sentence of Rule 166d(1) provides a general prohibition against discovery violations, replacing the several, somewhat confusing, itemized paragraphs of the former rule. The broad prohibition recognizes that any attempt to specify all possible types of discovery misconduct must fail. At the same time, this amendment is not intended to eliminate from the rule's coverage any of the specific categories listed in the former rule, including: failure of an entity party or other deponent to make a designation as required by the rules; failure of a deponent to appear for deposition or to answer deposition questions; failure to serve answers or objections to interrogatories; failure to respond to a request for inspection or production; evasive or incomplete answers to discovery; failure to comply with a person's written request for the person's own statement; failure to obey court orders concerning discovery; abuse of the discovery process in seeking, making, or resisting discovery; submission of interrogatories or requests for inspection or production that are unreasonably frivolous, oppressive, or harassing, or responses or answers that are unreasonably frivolous or made for purposes of delay.

Subparagraph (1)(a) deals with the form, contents, and service of the motion. To ensure adequate notice to the respondent, the rule requires that the motion specifically describe any alleged violation. The requirement that a motion be filed before the court may impose sanctions eliminates the former practice, which allowed the court to impose sanctions sua sponte, even in the absence of a motion. As a practical matter, if a judge observes conduct that constitutes discovery abuse and that is not independently punishable as contempt, the court may simply "invite" or encourage the filing of such motion, and in all probability a person injured by the conduct will file a motion.

Subparagraph (1)(b) requires an oral hearing, unless waived by the persons involved, prior to imposition of sanctions under paragraph (3). The rule does not require the hearing before an award of "non-substantial" expenses under paragraph (2). The final sentence specifies the materials on which a court is to base its decision.

Subparagraph (1)(c) contains the requirements for a court order that either grants relief under paragraph (2) or grants

sanctions under paragraph (3). This provision also contains the distinction between orders that impose non-substantial expenses under paragraph (2), and orders that impose sanctions under paragraph (3). Both types of orders must be in writing. An order imposing sanctions under paragraph (3), however, also must contain written findings or be supported by oral findings on the record. This subparagraph also makes clear that a court may impose sanctions or other relief against a party, attorney, law firm, or other person or entity whose actions necessitated the motion.

Paragraph (2). Paragraph (2) begins by recognizing that discovery violations may be remedied by orders compelling or quashing discovery as provided in Rule 166b. Rule 166d is not intended to change the procedures, standards, or substantive law regarding such orders, and Rule 166b shall control such matters. Paragraph (2) provides a simplified procedure for granting minimum awards of expenses, typically attorney's fees, in connection with such motions. As long as the amount of the award is "not substantial," the oral hearing requirement in paragraph (1)(b), the findings requirement in paragraph (1)(c), and the mandatory delay of compliance until final judgment in paragraph 4 do not apply. These additional safeguards are required, unless waived by agreement, if the amount involved is "substantial" either in absolute terms, or in relative terms taking into account the financial resources of the person or entity liable. If an objection is made contending that a requested monetary sanction would preclude access to the courts, the court must follow the procedures applicable to paragraph 3(c) prior to making any such award.

Paragraph (3). Paragraph (3) itemizes sanctions that the court may enter after following the procedures prescribed in paragraph (1). Paragraph (3) also adopts the principle from TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), that any sanction imposed must be "directed to remedying the particular violations involved, and should be no more severe than necessary to satisfy [the sanction's] legitimate purposes."

The rule continues the requirement that a sanction be "just," which requires that a direct relationship exist between the offensive conduct and the sanction imposed, and that the sanction imposed not be excessive. Id. at 917; Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76, 80 (Oct. 14, 1992).

A trial judge may consider several factors in determining an appropriate sanction, including: (1) the purposes for which sanctions are imposed; (2) the types of sanctions available; (3) the principle that sanction should be no more severe than necessary; (4) mitigating or aggravating factors.

The legitimate purposes that a trial court may consider in awarding sanctions include the following:

(1) specific deterrence of the offending party, or general deterrence of other litigants, from violating the rules;
(2) punishing a party who violates the rules;
(3) securing compliance with the rules; and
(4) compensating, or remedying the prejudice caused to, the innocent party.

See TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-18 (Tex. 1991); Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986); Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76, 80 (Oct. 14, 1992). Depending upon the nature of the case and the violation, as well as the respective roles of parties and counsel, the deterrent, punitive, compliance, or compensatory aspects may have varying importance.

Rule 166d addresses the least-severe-sanction principle of TransAmerican in two places. Paragraph (1)(c) requires as one of the specific findings that a trial court state "why a lesser sanction would be ineffective." Paragraph (3) states that any sanction imposed "should be no more severe than necessary to satisfy its legitimate purposes." Before imposing severe sanctions, the court must consider whether lesser sanctions will fully promote deterrence, punishment, compliance, and remedy of prejudice.

In the case of a "death penalty" sanction that would preclude a decision on the merits of a party's claim, counterclaim or defense, important due process considerations apply. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-18 (Tex. 1991). Accord Chrysler Corp. v. Blackmon, 36 Tex. Sup. Ct. J. 76 (Oct. 14, 1992). Paragraph (1)(c) requires that before a court may impose such sanctions, the court must find that the party or the party's counsel has engaged in conduct demonstrating flagrant bad faith or callous disregard for the rules. Even if such flagrant bad faith or callous disregard is present, lesser sanctions must first be tested to determine whether they are adequate to secure deterrence, punishment, compliance, and remedy of prejudice. Id.

A death penalty sanction should not be used to deny a trial on the merits unless the sanctioned party's conduct justifies a presumption that the party's claims or defenses lack merit and that it would be unjust to permit the party to present the substance of its position. Id.

The nine specific sanctions listed in paragraph (3) of Rule 166d are not intended to change substantially the types of sanctions authorized under former Rule 215. The changes simplify the language and clarify the availability of specific sanctions. Subparagraph (3)(i) also contains a general authorization for "such other orders as are just," to continue the authority for trial courts to exercise creativity in developing sanctions that fit the particular case.

The rule identifies reprimand as the first listed sanction to emphasize the availability of this frequently overlooked alternative, which may range from a "warm friendly discussion on the record" to a "hard-nosed reprimand in open court." Cf. Thomas v. Capital Security Serv., Inc., 836 F.2d 866, 878 (5th Cir. 1988).

Paragraph (3) authorizes two types of monetary sanctions: in subparagraph (c), assessing "a substantial amount" in expenses, including attorney's fees, of discovery or trial; in subparagraph (g), granting the movant a monetary award in addition to or in lieu of actual expenses.

Subparagraph (3)(h) adds specific reference to the availability of sanctions requiring specific performance, either for educational or community service purposes. Cf. Braden v. Downey, 811 S.W.2d 922 (Tex. 1991).

In determining an appropriate sanction, a court may consider a variety of mitigating or aggravating factors, including:

(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) prior history of sanctionable conduct by the offender;
(e) the reasonableness of any expenses incurred by the offended person as a result of the misconduct;
(f) the prejudice 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 culpability;
(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 person, 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) the burdens on the court system attributable to the misconduct, including consumption of judicial time, juror fees, and other court costs;
(m) the degree to which the offended person attempted to mitigate any prejudice suffered;

(n) the degree to which the offended person's own behavior caused any expenses for which recovery is sought;

(o) the extent to which the offender persisted in advancing a position while on notice that the position had no basis in law or fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

Cf. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 921 (Tex. 1991) (Gonzalez, J., concurring); American Bar Association Section of Litigation, Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101, 124 (1988) (Standard (L)(2)).

Paragraph (2) permits a court to award non-substantial reasonable expenses necessary in connection the motion, even without any finding of bad faith or negligence. Although the rule does not create an express willfulness prerequisite to the imposition of sanctions under paragraph (3) -- except for death penalty sanctions -- the offending party's good faith or bad faith is a proper factor to consider in determining the nature and severity of the sanction to be imposed. The absence of willfulness or bad faith, or a lesser degree of negligence, militates in favor of a lesser sanction.

Only rarely should a court consider conduct apart from the case then pending before the court in determining whether to assess sanctions. A prior history of sanctionable conduct is pertinent chiefly in situations in which a lawyer or party has insisted on relitigating the same facts and issues, especially when asserting a previously sanctioned position.

In awarding a monetary sanction, the trial court should attempt to determine the impact on the offender, based upon the offender's ability to pay. Such an assessment is necessary to serve properly two of the underlying purposes of sanctions, to punish violations and to deter future violations.

The court also should exercise care in making the culpability determination required by TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991): "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." The determination of relative culpability may be complex and fact specific, and a conflict of interest may arise between attorney and client, who may have directly opposing financial and other interests, depending upon the outcome of the culpability determination. The trial court should take appropriate steps to minimize as much as possible any intrusion into the attorney-client relationship. In some cases postponing the decision of a sanctions motion, or at least the culpability

determination, may be helpful. The court also should control discovery and evidentiary inquiries concerning sanctions issues to assure that such inquiries do not unnecessarily invade the attorney-client relationship or risk disclosure of privileged information. Protective orders and in camera inspection of privileged materials also may be useful to minimize such disruption.

Paragraph (3) also makes clear that even if the court concludes that a discovery violation has occurred, imposition of sanctions remains discretionary; the court still may determine that sanctions are inappropriate. A clear but minor and insignificant discovery violation may occur, yet the court may conclude that the circumstances do not warrant sanctions.

Paragraph (4). Paragraph (4) sets out the timing for compliance with orders, in accordance with the directives of Braden v. Downey, 811 S.W.2d 922, 929-30 (1991).

Paragraph (5). Paragraph (5) provides that an order under this rule shall be deemed to be part of the final judgment and subject to review on appeal. The rule also permits any person or entity affected by the order to appeal in the same manner as a party to the underlying judgment.

The supplementation provision of former Rule 215(5) has been moved to Rule 166b(6)(d). The rule deletes the language from the former rule concerning the availability of expenses for failure to comply with Rule 169, but comparable relief remains available under the general provisions of paragraphs (2) and (3) of Rule 166d. Other procedural matters from the former rule concerning Rule 169 have been transferred to Rule 169.

APPENDIX B

RULE 13. EFFECT OF PRESENTING PLEADINGS, MOTIONS, AND OTHER PAPERS

RULE 13. EFFECT OF PRESENTING PLEADINGS, MOTIONS, AND OTHER PAPERS

(a) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion, or other paper, an attorney or unrepresented party is certifying that to the best of the presenter's knowledge, information, and belief, formed after reasonable inquiry, the instrument is not groundless and presented in bad faith or groundless and presented for the purpose of harassment.

(b) Courts shall presume that pleadings, motions, and other papers are presented in good faith. "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.

(c) Any party adversely affected by a violation of this rule may file a motion seeking relief or sanctions. The procedure, compliance, and review provisions of Rule 166d shall govern motions and proceedings under this rule, except that motions under this rule shall be served at least twenty-one (21) days before being filed or presented to the court; if the challenged pleading, motion, or other paper is withdrawn or corrected within that twenty-one (21) day period, the motion under this rule shall not be filed or presented to the court.

(d) Upon finding a violation of this rule, the court may award relief and sanctions as provided in Rule 166d(2) and (3).

COMMENT

For clarity, the amendment divides the rule into three paragraphs.

Paragraph (a). This paragraph changes the focus of the rule from signing documents to the more meaningful act of presenting documents, whether by signing, filing, submitting, or advocating. This change makes clear that if a litigant learns that a position ceases to have any merit and is in bad faith or for harassment, the litigant may not thereafter present or otherwise advocate those positions. For example, an attorney who signs a document not knowing that the document is groundless and in bad faith, but who later learns that it is, does not thereafter have immunity under the rule to continue advocating the position before the court. Further, the change makes the rule applicable to

documents that a party or attorney does not personally sign but, in effect, asks the court to rely upon by presenting the documents to the court.

For a violation of this paragraph to occur, the paper presented must be either (1) groundless and in bad faith, or (2) groundless and for harassment. A paper that is merely groundless, but not in bad faith or for harassment, is not sanctionable under this rule.

Courts considering Rule 13 sanctions should take care to assure that sanctions are not used to deter those who pursue nontraditional, unpopular, or political cases, and should exercise appropriate care to avoid punishing or deterring creative advocacy:

> Sometimes there are reasons to sue even when one cannot win. Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge Plessy v. Ferguson was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to Brown v. Board of Education.

Eastway Construction Corp. v. City of New York, 637 F. Supp. 558, 575 (E.D.N.Y. 1986), modified, 821 F.2d 121 (2d Cir.), cert. denied, 484 U.S. 918 (1987).

The amendment deletes the fictitious-suits provision of the former rule, which was unnecessary and rarely used.

Paragraph (b). This paragraph retains the presumption that papers are presented in good faith, and also retains the definition of "groundless."

Paragraph (c). This provision sets out the procedures and remedies for violations of the rule. In general, the rule adopts by reference most of the procedures and remedies from Rule 166d, making practice under these two sanctions rules more consistent.

A party adversely affected by a violation of the rule may file a motion for relief or sanctions. To avoid collateral litigation of sanctions issues that the parties themselves do not deem sufficient or appropriate for contest, the rule omits authority for the trial court to initiate sanctions proceedings sua sponte. As a practical matter, in almost every case in which a trial court encourages an injured party to file such a motion, the party will do so; however, if the parties affected choose not to pursue such sanctions, whether as part of settlement or for other reasons, that decision will control.

To make Texas sanctions practice more consistent, and to adopt the salutary procedural protections specified by the Texas

Supreme Court for discovery sanctions, the rule generally incorporates the procedure, compliance, and review provisions of Rule 166d. See the Comment to Rule 166d concerning those provisions. Thus, except for differences expressly stated in the rules, those provisions of Rule 166d apply to and control practice under this rule.

The amendment creates a "safe harbor" provision, so that a motion under this rule must be served at least twenty-one (21) days before being filed or presented. A motion presented before the expiration of the twenty-one (21) days should be denied. This procedure provides the respondent with an opportunity to amend or withdraw the offending paper and thereby to avoid sanctions or other relief.

The certificate of conference requirement of Rule 166d(1)(a) also applies to Rule 13 motions.

Paragraph (d). The last paragraph of Rule 13 authorizes the relief and sanctions provided in Rule 166d(2) and (3). This provision also makes the award of relief or sanctions discretionary with the trial court -- changing the previous mandatory language ("shall impose") to permissive ("may award") -- so that the trial court may choose not to award relief or sanctions even if a technical violation of the rule occurs.

APPENDIX C

RULE 12a. DISQUALIFICATION OF ATTORNEY

RULE 12a. DISQUALIFICATION OF ATTORNEY

(1) An attorney representing a party may be disqualified by the court from further representation of the party only pursuant to this Rule or Rule 12.

(2) The court on its own motion may disqualify an attorney from further representation of a party if the court finds that:

(a) in the pending matter the attorney is representing more than one party whose interests in the litigation are directly opposing; and

(b) for the attorney to continue to represent the party will taint the fairness of the trial.

(3) On motion by a party who is a former client of an attorney or who is currently represented by an attorney in another matter, the court in its discretion may disqualify that attorney from further representation of another party in a pending matter upon a showing that:

(a) the interests of the other party being represented by the attorney in the pending matter are materially and directly adverse to the interests of the movant in a substantially related matter in which the attorney represents or represented the movant; or

(b) while representing the movant, the attorney acquired information protected by the attorney-client evidentiary privilege that in reasonable probability could be used in the pending matter to the disadvantage of movant; in the court's discretion such showing of which may be made in an in camera hearing or by in camera consideration of affidavit evidence; or

(c) the representation by the attorney of such other party in the pending matter in reasonable probability will have an adverse effect upon the representation of movant's interests in the other matter in which the attorney represents the movant; or

(d) the representation by the attorney of such other party in the pending matter constitutes a direct attack upon the work product attained for movant in the other matter in which the attorney represented the movant.

(4) A person who is not a party to the pending matter but who is a client or former client of an attorney who is representing a party in the pending matter may intervene for the purpose of moving to disqualify the attorney on one or more of the grounds specified in paragraph (3).

(5) In the event an attorney is held by the court to be disqualified pursuant to paragraph (3) of this rule, the court in its discretion may permit another attorney who practices with the firm of the disqualified attorney, or who is similarly associated in law practice with the disqualified attorney, to continue the representation of one or more of the parties if the court finds that:

(a) such representation will not taint the fairness of the trial;

(b) the disqualified attorney has been satisfactorily screened;

(c) knowing consent to the continuation of the representation is given by the party or parties whose representation is permitted to continue; and

(d) continuation of the presentation will not materially and adversely affect the interests of the movant.

(6) An attorney who previously had practiced in a firm with an attorney who is subject to disqualification ("disqualified attorney") under paragraphs (3) or (4) of this rule is also subject to disqualification under those paragraphs even though the attorney has not personally represented movant if the attorney is shown to have acquired from the disqualified attorney, from the disqualified attorney's firm, or from movant information protected by the attorney-client evidentiary privilege that in reasonable probability could be used to the disadvantage of movant in the litigation.

(7) Upon motion by a party, or motion by an interested person who intervenes, or upon the court's own motion, an attorney may be disqualified from representing a client in a pending matter if that attorney is prohibited from representing that client under Rule 1.10 of the Texas Disciplinary Rules of Professional Conduct regarding successive government and private employment. If the court disqualifies an attorney under this paragraph, the court in its discretion may permit another attorney who practices with the firm of the disqualified attorney, or who is similarly associated in law practice with the disqualified attorney, to continue the representation of one or more of the parties if the court finds that the representation will not taint the fairness of the trial and that the disqualified attorney has been satisfactorily screened.

(8) Upon motion by an opposing party or upon the court's own motion, the court in its discretion may disqualify an attorney from further representation of a party in a pending matter when it appears that the attorney while serving previously as a law clerk to an adjudicatory official or as a judge, magistrate,

hearing officer, master, arbitrator, or other adjudicatory official acted personally and substantially as a law clerk or in a judicial capacity concerning the matter now before the court. If the court disqualifies an attorney under this paragraph, the court in its discretion may permit another attorney who practices with the firm of the disqualified attorney, or who is similarly associated in law practice with the disqualified attorney, to continue the representation of one or more of the parties if the court finds that the representation will not taint the fairness of the trial and that the disqualified attorney has been satisfactorily screened.

(9) Subject to the provisions of paragraphs (11) and (12), upon motion by any party to the pending matter, the court may disqualify an attorney from further representation of his or her client or clients in the matter upon a showing that:

(a) the attorney will be or is likely to be a witness necessary to establish an essential fact on behalf of the attorney's client; and

(b) the prejudice, if any, that will result to movant if the attorney is not disqualified substantially outweighs the prejudice to the attorney's client if the attorney is not allowed to continue the representation.

(10) Subject to the provisions of paragraphs (11) and (12), upon motion by any party to the pending matter, the court may disqualify an attorney from further representation of his or her client or clients in the matter upon a showing that:

(a) movant in good faith will call the attorney as a necessary witness to a material fact substantially adverse to the attorney's client; and

(b) the prejudice, if any, that will result to movant if the attorney is not disqualified substantially outweighs the prejudice to the attorney's client if the attorney is not allowed to continue the representation.

(11) An attorney is not subject to disqualification under paragraphs (9) or (10) if it reasonably appears that:

(a) the testimony relates to an uncontested issue;

(b) the testimony on behalf of attorney's client will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(c) the testimony relates to the nature and value of legal services rendered in the case;

(d) the attorney is a party to the action and is appearing pro se;

(e) the attorney has promptly notified opposing counsel that the attorney expects to testify in the matter and disqualification would work substantial hardship on the attorney's client, unless movant after receiving notification promptly demonstrates to the court by clear and convincing evidence that movant will sustain actual prejudice if the attorney is not disqualified; or

(f) the movant under paragraph (10) failed to promptly notify the attorney whose disqualification is sought of movant's intent in good faith to call the attorney as a necessary witness to a material fact substantially adverse to the attorney's client.

(12) An attorney disqualified in accordance with paragraphs (9) or (10) may continue to represent the client except as an active advocate before the tribunal in the presentation of the pending matter. The disqualification of an attorney under paragraphs (9) or (10) does not disqualify other attorneys who are partners or associates of the disqualified attorney.

(13) In exercising its discretion, the court may deny a motion filed under paragraphs (3) through (10) if the court finds that in reasonable probability the fairness of the trial will not be tainted by the continued representation.

(14) A motion for disqualification shall be made promptly when the movant knows, or should have known, of the facts supporting the motion. Failure to file a motion promptly will constitute waiver. The motion for disqualification shall state the specific grounds therefor. Except as otherwise stated in this rule, movant has the burden of persuasion by a preponderance of the evidence. Upon written request by movant, any party, or any attorney to the proceeding, served in accordance with Rules 21 and 21a, the court shall conduct an oral hearing on the motion. The court shall make its determination based upon the pleadings, stipulations, affidavits, attachments, and the results of the discovery processes, on file, and any oral testimony. The order granting or denying the motion shall state with specificity the reasons for the court's decision.

(15) Definitions:

(a) "Screen" means that the attorney in question and the attorney's firm isolate the attorney to the extent that the attorney will not come in contact with files regarding the matter, will not give or receive any relevant or material information regarding the matters in question, will not receive any fee or remuneration in connection with the

pending matter, and will not participate in any manner in the representation in the pending matter.

(b) "Information Protected by the Attorney-client Evidentiary Privilege" is information protected by the rule of privilege set forth in Rule 503 of the Texas Rules of Civil Evidence or in Rule 503 of the Texas Rules of Criminal Evidence, or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates.

(c) "Private practice" refers to the practice of law by an attorney in any manner other than as a government attorney, a public officer, or an employee of a government agency.

(d) "Substantial hardship" refers to an adverse effect that is both material and important to a meaningful degree.

(e) Substantially Related Matter: A matter is "substantially related" to another matter when it appears that the two matters are so closely related factually that factual information regarding one of the matters will be of material importance or consequence in the other matter. "Matter" contemplates a discrete and isolable transaction or set of transactions between identifiable parties. A superficial resemblance between facts or issues is not sufficient to constitute a substantial relationship, and facts, common to the two matters, that are publicly known do not constitute a substantial relationship.

(f) Taint of Trial: The fairness of a trial is not tainted by the possibility that an attorney's independent professional judgment might not be exercised solely for the benefit of the client being represented. The fairness of a trial is tainted if:

(i) information protected by the attorney-client evidentiary privilege is likely to be used to the material disadvantage of a client or a former client;

(ii) movant is likely to be substantially prejudiced in the course of the trial by failure to disqualify the attorney; or

(iii) the continued participation in the trial by the attorney whose disqualification is sought is likely to adversely affect legal services previously rendered to movant.

COMMENT

New Rule 12a deals with disqualification of attorneys. The rule provides specific procedures and standards to govern such disqualification proceedings. Texas attorneys remain subject to the Texas Disciplinary Rules of Professional Conduct for disciplinary purposes, and this rule is not intended to vary the meaning, effect, or application of those rules in the disciplinary context.

Courts disfavor motions to disqualify counsel. Sharp v. Broadway Nat'l Bank, 784 S.W.2d 669, 671 (Tex. 1990). "Disqualification is a severe remedy. . . . The courts must adhere to an exacting standard when considering motions to disqualify so as to discourage their use as a dilatory tactic." Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 656 (Tex. 1990).

In considering motions to disqualify, courts sometimes have referred to the Texas Disciplinary Rules of Professional Conduct "for guidance," while recognizing that those rules are intended for disciplinary purposes, not disqualification. See Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 658 (Tex. 1990); Ayres v. Canales, 790 S.W.2d 654, 656 n.2, 658 (Tex. 1990); Texas Disciplinary Rules of Professional Conduct, Rule 3.08 Comments 9, 10. While Rule 12a now governs disqualification proceedings, the Texas Disciplinary Rules of Professional Conduct continue to apply and control for purposes of lawyer discipline.

Because a motion to disqualify presented by an opposing party can be misused as a form of harassment, Rule 12a guards against misuse, particularly by giving the trial judge considerable discretion in determining such motions and, under paragraph (13), in denying such motions if the court finds that in reasonable probability the fairness of the trial will not be tainted by the continued representation. A motion for disqualification that is groundless and in bad faith or groundless and for harassment is sanctionable under Rule 13.

Paragraph (1) of the rule makes clear that this rule and Rule 12 -- which provides a procedure for a challenged attorney to show authority to prosecute or defend a suit -- govern attorney disqualification.

Paragraph (2) deals with a situation in which an attorney represents multiple parties whose interests in the litigation are directly opposing.

Paragraph (3) deals with a motion by a party who is currently represented by an attorney in another matter or who is a former client of the attorney, and paragraph (4) allows intervention by such client or former client for the purpose of moving to disqualify the attorney.

Paragraph (5) provides discretion for the court, in the event the court disqualifies an attorney under paragraphs (2) or (3), to permit another attorney who is in the same firm, or who is similarly associated with the disqualified attorney, to continue the representation if specified conditions are met.

Paragraph (6) provides for disqualification of an attorney who previously practiced in a firm with an attorney who is subject to disqualification, if the first attorney obtained certain information protected by the attorney-client evidentiary privilege.

Paragraph (7) deals with disqualification arising from successive government and private employment, and paragraph (8) deals with disqualification arising from previous service as an adjudicatory official or as a law clerk to an adjudicatory official.

Paragraphs (9), (10), (11), and (12) deal with situations arising from an attorney potentially being a witness in the case.

Paragraph (14) sets out procedural aspects of motions to disqualify, including: requiring the movant to file such a motion promptly or risk waiver; the burden of persuasion; authorizing an oral hearing on the motion upon written request; specifying the matters that the court may consider in making its determination; and requiring that the order granting or denying the motion state specifically the reasons for the court's decision.

Paragraph (15) sets out the definitions of terms used in the rule.

APPENDIX D

RULE 166b(6)(b)

b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, at least thirty (30) days prior to the beginning of trial except on leave of court.

COMMENT

The amendment requires that supplementation of the information concerning expert witnesses be made at least thirty (30) days before trial, except on leave of court, and eliminates the former provision's additional, confusing reference to supplementation "as soon as is practical."

APPENDIX E

RULE 166b(6)(e)

RULE 166b(6)(e)

Notwithstanding any other rule of supplementation, any witness that has been deposed and identified in discovery responses by a party dismissed from the lawsuit within thirty (30) days prior to the beginning of trial may be timely designated by any other party within seven (7) days of notice of such dismissal.

APPENDIX F

RULE 166b(6)(d)

Unless the court makes a finding of good cause, a party who fails to make or supplement a discovery response shall not be entitled to present evidence that the party was under a duty to provide, or to offer the testimony of a witness, other than a named party, who has not been properly designated. The burden of establishing good cause is upon the party offering the evidence or witness, and good cause must be shown in the record. Notwithstanding the foregoing, the court may, in its discretion, grant a continuance to allow a response to be made or supplemented, and may condition such continuance upon payment of expenses related thereto by the party requesting the continuance or other orders pursuant to Rule 166d.

COMMENT

The amendment transfers from former Rule 215(5) to this rule the provision dealing with effect of failing to respond to or supplement discovery. The new provision permits the trial court -- as an alternative to complete exclusion of evidence or testimony not properly identified or supplemented -- to grant a continuance or other relief provided by Rule 166d. Cf. Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911 (Tex. 1992).

Among the factors that the court may consider in determining whether good cause exists for admission of evidence not properly provided or supplemented in discovery are the following:

(1) the existence or absence of surprise to the opponent;
(2) the existence or absence of prejudice to the opponent, including delay or expense;
(3) the good faith of counsel or the party in attempting to supplement; and
(4) the importance of the undisclosed evidence or witnesses to the proponent's case.

See Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989); Alvarado v. Farah Mfg. Co., Inc., 830 S.W.2d 911, 915-16 (Tex. 1992); see also Smith v. Southwest Feed Yards, 835 S.W.2d 89, 91 (Tex. 1992). The mere fact that the court may find that evidence exists establishing one or more of these factors does not necessarily compel a finding of good cause. These are proper factors for the court to consider, but the court has the discretion to determine what weight to give the factors in a particular case. Nor is this list exclusive of other factors that a court might consider.

The amended rule also exempts from the exclusion provision a party to the litigation. The party exemption applies to named parties; it is not intended to extend to corporate representatives who are not named parties or to unnamed members

APPENDIX G-1

RULE 18a(h)

RULE 18a(h)

The Task Force recommends repeal of paragraph (h) of Rule 18a.

APPENDIX G-2

RULE 21b

RULE 21b

The Task Force recommends repeal of this rule.

APPENDIX G-3

RULE 120a

The Task Force recommends repeal of the following language in Rule 120a:

> Should it appear to the satisfaction of the court at any time that any such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

APPENDIX G-4

RULE 166a(h)

RULE 166a(h)

The Task Force recommends repeal of paragraph (h) of Rule 166a.

APPENDIX G-5

RULE 169. REQUESTS FOR ADMISSION

RULE 169. REQUESTS FOR ADMISSION

1. Request for Admission. At any time after commencement of the action, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 166b set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including genuineness of any documents described in the request. Copies of the documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Whenever a party is represented by an attorney of record, service of a request for admissions shall be made on his attorney unless service on the party himself is ordered by the court. A true copy of a request for admission or of a written answer or objection, together with proof of the service thereof as provided in Rule 21a, shall be filed promptly in the clerk's office by the party making it.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted without necessity of a court order unless, within thirty days after the service of the request, or within such time as the court may allow, or as otherwise agreed by the parties, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of fifty days after the service of the citation and petition upon that defendant. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or easily obtainable by him is sufficient to enable him to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 166d, deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admission may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall

APPENDIX G-6

RULE 203

RULE 203

The Task Force recommends repeal of this rule.

APPENDIX G-7

RULE 269(e)

Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided.

COMMENT

The amendment deletes the unnecessary reference to the court's contempt power.

APPENDIX H-1

RULE 18a(h)

certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

(h) If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, that the motion to recuse is brought solely for the purpose of delay and without sufficient cause, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).

(Added June 10, 1980, eff. Jan. 1, 1981; amended Dec. 5, 1983, eff. April 1, 1984; April 10, 1986, eff. Sept. 1, 1986; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

This is a new rule.

Change by amendment effective April 1, 1984: Section (a) is changed textually.

Comment: The words "the Court of Criminal Appeals" have been added in (a); and subsection "1" has been added to (g).

RULE 18b. GROUNDS FOR DISQUALIFICATION AND RECUSAL OF JUDGES

(1) **Disqualification.** Judges shall disqualify themselves in all proceedings in which:

(a) they have served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; or

(b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or

(c) either of the parties may be related to them by affinity or consanguinity within the third degree.

(2) **Recusal.** A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;

(d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;

(e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

(g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(3) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(4) In this rule:

(a) "proceeding" includes pretrial, trial, or other stages of litigation;

(b) the degree of relationship is calculated according to the civil law system;

(c) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a rela-

APPENDIX H-2

RULE 21b

The party or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application.

After one copy is served on a party that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.

(Amended Sept. 20, 1941, eff. Dec. 31, 1941; Aug. 18, 1947, eff. Dec. 31, 1947; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Art. 2291.

Change by amendment effective January 1, 1978: The phrase, "if it relates to a pending suit." was deleted from the end of the first sentence. The phrase, "If the motion does not relate to a pending suit," was deleted from the beginning of the second sentence.

Change by amendment effective January 1, 1981: The rule is broadened to encompass matters other than motions and to require three-day notice unless the period is shortened.

Comment to 1990 change: To require filing and service of all pleadings and motions on all parties and to consolidate notice and service Rules 21, 72 and 73.

RULE 21a. METHODS OF SERVICE

Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the court in its discretion may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail or by telephonic document transfer, three days shall be added to the prescribed period. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

(Added Aug. 18, 1947, eff. Dec. 31, 1947; amended July 21, 1970, eff. Jan. 1, 1971; Oct. 3, 1972, eff. Feb. 1, 1973; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Note: Adopted as a new rule effective December 31, 1947.

Change by amendment effective January 1, 1971: The second and third sentences have been added to make service by mail complete upon proper deposit in the mail and to enlarge the time for acting after service by mail; the sentence formerly providing for notice of a motion by filing and entry on the motion docket has been eliminated.

Change by amendment effective February 1, 1973: The words "Postal Service" have been substituted for "Post Office Department" and a sentence has been inserted authorizing the court to grant an extension of time or other relief upon finding that a notice or document was not received or, if service was by mail, was not received within three days from the date of deposit in the mail.

Change by amendment effective January 1, 1978: The phrase "not relating to a pending suit" in the next to last sentence is deleted.

Change by amendment effective January 1, 1981: The next to last sentence from the end of the former rule requiring three-day notice is deleted, because Rule 21 is concurrently amended to require that notice.

Change by amendment effective April 1, 1984: This rule consolidates Rules 21a and 21b.

Comment to 1990 change: To allow for service by current delivery means and technologies.

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.

(Added April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: New rule. Repealed provisions of Rule 73, to the extent same are to remain operative, are moved to this new Rule 21b to provide sanctions for the failure to serve any filed documents on all parties.

RULE 21c. [REPEALED]

(Repealed April 10, 1986, eff. Sept. 1, 1986.)

SECTION 2. INSTITUTION OF SUIT

RULE 22. COMMENCED BY PETITION

A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk.

Notes and Comments

Source: Art. 1971, with minor textual change.

RULE 23. SUITS TO BE NUMBERED CONSECUTIVELY

It shall be the duty of the clerk to designate the suits by regular consecutive numbers, called file numbers, and he shall mark on each paper in every case the file number of the cause.

Notes and Comments

Source: Texas Rule 82 (for District and County Courts).

RULE 24. DUTY OF CLERK

When a petition is filed with the clerk he shall indorse thereon the file number, the day on which it was filed and the time of filing, and sign his name officially thereto.

Notes and Comments

Source: Art. 1972.

RULE 25. CLERK'S FILE DOCKET

Each clerk shall keep a file docket which shall show in convenient form the number of the suit, the names of the attorneys, the names of the parties to the suit, and the nature thereof, and, in brief form, the officer's return on the process, and all subsequent proceedings had in the case with the dates thereof.

Notes and Comments

Source: Art. 1973.

RULE 26. CLERK'S COURT DOCKET

Each clerk shall also keep a court docket in a permanent record that shall include the number of the case and the names of the parties, the names of the attorneys, the nature of the action, the pleas, the motions, and the ruling of the court as made.

(Amended April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Texas Rule 79 (for District and County Courts), with minor textual change.

RULE 27. ORDER OF CASES

The cases shall be placed on the docket as they are filed.

Notes and Comments

Source: Texas Rule 80 (for District and County Courts).

SECTION 3. PARTIES TO SUITS

RULE 28. SUITS IN ASSUMED NAME

Any partnership, unincorporated association, private corporation, or individual doing business under an assumed name may sue or be sued in its partnership, assumed or common name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted.

(Amended July 21, 1970, eff. Jan. 1, 1971.)

Notes and Comments

Source: Part of Federal Rule 17(b).

Change: Addition of "an individual doing business under an assumed name," and partnership or common name.

Change by amendment effective January 1, 1971: Language has been added to make the rule applicable to a private corporation and authorize the true name of the party to be substituted on motion.

RULE 29. SUIT ON CLAIM AGAINST DISSOLVED CORPORATION

When no receiver has been appointed for a corporation which has dissolved, suit may be instituted on any claim against said corporation as though the

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RULE 120a

RULE 120. ENTERING APPEARANCE

The defendant may, in person, or by attorney, or by his duly authorized agent, enter an appearance in open court. Such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if the citation had been duly issued and served as provided by law.

Notes and Comments

Source: Art. 2046, unchanged.

RULE 120a. SPECIAL APPEARANCE

1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

4. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

(Added April 12, 1962, eff. Sept. 1, 1962; amended July 22, 1975, eff. Jan. 1, 1976; June 15, 1983, eff. Sept. 1, 1983; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Note: This is a new rule, effective September 1, 1962.

Change by amendment effective January 1, 1976: Words are added in the third sentence which permit amendments to the special appearance motion.

Change by amendment effective September 1, 1983: To conform to S.B. 898, 68th Legislature, 1983.

Comment to 1990 change: To provide for proof by affidavit at special appearance hearings, with safeguards to responding parties. These amendments preserve Texas prior practice to place the burden of proof on the party contesting jurisdiction.

RULE 121. ANSWER IS APPEARANCE

An answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him.

Notes and Comments

Source: R.C.S. Art. 2047, unchanged.

RULE 122. CONSTRUCTIVE APPEARANCE

If the citation or service thereof is quashed on motion of the defendant, such defendant shall be deemed to have entered his appearance at ten o'clock a.m. on the Monday next after the expiration of twenty (20) days after the day on which the citation or service is quashed, and such defendant shall be deemed to have been duly served so as to require him to appear and answer at that time, and if he fails to do so, judgment by default may be rendered against him.

Notes and Comments

Source: R.C.S. Articles 2048 and 2093, Sec. 8.

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RULE 166a(h)

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits Made in Bad Faith. Should it appear 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, the court 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.

(Added Oct. 12, 1949, eff. March 1, 1950; amended Oct. 1, 1951, eff. March 1, 1952; July 20, 1966, eff. Jan. 1, 1967; July 21, 1970, eff. Jan. 1, 1971; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Note: Adopted as a new rule effective March 1, 1950.

Source: Federal Rule 56, as originally promulgated, except that the following wording in subdivision (a) has been eliminated: "pleading in answer thereto has been served"; and in its place the following language has been substituted: "adverse party has appeared or answered."

Change by amendment effective March 1, 1952: The last sentence is added to paragraph (a).

Change by amendment effective January 1, 1967: Fourth sentence of paragraph (c) was added.

Change by amendment effective January 1, 1971: The first sentence of paragraph (c) has been added, and the words "answers to interrogatories" have been inserted in the fifth sentence of paragraph (c).

Change by amendment effective January 1, 1978: The time requirements in (c) are changed. The third, fourth, and fifth sentences of (c) are new. The last sentence of (e) is new.

Change by amendment effective January 1, 1981: The second sentence adds the words "with notice to opposing counsel," "and any supporting affidavits," and "filed and." Third sentence adds the words, "file and."

Change by amendment effective April 1, 1984: Section (c) is changed to include stipulations and authenticated and certified public records as matters in support of a summary judgment.

Comment to 1990 change: This amendment provides a mechanism for using previously non-filed discovery in summary judgment practice. Such proofs must all be filed in advance of the hearing in accordance with Rule 166a. Paragraphs (d) through (g) are renumbered (e) through (h).

RULE 166b. FORMS AND SCOPE OF DISCOVERY; PROTECTIVE ORDERS; SUPPLEMENTATION OF RESPONSES

1. Forms of Discovery. Permissible forms of discovery are (a) oral or written depositions of any party or non-party, (b) written interrogatories to a party, (c) requests of a party for admission of facts and the genuineness or identity of documents or things, (d) requests and motions for production, examination, and copying of documents or other tangible materials, (e) requests and motions for entry upon and examination of real property and (f) motions for a mental or physical examination of a party or person under the legal control of a party.

2. Scope of Discovery. Except as provided in paragraph 3 of this rule, unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

a. *In General.* Parties may obtain discovery regarding any matter which is relevant to the subject matter in the pending action whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. It is also not ground for objection that an interrogatory propounded pursuant to Rule 168 involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time. It is also not ground for objection that a request for admission propounded pursuant to Rule 169 relates to statements or opinions of fact or of the application of law to fact or mixed questions of law and fact or that the documents referred to in a request may not be admissible at trial.

b. *Documents and Tangible Things.* A party may obtain discovery of the existence, description, nature, custody, condition, location and contents of any and all documents, (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, and any other data compilations from which information can be

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RULE 166b(6)

paragraph 2, a party seeking to exclude any matter from discovery on the basis of an exemption or immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon and at or prior to any hearing shall produce any evidence necessary to support such claim either in the form of affidavits served at least seven days before the hearing or by testimony. If the trial court determines that an in camera inspection and review by the court of some or all of the requested discovery is necessary, the objecting party must segregate and produce the discovery to the court in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained. When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct an inspection and review of the particular discovery before ruling on the objection. After the date on which answers are to be served, objections are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period.

5. **Protective Orders.** On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents. Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:

a. ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

b. ordering that the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court.

c. ordering that for good cause shown results of discovery be sealed or otherwise adequately protected, that its distribution be limited, or that its disclosure be restricted. Any order under this subparagraph 5(c) shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule.

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:

(1) he knows that the response was incorrect or incomplete when made;

(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; or

b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court.

c. In addition, a duty to supplement answers may be imposed by order of the court or agreement of the parties, or at any time prior to trial through new requests for supplementation of prior answers.

7. **Discovery Motions.** All discovery motions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed.

(Added Dec. 5, 1983, eff. April 1, 1984; amended July 15 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990 Sept. 4, 1990, eff. retroactively to Sept. 1, 1990.)

Notes and Comments

This is a new rule effective April 1, 1984.

This new rule combines all scope of discovery concept into one rule. It incorporates provisions previously located in Rules 167, 186a and 186b.

In the provisions concerning production of documents o tangible things for inspection contained in new Rule 166b possession, custody or control is defined in terms of "superior right to compel" from a third party; the existence and contents of settlement agreements are mad discoverable; the rule validates the use of interrogatorie and admissions that involve the application of law to fac or so-called mixed questions by providing that they are no objectionable on that basis; the rule contains a redraft o the medical authorization provisions of former Rule 16 seeks to clarify rules concerning experts and their report

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RULE 203

dence at a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings, without leave of court, and the non-stenographic recording may be presented at trial in lieu of reading from a stenographic transcription of the deposition, subject to the following rules:

a. Any party intending to make a non-stenographic recording shall give five days' notice to all other parties by certified mail, return receipt requested, and shall specify in said notice the type of non-stenographic recording which will be used.

b. After the notice is given, any party may make a motion for relief under Rule 166b. If a hearing is not held prior to the taking of the deposition, the non-stenographic recording shall be made subject to the court's ruling at a later time.

c. Any party shall have reasonable access to the original recording and may obtain a duplicate copy at his own expense.

d. The expense of a non-stenographic recording shall not be taxed as costs, unless before the deposition is taken, the parties so agree, or the court so orders on motion and notice.

e. The non-stenographic recording shall not dispense with the requirement of a stenographic transcription of the deposition unless the court shall so order on motion and notice before the deposition is taken, and such order shall also make such provision concerning the manner of taking, preserving and filing the non-stenographic recording as may be necessary to assure that the recorded testimony will be intelligible, accurate and trustworthy. Such order shall not prevent any party from having a stenographic transcription made at his own expense. In the event of an appeal, the non-stenographic recording shall be reduced to writing.

2. Deposition by Telephone. The parties may stipulate in writing, or the court may upon motion order, that a deposition be taken by telephone. For the purposes of this rule and Rules 201, 215–1a and 215–2a, a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him.

(Added Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

This is a new rule effective April 1, 1984: This combines former Rule 215c with new deposition by telephone material that was taken from Federal Rule 30(b)(7).

RULE 203. FAILURE OF PARTY OR WITNESS TO ATTEND OR TO SERVE SUBPOENA; EXPENSES

1. 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 to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

2. 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 to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

(Added Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

This is a new rule effective April 1, 1984. This is former Rule 215b with modification.

RULE 204. EXAMINATION, CROSS-EXAMINATION AND OBJECTIONS

1. Written Cross-Questions on Oral Examination. At any time before the expiration of ten days from the date of the service of the notice provided for in Rule 200, any party, in lieu of participating in the oral examination may serve written questions on the party proposing to take the deposition who shall cause them to be transmitted to the officer authorized to take the deposition who shall propound them to the witness and record the answers verbatim.

2. Oath. Every person whose deposition is taken upon oral examination shall be first cautioned and sworn to testify the truth, the whole truth and nothing but the truth.

3. Examination. The witness shall be carefully examined, his testimony shall be recorded at the time it is given and thereafter transcribed by the officer taking the deposition, or by some person under his personal supervision.

4. Objections to Testimony. The officer taking an oral deposition shall not sustain objections made to any of the testimony or fail to record the testimony of the witness because an objection is made by any of the parties or attorneys engaged in taking the testimony. Any objections made when the deposition is taken shall be recorded with the testimony and reserved for the action of the court in which the cause is pending. Absent express agreement recorded in the deposition to the contrary:

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RULE 215

After first giving all the attorneys of record written notice that they have an opportunity to claim and withdraw the same, the clerk, unless otherwise directed by the court, may dispose of them thirty days after giving such notice. If any such document is desired by more than one attorney, the clerk shall make the necessary copies and prorate the cost among all the attorneys desiring the document.

Order effective Jan. 1, 1988.

RULES 210 TO 214. [REPEALED]

(Repealed Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

For subject matter of former rule 210, see, now, rule 206.

For subject matter of former rules 211 to 213, see, now, rule 207.

RULE 215. ABUSE OF DISCOVERY; SANCTIONS

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 200–2b, 201–4 or 208; 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 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request for inspection submitted under Rule 167, 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 167;

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 paragraph 2b herein 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 166b.

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 paragraph 2(g) of Rule 166b, the person who made the request may move for an order compelling compliance with paragraph 2(g) of Rule 166b. 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.

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 200–2b, 201–4 or 208 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 paragraph 1 of this rule or Rule 167a, 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 facts 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 167a(a) 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 Rule 167.* If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

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 paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. Failure to Comply With Rule 169.

a. *Deemed Admission.* Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. *Motion.* The party who has requested the admission may move to determine the sufficiency of the answers or objections. 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 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. *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 169 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 169(1), 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.

5. **Failure to Respond to or Supplement Discovery.** A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

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.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Art. 3768, unchanged.

This is a new rule effective April 1, 1984. Rule 170 is deleted because this rule covers conduct in violation of Rule 167. The revisions to Rule 168, the deletion of Rule 170, and the provisions of new Rule 215 are intended to clarify under what circumstances the most severe sanctions authorized under the rules are imposable. New Rule 215 retains the conclusion reached in *Lewis v. Illinois Employers Ins. Co. of Wausau*, 590 S.W.2d 119 (Tex. 1979), and extends such rule to cover all discovery requests, except requests for admissions. New Rule 215 leaves to the discretion of the court whether to impose sanctions with or without an order compelling discovery, so that the court will be free to apply the proper sanction or order based upon the degree of the discovery abuse involved.

This rule is rewritten to gather all discovery sanctions into a single rule. It includes specific provisions concerning the consequences of failing to comply with Rule 169, and spells out penalties imposable upon a party who fails to supplement discovery responses. It provides for sanctions for those who seek to make discovery in an abusive manner.

Comment on 1988 Change: This amendment states that the party offering the evidence has the burden of establishing good cause for any failure to supplement discovery before trial and provides a manner for making a record for discovery hearings.

Comment to 1990 change: To require notice and hearing before an imposition of sanctions under paragraph 3, and to specify that such sanctions be appropriate.

RULES 215a TO 215c. [REPEALED]

(Repealed Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

For subject matter of former rules 215a, 215b, and 215c, see, now, rules 215, 203, and 202, respectively.

SECTION 10. THE JURY IN COURT

RULE 216. REQUEST AND FEE FOR JURY TRIAL

a. **Request.** No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

b. **Jury Fee.** Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(Amended March 31, 1941, eff. Sept. 1, 1941; Sept. 20, 1941, eff. Dec. 31, 1941; Oct. 12, 1949, eff. March 1, 1950; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Arts. 2124 and 2125.

Comment to 1990 change: Additional fees for jury trials may be required by other law, e.g., Texas Government Code § 51.604.

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RULE 269(e)

(d) Arguments on questions of law shall be addressed to the court, and counsel should state the substance of the authorities referred to without reading more from books than may be necessary to verify the statement. On a question on motions, exceptions to the evidence, and other incidental matters, the counsel will be allowed only such argument as may be necessary to present clearly the question raised, and refer to authorities on it, unless further discussion is invited by the court.

(e) Arguments on the facts should be addressed to the jury, when one is impaneled in a case that is being tried, under the supervision of the court. Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court.

(f) Side-bar remarks, and remarks by counsel of one side, not addressed to the court, while the counsel on the other side is examining a witness or arguing any question to the court, or addressing the jury, will be rigidly repressed by the court.

(g) The court will not be required to wait for objections to be made when the rules as to arguments are violated; but should they not be noticed and corrected by the court, opposing counsel may ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.

(h) It shall be the duty of every counsel to address the court from his place at the bar, and in addressing the court to rise to his feet; and while engaged in the trial of a case he shall remain at his place in the bar.

(Amended March 31, 1941, eff. Sept. 1, 1941; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source of Subdivision (a): Art. 2183.

RULE 270. ADDITIONAL TESTIMONY

When it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.

(Amended Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

Source: Art. 2181.

Change by amendment effective April 1, 1984: Textual changes.

D. CHARGE TO THE JURY

RULE 271. CHARGE TO THE JURY

Unless expressly waived by the parties, the trial court shall prepare and in open court deliver a written charge to the jury.

(Amended May 25, 1973, eff. Sept. 1, 1973; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 2184.

Change by amendment effective September 1, 1973: Last two sentences of the original rule have been deleted.

RULE 272. REQUISITES

The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury. All objections not so presented shall be considered as waived. The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.

(Amended Sept. 20, 1941, eff. Dec. 31, 1941; May 25, 1973, eff. Sept. 1, 1973; July 22, 1975, eff. Jan. 1, 1976; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 2185.

Change by amendment effective September 1, 1973: Last sentence of the original rule has been deleted.

Changes by amendment effective January 1, 1976: The rule has largely been rewritten.

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(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.
[Amended effective July 1, 1966; August 1, 1987.]

RULE 9. PLEADING SPECIAL MATTERS

(a) **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be specifically and with particularity.

(d) **Official Document or Act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) **Time and Place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special Damage.** When items of special damage are claimed, they shall be specifically stated.

(h) **Admiralty and Maritime Claims.** A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).
[Amended effective July 1, 1966; July 1, 1968; July 1, 1970; August 1, 1987.]

RULE 10. FORM OF PLEADINGS

(a) **Caption; Names of Parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) **Paragraphs; Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by Reference; Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the

pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

[Amended effective August 1, 1983; August 1, 1987.]

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

(a) When Presented. A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)–(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time

APPENDIX I-1(b)

PROPOSED AMENDMENTS AND COMMENTS TO FED. R. CIV. P. 11

office of the clerk. ~~Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules~~ A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

COMMITTEE NOTES

This is a technical amendment, using the broader language of Rule 25 of the Federal Rules of Appellate Procedure. The district court--and the bankruptcy court by virtue of a cross-reference in Bankruptcy Rule 7005--can, by local rule, permit filing not only by facsimile transmissions but also by other electronic means, subject to standards approved by the Judicial Conference.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper ~~of a party represented by an attorney~~ shall be signed by at least one attorney of record in the attorney's individual

name, or, if the party is not represented by an attorney, shall be signed by the party, ~~whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.~~ Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the~~

~~cost of litigation. If a pleading, motion, or other~~ An unsigned paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of ~~the pleader or movant~~ attorney or party.

~~(b) Representations to Court. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~ By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to

cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are 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) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an

order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's 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 which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

COMMITTEE NOTES

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); G. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to

refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and mandating sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer

tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not

thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or

through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the

sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations should be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf.

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for violations of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., ___ U.S. ___ (1992); Business Guides, Inc. v. Chromatic Communications Enter, Inc., ___ U.S. ___ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under

current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained

in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant.

Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See Chambers v. NASCO, ___ U.S. ___ (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

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(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

[Amended effective August 1, 1983; August 1, 1987.]

IV. PARTIES

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order

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penses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Sequence and Timing of Discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) **Discovery Conference.** At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) **Signing of Discovery Requests, Responses, and Objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the

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motion the reasonable expenses incurred in opposing the motion, including attorney's 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.

(b) Failure to Comply With Order.

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *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 Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

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

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) 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;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

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 that party or both to pay the reasonable expenses, including attorney's 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.

(c) 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 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's 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.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) [Abrogated].

(f) [Repealed].

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule

request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. 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 this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

[Amended effective March 19, 1948; July 1, 1970; August 1, 1987.]

RULE 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the 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.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying 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 made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the

26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

[Amended effective October 20, 1949; July 1, 1970; August 1, 1980; October 1, 1981; August 1, 1987.]

VI. TRIALS

RULE 38. JURY TRIAL OF RIGHT

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

[Amended effective July 1, 1966; August 1, 1987.]

RULE 39. TRIAL BY JURY OR BY THE COURT

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or of all those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

RULE 40. ASSIGNMENT OF CASES FOR TRIAL

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

APPENDIX I-4(b)

PROPOSED AMENDMENTS AND COMMENTS TO
FED. R. CIV. P. 37

COMMITTEE NOTES

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery until after the meeting of the parties required by Rule 26(f).

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. An application for an order to a party ~~may~~ shall be made to the court in which the action is pending~~, or, on matters relating to a deposition, to the court in the district where the deposition is being taken~~. An application for an order to a ~~deponent~~ person who is not a party shall be made to the court in the district where the ~~deposition is being taken~~ discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The

motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make

the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying 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 made pursuant to Rule 26(c).~~

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) ~~Award of Expenses of Motion~~ Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity ~~for hearing,~~ to be heard, require the party or deponent whose conduct necessitated the motion or the

party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in ~~obtaining the order~~ making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the ~~opposition to the motion~~ opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity ~~for hearing,~~ to be heard, require the moving party or the attorney ~~advising~~ filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the

making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

* * * *

(c) ~~Expenses on Failure~~ Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable

expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (~~1~~A) the request was held objectionable pursuant to Rule 36(a), or (~~2~~B) the admission sought was of no substantial importance, or (~~3~~C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (~~4~~D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own

Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court

shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's 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.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has ~~applied~~ a pending motion for a protective order as provided by Rule 26(c).

* * * *

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission ~~framing~~ of a proposed discovery plan ~~by agreement~~ as ~~to~~ required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

COMMITTEE NOTES

Subdivision (a). This subdivision is revised to

reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" is changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the

motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Subdivision (c). The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as

declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Subdivision (d). This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

Subdivision (g). This subdivision is modified to conform to the revision of Rule 26(f).

Rule 38. Jury Trial of Right .

* * * *

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand

APPENDIX J

TASK FORCE QUESTIONNAIRE AND RESPONSES

TASK FORCE ON SANCTIONS QUESTIONNAIRE
JUDGES' RESPONSES

[TOTAL NO. OF RESPONDENTS: 112]

1. Generally the current rules that govern sanctions should be:

   retained in their current form: 20.5%

   modified: 74.5%

   repealed completely: 5.0%

2. Current sanctions rules:

   a) are reasonable and work well.

      Strongly agree: 8.6%

      Agree: 35.2%

      Disagree: 39.1%

      Strongly disagree: 16.2%

      Don't know: .9%

   b) result in too much time and money spent on sanctions practice.

      Strongly agree: 37.6%

      Agree: 36.7%

      Disagree: 20.2%

      Strongly disagree: 3.7%

      Don't know: 1.8%

   c) are clearly written.

      Strongly agree: 7.3%

      Agree: 37.6%

      Disagree: 46.0%

      Strongly disagree: 7.3%

      Don't know: 1.8%

d) are vague and ambiguous.

Strongly agree:	7.3%
Agree:	38.2%
Disagree:	38.2%
Strongly disagree:	11.3%
Don't know:	4.5%

e) provide trial judges too much discretion.

Strongly agree:	0.0%
Agree:	11.7%
Disagree:	53.2%
Strongly disagree:	30.6%
Don't know:	4.5%

f) provide trial judges too little discretion.

Strongly agree:	20.2%
Agree:	31.2%
Disagree:	39.4%
Strongly disagree:	5.5%
Don't know:	3.7%

g) provide trial judges with the proper amount of discretion.

Strongly agree:	6.4%
Agree:	33.0%
Disagree:	43.1%
Strongly disagree:	13.8%
Don't know:	3.7%

h) encourage Rambo tactics.

Strongly agree:	28.0%
Agree:	36.9%
Disagree:	27.0%
Strongly disagree:	3.6%
Don't know:	4.5%

i) discourage Rambo tactics.

Strongly agree:	4.6%
Agree:	17.4%
Disagree:	47.7%
Strongly disagree:	22.0%
Don't know:	8.3%

3. The sanctions rules should:

a) require attorneys to confer before seeking sanctions.

Strongly agree:	54.5%
Agree:	38.2%
Disagree:	5.5%
Strongly disagree:	1.8%
Don't know:	0.0%

b) require an oral hearing before imposition of sanctions.

Strongly agree:	33.3%
Agree:	53.2%
Disagree:	9.9%
Strongly disagree:	2.7%
Don't know:	.9%

c) require a trial judge to state into the record specific reasons when:

(i) imposing sanctions.

Strongly agree:	*16.4%*
Agree:	*42.7%*
Disagree:	*24.6%*
Strongly disagree:	*13.6%*
Don't know:	*2.7%*

(ii) deciding not to impose sanctions.

Strongly agree:	*7.4%*
Agree:	*28.7%*
Disagree:	*44.4%*
Strongly disagree:	*16.7%*
Don't know:	*2.8%*

d) require a trial judge to make written findings of fact and conclusions of law when:

(i) imposing sanctions.

Strongly agree:	*3.6%*
Agree:	*12.7%*
Disagree:	*44.6%*
Strongly disagree:	*38.2%*
Don't know:	*.9%*

(ii) deciding not to impose sanctions.

Strongly agree:	*1.9%*
Agree:	*6.5%*
Disagree:	*50.9%*
Strongly disagree:	*39.8%*
Don't know:	*.9%*

e) allow sanctions for discovery abuse only after a court has issued an order compelling discovery, and then the order has been violated.

Strongly agree:	10.1%
Agree:	42.2%
Disagree:	34.9%
Strongly disagree:	11.9%
Don't know:	.9%

f) require alternative dispute resolution before seeking sanctions.

Strongly agree:	4.5%
Agree:	11.8%
Disagree:	57.3%
Strongly disagree:	19.2%
Don't know:	7.2%

g) allow a judge to appoint a master to resolve any:

(i) discovery disputes.

Strongly agree:	26.4%
Agree:	43.6%
Disagree:	17.3%
Strongly disagree:	9.1%
Don't know:	3.6%

(ii) sanctions issues.

Strongly agree:	12.8%
Agree:	35.8%
Disagree:	36.8%
Strongly disagree:	12.8%
Don't know:	1.8%

h) allow for immediate, interlocutory appeal of:

(i) any sanctions order.

Strongly agree:	*8.2%*
Agree:	*19.1%*
Disagree:	*40.0%*
Strongly disagree:	*29.1%*
Don't know:	*3.6%*

(ii) orders imposing "severe" sanctions.

Strongly agree:	*16.5%*
Agree:	*41.3%*
Disagree:	*25.7%*
Strongly disagree:	*15.6%*
Don't know:	*.9%*

i) specify a maximum amount on permissible monetary sanctions (other than attorney's fees).

Strongly agree:	*3.6%*
Agree:	*37.3%*
Disagree:	*42.8%*
Strongly disagree:	*13.6%*
Don't know:	*2.7%*

j) postpone, until after a decision on the merits, any hearing to determine whether to impose sanctions on the lawyer or client or both, in order to avoid or postpone a lawyer/client conflict during pretrial proceedings.

Strongly agree:	*3.6%*
Agree:	*27.3%*
Disagree:	*45.6%*
Strongly disagree:	*14.5%*
Don't know:	*9.0%*

k) require that, before ultimate sanctions (e.g., dismissal, default) are imposed, the client must receive actual notice.

Strongly agree: 23.4%

Agree: 51.4%

Disagree: 16.2%

Strongly disagree: 5.4%

Don't know: 3.6%

l) allow a party or lawyer to avoid sanctions for frivolous pleadings, motions, etc. by withdrawing the pleading after receiving notice that the pleading is frivolous.

Strongly agree: 13.8%

Agree: 63.3%

Disagree: 14.7%

Strongly disagree: 4.6%

Don't know: 3.6%

m) allow sanctions, when appropriate, against:

(i) the lawyer(s) involved.

Strongly agree: 39.1%

Agree: 60.9%

Disagree: 0.0%

Strongly disagree: 0.0%

Don't know: 0.0%

(ii) the lawyer's firm.

Strongly agree: 23.1%

Agree: 52.8%

Disagree: 20.4%

Strongly disagree: .9%

Don't know: 2.8%

(iii) the parties.

Strongly agree: 30.0%

Agree: 64.6%

Disagree: 4.5%

Strongly Disagree: 0.0%

Don't know: .9%

n) allow sanctions to deter or punish:

(i) frivolous suits, pleadings, motions.

Strongly agree: 33.9%

Agree: 55.1%

Disagree: 5.5%

Strongly disagree: 1.8%

Don't know: 3.7%

(ii) discovery abuse.

Strongly agree: 36.9%

Agree: 61.3%

Disagree: .9%

Strongly disagree: 0.0%

Don't know: .9%

o) if a violation of the rule is found, make imposition of sanctions:

(i) discretionary.

Strongly agree: 39.8%

Agree: 51.8%

Disagree: 6.5%

Strongly disagree: 1.9%

Don't know: 0.0%

(ii) mandatory.

Strongly agree:	7.5%
Agree:	10.3%
Disagree:	51.4%
Strongly disagree:	30.8%
Don't know:	0.0%

p) specifically mandate professional courtesy.

Strongly agree:	43.5%
Agree:	37.1%
Disagree:	10.2%
Strongly disagree:	4.6%
Don't know:	4.6%

q) have a comments section, similar to the federal rules, to clarify the application of the rules.

Strongly agree:	26.7%
Agree:	54.3%
Disagree:	8.6%
Strongly disagree:	.9%
Don't know:	9.5%

4. With respect to Rule 166b(6), which requires identification of an expert witness "as soon as is practical, but in no event less than thirty (30) days" before trial except on leave of court:

a) the "as soon as is practical" standard.

is too vague:	45.0%
is sufficiently clear:	37.0%
should be eliminated:	18.0%

b) the rule should not contain a deadline, but should leave the matter to be set by a pretrial order if a party or court wants to set a deadline.

Strongly agree:	*16.3%*
Agree:	*34.3%*
Disagree:	*33.3%*
Strongly disagree:	*15.2%*
Don't know:	*.9%*

5. With respect to Rule 215(5), which provides for the automatic exclusion of evidence and witnesses, absent a showing of good cause for admission, as to a party who fails to supplement discovery responses properly, should the rule be amended to:

a) provide more discretion for trial courts to admit such evidence/witness.

Strongly agree:	*36.1%*
Agree:	*41.7%*
Disagree:	*16.7%*
Strongly disagree:	*5.5%*
Don't know:	*0.0%*

b) specify what constitutes good cause to admit such evidence/witness.

Strongly agree:	*12.2%*
Agree:	*44.9%*
Disagree:	*28.0%*
Strongly disagree:	*12.1%*
Don't know:	*2.8%*

c) provide that a showing that the adverse party will not be prejudiced by the evidence/witness constitutes good cause for admission of the evidence/witness.

Strongly agree:	11.2%
Agree:	52.3%
Disagree:	24.3%
Strongly disagree:	9.4%
Don't know:	2.8%

d) provide that "excusable neglect" constitutes good cause for admission of the evidence/witness.

Strongly agree:	5.6%
Agree:	25.2%
Disagree:	53.3%
Strongly disagree:	8.4%
Don't know:	7.5%

e) require the adverse party to show prejudice before the evidence/witness is excluded.

Strongly agree:	7.5%
Agree:	42.5%
Disagree:	40.6%
Strongly disagree:	9.4%
Don't know:	0.0%

f) state expressly that a trial court may grant a continuance as an alternative to evidence/witness exclusion.

Strongly agree:	17.8%
Agree:	51.4%
Disagree:	22.4%
Strongly disagree:	6.5%
Don't know:	1.9%

g) permit a named party to a lawsuit to testify without being listed in answers to interrogatories.

Strongly agree: 49.5%

Agree: 43.0%

Disagree: 4.7%

Strongly agree: 1.9%

Don't know: .9%

h) permit attorney's fees experts to testify without being listed in answers to interrogatories.

Strongly agree: 20.8%

Agree: 43.4%

Disagree: 26.4%

Strongly disagree: 5.6%

Don't know: 3.8%

i) permit a party to call as a witness any witness listed in any other party's interrogatory responses.

Strongly agree: 28.0%

Agree: 48.6%

Disagree: 18.7%

Strongly disagree: 2.8%

Don't know: 1.9%

6. Should discovery rules be amended to adopt a new procedure, as is now under consideration for the federal rules, that certain discovery disclosures be automatic, including that:

a) within a specified time (e.g., 30 or 60 days) after service of an answer, each party must identify each person "likely to have information that bears significantly on any claim or defense," identify or produce each document "likely to bear significantly on any claim or defense," and disclose a computation of damages.

Strongly agree:	27.8%
Agree:	36.1%
Disagree:	17.6%
Strongly disagree:	10.2%
Don't know:	8.3%

b) by a specified date prior to trial (e.g., 30 or 60 days), each party must identify each expected trial witness and produce an expert witness report (including opinions; information relied upon; exhibits; qualifications).

Strongly agree:	25.7%
Agree:	47.7%
Disagree:	15.6%
Strongly disagree:	6.4%
Don't know:	4.6%

7. There are too many sanctions rules; a single rule should contain all sanctions provisions.

Strongly agree:	22.7%
Agree:	45.5%
Disagree:	20.9%
Strongly disagree:	1.8%
Don't know:	9.1%

8. Judges abuse sanctions powers:

Frequently:	3.7%
Infrequently:	52.8%
Don't know:	43.5%

9. Texas should provide an alternative accelerated docket, to permit cases to proceed to trial quickly with a minimum of discovery, motions, and expense.

Strongly agree:	*31.1%*
Agree:	*42.5%*
Disagree:	*13.2%*
Strongly disagree:	*2.8%*
Don't know:	*10.4%*

10. Years of service as a state district judge:

1-5:	*40.9%*
6-10:	*32.7%*
11-15:	*13.6%*
16-20:	*5.5%*
21-25:	*5.5%*
26 or more:	*1.8%*

COMMENTS

1. *We have too many statutory schemes disguised as "rules (e.g. TRCP 694-809) and too many rules on one subject (e.g. TRCP 99-119). Some excision and consolidation is in order, but sanctions are OK. Rule 13 is usable in its present form.*

2. I would prefer the rules before the current discovery amendments to what we have now. The discovery rules merely cause ambush by discover rather than substantive resolution of disputes. Too much time spent on needless discovery. England has almost no discovery, no lack of fairness at trial. Everything we've done on discovery in the '80s was wrong. I tried suits for 25 years before amendments and we had no trouble finding out about other sides case. Only 3 rules I'd retain is (1) List people with knowledge and (2) list testifying experts (3) discover insurance.

3. I like the new proposed federal rules. Trial by ambush would be much better than what we have now.

4. The new federal approach (#6) looks good. More discretion to trial courts, not to impose sanctions, but to summarily handle discovery disputes on submission - NOT HEARING. On sanctions, rather than oral hearing, try a procedure analogous to summary judge practice, with a reasonable standard for appellate review after the trial. Please, fewer hearings, not more!!

5. Glad to see a comprehensive examination of the Rules.

6. Leave new rules unchanged for at least 5 years, to afford adequate time for testing.

7. I personally like the rules to be fairly specific; if not, some attorneys use non-specifics to feed procrastinative tendencies.

8. It should go without saying that the reason for trials is to discover the truth and do justice, the current rules discourage this. A witness should be allowed to testify if the opposition is not surprised or harmed, if he is, a continuance should be granted. Judges need the ability to be fair and do what is right.

9. Rather than answer all these SILLY questions, I say that a judge ought to be allowed to fine those who could possibly know how to answer it.

Hell out of lawyers who file frivolous lawsuits and frivolous motions (including motions to sanction and motions to compel) on the judge's own motion. The rules should make all lawyers afraid to file discovery motions of any kind and "dog" type lawsuits. If this breaks and bankrupts lawyers, so be it.

You will never get anywhere until you decide that trial by ambush is a good thing, as compared to full discovery, which only serves the purpose of making lawsuits extremely expensive and excruciatingly boring.

10. Regarding #2(e): as long as elected they **are** going to use discretion.

    Regarding #5(a): particularly in child custody cases - welfare of child - best interest.

    Regarding #5(f): Some attorneys do not even have the knowledge to ask for a continuance or to withdraw _____ if ready.

11. These rules should apply to civil claims (exclusive if attorneys fee) in excess of $50,000.00 and to contested divorce matters on file over 120 days.

12. Let's quit the game playing and get back to Rule 1, or the public will correctly perceive that the civil courts put form over substance - a common criticism of our criminal justice system.

13. We need to look closely at following or "adopting" Federal Discovery and Sanction Rules.

14. Re: #10 - however, I was a family court master for 7 years before being elected to district bench.

15. I think discovery abuse and the need for sanctions hearings has lessened in the last year in my Court. Maybe we are learning.

16. Regarding #4: Place burden on objecting party to show harm.

    My general feeling is that we have tried to incorporate too many rules and regulations into the sanction area and have created a problem that was intended to be solved. No client should have their right jeopardized because the lawyer failed to list names of witnesses. We need some method to deal with this other than these "automatic" rules.

    As a sitting district judge, it is my firm belief that the rules now bind and constrain the presiding judge from effecting a fair remedy in many cases. Specifically, in the event that a witness has not been properly identified, there should be a procedure whereby the district judge can determine whether or not in his opinion this omission will prejudice one of the parties, has been deliberately done,

or will be in any way harmful to allow this witness to testify. For instance, when the plaintiff or defendant himself is not allowed to testify or when a witness's deposition has been taken months earlier is not allowed to testify an injustice can result that the district court could correct if allowed to do so. On the other hand, the court must be given the discretion to determine whether omissions were made for a purpose and would not prejudice a party. We cannot enact enough rules to govern every specific situation and there has to be some discretion and trust placed in our district judges whom we elect and if they are not exercising that judgment properly they can be defeated. If we are not going to give local district judges the discretion to make these judgment calls we will never have the ability to properly handle these situations.

As to the rule on sanctions for frivolous pleadings, etc., it is my general feeling that such a rule does serve a laudable purpose. I believe that it compels all parties to look seriously at the matters they place in our courts to be resolved in a public forum. Since I am not that familiar with the federal court rule, it is difficult for me to evaluate it. I would think that drawing upon the experience and the decisions made in federal court certainly could be helpful. I believe that the Transamerica decision setting out the requirements for sanctions serves the purpose of any excessive sanctions that may have been imposed. I have used sanctions very few times, but the rule needs to be in place for the proper case.

I think the requirement of a hearing and stating into the record reasons for the ruling is a good requirement. Certainly if a judge cannot articulate good reason for sanctions, they should not be imposed.

However, I hope that we do not enact a rule that ends up like a contempt proceeding that is basically useless by the trial court in conducting a proper trial.

I do feel that in the egregious case the sanction should not be levied upon the parties but on the attorney that is guilty of such conduct.

17. As a prefatory remark, I will note that sanctions practice appears to be different in Tarrant county than in the other urban counties. While for a time we seemed to swim in discovery disputes, the tide has changed somewhat. I thought it was because lawyers felt that the practice had gotten out of hand, but maybe it was because it became known that Tarrant County judges were generally not very amenable to sanctions relief.

A few general conclusions can be stated:

1. Rule 215 sanctions. Abuse of discovery would all but disappear if the Supreme Court would rethink the automatic exclusion of witnesses. Automatic exclusion is currently far and away the most frequently used predatory discovery weapon. The previous flexible system based upon surprise (and ultimately, abuse of discretion) worked fine.

The goals hoped to be achieved by the last round of major rules revisions were never achieved. Instead, they encouraged gamesmanship -- even rewarded it. Lawyers determined that there was profit to be made in the offensive use of sanctions motions and quit talking to one another. Clients found that offensive use of the discovery process wore out opponents and instructed lawyers to zealously pursue them. In the meantime, we in the judiciary legitimized this by "buying into" discovery disputes. We heard them, granted relief where informal resolution sufficed before and the cycle accelerated. We actually engendered the conduct which is so widely regarded as Rambo tactics. The tide could have been stemmed by refusing to tolerate such nonsense.

I believe the cycle has slowed, and if the Supreme Court would revise Rule 215 to conform with the spirit of Transamerican Natural Gas Pipeline Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991) we will be far better off.

On the other hand, I have found the problem of designation of experts "as soon as practicable" to be an easy one to administer and decide. I would leave it alone.

2. The Rule 13 problem. Possibly the filing of frivolous pleadings is a problem to some, but I find it insignificant compared to the other issues to be addressed by your committee.

3. More Importantly. Suggestions have been made to create more procedures to facilitate discovery and require all sorts of automatic disclosures in every case. Frankly, the system seemed to work fine before we tried to "fix" it. Plain old interrogatories, requests for production and depositions are handy tools that work well.

I would like to be one voice in the cacophony imploring you to seriously consider whether, besides eliminating Rule 215 problems, we really need more rules. Creating new rules was what got us in trouble in the first place. We need fewer rules. As it is now, a case cannot be litigated

other than by the wealthy. The proposals mentioned in your questionnaire presuppose that dockets are predominated by giant product liability cases. To the contrary, they are predominated by general negligence cases that do not need the medicine prescribed.

In short, less is better.

18. Regarding #6. This would seem to open Pandora's box.

19. Many lawyers abuse discovery in order to delay trials and increase fees.

20. In 3 years I have imposed sanctions only 3 times; each time the sanction was payment of attorneys fees for the party who was abused, and I thought the abuse was very clearcut.

21. Regarding #5(f): Agree, but <u>NOT</u> if proponent of evidence/witness has announced "ready".

Regarding #5(h): Strongly agree, but <u>only</u> if the attorney is the Rule 8 attorney.

Regarding #9: Strongly agree if by agreement. We could call it ADR!

22. Regarding #5g: Strongly agree. Otherwise is ignorance.

Sanctions are consuming entirely too much time. It will soon rival the old special issue practice for wasted time and effort.

23. Sanctions should be used to encourage discovery or discourage frivolous pleading; not as an alternative to summary judgments. Training for judges in creatively and fairly applying sanction techniques would be a great benefit to judges and possibly provide for a forum for exchange of techniques or tools.

24. Enforcement of these current rules seem to lead to artificial rather than just results. Trial Judges should be allowed considerable discretion but not so much as to allow injustice. Management of the dockets is very important and some acceleration by time scheduling important.

25. With respect to #9 above (p.6) A.D.R. procedures may be used where appropriate.

26. Discovery and sanctions have resulted in the average person unable to afford the expense of an attorney. If we do not curtail the time used in discovery the public will demand it. We are now in the quagmire of the old pleading system. Ethical lawyers are being punished.

27. Regarding #5e: See 5c above, to put burden on offering, non-adverse party.

28. With reference to Rule 13, I have imposed sanctions (attorney fees) on two different occasions. On one occasion, a local attorney filed a lawsuit that involved the State and the attorney had to know that his client was not entitled to the relief requested. The Attorney General's Office had a representative at the hearing and requested attorney fees in an amount which was less than $200.00 = nothing like a practicing attorney would have requested. I imposed the sanctions on both the attorney and the client, who was also in the Courtroom.

The second time was when the attorney made a motion to set aside a divorce decree that was approximately four years old at the time. He wanted it set aside because of lack of jurisdiction. The Respondent participated in the trial with reference to custody and visitation. The attorney was a new attorney, but was not a real young attorney. The attorney, in my opinion, was completely in error in what he was doing, and so was his client. The ex-wife in this case had moved to Wisconsin approximately three years after the divorce was granted. The attorneys for the ex-wife requested a sanction of $5,000.00 in attorney fees. I granted it. Because of the intervention of one of his former law professors, the attorneys settled their claim for $2,500.00 - which I approved. However, after reading the bitter denunciation of the Judge in his Motion for Rehearing, I would like to have levied a several thousand dollar sanction in the form of a fine. This was before the settlement was reached. Though I believed it was sufficient to notify the grievance committee in his jurisdiction, I did not. I do not think the procedure under the old rule would be appropriate.

With reference to the naming of an expert witness, maybe the Judges should have a little more discretion when thinking about attorney fees where an attorney intends to call another attorney to testify to the reasonableness of the attorney fees. I can think of one case that involved several million dollars. A person on the payroll of the Plaintiff attended fifteen or twenty depositions at which all the attorneys to the lawsuit were involved. He was not

named as an expert witness, but was called as an expert witness during the trial. I did not let the witness testify, but I would have except it might have been an abuse of discretion if I did.

I am sure what the Judges in the larger towns say will be a whole lot more informative as far as stating problems with the discovery process.

29. Regarding #3(q): Unless the rules are made clear; if they are clear enough, comments would be unnecessary.

30. Family law cases should perhaps be treated a little differently.

31. Trial judges need more discretion in managing pre-trial and trial related sanctions - severe sanctions should be immediately appealable. Judge should be liable to sanction lawyer abusing trial procedure without having to hold lawyer in contempt of it.

32. "Transamerican" should be the standard for all sanctions - trial court should have broad discretion with expedited review by court of appeals.

33. Discovery rules are adequate. Appellate decisions on the rules are sometimes "light & variable." The rules are not impediments for the search for truth but unfortunately, variable judicial philosophy has made them a tactical battleground in and of themselves. Transamerica has got us headed in the right direction.

34. We need sanctions with judicial discretion.

35. You need calm judge and some rules. With poor judge there is temptation to multiply the rules. We need better, reality related judicial CLS seminars.

Regarding #6(a) Or have trigger mechanism. Except by agreement - deadline be moved back.

36. My experience in civil practice is limited as I have served my years as an attorney as a prosecutor. Therefore my answers are subject to change as I handle more civil cases.

37. Regarding #5h: Agree, limited to counsel of record.

38. Sanctions are needed to encourage orderly discovery and prevent abuse or delay.

39. *Regarding #3(q): Stay away from Federal Rules. They are designed to hinder, not aid justice by making pre-trial matters so burdensome a litigant cannot afford to try his case on the merits.*

Regarding #4b: Deadline should be more than 30 days.

Regarding #6(a): Stay away from Federal Rules. This opinion of many that the federal rules are superior and Texas Rules should be pattered thereafter is ludicrous. Federal rules promote a plethora of trial by ambush because of too many automatic pre-trial sanctions.

(1) Automatic sanctions should be done away with. (2) Interrogatories should be reduced. (3) Certain interrogatories should be prohibited. Suggestions: (A.) Allow no interrogatories until after answer date. (B.) Interrogatories must be submitted within specified time after answer date. (C.) No Request for Admissions until Interrogatory answer date has passed. (D.) Eliminate interrogatory asking name of persons with knowledge of relevant facts. (E.) No depositions allowed until interrogatory deadline has passed. (F.) No need to designate parties or lawyers (experts) who are to testify as to attorney fees unless ordered by court. (G.) Pre-trial litigation must decrease and lawyers have to assume responsibility for preparing their own cases, not pre-trial ambush.

40. *Help - I have a very active trial docket; however the imposition of sanctions has been a problem for me only once in over seven years. Please note the geographic and demographic make-up of my district. When discovery problems do arise, they have a significant impact on my docket.*

41. *Regarding #3(h)(ii): severe sanctions have to be clearly defined.*

Regarding #3(l): Notice from who? Court or opposing attorney?

Regarding #3(n)(i): It doesn't seem to work in actual practice.

42. *Figure out a better way to accomplish "in camera" inspections -- when does a judge have time to examine 100's and sometimes 1000's of pages of documents -- put burden on counsel.*

TASK FORCE ON SANCTIONS QUESTIONNAIRE
ATTORNEY RESPONSES

[TOTAL NO. OF RESPONDENTS: 139]

1. Generally the current rules that govern sanctions should be:

retained in their current form:	9.6%
modified:	75.6%
repealed completely:	14.8%

2. Current sanctions rules:

a) are reasonable and work well.

Strongly agree:	2.2%
Agree:	15.9%
Disagree:	50.7%
Strongly disagree:	29.7%
Don't know:	1.5%

b) result in too much time and money spent on sanctions practice.

Strongly agree:	38.3%
Agree:	36.2%
Disagree:	20.6%
Strongly disagree:	2.8%
Don't know:	2.1%

c) are clearly written.

Strongly agree:	2.2%
Agree:	16.9%
Disagree:	63.2%
Strongly disagree:	16.2%
Don't know:	1.5%

d) are vague and ambiguous.

Strongly agree:	13.9%
Agree:	57.4%
Disagree:	26.5%
Strongly disagree:	1.5%
Don't know:	.7%

e) provide trial judges too much discretion.

Strongly agree:	25.9%
Agree:	31.7%
Disagree:	31.7%
Strongly disagree:	4.3%
Don't know:	6.4%

f) provide trial judges too little discretion.

Strongly agree:	2.3%
Agree:	10.9%
Disagree:	59.1%
Strongly disagree:	21.9%
Don't know:	5.8%

g) provide trial judges with the proper amount of discretion.

Strongly agree:	1.4%
Agree:	18.1%
Disagree:	53.6%
Strongly disagree:	18.1%
Don't know:	8.8%

h) encourage Rambo tactics.

Strongly agree:	*37.3%*
Agree:	*29.7%*
Disagree:	*23.9%*
Strongly disagree:	*4.9%*
Don't know:	*4.2%*

i) discourage Rambo tactics.

Strongly agree:	*2.1%*
Agree:	*13.2%*
Disagree:	*52.8%*
Strongly disagree:	*27.1%*
Don't know:	*4.8%*

3. The sanctions rules should:

a) require attorneys to confer before seeking sanctions.

Strongly agree:	*51.4%*
Agree:	*35.7%*
Disagree:	*9.4%*
Strongly disagree:	*2.1%*
Don't know:	*1.4%*

b) require an oral hearing before imposition of sanctions.

Strongly agree:	*59.6%*
Agree:	*33.3%*
Disagree:	*5.7%*
Strongly disagree:	*1.4%*
Don't know:	*0.0%*

c) require a trial judge to state into the record specific reasons when:

(i) imposing sanctions.

Strongly agree:	*63.6%*
Agree:	*32.9%*
Disagree:	*2.8%*
Strongly disagree:	*.7%*
Don't know:	*0.0%*

(ii) deciding not to impose sanctions.

Strongly agree:	*35.5%*
Agree:	*32.6%*
Disagree:	*26.2%*
Strongly disagree:	*5.0%*
Don't know:	*.7%*

d) require a trial judge to make written findings of fact and conclusions of law when:

(i) imposing sanctions.

Strongly agree:	*45.0%*
Agree:	*22.1%*
Disagree:	*26.4%*
Strongly disagree:	*4.4%*
Don't know:	*2.1%*

(ii) deciding not to impose sanctions.

Strongly agree:	*17.3%*
Agree:	*23.7%*
Disagree:	*40.3%*
Strongly disagree:	*16.5*
Don't know:	*2.2%*

e) allow sanctions for discovery abuse only after a court has issued an order compelling discovery, and then the order has been violated.

Strongly agree:	35.5%
Agree:	29.8%
Disagree:	21.3%
Strongly disagree:	11.3%
Don't know:	2.1%

f) require alternative dispute resolution before seeking sanctions.

Strongly agree:	7.6%
Agree:	14.5%
Disagree:	40.5%
Strongly disagree:	25.9%
Don't know:	11.5%

g) allow a judge to appoint a master to resolve any:

(i) discovery disputes.

Strongly agree:	17.0%
Agree:	41.8%
Disagree:	24.8%
Strongly disagree:	13.6%
Don't know:	2.8%

(ii) sanctions issues.

Strongly agree:	12.4%
Agree:	22.6%
Disagree:	41.6%
Strongly disagree:	20.5%
Don't know:	2.9%

h) allow for immediate, interlocutory appeal of:

(i) any sanctions order.

Strongly agree:	*20.7%*
Agree:	*29.8%*
Disagree:	*34.0%*
Strongly disagree:	*12.0%*
Don't know:	*3.5%*

(ii) orders imposing "severe" sanctions.

Strongly agree:	*45.0%*
Agree:	*35.0%*
Disagree:	*12.1%*
Strongly disagree:	*5.0%.*
Don't know:	*2.9%*

i) specify a maximum amount on permissible monetary sanctions (other than attorney's fees).

Strongly agree:	*15.7%*
Agree:	*37.9%*
Disagree:	*28.6%*
Strongly disagree:	*8.6%*
Don't know:	*9.2%*

j) postpone, until after a decision on the merits, any hearing to determine whether to impose sanctions on the lawyer or client or both, in order to avoid or postpone a lawyer/client conflict during pretrial proceedings.

Strongly agree:	*17.7%*
Agree:	*26.2%*
Disagree:	*38.3%*
Strongly disagree:	*12.1%*
Don't know:	*5.7%*

k) require that, before ultimate sanctions (e.g., dismissal, default) are imposed, the client must receive actual notice.

Strongly agree:	40.1%
Agree:	45.8%
Disagree:	9.9%
Strongly disagree:	1.4%
Don't know:	2.8%

l) allow a party or lawyer to avoid sanctions for frivolous pleadings, motions, etc. by withdrawing the pleading after receiving notice that the pleading is frivolous.

Strongly agree:	25.0%
Agree:	46.4%
Disagree:	17.1%
Strongly disagree:	7.9%
Don't know:	3.6%

m) allow sanctions, when appropriate, against:

(i) the lawyer(s) involved.

Strongly agree:	29.0%
Agree:	59.4%
Disagree:	6.5%
Strongly disagree:	4.4%
Don't know:	.7%

(ii) the lawyer's firm.

Strongly agree:	16.8%
Agree:	43.8%
Disagree:	23.4%
Strongly disagree:	13.1%
Don't know:	2.9%

(iii) the parties.

Strongly agree:	*21.7%*
Agree:	*66.7%*
Disagree:	*5.8%*
Strongly Disagree:	*2.9%*
Don't know:	*2.9%*

n) allow sanctions to deter or punish:

(i) frivolous suits, pleadings, motions.

Strongly agree:	*32.1%*
Agree:	*55.0%*
Disagree:	*7.9%*
Strongly disagree:	*2.9%*
Don't know:	*2.1%*

(ii) discovery abuse.

Strongly agree:	*34.3%*
Agree:	*62.0%*
Disagree:	*2.2%*
Strongly disagree:	*1.5%*
Don't know:	*0.0%*

o) if a violation of the rule is found, make imposition of sanctions:

(i) discretionary.

Strongly agree:	*20.9%*
Agree:	*51.5%*
Disagree:	*20.1%*
Strongly disagree:	*4.5%*
Don't know:	*3.0%*

(ii) mandatory.

Strongly agree: 6.6%

Agree: 19.1%

Disagree: 44.9%

Strongly disagree: 27.2%

Don't know: 2.2%

p) specifically mandate professional courtesy.

Strongly agree: 29.9%

Agree: 37.3%

Disagree: 18.7%

Strongly disagree: 9.7%

Don't know: 4.4%

q) have a comments section, similar to the federal rules, to clarify the application of the rules.

Strongly agree: 29.4%

Agree: 52.9%

Disagree: 9.6%

Strongly disagree: 3.7%

Don't know: 4.4%

4. With respect to Rule 166b(6), which requires identification of an expert witness "as soon as is practical, but in no event less than thirty (30) days" before trial except on leave of court:

a) the "as soon as is practical" standard

(i) is too vague: 53.5%

(ii) is sufficiently clear: 22.5%

(iii) should be eliminated: 24.0%

b) the rule should not contain a deadline, but should leave the matter to be set by a pretrial order if a party or court wants to set a deadline

Strongly agree:	*19.7%*
Agree:	*37.1%*
Disagree:	*25.8%*
Strongly disagree:	*14.4%*
Don't know:	*3.0%*

5. With respect to Rule 215(5), which provides for the automatic exclusion of evidence and witnesses, absent a showing of good cause for admission, as to a party who fails to supplement discovery responses properly -- Should the rule be amended to:

a) provide more discretion for trial courts to admit such evidence/witness

Strongly agree:	*24.3%*
Agree:	*33.3%*
Disagree:	*22.2%*
Strongly disagree:	*16.7%*
Don't know:	*3.5%*

b) specify what constitutes good cause to admit such evidence/witness

Strongly agree:	*24.4%*
Agree:	*47.5%*
Disagree:	*20.9%*
Strongly disagree:	*4.3%*
Don't know:	*2.9%*

c) **provide that a showing that the adverse party will not be prejudiced by the evidence/witness constitutes good cause for admission of the evidence/witness**

Strongly agree:	*14.0%*
Agree:	*42.2%*
Disagree:	*31.3%*
Strongly disagree:	*9.4%*
Don't know:	*3.1%*

d) **provide that "excusable neglect" constitutes good cause for admission of the evidence/witness**

Strongly agree:	*10.0%*
Agree:	*30.7%*
Disagree:	*37.9%*
Strongly disagree:	*12.9%*
Don't know:	*8.5%*

e) **require the adverse party to show prejudice before the evidence/witness is excluded**

Strongly agree:	*14.0%*
Agree:	*32.6%*
Disagree:	*34.1%*
Strongly disagree:	*15.6%*
Don't know:	*3.7%*

f) **state expressly that a trial court may grant a continuance as an alternative to evidence/witness exclusion**

Strongly agree:	*17.5%*
Agree:	*49.6%*
Disagree:	*16.1%*
Strongly disagree:	*13.9%*
Don't know:	*2.9%*

g) permit a named party to a lawsuit to testify without being listed in answers to interrogatories

Strongly agree: 47.9%

Agree: 37.9%

Disagree: 7.8%

Strongly disagree: 6.4%

Don't know: 0.0%

h) permit attorney's fees experts to testify without being listed in answers to interrogatories

Strongly agree: 27.3%

Agree: 31.7%

Disagree: 28.1%

Strongly disagree: 10.8%

Don't know: 2.1%

i) permit a party to call as a witness any witness listed in any other party's interrogatory responses

Strongly agree: 38.9%

Agree: 41.7%

Disagree: 12.9%

Strongly disagree: 6.5%

Don't know: 0.0%

6. Should discovery rules be amended to adopt a new procedure, as is now under consideration for the federal rules, that certain discovery disclosures be automatic, including:

a) within a specified time (e.g., 30 or 60 days) after service of an answer, each party must identify each person "likely to have information that bears significantly on any claim or defense," identify or produce each document "likely to bear significantly on any claim or defense," disclose a computation of damages

Strongly agree:	21.7%
Agree:	21.7%
Disagree:	24.0%
Strongly disagree:	29.0%
Don't know:	3.6%

b) by a specified date prior to trial (e.g., 30 or 60 days), each party must identify each expected trial witness and produce an expert witness report (opinions; information relied upon; exhibits; qualifications)

Strongly agree:	19.3%
Agree:	31.1%
Disagree:	21.5%
Strongly disagree:	26.7%
Don't know:	1.4%

7. There are too many sanctions rules; a single rule should contain all sanctions provisions.

Strongly agree:	30.6%
Agree:	45.5%
Disagree:	13.4%
Strongly disagree:	3.0%
Don't know:	7.5%

8. Judges abuse sanctions powers:

Frequently:	36.7%
Infrequently:	41.0%
Don't know:	22.3%

9. Texas should provide an alternative accelerated docket, to permit cases to proceed to trial quickly with a minimum of discovery, motions, and expense.

Strongly agree:	30.6%
Agree:	40.3%
Disagree:	11.2%
Strongly disagree:	6.7%
Don't know:	11.2%

10. Size of your firm:

1-2:	32.6%
3-5:	14.5%
6-10:	11.6%
11-20:	6.5%
21-50:	14.5%
More than 50:	20.3%

11. Primary area of your litigation practice:

general litigation:	22.0%
commercial litigation:	31.6%
family law:	8.9%
personal injury - plaintiffs:	21.4%
personal injury - defense:	12.5%
other:	3.6%

12. Years of practice:

1-5:	22.4%
6-10:	17.4%
11-15:	15.2%
16-20:	16.7%
21-25:	14.5%
26 or more:	13.8%

COMMENTS:

1. Sanctions too frequently imposed, too harsh. Should not be imposed (exclusion of testimony, striking pleadings, dismissal) except after oral hearing and order and violation of order. With regard to witnesses, we've gone past the point of notice to having to cross T's and dot i's. If party attempting to secrete witness, then motion, oral hearing and order before sanctions.

2. The major metropolitan areas need a Special Master, who is well-versed in current discovery laws, to whom all discovery disputes <u>can</u> be referred by the trial judge.

3. Regarding #4 - Experts: <u>Not</u> "practical" to disclose until fact witnesses upon whose testimony the expert may base his/her opinion have been deposed.

4. My primary complaint with regard to the utilization of sanctions by attorneys and trial courts arises from my perception that sanctions or the threat thereof are frequently used (1) to coerce discovery and (2) to recover attorney's fees (where they otherwise might not be recoverable), rather than punish actual wrongdoing.

5. We have markedly different perspectives on sanctions practice. I believe that Rambo litigation has not abated, although it may now be practiced in a more sophisticated manner. For example, instead of blanket objections to document requests, there are blanket productions where masses of uncalled for documents are produced, but "smoking gun" materials are buried or omitted. Based on my eight years of practice in commercial litigation in Dallas, I am convinced that

strong sanctions, applied more vigorously, are warranted. No doubt, some streamlining and consolidation of the Rules would be helpful. I disagree with views you have expressed in the Texas Lawyer, however, suggesting that sanctions are too often imposed. My experience has been that trial courts impose sanctions infrequently, and then with undue reluctance. Commercial litigation is a high-stakes business, and many lawyers will be dissuaded from improper conduct they perceive as giving them an edge only when and if sanctions are imposed and publicized. Placing excessive restraint on the discretion of trial judges is not the way to go.

6. *The "Rambo" lawyers whom the present system of sanctions was designed to police are the very ones who have mastered techniques to abuse the system and win their cases through sanctions abuse without a trial on the merits. Certain state district judges seem to enjoy these technical games and gymnastics and take every opportunity to get a case off of their trial dockets by striking pleadings or pressuring one side to accept an unfair settlement over discovery matters that are trivial compared to the right to a trial by jury.*

The ultimate sanction of striking pleadings and the sanction of ordering that one side cannot put on witnesses nor cross examine witnesses should only be allowed when there has been total non-compliance with discovery requests for a period of at least six months, with no reasonable explanation.

Certain courts are too obsessed with bringing cases to trial within six months of filing regardless of the complexity of the case and the number of parties. Most multi-party cases can't be prepared and discovery completed that quickly. If all parties agree that discovery is not complete and that they want a continuance, the Judge should not have the right to dictate when the parties' case will be tried unless the case is over one year old and other continuances have been granted.

The present state of discovery and pre-trial procedure is far too expensive on clients. Most litigants would be better off if the present rules of discovery were scrapped, and they could just get their lawyer and witnesses and to go court for trial.

7. Our judiciary has allowed advocates to take over the system. Fairness, impartiality and justice are being sacrificed in the name of legal gamesmanship. It is a sad commentary upon our profession to be required to debate the necessity of sanctions. However, they are necessary. They are the tools by which an <u>impartial</u> judiciary should take control of the process and restore litigation to a search for truth and justice.

The concept embodied in question 6 of the questionnaire is more than a mere procedural device. It is the central theme of the reason for discovery. That is, both sides should be required to disclose the facts under evidence. Advocacy is the art of presenting those facts. Today, advocacy has become the art of obturation, one-upsmanship and even trickery. Little wonder that the public holds our profession and our system in such low esteem.

8. Too many cases are decided based on sanctions. Judges use sanctions to "hometown" attorneys and clients from other cities. We need changes.

9. Regarding #3 - This is only effective if judges enforce.

Regarding #9 - Unavailable where parties disagree. Already in effect where parties agree.

These are answered based on what I think <u>should</u> be done, not what I think <u>can</u> be done.

10. Regarding #6a - No more hide the ball - let's be frank and settle or try it.

11. I have witnessed the evolution of "Trial by Ambush" to "Ambush by Discovery".

When plaintiffs and defendants are excluded from testifying at their own trials because their attorneys failed to list them as witnesses, something is wrong with the system.

When attorneys representing either the plaintiff or the defendant are not allowed to testify because they weren't listed as expert witness when the party had asked for attorney's fees, something is wrong with the system.

When the main purpose of the system seems to be utilization of sanctions to prevent fair trials, something is wrong with the system.

I know of a divorce trial wherein the husband's attorney was successful in keeping the wife from testifying as to the value of their community home because her attorney had not listed her as an "EXPERT" witness and the husband's attorney successfully argued to the court that while a party could testify as to the value of the property owned by them that she was testifying as an expert witness and since she hadn't been listed as an expert witness that she shouldn't be allowed to testify..

The trial judge agreed and refused to let the wife testify as to the value of the parties' community property home.

When this happens, something is wrong with the system.

There should be an amendment to the rules that if an individual is listed as an expert witness, the fact that the individual is listed as an expert should also have the effect of also listing that person as a fact witness without separately having to so list that "expert".

I have heard of an instance where the wife's attorney was listed as an expert witness and not as a fact witness and at the trial the attorney for the husband successfully argued that while the wife's attorney could be allowed to testify as to the value of attorney's fees in general that he should not be allowed to testify as to what he had done as regards his representation of the wife in the case because those were "facts" and he hadn't been listed as a fact witness.

When rulings like this are made, something is wrong with the system.

We attorneys are rapidly getting into the same "trap" that the physicians find themselves.

Physicians many times order what some might think are "unnecessary" tests to protect the physician. In other words, these physicians are, by the system, required to practice DEFENSIVE MEDICINE.

We attorneys, even in a simple divorce, find ourselves practicing DEFENSIVE LAW by sending out a set of interrogatories; a request for production; taking depositions; etc.; when in many instances this discovery is probably not required. But if the attorney's client comes back at a later date against the attorney and says that he or she was not adequately represented because all possible discovery was not done, the attorney's in the "trap".

As a result the middle class many times is being denied competent representation because the middle class cannot afford the competent representation.

The rules should be amended to provide, among other things:

1. that all witnesses must be named more than 30 days before the date of trial and if a witness is not named more than 30 days from the trial of the matter, the witness may still be allowed to testify unless the other party can show "surprise" and if the other party can show "surprise", then the case will be continued by the Court for a reasonable time and all expenses associated with this "late designation" shall be borne by the party not timely designating the witness or witnesses.

2. that "death penalty" sanctions only be granted when they involve a direct violation of a direct order of the Court and then only if there is no other reasonable sanction that might be imposed.

Cases where a party knows of the existence of the other party's expert more than 30 days before the trial of the matter; knows that this expert will or probably will testify; takes the expert's deposition; and, objects to this expert testifying because the opposing party failed to list this expert in their answers to interrogatories and the objection is sustained, the system needs to be changed.

I am aware of an attorney in this area who prides himself on the fact that as soon as the other party answers (if the other party is the defendant) or as soon as he answers (if the other party is the plaintiff) the attorney sends over a set of interrogatories asking only two questions -- one as to any fact witnesses and one as to any expert witnesses.

Since these interrogatories are asked so early, the usual answer is "has not been determined" or "will supplement".

The attorney referred to above many times does not send a second set of interrogatories and/or if he does send a second set of interrogatories then he doesn't in any way refer to fact witnesses and/or expert witnesses but rather he asks other very complicated interrogatories and then concentrates all of his efforts on this set of interrogatories and never mentions his first set of interrogatories.

As a result, many times the opposing attorney forgets to supplement his answers to the "first set" of interrogatories.

Then, at the trial of the matter, when the opposing party attempts to put on his first witness, the attorney that sent this first set of interrogatories stands up and says that witness was not listed in the opposing party's answers to interrogatories and therefore should not be allowed to testify.

Therefore, in family law cases, sometimes this attorney is successful in keeping the other party from testifying; from keeping the other party's attorney from testifying either for attorney's fees and/or against attorney's's fees; court appointed psychologists from testifying if the testimony is unfavorable to the sending attorney; etc.

When this happens, something is wrong with the system.

When things of this nature are pointed out to the attorneys doing these things, the usual response is either "this is an adversarial system and I need to protect my client" or "if I did go ahead and let him testify, I'd probably end up getting sued".

When this happens, something is wrong with the system.

The current system replaced a bad system with a worse system.

One of the prime examples of the problems with the present system are when an attorney receives interrogatories containing what he believes are objectionable interrogatories; the receiving attorney files objections to the interrogatories and asks for sanctions against the sending attorney for asking these objectionable questions; the sending attorney then files a motion asking for sanctions against the receiving attorney because of the receiving attorney's "frivolous" objections; and, then the receiving attorney files a motion asking for sanctions against the sending attorney for filing a "frivolous" motion for sanctions against the receiving attorney.

As a trial attorney who operated both under the prior "discovery" system and under the current "discovery" system, the "prior" system, for all of its defects, was better than the current system.

Many of the discovery rules seem to have been designed to combat "RAMBO" tactics in "MEGA-CASES" and are not appropriate to the 99+% of the other cases filed in this state.

There might be two sets of rules for cases in this state -- one for "non complex" cases and one for "complex" cases. To designate a case as a complex case, any party to the litigation could make application to the Court to designate the case as a "complex" case and the Court could then either designate the case as a "complex" case or refuse to designate the case as a "complex" case.

If the case were designated as a complex case, then one set of "very strict" rules would apply; while if the case was not designated as a "complex" case, then a much more liberal set of rules would apply.

The present discovery rules are the perfect example of what happens when one uses a sledge hammer to kill a mosquito.

12. *Here are three opinions that make absolutely no sense. The defense lawyers in this dog bite case have charged their client over $50,000.00 to defend the case. My litigation expenses exceeded $6,000.00 and my time was over three hundred hours. The Court of Appeals lied and misstated the law.*

In the case Powers vs. Palacios, found at 771 S.W.2d 716 (Tex.App. -- Corpus Christi, 1989, writ denied), the trial court sanctioned my client and I for bringing a frivolous lawsuit when a pit bull kept and harbored at Mr. Palacios' residence escaped and attacked my client, who was delivering mail in the neighborhood, amputating a good portion of her right index finger.

Shortly after defense counsel filed an answer to the lawsuit I contacted him to schedule the deposition of his client. Upon counsel's representation that he was "too busy" for the next two months, I agreed to take his client's deposition on a Monday, at 9:30 a.m. which was some 59 days later. A few weeks later, the defense lawyer filed a Motion for Summary Judgment, attaching to it his client's affidavit and scheduling the Summary Judgment hearing for 9:15 a.m. -- fifteen minutes before the time he agreed his client's deposition should be taken.

I then rescheduled the deposition for two weeks before the time that the Motion for Summary Judgment was scheduled; however, the trial court quashed the deposition and ordered it be taken fifteen minutes after the Summary Judgment hearing. Thereafter, I requested the trial court reschedule the Summary Judgment hearing, but such motion was denied. In complete frustration, I filed a non-suit four days before the Summary Judgment Motion was to be heard, which under the rules and case law is perfectly permissible.

I unfortunately believed that I owed to the trial court the courtesy of appearing for the now moot summary judgment hearing to inform the court that a non-suit had been filed four days previous. However, without notice and without offering any testimony whatsoever the defense lawyer asked for $4,500.00 in attorney's fees as sanctions for bringing a frivolous lawsuit. The court, after not asking one question regarding the law or facts of the case summarily imposed a $2,500.00 sanction under the guise of utilizing Texas Practice and Remedy's Code 9.012. Fortunately, the legislature provided procedural protections for such arbitrary abuses, however, these procedural protections were ignored by the trial court. Specifically, the trial court must recite specific findings of good cause in its order and the trial court must allow a party ninety days in which to either amend the pleading or withdraw it. Neither of those rights were afforded the litigant in this case.

On appeal the appellate court, although finding error, misstated the record and wrote that the ninety day requirement was waived (in fact, there was a full blown hearing on the issue), and that the trial court's failure to state good cause in its ruling as mandated by Tex.R.Civ.P. 13 was not harmful. The appellate court wrote the trial court "clearly held" the lawsuit frivolous, but the trial court did no such thing. And, even though the trial court did no such thing and even though the appellate court did not review any of the evidence, the Court of Appeals rubber-stamped the trial court's actions. In fact, we filed an affidavit with the trial court of a neighbor who testified the pit bull "Two-By-Four" was always kept at Palacios' house and had terrorized the neighborhood for years.

Even more significant, we assigned as error in the appellate court both legal and factual insufficiency of evidence points of error, but the appellate court did not review the evidence and also ignored these points of error. Thereafter, the Supreme Court decided not to address these significant issues brought to it.

Ironically, the case was refiled and tried to a jury. After the close of evidence the trial court overruled the defendant's motions for a directed verdict based on no evidence on the theories of negligence, negligence per se, strict liability and gross negligence. Although, the jury returned a defense verdict, the case again went into the appellate court which affirmed the trial court. This time however, the appellate court was forced into reciting the underlying facts of the case. We finally got the attention of the Texas Supreme Court and it reversed the trial court and remanded for a new trial.

However, given that the Supreme Court says one things, the harsh reality of the practice of law in Texas is that you can get away with, and even be rewarded for, abusive litigation tactics because the current rules reward unethical conduct. Basically, under the current rules it is an "anything goes" approach to litigation, and under the "abuse of discretion" standard that appellate courts so love to use, I have learned that these rules are unfairly used for unjust results.

Do the rules encourage abusive litigation? No question about it. Do the rules need to be revised to avoid the kind of horrible results that occurred in the Powers' case? Absolutely!

13. As you can no doubt tell, I take a dim view of Rule 215, in particular. I recently for the first time in 45 years of law practice found myself before a judge who knew neither the law or rules of evidence. I ended up with a mistrial and a "contempt of Court" fine of $1,500.00, which the Judge then tried to change to a "sanctions" order. I ultimately ended up with a sanction of some $33,000.00, which was utterly ridiculous. Both were set aside, but only after I had to employ other counsel to represent me.

There was no question but the "sanctions" order created a conflict of interest with my client. I had to use a case out of Houston, which I see has now been overturned to even allow my client to testify. The real problem was that plaintiff had sued the wrong defendant which the Court refused to recognize.

I successfully practiced law for many years before sanctions appeared. Not often do I agree with former Justice Kilgarlin, but I certainly agreed with his recent article in the Texas Bar Journal concerning Rule 215, sanctions.

Our Courts today are cluttered with motions relating to discovery, and there are more Writs of Mandamus being filed now per year that were probably filed in my first 40 years of law practice.

I used to investigate a law suit, perhaps take one or two depositions and go to trial; and dispose of the entire matter in two to three months. Now even a mildly contested law suit may take a year or more with numerous unnecessary court appearances to resolve pre-trial problems.

Further, too many trial Judges become advocates on one side or the other. To give such a Judge the further power of sanctions violates every concept of justice in our courts.

As to "frivolous" law suits, I believe a jury should be allowed to make that determination not a judge who wishes to clear his docket.

All a dismissal of a so-called "frivolous" law suit does is cause an appeal which further burdens the appellate courts.

In today's environment in our Courts some of the most notable constitutional law cases would probably be dismissed as "frivolous".

14. The task force has discussed the conflict inherent in a motion for sanctions against both a lawyer and the lawyer's client.

The Second Circuit recently clearly recognized the conflict, in Healey v. Chelsea Resources, 947 F.2d 611, 623 (2nd Cir. 1991): "A potential for conflict is inherent in a sanctions motion that is directed against both a client and a lawyer, even when, as here, the two agree that an action was fully warranted in fact and law."

I suggest our Texas rule should follow the Second Circuit and provide that whenever a motion seeks sanctions against both lawyer and client the motion shall not be hard until decision on the merits has been rendered and the client has had opportunity to secure independent counsel to represent him in opposing the motion.

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APPENDIX K

AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, "STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE"

STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION

June 1988

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RULE 11 STANDARDS AND GUIDELINES

Introduction

The Standards and Guidelines that follow were drafted by the Trial Practice Committee of the Section of Litigation of the American Bar Association. They were approved by the Section of Litigation in September 1988. Two underlying concerns motivated the drafting and publication of these Standards and Guidelines: (1) uneven application of Rule 11 by the courts and (2) a lack of awareness among many lawyers of significant issues that arise under the Rule.

The Committee's survey of all reported Rule 11 decisions (which now number more than 1,000) confirmed that, on many of the recurring issues, the courts apply Rule 11 uniformly. The survey also confirmed, however, that on some material issues there are differences among the district courts and individual judges that can lead to disparate treatment of similarly situated persons. These Standards and Guidelines are intended to reduce instances of disparate treatment by setting forth a uniform position on each major issue raised by Rule 11. Where the courts have differed in their approaches to the Rule, the Section has expressed its preferred approach.

These Standards and Guidelines are also intended to educate the bar on the complexities of practice under Rule 11. Most of the Standards and Guidelines are non-controversial and codify existing case law. Representative citations are provided after each Standard for the convenience of the reader. Where the Standards and Guidelines take a position on controversial issues—such as those on which the circuits are split—the divergence of authorities is reflected by "*but see*" citations and, in five instances, by a statement of the opposing view.[1] The citations do not purport to be exhaustive, and neither the citations nor the headings in the text are intended to add to or detract from the substance of the respective Standards that they accompany.

Some courts appear to have construed Rule 11 expansively in order to reach litigating conduct deemed undesirable or inappropriate. These Standards and Guidelines strive to construe the Rule neither broadly nor narrowly but in a balanced way, in light of the text and the avowed purposes of the Rule. This approach recognizes that judges have numerous sanctioning powers to which they can turn when confronted with inappropriate behavior that is not proscribed by Rule 11. The sources of these powers include, among others: Federal Rules of Civil Procedure 16(f), 26(g), 30(g)(2), 37, 41, 45(f), 55 and 56(g); 28 U.S.C. §§ 1912 and 1927; Federal Rule of Appellate Procedure 38; civil and criminal contempt power; and the inherent power of the court.[2] Courts are urged to turn to these other sources of authority in appropriate cases

1. *See* Standards (C)(4), (H)(3), (K)(2), (O)(2) and (Q).

2. *See generally* ABA Section of Litigation, SANCTIONS. RULE 11 AND OTHER POWERS (2d ed. 1988).

rather than to read into Rule 11 sanctioning power that the Rule does not confer.

Section of Litigation
Trial Practice Committee
Jerold S. Solovy, Esq.
Committee Chair

Rule 11 Subcommittee
Alvin K. Hellerstein, Esq.
Subcommittee Chair

Gregory P. Joseph, Esq.
Drafting Committee Chair

Professor Margaret A. Berger
Jerome Gotkin, Esq.
Standish F. Medina, Jr., Esq.
Professor Maurice Rosenberg
Professor Jeffrey W. Stempel
Professor Georgene M. Vairo
Professor Ettie Ward
Drafting Committee Members

June 1988

TEXT OF FEDERAL RULE OF CIVIL PROCEDURE 11

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred

because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(1)

1938 Notes of Advisory Committee on Rules

This is substantially the content of former Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin, L.R.*, 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

U.S.C. Title 28 former:

§ 381 (Preliminary injunctions and temporary restraining orders).

§ 762 (Suit against the United States).

U.S.C., Title 28, former § 829 (now § 1927) (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances. See Pa. Stat.Ann. (Purdon, 1931) see 12 P.S.Pa., § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, 69 F.2d 294 (C.C.A.3d. 1934).

(2)

1983 Amendment [Advisory Committee Notes]

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rhodes, Ripple & Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 64–65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, Federal Practice ¶ 7.05 at 1547, by

emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. *See, e.g., Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir.1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. *See, e.g., Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y.1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. *See Kinee v. Abraham Lincoln Fed.Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D.Pa.1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. *See Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir.1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations. *See Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. *See generally* Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed.R.Civ.P. 11, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. *See Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y.1961); 5 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. *See National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. *See North American Trading Corp. v. Zale Corp.*, 83 F.R.D. 293 (S.D.N.Y.1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement,

encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. *See* 5 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1969); 2A Moore, Federal Practice ¶ 11.02, at 2104 n. 8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. *See Browning Debenture Holders' Committee v. DASA Corp., supra.* This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

(3)

1987 Amendment [Advisory Committee Note]

The amendments are technical. No substantive change is intended.

A. "PLEADING, MOTION, OR OTHER PAPER"

1. Scope.

a. *Generally.* Rule 11 applies to all pleadings, motions and other papers served or filed in civil actions in federal district court, subject to the exclusions set forth in Rule 81.

Fed.R.Civ.P. 1, 7, 11, 81.

b. *Limitations.*

i. Rule 11 does not apply to all manner of litigating misconduct but only to the signing of a pleading, motion or other paper in violation of the Rule. Misconduct that does not involve the signing of such a document is not sanctionable under the Rule.

Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1268 (2d Cir.1987); *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 621 (8th Cir.1987); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1128, 1129, 1132 (5th Cir.1987); *United Energy Owners Committee, Inc. v. United States Energy Mgmt. Sys.*, 837 F.2d 356, 364–65 (9th Cir.1988). *See also* Standard (K)(2) (Vicarious Liability) and (K)(3) (Successor Liability), *infra*.

ii. Although Rule 11 by its terms applies to all signed papers that are served or filed, certain papers are governed by more specific requirements imposed in other rules.

See, e.g., Rule 26(g) (discovery requests and responses); Adv.Com. Note to Fed.R.Civ.P. 11; *Bell v. Bell*, No. 86–4321 (5th Cir. Sept. 17, 1986). *Cf.* Rule 37(c) (improper failure to admit); Rule 56(g) (affidavits filed on summary judgment).

2. Removed Proceedings. Rule 11 does not apply to, and sanctions may not be imposed for defects in, pleadings, motions or other papers served or filed in a state court action, even if that action is subsequently removed to federal court.

Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir.1986); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256–57 (4th Cir.1987).

a. Rule 11 applies to the removal petition that is filed in federal district court.

Davis v. Veslan Enters., 765 F.2d 494, 499–500 (5th Cir.1985).

b. Rule 11 applies to all pleadings, motions and other papers served or filed in federal court following removal.

Brown v. Capitol Air, Inc., 797 F.2d 106, 108 (2d Cir.1986); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256–57 (4th Cir.1987); Fed.R. Civ.P. 81(c).

3. Appeals. Rule 11 applies to a notice of appeal that is served or filed in federal district court.

Thornton v. Wahl, 787 F.2d 1151, 1153 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986).

a. Where sanctions have been (1) wrongly denied or (2) properly granted by the district court, reasonable expenses, including attorneys' fees, incurred on an appeal of that decision may be recovered under Rule 11.

Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C.Cir.1985); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 607 (1st Cir.1988) (same).

b. Rule 11 does not otherwise apply to papers served or filed on appeal, unless the local rules of the pertinent court of appeals incorporate Rule 11.

Braley v. Campbell, 832 F.2d 1504, 1510 n. 4 (10th Cir.1987); *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir.1988); *In re Disciplinary Action Curl*, 803 F.2d 1004, 1007 (9th Cir.1986). *But see Thornton v. Wahl*, 787 F.2d 1151, 1153 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986) (Rule 11 applies to appellate briefs).

4. **Court Papers.** Rule 11 applies only to papers signed in connection with federal court litigation if those papers are served or filed pursuant to statute, rule or order, or are served or filed by or on behalf of the signatory, in the action *sub judice*.

Adduono v. World Hockey Ass'n, 824 F.2d 617, 620–21 (8th Cir.1987).

a. Rule 11 does not extend to settlement agreements that are not submitted to or filed with the court for approval.

Adduono v. World Hockey Ass'n, 824 F.2d 617, 621 (8th Cir.1987).

b. A court may not impose Rule 11 sanctions for transgressions which occurred before another court or in another action, except that an appellate court may order the imposition of sanctions for transgressions that occurred before a lower court in the same action.

Burull v. First Nat'l Bank, 831 F.2d 788, 790 (8th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988). *But cf.* Standard (L)(6)(d), *infra* (prior violations may be considered in determining an appropriate sanction).

B. "SIGNED BY AT LEAST ONE ATTORNEY OF RECORD [OR BY ANY] PARTY WHO IS NOT REPRESENTED BY AN ATTORNEY"

1. **Signing Requirement.**

a. Every pleading, motion or other paper must be signed. If a party is represented, the signature must be that of one of the attorneys of record for the party and may not be that of a law firm. If a party appears *pro se*, the party must sign every pleading, motion or other paper, and the party's signature has the same effect as that of an attorney.

Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir.1987).

b. "If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." Fed.R.Civ.P. 11.

2. Reading Requirement. Rule 11 requires that every pleading, motion or other paper be read by the signer before it is signed. Personal ignorance of defects in a paper challenged as unmeritorious is no defense.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir.1986); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986).

C. "THE SIGNATURE OF AN ATTORNEY OR PARTY CONSTITUTES A CERTIFICATE BY THE SIGNER"

1. Certification. Upon signing a pleading, motion or other paper, an attorney or *pro se* litigant certifies that he or she has fulfilled the affirmative duties imposed by Rule 11. This certification includes: (1) that the signer has conducted a reasonable inquiry into the facts that support the pleading, motion or other paper; (2) that the signer has conducted a reasonable inquiry into the law such that the paper embodies existing law or a good faith argument for the extension, modification, or reversal of existing legal principles; and (3) that the paper is not interposed for any improper purpose.

Fed.R.Civ.P. 11; *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 874 (5th Cir.1988).

2. Standard. In determining whether Rule 11 has been violated, the court tests the certification under an objective standard of reasonableness, except that it may inquire into the signer's actual knowledge and motivation to determine whether a paper was interposed for an improper purpose.

Note: The improper purpose standard is set forth in Part H, *infra*.

3. Time of Testing Certification. The certification by the signer is tested as of the time the pleading, motion or other paper is signed. The court must strive to avoid the wisdom of hindsight in determining whether the certification was valid when the paper was signed, and all doubts must be resolved in favor of the signer.

Adv.Com. Note to Fed.R.Civ.P. 11; *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir.1985); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 401 (6th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Laborers Local 938 v. B.R. Starnes Co.*, 827 F.2d 1454, 1458 (11th Cir.1987); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir.1987).

4. No Continuing Obligation.

a. Rule 11 does not impose a continuing obligation on the signer to update, correct or withdraw any pleading, motion or other paper which, when signed, satisfies the requirements of the Rule.

Oliveri v. Thompson, 803 F.2d 1265, 1274, 1275 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 454

(7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 874–75 (5th Cir.1988). *But see Albright v. Upjohn Co.*, 788 F.2d 1217, 1221 n. 7 (6th Cir.1986).

b. The adequacy under Rule 11 of each pleading, motion or other paper is tested as of the time that it is signed. Thus, each newly signed paper must satisfy the Rule's requirements, and must reflect the results of intervening inquiry, including discovery, investigation and other case developments, since the last prior paper was signed.

Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451, 454 (7th Cir.1987) ("There is an implicit obligation to update because Rule 11 applies to all papers filed in the litigation. Each filing must reflect the results of reasonable inquiry. Rare is the case that goes from complaint and answer to trial without an intervening filing. Updating occurs in the course of these filings").

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows:

> Rule 11 imposes a continuing obligation on the signer to update, correct or withdraw any pleading, motion or other paper which, when signed, satisfies the requirements of the Rule if the signer later learns that there is no reasonable basis for the previously asserted position.

See, e.g., Albright v. Upjohn Co., 788 F.2d 1217, 1221 n. 7 (6th Cir.1986). *But see Oliveri*, 803 F.2d 1265, 1274–75 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 454 (7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 874–75 (5th Cir.1988).

D. "FORMED AFTER REASONABLE INQUIRY"

1. **Duty to Investigate.** Rule 11 imposes an affirmative duty of investigation as to both law and fact.

Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir.1987); *Donaldson v. Clark*, 819 F.2d 1551, 1555–56 (11th Cir.1987); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir.1985); Adv.Com. Note to Fed.R.Civ.P. 11.

2. **Timing of Investigation.** Reasonable inquiry must precede signing. A pleading, motion or other paper may not be signed first and the basis investigated thereafter.

Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir.1987); Adv.Com. Note to Fed.R.Civ.P. 11.

3. **Objective Standard.** Whether an adequate investigation into fact and law has been made is judged under a standard of objective reasonableness.

Fed.R.Civ.P. 11; *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir.1985).

4. **Circumstantial Nature of Inquiry.** What constitutes a reasonable inquiry depends upon the circumstances.

a. "[W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer;

whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar."

Adv.Com. Note to Fed.R.Civ.P. 11.

b. Whether a party is represented by counsel may affect the determination whether a particular prefiling inquiry was reasonable in the circumstances, but the duty to conduct a reasonable prefiling investigation extends to *pro se* litigants as well as represented parties.

Shrock v. Altru Nurses Registry, 810 F.2d 658, 661–62 (7th Cir.1987).

Reasonable Inquiry into Fact

5. Generally. In determining whether a reasonable inquiry into fact has been made, the court considers all relevant circumstances, including:

a. the amount of time that was available to the signer to investigate the facts;

b. the complexity of the factual and legal issues in question;

c. the extent to which pre-signing investigation was feasible;

d. the extent to which pertinent facts were in the possession of opponents or third parties, or otherwise were not readily available to the signer;

e. the knowledge of the signer;

f. the extent to which counsel relied upon his or her client for the facts underlying the pleading, motion or other paper;

g. the extent to which counsel had to rely upon his or her client for the facts underlying the pleading, motion or other paper;

h. whether the case was accepted from another attorney and, if so, at what stage of the proceedings;

i. the extent to which counsel relied upon other counsel for the facts underlying the pleading, motion or other paper;

j. the extent to which counsel had to rely upon other counsel for the facts underlying the pleading, motion or other paper;

k. the resources reasonably available to the signer to devote to the inquiry; and

l. the extent to which the signer was on notice that further inquiry might be appropriate.

Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 875–76 (5th Cir.1988); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir.1987).

6. *Pro Se* Status. While the fact that a party is appearing *pro se* may be relevant to the court's determination whether a reasonable inquiry into fact was made, the choice to proceed without counsel does not excuse a *pro se* litigant from the duty to conduct a reasonable inquiry into the factual basis of every pleading, motion and other paper that he or she signs. The standard imposed by the Rule is objective:

what a reasonable person in the *pro se* litigant's position would have done.

Shrock v. Altru Nurses Registry, 810 F.2d 658, 661–62 (7th Cir.1987).

7. **Repetitive Submissions.** Re-serving or re-filing a pleading, motion or other paper that was previously adjudicated deficient, without substantially addressing the factual deficiencies previously adjudicated, violates the duty to conduct a reasonable inquiry into fact.

Orange Prod. Credit Ass'n v. Frontline Ventures, Ltd., 792 F.2d 797, 800–01 (9th Cir.1986); *Fuji Photo Film USA, Inc. v. Aero Mayflower Transit Co.*, 112 F.R.D. 664, 667–68 (S.D.N.Y.1986).

8. **Available Information.** The signer is obliged to review documents and information reasonably available to the signer that tend to prove or disprove any fact or claim asserted.

Burgess v. United States Postal Service, Nos. 83 Civ. 8122, 8133 RLC (S.D.N.Y. Aug. 1986).

9. **Pre–Signing Obligation.** Reasonable inquiry into fact must precede the signing of any pleading, motion or paper. No document may be signed before the requisite inquiry has been made.

Cabell v. Petty, 810 F.2d 463, 466 (4th Cir.1987).

10. **Reliance on Client.**

a. A reasonable inquiry into fact ordinarily requires more than exclusive reliance on representations of fact made by a client.

Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir.1986).

b. In determining whether a reasonable inquiry into fact requires more than exclusive reliance on representations of fact made by a client, the court considers all relevant circumstances, including:

i. the availability of alternate sources of information;

ii. the character of the client's knowledge, including whether it is firsthand, derivative or hearsay in nature;

iii. the plausibility of the client's account;

iv. the history and duration of the relationship between the attorney and the client;

v. the extent to which the attorney questioned the client; and

vi. the other factors considered by the court in determining whether a reasonable inquiry into fact has been made (Standard (D)(5), *supra*).

Continental Air Lines, Inc. v. Group Systems Int'l Far East, Ltd., 109 F.R.D. 594, 597 (C.D.Cal.1986); *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 206 (E.D.Ky.1987); *Nassau–Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 114 F.R.D. 684, 689 (S.D.N.Y.1987); *Harris v. Marsh*, 679 F.Supp. 1204, 1385–86 (E.D.N.C.1987); *Fleming Sales Co. v. Bailey*, 611 F.Supp. 507, 519 (N.D.Ill.1985).

11. Reliance on Counsel.

a. The duty to conduct a reasonable inquiry into fact may require more of counsel than exclusive reliance on other counsel to determine the merit of factual allegations.

Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 557-58 (9th Cir.1986), *cert. denied*, — U.S. ——, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987).

b. In determining whether a reasonable inquiry into fact requires more of counsel than exclusive reliance on other counsel, the court considers all relevant circumstances, including:

i. the availability of alternate sources of information (including the client);

ii. the basis of relied-upon counsel's knowledge, including whether it is firsthand, derivative or hearsay in nature;

iii. the plausibility of the factual account;

iv. the respective roles of counsel in the litigation (e.g., local counsel, lead counsel, forwarding counsel);

v. the respective expertise of relying counsel and of counsel on whom reliance is placed;

vi. the history, duration and nature of the relationship between counsel;

vii. the extent to which the signer questioned counsel upon whom reliance was placed concerning the nature and scope of the latter's inquiry into fact; and

viii. the other factors considered by the court in determining whether a reasonable inquiry into fact has been made (Standard (D)(5), *supra*).

Reasonable Inquiry Into Law

12. Generally. In determining whether a reasonable inquiry into the law has been made, the court considers all relevant circumstances, including:

a. the amount of time that was available to the signer to research and analyze the relevant legal issues;

b. the complexity of the factual and legal issues in question;

c. the clarity or ambiguity of existing law;

d. the plausibility of the legal position asserted;

e. whether the signer is an attorney or *pro se* litigant;

f. the knowledge of the signer;

g. whether the case was accepted from another attorney and, if so, at what stage of the proceedings;

h. the extent to which counsel relied upon other counsel to conduct the legal research and analysis underlying the position asserted;

i. the extent to which counsel had to rely upon other counsel to conduct the legal research and analysis underlying the position asserted;

j. the resources reasonably available to the signer to devote to the inquiry; and

k. the extent to which the signer was on notice that further inquiry might be appropriate.

Brown v. Federation of State Medical Bds., 830 F.2d 1429, 1435 (7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 875–76 (5th Cir.1988); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir.1987).

13. ***Pro Se* Status.** While the fact that a party is appearing *pro se* is relevant to the court's determination whether a reasonable inquiry into law was made, the choice to proceed without counsel does not excuse a *pro se* litigant from the duty to conduct a reasonable inquiry into the legal basis of every pleading, motion and other paper that he or she signs. The standard imposed by the Rule is objective: what a reasonable person in the *pro se* litigant's position would have done.

Stelly v. Comm'r, 761 F.2d 1113, 1116 (5th Cir.1985) (construing Fed.R. App.P. 38), *cert. denied*, 474 U.S. 851, 106 S.Ct. 149, 88 L.Ed.2d 123 (1985); *Bacon v. American Fed'n of State, County and Mun. Employees Council No. 13*, 795 F.2d 33, 35 (7th Cir.1986) (same); *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 661–62 (7th Cir.1987); *Pryzina v. Ley*, 813 F.2d 821, 823–24 (7th Cir.1987).

14. **Repetitive Submissions.** Re-serving or re-filing a pleading, motion or other paper that was adjudicated deficient, without substantially addressing legal deficiencies previously adjudicated, violates the duty to conduct a reasonable inquiry into law.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 831–32 (9th Cir.1986); *Cannon v. Loyola University of Chicago*, 784 F.2d 777 (7th Cir.1986), *cert. denied*, 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987); *Martin v. Supreme Court of New York*, 644 F.Supp. 1537, 1544–45 (N.D.N.Y. 1986).

15. **Pre–Signing Obligation.** The duty to conduct a reasonable inquiry into law requires the signer to research and analyze the legal issues involved before signing a pleading, motion or other paper.

Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986).

16. **Reliance on Client.** The duty to conduct a reasonable inquiry into law generally precludes reliance by counsel on representations of law made by a client where the client is not a lawyer. Where the client is a lawyer, the following paragraph is applicable.

In re Disciplinary Action of Curl, 803 F.2d 1004, 1006–07 (9th Cir. 1986).

17. **Reliance on Counsel.**

a. The duty to conduct a reasonable inquiry into law may require more than exclusive reliance on other counsel to determine the merit of legal positions asserted.

Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir.1987).

b. In determining whether a reasonable inquiry into law requires more than exclusive reliance on other counsel, the court considers all relevant circumstances, including:

i. the plausibility of the legal position asserted;

ii. the respective roles of counsel in the litigation (e.g., local counsel, lead counsel, forwarding counsel);

iii. the respective expertise of counsel;

iv. the history, duration and nature of the relationship between counsel;

v. the extent to which the signer questioned counsel upon whom reliance was placed concerning the nature and scope of the latter's inquiry into law; and

vi. the other factors considered by the court in determining whether a reasonable inquiry into the law has been made (Standard (D)(12), *supra*).

Robinson v. National Cash Register Co., 808 F.2d 1119, 1128 (5th Cir.1987); *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 557–58 (9th Cir.1986), *cert. denied*, — U.S. —, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987); *In re Disciplinary Action Curl*, 803 F.2d 1004, 1006–07 (9th Cir.1986).

E. "WELL GROUNDED IN FACT"

1. **Generally.** In addition to requiring a reasonable inquiry into fact, Rule 11 requires that the signer reasonably believe that each pleading, motion or other paper is well grounded in fact. A pleading, motion or other paper is well grounded in fact if a reasonable person in the signer's position, following reasonable inquiry, would believe the statements of fact contained therein. The reasonableness of the signer's belief is judged under an objective standard.

a. Rule 11 sanctions are not appropriate merely because a pleading, motion or paper does not prevail on the merits. Losing on the merits, without more, does not warrant the imposition of sanctions.

Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1583 (9th Cir.1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 124 (8th Cir.1987).

b. Isolated factual errors do not ordinarily warrant the imposition of sanctions if the pleading, motion or other paper as a whole is well grounded in fact.

Forrest Creek Assoc., Ltd. v. McLean Sav. & Loan Ass'n, 831 F.2d 1238, 1244–45 (4th Cir.1987).

c. It is not a violation of Rule 11 to assert or pursue a litigable issue of fact.

Rossman v. State Farm Mut. Auto Ins. Co., 832 F.2d 282, 289–90 (4th Cir.1987).

2. **Speculation.** Speculation may not be presented as fact.

In re Kelly, 808 F.2d 549, 551–52 (7th Cir.1986); *In re Disciplinary Action Curl*, 803 F.2d 1004, 1006–07 (9th Cir.1986).

3. **Unfounded or Untrue Statements.** A baseless statement or deliberate misstatement may not be presented as a statement of fact.

Frazier v. Cast, 771 F.2d 259, 265 (7th Cir.1985); *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir.1986); *Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 690–91 & n. 4 (D.C. Cir.1987).

F. "WARRANTED BY EXISTING LAW"

1. **Generally.** A position is warranted by existing law if it is supported by a non-frivolous legal argument. A legal argument is non-frivolous if it is likely to succeed on the merits or if reasonable persons could differ as to the likelihood of its success on the merits. A legal argument is frivolous only if it is obviously and wholly without merit.

Hoover Universal, Inc. v. Brockway Imco, Inc., 809 F.2d 1039, 1044 (4th Cir.1987); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir.1986); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081–82 (7th Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988). *Cf. Autorama Corp. v. Stewart*, 802 F.2d 1284, 1288–89 (10th Cir.1986) (construing Fed.R.App.P. 38); *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C.Cir.1986) (same). *See also* Standard (G)(2), *infra*.

a. Rule 11 sanctions are not appropriate merely because a pleading, motion or paper does not prevail on the merits. Losing on the merits, without more, does not warrant the imposition of sanctions.

Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1583 (9th Cir.1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 124 (8th Cir.1987).

b. Advancing a groundless claim or defense may violate Rule 11 even if other claims or defenses in the same paper are not groundless.

Frantz v. United States Powerlifting Fed'n, 836 F.2d 1063, 1067 (7th Cir.1987) (groundless claim); *Burull v. First Nat'l Bank*, 831 F.2d 788, 789–90 (8th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988) (same); *Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff*, 638 F.Supp. 714, 726 (S.D.N.Y.1986) (groundless affirmative defenses and counterclaims).

c. Advancing a non-meritorious argument or position, not interposed for an improper purpose, does not ordinarily justify the imposition of sanctions if the paper, as a whole, is warranted by existing law.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540–41 (9th Cir.1986).

d. Advancing a debatable issue of law is not sanctionable.

Laborers Local No. 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co., 827 F.2d 1454, 1458 (11th Cir.1987); *Morristown Daily Record, Inc. v. Graphic Communications, Union Local 8N*, 832 F.2d 31, 32 n. 1 (3d Cir.1987).

2. **Recurring Problems.** A pleading, motion or other paper is not warranted by existing law if it asserts a claim or defense that is plainly barred by operation of the doctrine of collateral estoppel or *res judicata*

or by the applicable statute of limitations and the signer lacks a non-frivolous argument for avoiding the bar.

McLaughlin v. Bradlee, 803 F.2d 1197, 1201 (D.C.Cir.1986); *Norris v. Grosvenor Mktg., Ltd.*, 803 F.2d 1281, 1286–87 (2d Cir.1986); *Sam & Mary Housing Corp. v. New York State*, 632 F.Supp. 1448, 1452–53 (S.D.N.Y.1986); *Magnus Elec., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1403–04 (7th Cir.1987); *International Ass'n of Machinists v. Boeing Co.*, 833 F.2d 165, 172 (9th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1488, 99 L.Ed.2d 715 (1988); *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir.1987).

3. **Judicial Views.** The fact that a judge has considered and accepted a legal argument is evidence that the argument is non-frivolous.

Indianapolis Colts v. Mayor & City Council of Baltimore, 775 F.2d 177, 182 (7th Cir.1985).

4. **Misrepresentation of Law.** A baseless statement or a deliberate misrepresentation of law may not be made in a pleading, motion or other paper.

Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.1986), *cert. denied*, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986).

G. "WARRANTED BY ... A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW"

1. **Objective Standard.** Whether a pleading, motion, or other paper is warranted by a good faith argument for the extension, modification, or reversal of existing law is judged under a standard of objective reasonableness.

Eastway Constr. Co. v. City of New York, 762 F.2d 243, 254 (2d Cir.1985); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081–82 (7th Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988).

2. **Factors.** In determining whether a pleading, motion, or other paper is warranted by a good faith argument for the extension, modification, or reversal of existing law, the court considers all relevant circumstances, including:

a. whether the signer has offered arguments in support of the extension, modification or reversal of existing law;

b. the legal sufficiency and plausibility of those arguments;

c. the creativity, novelty or innovativeness of those arguments;

d. any other objective indication that the signer sought the extension, modification or reversal of existing law;

e. the candor and adequacy of the discussion of existing law, including adverse precedent;

f. the clarity or ambiguity of existing law;

g. the nature of the case, including whether constitutional doctrines are implicated; and

h. the danger of chilling either (i) the enthusiasm or creativity of counsel or (ii) reasonable efforts to extend, modify, or reverse existing law.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987); *Dalton v. United States*, 800 F.2d 1316, 1320 (4th Cir.1986); *Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 788–89 (5th Cir.1986); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081–82 (7th Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.1986); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir.1987).

H. "IMPROPER PURPOSE"

1. **Generally.** No pleading, motion or other paper may be interposed for an improper purpose, such as to harass or to cause unnecessary delay or a needless increase in the cost of litigation. Fed.R.Civ.P. 11.

2. **Objective Standard.** Whether a signer acted with an improper purpose is judged under an objective standard.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *In re TCI, Ltd.*, 769 F.2d 441, 445 (7th Cir.1985).

a. *Successive Filings.* Repetitive service or filing of previously rejected positions evidences an improper purpose.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 831–32 (9th Cir.1986).

b. *"Harass[ment]."* "Harass[ment]," within Rule 11, is not gauged by the effect of the challenged conduct on the opposing party—whether, e.g., the conduct did in fact bother, annoy or vex. The focus is on the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 831–32 (9th Cir.1986).

3. **Filing of Objectively Meritorious Paper for Improper Purpose.**

a. The service or filing of a pleading, motion or other paper for an improper purpose violates the Rule, even if the paper is well grounded in fact and law.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *In re TCI, Ltd.*, 769 F.2d 441 (7th Cir.1985); *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir.1987). *But see Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir.1987); *Cf. Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987).

b. The service or filing of excessive, successive or repetitive pleadings, motions or other papers may constitute evidence of an improper purpose even if each paper is well founded in fact and law.

Robinson v. National Cash Register Co., 808 F.2d 1119, 1130 (5th Cir.1987).

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows:

A pleading, motion or other paper that is well grounded in fact and law does not violate the improper purpose clause regardless of the signer's subjective intent.

Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir.1987); *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir.1987). *Cf. Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987). *But see Brown, supra; Hill, supra; Robinson, supra.*

I. "THE COURT, UPON ... ITS OWN INITIATIVE"

1. ***Sua Sponte* Sanctions.** The court may impose Rule 11 sanctions upon its own initiative, provided that the manner in which sanctions are imposed comports with due process requirements and, in appropriate cases, with other applicable rules or statutes.

Sanko S.S. Co. v. Galin, 835 F.2d 51, 53 (2d Cir.1987); *Gagliardi v. McWilliams*, 834 F.2d 81, 82–83 (3d Cir.1987). *See also* Standards (L)(2)(k) (Types of Sanctions) and (M) (Procedure), *infra.*

J. "THE COURT ... SHALL IMPOSE"

1. **Mandatory Nature of Sanctions.** If a pleading, motion or other paper is not well grounded in fact or warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law, or if it is interposed for an improper purpose, the court must, subject to the following paragraph, impose a sanction.

Brown v. Federation of State Medical Bds., 830 F.2d 1429 (7th Cir. 1987); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 n. 7 (2d Cir.1985); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C.Cir. 1986).

2. **Equitable Considerations.** A court may decline to impose a sanction if a violation of the Rule is merely technical or *de minimis* in nature or if, in the circumstances, it would be inequitable to impose a sanction.

Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Brown v. Capitol Air, Inc.*, 797 F.2d 106, 108 (2d Cir.1986); *Greenberg v. Sala*, 822 F.2d 882, 887 (9th Cir.1987); *but see Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc).

3. **Discretion as to Form.** The type of sanction that is imposed rests within the discretion of the judge.

Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174–75 (D.C.Cir.1985); *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1222 (6th Cir.1986); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 401 (6th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Unioil, Inc.*

v. E.F. Hutton & Co., 809 F.2d 548, 559 (9th Cir.1986), *cert. denied.* —— U.S. ——, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987). *See also* Part L. *infra.*

K. "UPON THE PERSON WHO SIGNED IT, A REPRESENTED PARTY, OR BOTH"

1. **Generally.** Sanctions may be imposed on the signer of the offending pleading, motion or other paper; on the signer's client; or both. Fed.R.Civ.P. 11; *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir.1985).

2. **Vicarious Liability.**

Liability for a Rule 11 violation ordinarily does not extend beyond the signing attorney, other than to the client.

Robinson v. National Cash Register Co., 808 F.2d 1119, 1132 (5th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc); *see also In re DeLorean Motor Co. Litig.*, 59 B.R. 329 (E.D.Mich.1986). *But see: Calloway, infra; Anschutz, infra; Sony, infra.*

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows (in two parts):

a. Liability for a Rule 11 violation extends beyond a signing attorney to other members of his or her law firm.

Calloway v. Marvel Entertainment Group, 650 F.Supp. 684, 687–88 (S.D.N.Y.1986); *Anschutz Petroleum Mktg. Corp. v. E.W. Saybolt & Co.*, 112 F.R.D. 355 (S.D.N.Y.1986); *Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 542 (S.D.N.Y.1985). *But see Robinson, infra; DeLorean, infra.*

b. The liability of other members of the firm exists only to the extent that the pertinent court papers were signed and served or filed in violation of Rule 11 while the offender was a member of the firm; it does not extend to other papers.

Calloway v. Marvel Entertainment Group, 650 F.Supp. 684, 687–88 (S.D.N.Y.1986).

3. **Successor Liability.** When new counsel assumes responsibility for a pending case, new counsel's liability is limited to liability for the pleadings, motions and other papers that he or she signs; no responsibility is assumed for papers previously signed by predecessor counsel except to the extent that such papers are expressly relied upon or incorporated within papers signed by successor counsel.

United States v. Kirksey, 639 F.Supp. 634 (S.D.N.Y.1986). *Note: See also* Standard (C)(4)(a)–(b), *supra.*

L. "AN APPROPRIATE SANCTION"

1. **Generally.** The district court is vested with broad discretion to fashion an appropriate sanction for violation of Rule 11.

Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 n. 7 (2d Cir.1985); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C.Cir.1986); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1222 (6th Cir.1986).

2. Types of Sanctions. Among the types of sanction that the court, in its discretion, may choose to impose are:

a. a reprimand of the offender;

b. mandatory continuing legal education;

c. a fine;

d. an award of reasonable expenses, including reasonable attorneys' fees, incurred as a result of the misconduct;

e. reference of the matter to the appropriate attorney disciplinary or grievance authority;

f. an order precluding the introduction of certain evidence;

g. an order precluding the litigation of certain issues;

h. an order precluding the litigation of certain claims or defenses;

i. dismissal of the action;

j. entry of a default judgment;

k. injunctive relief limiting a party's future access to the courts; and

l. censure, suspension or disbarment from practicing before the forum court, subject to applicable rules or statutes.

Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157–58 (3d Cir.1986); *Davis v. Veslan Enters.*, 765 F.2d 494, 500–01 & n. 14 (5th Cir.1985); *In re Kelly*, 808 F.2d 549, 552 (7th Cir.1986); *Cheek v. Doe*, 828 F.2d 395, 397–98 (7th Cir.), *cert. denied*, — U.S. ——, 108 S.Ct. 349, 98 L.Ed.2d 374 (1987); *In re Disciplinary Action Curl*, 803 F.2d 1004, 1007 (9th Cir.1986); *Cotner v. Hopkins*, 795 F.2d 900, 902–03 (10th Cir.1986); *Gagliardi v. McWilliams*, 834 F.2d 81, 82–83 (3d Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc); *Frantz v. United States Powerlifting Federation*, 836 F.2d 1063, 1066 (7th Cir. 1987).

3. Allocation.

a. *Relative Culpability.* Sanctions should be allocated among the persons responsible for the offending pleading, motion or other paper, based upon their relative culpability.

Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir.1985); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1178–79 (D.C.Cir.1985).

b. *Attorney–Client Relationship.* In allocating sanctions between counsel and client, the court takes into account the privileged nature of their relationship and avoids encroaching upon the attorney-client privilege or jeopardizing counsel's ability to act, and act effectively, for the client.

4. Least Severe Sanction. In determining the appropriate sanction, the court considers which of the purposes underlying Rule 11 it seeks to implement and then imposes the least severe sanction adequate to serve the purpose or purposes.

Matter of Yagman, 796 F.2d 1165, 1182–83 (9th Cir.1986); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 404 (6th Cir.1987), *cert. denied*, — U.S. ——, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Cabell v. Petty*, 810 F.2d 463, 466–67 (4th Cir.1987); *Brown v. Federation of*

State Medical Bds., 830 F.2d 1429, 1437 (7th Cir.1987); *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir.1987).

5. Purposes of Rule 11. Among the purposes for which a court may impose Rule 11 sanctions are:

a. deterring dilatory or abusive litigation tactics by the same offender and others;

b. imposing punishment for deserving misconduct;

c. compensating an offended person for some or all of the reasonable expenses incurred by reason of the misconduct;

d. alleviating other prejudice to an offended person resulting from the misconduct, including prejudice to that person's litigation positions: and

e. streamlining litigation and bringing about economies in the use of judicial resources by curtailing frivolous and abusive practices.

Westmoreland v. CBS, Inc., 770 F.2d 1168, 1180 (D.C.Cir.1985); *Brown v. Capitol Air, Inc.*, 797 F.2d 106, 108 (2d Cir.1986); *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1437–38 (7th Cir.1987); *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 158 (3d Cir.1986); *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir.1987).

6. Mitigating and Aggravating Factors. Among the factors which the court may consider (1) as militating in favor of, or against, the imposition of a particular sanction, or (2) in the case of a monetary sanction, in assessing the amount thereof, are:

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;

m. the degree to which the offended person attempted to mitigate any prejudice suffered by him or her;

n. the degree to which the offended person's own behavior caused the expenses for which recovery is sought;

o. the extent to which the offender persisted in advancing a position while on notice that the position was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and

p. the time of, and circumstances surrounding, any voluntary withdrawal of a pleading, motion or other paper.

Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157–58 (3d Cir.1986); *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987); *In re Disciplinary Action of Curl*, 803 F.2d 1004, 1007 (9th Cir.1986); *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 790 F.2d 1421, 1426–27 (9th Cir.1986); *INVST Financial Group, Inc. v. Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 404 (6th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 988 (4th Cir.1987); *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10th Cir.1985); *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Anschutz Petroleum Mktg. Corp. v. E. W. Saybolt & Co.*, 112 F.R.D. 355, 358 (S.D.N.Y.1986); *Miller v. United States*, 669 F.Supp. 906, 911 & n. 3 (N.D.Ind.1987); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429 (7th Cir.1987).

7. **Attorneys' Fees.**

a. If the court decides to award a monetary sanction to compensate an offended person for attorneys' fees incurred as a result of a Rule 11 violation, the relevant circumstances include:

i. the time and labor required;

ii. the novelty and difficulty of the questions involved;

iii. the skill requisite to perform the legal service properly;

iv. the customary fee;

v. whether the fee is fixed or contingent;

vi. time limitations imposed by the client or the circumstances;

vii. the amount involved and the results obtained;

viii. the experience, reputation and ability of the attorneys;

ix. awards in similar cases; and

x. the other factors set forth in Standard (L)(6), *supra*.

Great Hawaiian Fin. Corp. v. Aiu, 116 F.R.D. 612, 619 (D. Haw. 1987); *Eastway Constr. Corp. v. City of New York*, 637 F.Supp. 558, 569–75

(E.D.N.Y.1986), *mod'd*, 821 F.2d 121, 122–24 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

b. An agreed-upon fee between a successful party and counsel might be reasonable between attorney and client, in light of the circumstances, yet not reasonable when judicially shifted to the opposing party pursuant to Rule 11.

Aetna Casualty & Sur. Co. v. Fernandez, 830 F.2d 952, 956–57 & nn. 17–18 (8th Cir.1987); *Doe v. Keane*, 117 F.R.D. 103, 106–07 (W.D. Mich.1987).

M. PROCEDURE

1. **Generally.** Due process requires that, before sanctions are imposed, the alleged offender be afforded fair notice and an opportunity to be heard.

Gagliardi v. McWilliams, 834 F.2d 81, 82–83 (3d Cir.1987).

2. **Notice.** Sanctions may not be imposed upon a person who is not on notice of (a) the fact that sanctions are under consideration, (b) the reasons why sanctions are under consideration or (c) the type of sanctions under consideration.

Gagliardi v. McWilliams, 834 F.2d 81, 82–83 (3d Cir.1987); *Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53 (2d Cir.1987); *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 662 (7th Cir.1987); *Braley v. Campbell*, 832 F.2d 1504, 1514–15 (10th Cir.1987) (en banc).

3. **Factors.** The procedure employed may vary with the circumstances, provided that due process requirements are satisfied. Among the factors that the court considers in fashioning a procedure to insure due process are:

a. the severity of the sanction under consideration;

b. the interests of the alleged offender in having a sanction imposed only when justified;

c. the risk of an erroneous imposition of sanctions relative to the probable value of additional notice and hearing;

d. the interest of the court in the efficient use of the judicial system, including the fiscal and administrative burdens that additional procedural requirements would entail;

e. whether the sanctions at issue were sought by a party or are being considered *sua sponte* by the court;

f. if the sanctions were sought by a party, the type of sanction sought;

g. the type of sanction under consideration by the court;

h. whether the alleged offender was notified, or is otherwise aware, that sanctions are under consideration, and the nature of those sanctions;

i. whether the sanction under consideration rests on a factual finding, such as a finding of bad faith on the part of the alleged offender;

j. whether the judge imposing or considering the sanction presided over the proceedings and is the same judge before whom the offense was committed;

k. whether the alleged offender has been provided an opportunity to be heard before sanctions issued;

l. whether the alleged offender will be provided an opportunity to be heard after sanctions issued;

m. whether counsel, client or both are the target of the proposed sanction, and the impact of the sanctions proceedings on the attorney-client relationship.

Adv.Com.Note to Fed.R.Civ.P. 11; *Donaldson v. Clark*, 819 F.2d 1551, 1558–60 (11th Cir.1987); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 405 (6th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205–06 (D.C. Cir.1986); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540–41 (3d Cir.1985); *Davis v. Veslan Enters.*, 765 F.2d 494, 500 & n. 12 (5th Cir.1985); *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 662 (7th Cir.1987); *Rodgers v. Lincoln Towing Serv., Inc.*, 771 F.2d 194, 205–06 (7th Cir.1985).

4. **Hearing.** The court, in its discretion, shall determine whether to hold a hearing on sanctions under consideration. A hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender. A hearing is appropriate whenever it would assist the court in its consideration of the sanctions issue or would significantly assist the alleged offender in the presentation of his or her defense.

Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205–06 (7th Cir.1985); *INVST Fin. Group, Inc. v. Chem-Nuclear Sys.*, 815 F.2d 391, 405 (6th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987); *Brown v. Nat'l Board of Medical Examiners*, 800 F.2d 168, 173 (7th Cir.1986).

5. **Discovery.** Except in extraordinary circumstances, discovery is not permitted on Rule 11 motions.

See Adv.Com.Note to Fed.R.Civ.P. 11.

N. FINDINGS AND CONCLUSIONS

1. **Sanction Granted.** The record must reflect the specific reasons for which a sanction is imposed and the basis on which the imposition rests. The degree of specificity required will depend upon the circumstances and upon the amount, type and effect of the sanction imposed. Unless it is otherwise apparent from the record, the trial court should include an identification of each pleading, motion or other paper held to violate the Rule, a specification of the nature of the violation and an explanation of the manner in which the sanction was computed or otherwise determined.

F. H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1268 (2d Cir.1987); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429

(7th Cir.1987); *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 158 (3d Cir.1986).

2. **Sanction Denied.** If the court denies a motion for sanctions, it shall have discretion to determine whether to place on the record the reasons for its action.

Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866 (5th Cir.1988) (en banc).

O. JURISDICTION TO IMPOSE SANCTIONS

1. **Generally.** A court has jurisdiction to impose sanctions upon any counsel or *pro se* litigant who has signed a pleading, motion or other paper served or filed in the action before the court, even if the court lacks jurisdiction over the subject matter of the action.

Orange Prod. Credit Ass'n v. Frontline Ventures Ltd., 792 F.2d 797, 801 (9th Cir.1986); *News-Texan, Inc. v. City of Garland*, 814 F.2d 216, 219–20 (5th Cir.1987).

2. **Post-Dismissal or Post-Judgment Sanctions.**

a. The court may impose sanctions for a violation of Rule 11 after the underlying action has been dismissed or judgment entered.

McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C.Cir.1986); *Hicks v. Southern Maryland Health Sys. Agency*, 805 F.2d 1165, 1166–67 (4th Cir.1986); *Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989, 991–92 (5th Cir.1986); *In re Ruben*, 825 F.2d 977, 981–82 (6th Cir.1987); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077–79 (7th Cir.1987), *cert. dismissed*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988); *Langham-Hill Petroleum Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1330–31 (4th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 99, 98 L.Ed.2d 60 (1987). *But see: Foss, infra; Johnson, infra.*

b. The court's discretion to impose post-judgment or post-dismissal sanctions may be limited by local court rule.

Hicks v. Southern Maryland Health Sys. Agency, 805 F.2d 1165, 1166 (4th Cir.1986); *In re Ruben*, 825 F.2d 977, 982 (6th Cir.1987); *cf. White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450–55, 102 S.Ct. 1162, 1165–68, 71 L.Ed.2d 325 (1982).

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows (in two parts):

a. Once an action is dismissed, the court loses all jurisdiction and is precluded from entering an award of sanctions.

Johnson Chemical Co. v. Home Care Prods., Inc., 823 F.2d 28, 31 (2d Cir.1987); *Foss v. Federal Intermediate Credit Bank*, 808 F.2d 657, 660 (8th Cir.1986). *But see: McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir.1986); *Hicks v. Southern Maryland Health Sys. Agency*, 805 F.2d 1165, 1166–67 (4th Cir.1986); *Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989, 991–92 (5th Cir.1986); *In re Ruben*, 825 F.2d 977, 981–82 (6th Cir.1987); *Szabo Food Serv. Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077–79 (7th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988); *Langham-Hill Petroleum*

Inc. v. Southern Fuels Co., 813 F.2d 1327, 1330–31 (4th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 99, 98 L.Ed.2d 60 (1987).

b. Following the entry of judgment, no sanctions may be imposed.

Adduono v. World Hockey Ass'n, 824 F.2d 617 (8th Cir.1987).

P. APPEALABILITY

1. **Parties.**

a. An order imposing sanctions upon a party is appealable upon the entry of judgment or a final decision adverse to that party.

28 U.S.C. § 1291.

b. An order imposing sanctions is appealable only after sanctions have been fixed.

In re Jeanette Corp., 832 F.2d 43, 46 & n. 2 (3d Cir.1987).

2. **Non-Parties.** An order imposing sanctions on counsel, or any other non-party to the underlying action, may immediately be appealed as a final order.

Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1047 n. 1 (9th Cir.1985); *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 556 (9th Cir.1986), *cert. denied*, — U.S. —, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987); *Sanko S.S. Co. v. Galin*, 835 F.2d 51, 53 (2d Cir.1987); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir.1985).

Q. APPELLATE REVIEW

Generally. All aspects of an order imposing sanctions—factual findings, legal conclusions and the appropriateness of the sanction imposed—are reviewed under the abuse-of-discretion standard. *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866 (5th Cir.1988) (en banc).

NOTE: An alternative rule is enforced in certain courts. This alternative may be stated as follows:

Upon review of a district court order imposing sanctions:

a. factual determinations are reviewed under the clearly erroneous standard;

b. the legal conclusion that the facts constitute a violation of the Rule is reviewed *de novo;* and

c. the appropriateness of the sanction imposed is reviewed under the abuse-of-discretion standard.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir.1986); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429 (7th Cir.1987).

APPENDIX L

TEXAS SUPREME COURT TASK FORCE ON SANCTIONS: MEMBERS AND VOLUNTARY PARTICIPANTS

Texas Supreme Court Task Force on Sanctions:

Charles Herring, Jr. - Chairman
Jones, Day, Reavis & Pogue
301 Congress, Suite 1200
Austin, Texas 78701
(512) 477-3939
FAX - (512) 478-9127

Lisa Blue
Baron & Budd
3102 Oaklawn Ave., #1100
Dallas, Texas 75219
(214) 750-6063
FAX - (214) 750-6063

Herbert Boyland
Harbour, Kenley, Boyland,
Smith & Harris, P.C.
404 N. Green at Magrill Street
P.O. Drawer 2072
Longview, Texas 75606
(903) 757-4001
FAX - (903) 753-5123

Honorable Scott A. Brister
234th Judicial District
Civil Courts Building
301 Fannin Street
Houston, Texas 77002
(713) 755-6263

Carlyle H. Chapman, Jr.
Chapman & Reese, A/P.C.
2777 Stemmons Freeway, Suite 1200
Dallas, Texas 75207
(214) 638-3600

Elizabeth Ann Crabb
259 S. Texas Blvd.
Weslaco, Texas 78596
(512) 968-6574

Russell H. McMains
McMains & Constant
2600 One Shoreline Plaza
P.O. Box 2846
Corpus Christi, Texas 78403
(512) 887-4455

Elizabeth G. Thornburg (Assistant Professor)
School of Law
Southern Methodist University
3315 Daniels Avenue
Dallas, Texas 75275
(214) 692-2576

Robert A. Valadez
Wright & Greenhill
8620 North New Braunfels, #300
San Antonio, Texas 78217-6367
(512) 829-1921
FAX - (512) 829-1923

Volunteer participants:

Mr. Bruce W. Bowman, Jr.
Vial Hamilton Koch & Knox
1717 Main Street #4400
Dallas, Texas 75201
(214) 745-4400

Mr. Samuel L. Boyd
Boyd & Associates
901 Main Street, 50th Floor
NCNB Plaza
Dallas, Texas 75202
(214) 760-2400

Mr. William A. Brewer, III
Bickel & Brewer
1717 Main Street, Suite 4800
Dallas, Texas 75201
(214) 653-4000

Mr. Gerald J. Brown
Beirne Maynard & Parsons
First Interstate Tower
24th Floor
1300 Post Oak Boulevard
Houston, Texas 77056-3000
(713) 623-0887

Mr. George Chandler
Law Offices of George Chandler
P. O. Box 340
Lufkin, Texas 75902-0340
(409) 632-7778

Mr. Dennis K. Drake
Law Offices of Dennis K. Drake
Lincoln Center #235
7800 I-10 West
San Antonio, Texas 78230
(512) 366-9636

Ms. Sharon M. Easley
McFall & Ashcraft
460 Preston Commons
8117 Preston Road
Dallas, Texas 75225
(214) 987-3800

Mr. William R. Edwards
Edwards & Terry
P. O. Drawer 480
Corpus Christi, Texas 78403
(512) 883-0971

Mr. William R. Edwards, III
Edwards & Terry
P. O. Drawer 480
Corpus Christi, Texas 78403
(512) 883-0971

Mr. Charles Gandy
Searcy & Gandy
Commerce National Bank Building
2405 Texas Avenue South #301
College Station, Texas 77840
(409) 696-6633

Mr. Dewey J. Gonsoulin
Mehaffy & Weber
P. O. Box 16
Beaumont, Texas 77704
(409) 835-5011

Mr. Benjamin L. Hall, III
Vinson & Elkins
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2222

Mr. Jett Hanna
Texas Lawyers' Insurance Exchange
P.O. Box 13325
Austin, Texas 78711
(512) 480-9074
(512) 482-8738 (FAX)

Mr. Thomas R. Harkness
Whitehurst Harkness & Watson
P. O. Box 1802
Austin, Texas 78767
(512) 476-4346

Thomas M. Harlan
717 West Sealy
Alvin, Texas 77511
(713) 331-6404
(713) 585-8767 (FAX)

Honorable Joe Hart
Travis County Courthouse
P.O. Box 1748
Austin, Texas 78767
(512) 473-9313

Mr. David W. Holman
Fisher Gallagher & Lewis
70th Floor, First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002
(713) 654-4433

Mr. James H. Holmes, III
Burford & Ryburn
500 North Akard Street #3131
Dallas, Texas 75201-3320
(214) 740-3100

Mr. Tommy Jacks
Mithoff & Jacks
111 Congress, Suite 1010
Austin, Texas 78701
(512) 478-4422

Mr. Don Jackson
Vinson & Elkins
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 758-2222

Mr. Byron C. Keeling
1701-C Valley Road
Champaign, Illinois 61820

Mr. Kevin J. Keith
Bailey & Williams
3500 NCNB Plaza
901 Main Street
Dallas, Texas 75202-3714
(214) 939-3300

Mr. Harris E. Kerr
Cotton Bledsoe Tighe & Dawson
P.O. Box 2776
Midland, Texas 79702-2776
(915) 682-9972

Mr. J. Mark Mann
Wellborn Houston Adkison
Mann Sadler & Hill
P. O. Box 1109
Henderson, Texas 75653-1109
(512) 657-8544

Mr. Stephen R. Marsh
Union Square Building #316
1401 Holliday Street
Wichita Falls, Texas 76301
(817) 696-2575

Honorable Scott McCown
Travis County Courthouse
P.O. Box 1748
Austin, Texas 78767
(512) 473-9374

Mr. Richard Mithoff
Mithoff & Jacks
One Allen Center, Penthouse
Houston, Texas 77002
(713) 654-1122
(713) 739-8085 (FAX)

Mr. David J. Nagle
David Nagle & Associates
901 Mopac South #2495
Austin, Texas 78746
(512) 328-2121

Mr. Steven D. Naumann
The Chaffin Law Firm
7500 San Felipe #1030
Houston, Texas 77063
(713) 528-1000

Mr. Harold W. Nix
Harold W. Nix & Associates
P. O. Box 679
Daingerfield, Texas 75638

Honorable Eileen F. O'Neill
190th District Court
1310 Prairie, 11th Floor
Houston, Texas 77002
(713) 651-2222

Mr. Charles W. Oldham
Oldham & Barnett
P. O. Box 324
Wichita Falls, Texas 76307
(817) 766-4317

Mr. George (Tex) Quesada
Law Offices of Frank L. Branson
18th Floor
Highland Park Place
4514 Cole Avenue
Dallas, Texas 75205-4185
(214) 522-0200

Mr. James B. Ragan
101 North Shoreline #400
Corpus Christi, Texas 78401
(512) 884-7787

Mr. Roger Rider
Rider & Associates
Texas Commerce Tower
600 Travis #4770
Houston, Texas 77002
(713) 237-1313

Mr. Earl Rutledge
Law Offices of Earl Rutledge
1845 Precinct Line Road #209
Hurst, Texas 76054
(817) 577-2332

Mr. Luke Soules
Soules & Wallace
175 E. Houston Street, 10th Floor
San Antonio, Texas 78205
(512) 224-9144
(512) 224-7073 (FAX)

Mr. Frank R. Southers
Southers & Lyons
126 Villita
San Antonio, Texas 78205
(512) 225-5251

Chris A. Stacy
Chris A. Stacy & Associates
Lyric Office Centre, Suite 200
440 Louisiana Street
Houston, Texas 77002
(713) 223-9200

Professor John F. Sutton, Jr.
University of Texas School of Law
727 East 26th Street
Austin, Texas 78705
(512) 471-3293

Ms. Mary Wolf
Small, Craig & Werkenthin
100 Congress, Suite 1300
Austin, Texas 78701
(512) 472-8355

APPENDIX M

LIST OF BATES-STAMPED MATERIALS REVIEWED BY THE TASK FORCE

SUPREME COURT TASK FORCE ON SANCTIONS

Index of Batestamped Materials

1. Letter from Chuck Herring to Task Force and advisory committee enclosing items 1 through 8 below. (000000-000-A)

   Correspondence from Luke Soules, Chairman of the Texas Supreme Court Advisory Committee, transmitting materials that the Committee has received or developed pertaining to proposed amendments or comments applicable to sanctions. (000001-000034)

2. A preliminary bibliography of sanctions articles and papers. (000035-000039)

3. The Texas Supreme Court's decisions in Transamerican Natural Gas Corporation v. Powell and Braden v. Downey. (000040-000070)

4. Various sanctions rules, statutes: Rules 13, 18a, 21b, 166a, 166b, 215, 269, Tex. R. Civ. P.; Rule 84, Tex. R. App. P.; §§ 9.011, 9.012, Tex. Civ. Prac. & Rem. Code; Rules 11, 16, 26, 37, Fed. R. Civ. P.; Rule 38, Fed. R. App. P.; 28 U.S.C. §§ 1912, 1927. (000071-000100)

5. Proposed amendments to Rules 16, 26, 30, 33, 37, 56, Fed. R. Civ. P. (000101-000138)

6. Miscellaneous articles and additional materials. (000139-000148)

7. Rule 203, Tex. R. Civ. P. (000149)

8. Supreme Court Order - Appointment of Task Forces to Consider Changes in the Rules of Procedure in Texas Courts. (000150-000152)

9. 6/91 proposed amendments to Fed. R. Civ. P. 26. (000153-000169)

10. Memo to Chuck Herring from Jett Hanna on legal malpractice issues concerning sanctions, including Loigman v. Massachusetts Bay Insurance Co. (000170-000178)

11. Letter from David Nagle to Chuck Herring attaching proposed set of new rules. (000179-000187)

12. Letter from Judge Scott Brister to Chuck Herring enclosing a draft amendment to Rule 215. (000188-000197)

13. Textual comparison of Rule 13 of the TRCP with Rule 11 of the FRCP. (000198-000204)

14. Letter from Chuck Herring to Task Force and advisory committee members enclosing items 9 through 13 above. (000205-000222)

15. Letter from Stephen R. Marsh to Judge Scott Brister commenting on Judge Brister's proposals regarding a revised TRCP Rule 215. (000223-000227)

16. Letter from Stephen R. Marsh to Chuck Herring responding to the Issues and Questions raised at the first Task Force meeting. (000228-000236)

17. Article from September 1991 issue of Trial: "A Reasonable Rule 11" by Bob Gibbins. (000237)

18. Letter from Stephen R. Marsh to Chuck Herring enclosing a draft of Tex. R. Civ. P. 215. (000238-000242)

19. Letter from Chuck Herring to Task Force and advisory committee members enclosing items 15 through 18 above. (000243)

20. Letter from Chuck Herring to Task Force and advisory committee members enclosing items 20 through 24 below. (000243-A - 243-B)

    A paper furnished by Jett Hanna, authored by Joel Wilson, "Difficult Decisions: The Relationship Between Malpractice and Sanctions." (000244-287)

21. Letter from Beth Crabb enclosing the New York State Bar Association "Report of Special Committee to Consider Sanctions for Frivolous Litigation in New York State Courts" (March 20, 1990). (000288-353)

22. Letter from Stephen Marsh enclosing a proposed redraft of Tex. R. Civ. P. 13. (000354-356)

23. Letter from Harold Nix responding to C. Herring August 26, 1991 letter. (000357-358)

24. Lists of Texas cases citing Rule 13 and Rule 215. (000359-376)

25. 10/7/91 Texas Lawyer article: "The Defense Blows It. AG Misses Deadline, Defends Whistleblower Suit Without Experts." (000377-379)

26. 9/29/91 Letter from Beth Crabb to Chuck Herring enclosing (1) Rule 11 outline, (2) a copy of the "Call for Written Comments on Rule 11...," published by the Advisory Committee, identifying some of the major concerns and

criticisms of Rule 11 and attaching a bibliography of Rule 11 materials, (3) a copy of the currently proposed revisions to Rule 11 and Advisory Committee notes, (4) a supplemental bibliography on Rule 11 materials, (5) a copy of Cochran, Rule 11: The Road To Amendment, 8 Fifth Cir. Rptr 559 (1991). (000380-447)

27. Browning v. Kramer, 931 F.2d 340 (5th Cir. 1991). (000448-456)

28. 9/11/91 Letter to Chuck Herring from David Holman. (000457-458)

29. 9/9/91 Letter to Chuck Herring from Robert Valadez enclosing a memorandum outlining New York's procedural analogues to Texas Rules 13 and 215; also, text of New York rules with excerpts from the commentaries and notes of decisions. (000459-545)

30. 7/31/91 Letter to J. Ross Hostetter from Burt Berry re discovery issues, citing an opinion in American Home Insurance Company v. Cooper, 786 S.W.2d 769. (000546-547)

31. 8/9/91 Letter to Justice Kilgarlin from Stephen Marsh, attaching an article entitled "Professionalism and Modern Litigation Technique." (000548-552)

32. 9/13/91 Letter to Chuck Herring from Stephen Marsh. Also attached is a copy of Cochran, Rule 11: The Road To Amendment, 8 Fifth Cir. Rptr 559 (1991). (000553-572)

33. Letter from Chuck Herring to Task Force and advisory committee members enclosing items 25 through 32 above. (000573-574)

34. Appendices to memo (#35) re various states' rules comparable to Texas Rules 13 and 215. (000575-678)

35. Sanctions Task Force; Overview of various states' rules comparable to Texas Rules 13 and 215: Illinois, Maryland, Massachusetts, Mississippi, New Jersey, Ohio, and Wisconsin. (000679-694)

36. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 34 and 35 above. (000695)

37. Rodriguez v. State Dept. of Highways and Public Transportation, No. 13-90-352-CV (Tex. App. -- Corpus Christi October 3, 1991, n.w.h.). (000696-701)

38. American Bar Association Standards and Guidelines for Practice under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101 (1988). (000702-731)

39. Amended Bibliography of sanctions articles, annotations and books. (000732-744)

40. Bill Burton's memo re Dean John Sutton's proposed changes re TRCP 11 and re new rule concerning disqualification of lawyers. (000745-747)

41. October 29, 1991 letter from Judge Brister enclosing a revised version of his original draft of Rule 215. (000748-749)

42. October 30, 1991 letter from Luke Soules enclosing a letter from James Kronzer regarding proposed changes to TRCP 166b. (000750-751)

43. October 28, 1991 letter from Professor John Sutton enclosing a Georgia Supreme Court opinion, Yost v. Torok. (000752-755)

44. October 1991 Texas Bar Journal article entitled "The Least Severe Sanction Adequate: Reversing the Trend in Rule 11 Sanctions," by Judge Sam D. Johnson, Byron C. Keeling, and Thomas M. Contois. (000756-763)

45. California Rules of Procedure on sanctions for discovery misuse received from David Nagle. (000764)

46. October 25, 1991 letter from Byron Keeling enclosing a draft article for Baylor Law Review, entitled "The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions," by Judge Sam D. Johnson, Thomas M. Contois, and Byron C. Keeling. (000765-815)

47. Pages 3 thru 6 and 18 thru 20 of the amici curiae brief in Chrysler Corporation v. The Honorable Robert Blackmon, now pending in the Texas Supreme Court. (000816-823)

48. November 13, 1991 letter from Byron C. Keeling enclosing the memorandum regarding the nature of sanctions in Robeson Defense Committee v. Britt. (000824-864)

49. November 19, 1991 letter from Beth Crabb enclosing "Bench-Bar Proposal to Revise Civil Procedure Rule 11," 137 F.R.D. 159. (000865-881)

50. November 19, 1991 memo from Dudley Page McClellan entitled "The applicability against the State of Texas and its agencies of sanctions under the Texas Rules of Civil Procedure." (000882-897)

51. October 28, 1991 Texas Lawyer article entitled "Celebrating -- and Helping Repair -- the Texas Rules of Civil Procedure" by Alex Wilson Albright. (000898)

52. Recent decisions: Service Lloyds Insurance Company vs. Harbison; Mossler vs. Shields; Felderhoff vs. Knauf, et al.; Koepp vs. Utica Mutual Insurance Company; Welex v. Broom; General Electric Credit Corporation v. Midland Central Appraiser District; Owens-Corning Fiberglas v. Caldwell; and O'Connell v. The Home Insurance Company, dealing with the issue of whether a sanctions award was within the coverage of a legal malpractice insurance policy. (000899-923)

53. Missouri decision concerning malpractice insurance coverage for Rule 11 sanctions. (000924-926)

54. Rule 215 draft modifying slightly Judge Brister's draft. (000927-930)

55. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 41 through 54 above. (000931-933)

56. December 17, 1991 letter from Judge Bruce Auld enclosing supplemental comments to his questionnaire response. (000934-935)

57. December 19, 1991 letter from Judge Jack Carter enclosing additional comments to his questionnaire response. (000936-937)

58. December 19, 1991 letter from Judge Kenneth A. Douglas enclosing additional comments to his questionnaire response. (000938-939)

59. December 9, 1991 Texas Lawyer Commentary: "Rambo Judges Undermine the Court System." (000940)

60. December 17, 1991 letter from D. Bradley Kizzia enclosing additional comments to his questionnaire response. (000943)

61. December 18, 1991 letter from Leonard A. Hirsch enclosing additional comments to his questionnaire response. (000944-945)

62. Revised draft of Rule 13, which addresses some (though not all) of the points discussed at our last meeting. (000941-942);

63. Revised version of Rule 215 (000946-949).

64. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 56 through 63 above. (000950-951)

65. December 24, 1991 letter from Bradford M. Condit containing additional comments to his questionnaire response and sanctions related cases. (000952-975)

66. Comments from Judge William R. Powell of Houston regarding rules 13 and 215. (000976)

67. January 2, 1992 letter from John L. Bates enclosing additional comments to his questionnaire response. (000977-978)

68. January 2, 1992 letter from Dewey J. Gonsoulin regarding a recent publication entitled "Judicial Sanctions" published by the Defense Research Institute. (000979)

69. January 6, 1992 letter from Professor John F. Sutton regarding a recent Second Circuit decision recognizing the conflict potential inherent in a motion for sanctions. (000980)

70. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 65 through 69 above. (000981)

71. 12/19/91 note from Lisa Bagley with her comments on sanctions. (000982)

72. 12/30/91 letter from W. Ted Minick containing comments regarding the sanctions questionnaire. (000983)

73. 01/15/92 letter from Alan B. Rich enclosing his article entitled "Certified Pleadings: Interpreting Texas Rule 13 in Light of Federal Rule 11," 11 REV. LITIGATION 59 (1991). (000984-1009)

74. 01/17/92 letter from James R. Bass containing comments regarding the sanctions questionnaire. (001010-1014)

75. 01/27/92 letter from Stephen R. Marsh enclosing the opinion in McCoy v. Knowles, an 8/91 report from the President's Council on Competitiveness: "Agenda for Civil Justice Reform in America," and a draft proposal or Rule 215. (001016-1028, 001058-1062)

76. National Union Fire Ins. Co. v. Wyar, No. 01-90-01054-CV (Tex. App. -- Galveston 11/21/91). (001029-1040)

77. Healey v. Chelsea Resources Ltd., 947 F.2d 611 (2nd Cir. 1991). (001041-1057)

78. Sanctions Questionnaire: Compilation of Judges' Responses. (001063-1084)

79. Sanctions Questionnaire: Compilation of Attorneys' Responses. (001085-1108)

80. Letter from Bill Burton enclosing a rough draft of proposed Rule 12A, as suggested by Dean John F. Sutton, Jr. (001109-1116)

81. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 71 through 80 above. (001117-1118)

82. Stephen Marsh transmittal of a page from O'Connor's Texas Rules regarding automatic exclusion. (001118A)

83. 1991 DRI publication entitled "Judicial Sanctions." (001119-1160)

84. Revised version of a draft of Rule 13. (001161-1162)

85. Revised version of a draft of Rule 166d (formerly Rule 215). (001163-1168)

86. Draft of "Notice to Client" language (001169)

87. Draft of "Duty to Supplement" language. (001170)

88. March 6, 1992 memorandum from Mary Wolf regarding sanctions for bringing fictitious suit under Rule 13. (001171-1173)

89. Several relevant opinions: Javor v. Dellinger, 3 Cal. Rptr.2d 662 (Cal. App. 1992); Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992); Lassiter v. Shavor, 824 S.W.2d 667 (Tex. App. -- Dallas 1992, no writ); Bloom v. Graham, 825 S.W.2d 244 (Tex. App. -- Fort Worth 1992, writ denied); Rogers v. Stell, 828 S.W.2d 115 (Tex. App. -- Dallas 1992, no writ); Glass v. Glass, 826 S.W.2d 683 (Tex. App. -- Texarkana 1992, no writ); Shell Western E & P, Inc. v. Partida, 823 S.W.2d 400 (Tex. App. -- Corpus Christi 1992, no writ); Willy v. Coastal Corporation, 112 S. Ct. 1076 (1992), reh'g denied, 112 S. Ct. 2001 (1992); Baylor Medical Plaza Services Corp. v. Kidd, No. 6-91-057-CV, 1992 WL 59438 (Tex. App. -- Texarkana 1992, n.w.h.); Koslow's v. Mackie, 796 S.W.2d 700 (Tex. 1990). (001174-1257)

90. February 10, 1992 letter from Byron Keeling. (001258-1263)

91. February 24, 1992 letter from Evelyn Avent to Members of the Committee on Administration of Justice enclosing a redraft of Rule 215 from Shelby Sharpe. (001264-1274)

92. December 19, 1991 excerpt from The Advocate, "Procedure Update," regarding Rule 13 Sanctions - Standard of Appellate Review. (001275-1285)

93. March 18, 1992 letter to Evelyn Avent from Shelby Sharpe enclosing additional changes to Rule 215 draft. (001286-1298)

94. "Vast Revisions to Civil Rules Proposed by Judicial Conference Committee," Litigation News, April 19, 1992, regarding proposals for mandatory discovery disclosure. (001299)

95. "Sanctions were Reversed because of Court's Failure to Articulate Basis for Award," Federal Litigation Guide Reporter, pp. 107-109. (001300-1302)

96. "Sanctions Should be Decided Separately from Merits when Credibility of Plaintiff is at Issue," Federal Litigation Guide Reporter, pp. 111-112. (001303-1304)

97. May 6, 1992 update re Rule 11 proposals. (001305-1306)

98. "Quayle Likes the 'English Rule' But Brits Have their Doubts," Legal Times, February 10, 1992. (001307-1309)

99. "Heavy Sanctions," Wall Street Journal, May 22, 1992. (001310-1311)

100. "Immigration Lawyers Balk at New INS Sanctions," Legal Times, June 1, 1992. (001312-1313)

101. "Texas Lawyers Hit With Record Sanctions," The National Law Journal, June 1, 1992. (001314)

102. "Rule 11 Reform," The National Law Journal, May 25, 1992. (001315)

103. "Rule 11 Reforms are Criticized," The National Law Journal, May 25, 1992. (001316)

104. May 8, 1992 letter from Stephen Marsh suggesting changes to current sanctions laws. (001317-1318)

105. "Respondents to Litigation News Fax Poll Want Reforms," Litigation News, June 1992. (001319-1325)

106. "Fax Poll Results Draw Positive Reaction," Litigation News, June 1992. (001326-1327)

107. Judicial Conference Standing Committee on Rules of Practice and Procedure (Judicial Conference Advisory Committee on Civil Rules), drafts for Rules 11 and 37. (001328-1345)

108. "Losers Face $1M Fine for Trial Tactics; Rule 13 Sanction Catches Task Force's Eye," Texas Lawyer, May 25, 1992. (001346-1347)

109. Second draft of Dean Sutton's proposed Rule 12a, dealing with disqualification of attorneys. (001348-1353)

110. Draft of Rule 13, with comments. (001354)

111. Draft of Rule 166d [formerly Rule 215], with comments. (001355-1359)

112. Another version of Rule 13, designed to combine both Rule 13 and former Rule 215 into a single rule. (001360-1362)

113. Another version of Rule 166d [former Rule 215], which is sort of "non-Bristerized" draft. (001363-1368)

114. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 82 through 113 above. (001369-1376)

115. June 24, 1992 letter from Lev Hunt, regarding joint report of the Corpus Christi Chamber of Commerce and the Nueces County Bar Association. (001377-1383)

116. June 26, 1992 letter from L.T. "Butch" Bradt, concerning Judge West's $1 million sanctions, also enclosing the judgment. (001384-1390)

117. "Rare Sanctions Against Firm, Client," ABA Journal, July 1992. (001391)

118. "Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions," Baylor Law Review, Vol. 44, p. 253, by Kevin F. Risley. (001392-1416)

119. Reports concerning: a federal court order imposing sanctions without possibility of reimbursement from any source, including client, employer, or insurer; a Fifth Circuit decision reversing trial court Rule 11 sanctions for failure to make specific findings why the sanction chosen is the least severe sanction adequate to accomplish Rule 11's purposes; May 8th version of Rule 11; a Fifth circuit case holding that a 33-month delay between an alleged violation of Rule 11 and a motion for sanctions was too long and defeated the rule's deterrent purpose. (001417-1422)

120. McKellar Development Group, Inc. v. Fairbank, 827 S.W.2d 579 (Tex. App. -- San Antonio 1992, n.w.h.); Kutch v. Del Mar College, No. 13-91-285-CV, 1992 WL 106842 (Tex. App. -- Corpus Christi, May 21, 1992, n.w.h.); Smith v. Southwest

Feed Yards, No. D-1503, 1992 WL 140839 (Tex. June 25, 1992). (001423-1444)

121. Letter from Chuck Herring to Task Force and Advisory Committee Members enclosing items 115 through 120 above. (001445-1447)

APPENDIX N

ORDER OF TEXAS SUPREME COURT, JUNE 19, 1991, APPOINTING TASK FORCE ON SANCTIONS

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 91-0048

APPOINTMENT OF TASK FORCES TO CONSIDER CHANGES IN THE RULES OF PROCEDURE IN TEXAS COURTS

ORDERED:

To assist the Supreme Court in determining whether changes should be made in the rules of procedure in Texas courts:

1. The following persons are appointed as a Task Force on Sanctions to study, to consult with such other interested persons as may seem appropriate, and to report to the Rules Advisory Committee as soon as practicable what changes, if any, should be made in the Texas Rules of Civil Procedure governing the imposition of sanctions:

Charles F. Herring, Jr., Chairman

Lisa Blue	Elizabeth A. Crabb
Herbert Boyland	Russell H. McMains
Hon. Scott A. Brister	Elizabeth G. Thornburg
Carlyle H. Chapman, Jr.	Robert A. Valadez

2. The following persons are appointed as a Task Force on Discovery to study, to consult with such other interested persons as may seem appropriate, and to report to the Rules Advisory Committee what changes, if any, should be made in the Texas Rules of Civil Procedure governing the scope and conduct of discovery:

David W. Keltner, Chairman

Paul N. Gold	William Powers, Jr.
Mark L. Kincaid	Dan R. Price
Hon. Bonnie Leggat	Eduardo R. Rodriguez
James W. McCartney	James B. Sales
David L. Perry	Jonathan W. Vickery

3. The following persons are appointed as a Task Force on the Jury Charge to study, to consult with such other interested persons as may seem appropriate, and to report to the Rules Advisory Committee what changes, if any, should be made in the Texas Rules of Civil Procedure governing the jury charge:

Hon. Ann Tyrrell Cochran, Chairman
George W. Bramblett, Jr.
Michael A. Hatchell
Daniel K. Hedges
P. Michael Jung
John G. Lewis
Richard R. Orsinger
Jorge C. Rangel
Paula Sweeney

4. The following persons are appointed as a Task Force on Revision of the Texas Rules of Civil Procedure to study, to consult with such other interested persons as may seem appropriate, and to report directly to the Supreme Court as soon as practicable whether those rules should be recodified into a more coherent and easily usable body, either with or without substantive change:

William V. Dorsaneo III, Chairman
Alexandra W. Albright
James W. Cannon, Jr.
David E. Chamberlain
John C. Chambers
Fred Hagans
Hon. Lynn N. Hughes
David Lopez
Linda Turley

5. Luther H. Soules III, chairman of the Rules Advisory Committee, is appointed an *ex officio* member of each task force.

6. Hon. Nathan L. Hecht is appointed liaison from the Supreme Court to each task force.

7. Each task force should identify issues within the scope of its charge, research relevant materials, and report both recommendations and divergent views. The Court may, from time to time, modify the charge of each task force.

SIGNED AND ENTERED this 19th day of June, 1991.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

APPENDIX O

STATE BAR OF TEXAS COMMITTEE ON ADMINISTRATION OF JUSTICE -- PROPOSALS FOR TEX. R. CIV. P. 215

STATE BAR OF TEXAS

re Chuck Herring

February 24, 1992

TO: Members of the Committee on Administration of Justice

FROM: Evelyn A. Avent, Secretary

Enclosed is a redraft of Rule 215 which Shelby Sharpe has completed and which will be on the March 14 Agenda for final action.

If you have any suggestions regarding the redraft, please contact Shelby as soon as possible so that any corrections or changes which seem appropriate may be made and the final draft mailed to the committee as least one week in advance of the March 14 meeting.

Evelyn

Evelyn A. Avent

Enclosure

001264

P. O. Box 12487 Austin, Texas 78711

STATE BAR OF TEXAS

COMMITTEE ON ADMINISTRATION OF JUSTICE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule 215.

RULE 215. ABUSE OF DISCOVERY; SANCTIONS

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 200–2b, 201–4 or 208; 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 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or

(c) to serve a written response to a request for inspection submitted under Rule 167, 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 167;

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 paragraph 2b herein 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 166b.

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 paragraph 2(g) of Rule 166b, the person who made the request may move for an order compelling compliance with paragraph 2(g) of Rule 166b. 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.

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 200–2b, 201–4 or 208 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 paragraph 1 of this rule or Rule 167a, 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 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 fact 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 167a(a) 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 Rule 167.* If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

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 paragraph 2b of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

4. Failure to Comply With Rule 169.

a. *Deemed Admission.* Each matter of which an admission is requested shall be deemed admitted unless, within the time provided by Rule 169, the party to whom the request is directed serves upon the party requesting the admissions a sufficient written answer or objection in compliance with the requirements of Rule 169, addressed to each matter of which an admission is requested. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer.

b. *Motion.* The party who has requested the admission may move to determine the sufficiency of the answers or objections. 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 169, it may order either that the matter is admitted or that an amended answer be served. The provisions of paragraph d of subdivision 1 of this rule apply to the award of expenses incurred in relation to the motion.

c. *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 169 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 169(1), 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.

5. Failure to Respond to or Supplement Discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

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.

RULE 215. DISCOVERY DISPUTES; SANCTIONS

1. Abuse of Discovery. The following may be considered an abuse of discovery:

(a) a party or other deponent which is a corporation or other entity fails to make a designation under Rule 200-2b, 201-4 or 208; or

(b) a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(1) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(2) to answer a question properly propounded or submitted upon oral examination or upon written questions; or

(3) to produce a properly subpoenaed document, item or thing; or

(4) to complete a deposition without cause; or

(c) a party fails:

(1) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(2) to responsively answer an interrogatory submitted under Rule 168; or

(3) to serve a written response to a request for inspection or production submitted under Rule 167, after proper service of the request; or

(4) 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 167; or

(5) to comply with any persons written request for the persons own statement as provided in paragraph 2(g) of Rule 166b; or

(6) to respond to or supplement answers or responses to a request for discovery; or

(7) to comply with an order under Rule 167a(a) requiring the party to appear or produce a person for examination, unless the person failing to comply shows the party is unable to appear or to produce such person for examination; or

(d) a party or an officer, director or managing agent of a party or a person designated under Rules 200-2b, 201-4 or 208 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 under Rule 167a; or

(e) an attorney terminates a deposition prior to its completion without cause; or

(f) if the court finds that a party is resisting discovery or if the court finds that any discovery request or answers or responses thereto are frivolous, oppressive, harassing, non-responsive or made for purposes of delay.

For purposes of this rule, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

2. Motion and Proceedings Thereon. Following the commission of an abuse of discovery by any party or person, a party may file a motion seeking an order compelling discovery or for sanctions without the necessity of first having obtained a court order compelling such discovery which shall not be heard until all parties and all other persons affected thereby have received reasonable notice.

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

(b) When a motion relates to the taking of a deposition on oral examination, the proponent of the motion may complete or adjourn the examination before he applies for an order.

(c) The party who has requested an admission under Rule 169 may move to determine the sufficiency of the answer or objection.

(d) On matters relating to a deposition, the motion for an order to a party may be made to the court in which the action is pending or to any court of competent jurisdiction in the district where the deposition is being taken. A motion 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, the motion for an order will be made to the court in which the action is pending.

(e) Except on leave of court, the party or person against whom a motion has been filed under this rule may file a written response not later than seven (7) days prior to the date of hearing of the motion. Service of any response shall be accomplished on the movant not later than seven (7) days prior to the date of hearing, except on leave of court.

(f) No oral testimony shall be received at the hearing unless an issue of fact is raised by a timely filed response. An issue of fact is raised by an affidavit of a person with knowledge or other sworn testimony attached to the response. Oral testimony shall be received only regarding the fact or facts put in issue by an affidavit or other sworn testimony.

(g) The court shall place a motion filed pursuant to Section 1 (b), (d), (e), or (f) of this rule on an expedited docket for hearing.

4. Disposition of Motion.

(a) If the court finds that the discovery dispute is an honest difference of opinion reasonably grounded regardless of whether the motion is granted in whole or in part or denied, then the court shall enter an appropriate order on the motion without awarding any sanctions.

(b) If the court finds that there is clear and convincing proof establishing an abuse of discovery or a failure to obey an order regarding discovery regardless of whether the motion is granted in whole or in part or denied, the court shall enter an appropriate order on the motion and shall impose such sanctions as are just and appropriate for the conduct to the sanctioned.

(c) 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 166b.

(d) Any order entered under this rule requiring payment of money to movant or respondent shall be paid into the registry of the court for disposition in the final judgment which shall be subject to review by appeal following entry of the judgment.

(e) If the court overrules an objection to a matter requested to be admitted under Rule 169, the court may order that the matter is admitted or permit the party to file an amended answer within a reasonable time, but not more than 30 days from the date of hearing, whichever order is just under the circumstances. If the court enters an order that the matter is admitted, the court may assess such expenses and costs against the disobedient party or attorney advising him, or both, as the court deems just.

(f) If a nonparty fails to comply with an order under Rule 167, the court which made the order may treat the failure to obey as contempt of court.

(g) In lieu of any of the foregoing orders or in addition thereto, the court may enter 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.

5. Sanctions for Pre-Trial Discovery Abuses. The court should not assess sanctions which are so severe as to preclude presentation of the merits of the case absent a party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery under the rules. Sanctions for consideration are:

(a) 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, or both; or

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

(c) 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; or

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

committing the abuse of discovery;

(e) 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. Guidelines for Sanctions. In determining the propriety and scope of sanctions, the court shall consider the following guidelines:

(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 the 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;
(m) the degree to which the offended person attempted to mitigate any prejudice suffered by him or her; and
(n) the degree to which the offended person's own behavior caused the expenses for which recovery is sought.

7. Trial Sanctions for Discovery Abuses.

(a) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 169 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the court may enter an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees, unless the court finds that (1) the request was held objectionable pursuant to Rule 169(1), 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.

(b) A party who fails to respond to or supplement his response or answer to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

8. Appeal. Any order of sanction under this rule shall be subject to review on appeal from final judgment. Upon written request by any attorney or party filed not later than 10 days after the signing of an order of sanction, the court shall file findings of fact and conclusions of law not later than 30 days after the signing of such order. If the court fails to file timely findings of fact and conclusions of law, the person making the request shall follow the procedure set forth in Rule 297. Notice of the filing of the request shall be served as provided by Rule 21a.

III. **Brief statement of reasons for requested changes and advantages to be served by proposed new Rule:**

Rule 215 is poorly organized, lacks sufficient guidelines and instructions for the bench and bar to be justly implemented and to comply with due process. The changes should bring about better organization, clarification in dealing with discovery disputes, direction for determining when sanctions are appropriate, guidelines for sanctions in accordance with the latest Supreme Court of Texas opinions construing Rule 215, and a standard of review for an appeal of an order of sanctions. Because sanctions are so consequential, they should only be based upon a high standard of proof. Findings of fact and conclusions of law will also provide a better appellate review.

4543.001

✓10-15-93

ANN TYRRELL COCHRAN
JUDGE, 270TH DISTRICT COURT
CIVIL COURTS BUILDING
HOUSTON, TEXAS 77002

April 12, 1993

Hon. Nathan Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Enclosed for consideration by the Supreme Court are recommended rule changes from your Task Force on Rules Relating to the Jury Charge. These proposals have the unanimous recommendation of the members of that task force and, as explained in greater detail below, are the result of our consulting with a great many other lawyers, judges, and law professors.

The greatest challenge to the task force came in considering proposals to simplify the means to preserve appellate complaint. As you well know, an earlier proposal to move to an "object only" system raised a good deal of opposition from the trial bench. In order to understand the concerns of the trial judges, we asked Justice Linda Thomas, then chair of the Judicial Section, to appoint several trial judges from across the state to meet with us and share their concerns. Our two meetings with these judges were very productive. All agreed that the current system needed to be revised to simplify preservation of error, but given the complicated nature of so much civil litigation, and the lack of clerical support, time, and research facilities so many trial judges face, there was a serious concern that total abolition of the tender requirement would give rise to greater problems in preparing a correct charge at the trial court level. Thought was given to earlier proposals to allow judges to order tender without making tender a prerequisite to appellate complaint, but we concluded that the lack of appellate consequences made such orders unenforceable and thus unhelpful.

In addition to the trial judges, task force members have sought and received advice and comment from the consultative group, many lawyers

who have expressed interest in our work, and legal scholars. We feel that our conclusions have the support of a wide cross-section of the trial and appellate bar as well as the trial judiciary.

The conclusion of the task force was that objection should always be required, but that an additional requirement of written tender should be necessary only in the following limited circumstances: (1) the question, definition, or instruction is totally omitted from the proposed charge; and (2) it is something that party has the burden to plead. This approach gives the trial judge the "bare bones" of the charge, but alleviates the current problem of requiring a party to write a correct charge for the opposing side.

We also addressed the problems currently posed by the appellate construction of the requirement that any tender be in "substantially correct" form, and have proposed instead the following language:

"Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction."

The task force believes that this approach satisfies the legitimate concerns of the trial bench and offers as well a workable system of preservation of error.

The task force retained the substance of Rule 279 regarding the effect of omissions from the charge. Two substantive clarifications were made: (1) that express or deemed findings by the court on omitted elements may be made against any party who has failed to preserve appellate complaint regarding the omission,but not against a party who has preserved appellate complaint; and (2) that evidentiary sufficiency challenges to express findings under Rule 279 are governed by the same rules for preservation of appellate complaint as in the case of findings in bench trials. See Tex. R. App. P. 52(d).

The jury instructions (Rule 226a) have been rewritten, primarily to simplify the language used and to reorganize at what point in the trial certain instructions are given. A few are new. Instructions about conduct in the jury room and the role of the presiding juror were added at the suggestion of trial judges who have found over the years that jurors need more information about that stage of the trial. An instruction about the effect of sustaining evidentiary objections has been added, as has one telling the jury that they are bound to follow the law whether they think it is right or wrong. (The latter was added as emphasis in light of the fact that the types of jury misconduct that may be grounds for motions for

new trial have changed since the Rule 226a instructions were originally written.)

We did attempt to consolidate and reorganize the rules with which we were dealing, and understand that Professor Dorseano's task force will be looking at these aspects as well. Michael Jung, of our task force, is serving as our unofficial liason with that group.

The enclosed report is submitted in two forms: (1) a plain copy of the proposal; and (2) an annotated version, with underlining and strike-outs to show the changes.

Thank you for allowing me to work on this project for you. The members of the task force are excellent lawyers and fine people. It has been a pleasure to serve with them.

Very truly yours,

Ann Tyrrell Cochran

Ann Tyrrell Cochran

Supreme Court Jury Charge Task Force

Proposed Revisions to Tex. R. Civ. P. 226, 226a, 236, and 271-279

Rule 226. Oath to Jury Panel

Before the parties or their attorneys begin the examination of the jury panel, the jurors shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will give true answers to all questions asked you concerning your qualifications as a juror, so help you God?"

Rule 226a. Instructions to Jury Panel and Jury

The judge shall give the following instructions to the jury panel and to the jury. If the case is tried to a six-person jury, the references to ten or eleven jurors in these instructions should be changed to read "five."

Part 1 - Jury Panel

After the members of the panel have been sworn as provided in Rule 226 and before the voir dire examination, the judge shall read the following instructions, with such modifications as the circumstances of the particular case may require, to the jury panel.

The case that is now on trial is _____ v. _____. This is a civil lawsuit that will be tried before a jury. Your duty as jurors will be to decide the disputed facts. It is the duty of the judge to see that the case is tried in accordance with the rules of law. It is very important that you follow carefully all instructions that I give you now and later during the trial. If you do not obey these instructions, it may become necessary for another jury to retry this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial.

1. Do not mingle with or talk with the parties, the lawyers, the witnesses, or any other person who might be connected with or interested in this case, except for casual greetings. You may not even

have casual conversation about things completely unrelated to this lawsuit with any of those people.

2. Do not accept any favors from these people, and do not give them any favors. You must avoid even slight favors, such as rides, food, or refreshments.

3. Do not discuss this case with anyone, including your spouse. Do not let anyone discuss the case in your presence. If anyone tries to talk about the case with you or in your hearing, tell me immediately.

4. The attorneys will now have an opportunity to talk with you about the case and the people involved, and to ask you some questions about your backgrounds, experiences, attitudes, and opinions. Listen to the questions and give true and complete answers. Do not conceal information. If you cannot hear or understand the questions, please let me know.

5. If a question is asked of the whole panel that requires an answer from you, please raise your hand and keep it raised long enough for everyone to make a quick note of the people who responded.

Part 2 - Jury

Immediately after the jurors are selected and have been sworn as provided in Rule 236, the judge shall give each juror a copy of the following written instructions and then read them to the jury.

By your oath, you are now officials of this court, and active participants in the administration of justice. It is essential to the administration of fair and impartial justice that you follow these instructions:

1. You must continue to obey the instructions I gave you earlier. Do not talk about the case with anyone, and do not have any contact with the parties, attorneys, witnesses, or other interested persons outside the courtroom.

2. Do not even discuss the case among yourselves until you have heard all of the evidence, the court's charge, the attorneys'

arguments, and I have sent you to the jury room to begin your deliberations.

3. You are the judges of the facts of this case. It is your duty to listen to and consider carefully the evidence admitted under my rulings, and to answer the specific questions about the facts that I will submit to you in writing in the court's charge.

4. In arriving at your verdict, you can consider only the evidence admitted during the trial. Do not make any investigation about the facts of this case. Do not seek out any information contained in documents, books, or records that are not in evidence. Do not make personal inspections or observations outside the courtroom. Do not let anyone else do any of these things for you. This avoids a trial based upon secret evidence.

5. The law is determined by the legislature and courts of this state. You are obligated to follow my instructions about the law, regardless of whether you think the law is right or wrong.

6. During the presentation of evidence, the attorneys may make legal objections. If an objection to a question is sustained, disregard the question, and do not speculate as to why it was asked or what the answer would have been. If an objection to a witness's answer is sustained, disregard that answer. It is not in evidence, and should not be considered. Do not speculate about or consider for any reason the objections or my rulings themselves.

I stress again that it is imperative that you follow these instructions, as well as any others that I may later give you. If you do not obey these instructions, then it may become necessary for another jury to retry this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial. Keep your copy of these instructions, and refer to them should any question arise about the rules that govern your conduct during this trial. A violation of any instruction must be reported to me as soon as possible.

Part 3 - Court's Charge

The following written instrutions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

1. This case is submitted to you by asking questons about the facts. Your answers must be based only upon the evidence, including exhibits, admitted during the trial.

2. In considering the evidence, you are bound to follow the law set forth in this charge, as well as all instructions concerning jurors' conduct that you have been given.

3. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony.

4. Do not let bias, prejudice, or sympathy play any part in your deliberations.

5. Do not become a secret witness by telling other jurors about other incidents, experiences, or lawsuits. Do not tell other jurors about any special knowledge, information, or expertise you may have. You must confine your deliberations to the evidence presented in open court. This avoids a trial based upon secret evidence.

6. Do not discuss or consider attorneys' fees. [Omit when attorneys' fees are in issue.]

7. Do not discuss or consider whether insurance protects any party. [Omit when coverage is in issue.]

8. This charge includes all legal instructions and definitions that are necessary to assist you in reaching your verdict, so do not seek out any information in law books or dictionaries.

9. Every answer required by the charge is important.

10. Do not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions; and do not concern yourselves with the effect of your answers.

11. Do not decide a question by any method of chance.

12. Do not answer a question that calls for a numerical answer by adding together each juror's figure and then dividing by the number of jurors to get an average.

13. Do not do any trading on your answers. That is, one juror must not agree to answer one question a certain way if other jurors will agree to answer another question a certain way.

14. After you retire to the jury room, you will select a presiding juror. You will then deliberate upon your answers.

15. It is the duty of that presiding juror:

a. to preside during the deliberations to provide order and compliance with the charge;
b. to write, sign, and deliver to the bailiff any communication to me;
c. to conduct the vote; and
d. to write your answers in the spaces provided.

16. You may render your verdict on the vote of ten or more members of the jury, but the same ten or more must agree upon each of the answers made.

17. If the verdict is reached by unanimous agreement, the presiding juror will sign the verdict on the certificate page for the entire jury.

18. If the verdict is less than unanimous, the ten or eleven jurors who agree to each and every answer will sign the verdict individually on the certificate page.

19. If you observe a violation of my instructions outside the jury room, by either a juror or any other person, you must report that to me.

20. During your deliberations, any juror who observes a violation of my instructions shall point out the violation and caution the offending juror not to violate the instruction again.

21. You must not discuss the case with anyone, not even with other members of the jury, unless all of the jurors are in the jury room. If anyone other than a juror tries to talk to you about the case before you reach a verdict, tell me immediately.

22. When all required questions have been answered, the presiding juror has written your answers on the charge, and the

verdict has been signed, you will summon the bailiff and be returned to court with your verdict.

[Instructions, definitions, and questions to be placed here.]

Certificate

We, the jury, have answered the questions as shown and return these answers to court as our verdict.

Signature of presiding juror, if unanimous. [One signature line here.]

Signatures of jurors voting for the verdict, if not unanimous. [Eleven signature lines here.]

Part 4 - Jury Release

The judge shall give the jury the following oral instructions after accepting the verdict and then release them:

I earlier instructed you to observe strict secrecy during the trial, not to discuss this case with anyone except other jurors while you were deliberating. I am about to discharge you. Once I have done that, you are released from that and all of the other orders that I gave you. You will be absolutely free to discuss anything about this case with anyone. You will be just as free to decline to talk about the case if that is your decision.

[Judge's commendation of jurors and the important service they have performed may be added here.]

Rule 236. Jurors' Oath

The jury shall be sworn by the court or under its direction as follows: "Do you solemnly swear or affirm that you will return a true verdict, according to the law stated in the court's charge and to the evidence submitted to you under the rulings of this court, so help you God?"

Rule 271. Charge to the Jury

The trial court shall prepare a written charge to the jury. The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable opportunity for the parties to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After the requests and objections are made and ruled upon and any modifications to the charge are made, the court shall read the charge to the jury in open court in the precise words in which it is written. The court shall deliver one or more copies of the written charge to the jury. The charge shall be signed by the court and filed with the clerk.

Rule 272. Standards for the Jury Charge

1. General Standards

a. Pleading Required. A party who has the burden of pleading a matter shall not be entitled to the submission of a question, instruction, or definition regarding that matter unless the matter is affirmatively raised by the party's pleading.

b. Comment on the Evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of their answers, but an otherwise proper question, instruction, or definition shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers.

2. Questions

a. In General. The court shall submit questions on the disputed material factual issues which are raised by the pleadings and the evidence.

b. Broad Form Submission. The court shall, whenever feasible, submit the case upon broad form questions.

c. Conditional Submission. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

d. Disjunctive Submission. The court may submit a question disjunctively when the evidence shows as a matter of law that one or the other of the conditions or facts inquired about necessarily exists.

e. Inferential Rebuttal. Inferential rebuttal questions shall not be submitted.

3. Instructions and Definitions

a. In General. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

b. Burden of Proof. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

Rule 273. Repealed.

Rule 274. Preservation of Appellate Complaints

1. Requests. A party may not assign as error the failure to give a question, definition, or instruction on a contention which that party was required to plead unless the record reflects that, after the conclusion on the evidence and before or at the time of objecting, the party tendered such question, definition, or instruction to the judge in writing. Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction. If a request has been filed and bears the judge's signature, it shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.

2. Objections. No party may assign as error the giving or the failure to give a question definition, or instruction unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. An objection is required even if the objecting party is required to tender a request under paragraph 1 of this rule. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time.

3. Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.

4. Rulings. The court shall announce its rulings on objections in open court before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

5. Evidentiary Sufficiency Complaints. A claim that there was no evidence to support the submission of a question, or that the answer to the question was established as a matter of law, may be made for the first time after the verdict. A claim that there was factually insufficient evidence to support the jury's answer to a question, or that the answer to a question was against the great weight and preponderance of the evidence, must be made after the verdict. Any of such claims may be made regardless of whether the submission of the question was requested by the complainant.

Rule 275. Repealed.

Rule 276. Repealed.

Rule 277. Repealed.

Rule 278. Repealed.

Rule 279. Omissions from the Charge

1. Omission of Entire Ground. Any independent grounds of recovery or of defense which is not conclusively established under the evidence and all elements of which are omitted from the charge

without preservation of appellate complaint by the party relying thereon is waived.

2. Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain such ground of recovery or defense, and necessarily referably thereto, is submitted to and found by the jury, and one or more of such elements is omitted from the charge, the court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal or factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.

SUPREME COURT JURY CHARGE TASK FORCE
PROPOSED REVISIONS TO TEX. R. CIV. P. 271-79

REVISED DRAFT 10/19/92

RULE 271. CHARGE TO THE JURY

Amended Text	Sources and Dispositions
~~Unless expressly waived by the parties,~~ The trial court shall prepare ~~and in open court deliver~~ a written charge to the jury. **The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable opportunity for the parties to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After the requests and objections are made and ruled upon and any modifications to the charge are made, the court shall read the charge to the jury in open court in the precise words in which it is written. The court shall deliver one or more copies of the written charge to the jury. The charge shall be signed by the court and filed with the clerk.**	Disposition: Omitted as unnecessary Disposition: Fourth sentence of New Rule 271 Source: Second sentence of Current Rule 272 and second sentence of Current Rule 273 Source: Current Rule 275 Source: First sentence of Current Rule 271 Source: First sentence of Current Rule 272

RULE 272. ~~REQUISITES~~ STANDARDS FOR THE JURY CHARGE

Amended Text	Sources and Dispositions
~~The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury. All objections not so presented shall be considered as waived. The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.~~	Disposition: First sentence of New Rule 271 Disposition: Fifth sentence of New Rule 271 Disposition: Omitted as unnecessary Disposition: Second sentence of New Rule 271 Disposition: Second sentence of New Rule 274(2) Disposition: First sentence of New Rule 274(2) Disposition: First sentence of New Rule 274(4) Disposition: Omitted as unnecessary Disposition: Third sentence of New Rule 274(2)
1. General Standards.	
a. Pleading Required. A party who has the burden of pleading a matter shall not be entitled to the submission of a question, instruction, or definition regarding that matter unless the matter is affirmatively raised by the party's pleading.	Source: Generalization of second sentence of Current Rule 278
b. Comment on the Evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of their answers, but an otherwise proper question, instruction, or definition shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers.	Source: Generalization of ninth sentence of Current Rule 277

2. Questions.

a. In General. The court shall submit questions on the disputed material factual issues which are raised by the pleadings and the evidence.

Source: Adapted from first sentence of Current Rule 278

b. Broad Form Submission. The court shall, whenever feasible, submit the case upon broad form questions.

Source: First sentence of Current Rule 277

c. Conditional Submission. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

Source: Generalization of seventh sentence of Current Rule 277

d. Disjunctive Submission. The court may submit a question disjunctively when the evidence shows as a matter of law that one or the other of the conditions or facts inquired about necessarily exists.

Source: Adapted from eighth sentence of Current Rule 277

e. Inferential Rebuttal. Inferential rebuttal questions shall not be submitted.

Source: Third sentence of Current Rule 277

3. Instructions and Definitions.

a. In General. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Source: Second sentence of Current Rule 277 and first sentence of Current Rule 278

b. Burden of Proof. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

Source: Fourth sentence of Current Rule 277

~~RULE 273. JURY SUBMISSIONS~~ [Repealed]

Amended Text	Sources and Dispositions
~~Either party may present to the court and request written questions, definitions, and instructions to be given to the jury; and the court may give them or a part thereof, or may refuse to give them, as may be proper.~~	Disposition: Omitted as unnecessary
~~Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination.~~	Disposition: Second sentence of New Rule 271 Disposition: Omitted as unnecessary
~~A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge.~~	Disposition: Requirement repealed

RULE 274. ~~OBJECTIONS AND REQUESTS~~ PRESERVATION OF APPELLATE COMPLAINTS

Amended Text	Sources and Dispositions
1. Requests. A party may not assign as error the failure to give a question, definition, or instruction on a contention which that party was required to plead unless the record reflects that, after the conclusion of the evidence and before or at the time of objecting, the party tendered such question, definition, or instruction to the judge in writing. Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction. If a request has been filed and bears the judge's signature, it shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.	Source: Adapted from fifth and sixth sentences of Current Rule 278 Source: New Source: Adapted from third sentence of Current Rule 276
2. Objections. No party may assign as error the giving or the failure to give a question, definition, or instruction unless that party objects thereto before the charge is read to the jury, ~~A party objecting to a charge must point out~~ stating distinctly the ~~objectionable~~ matter objected to and the grounds of the objection. An objection is required even if the objecting party is required to tender a request under paragraph 1 of this rule. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections didso at the proper time. ~~Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections.~~	Source: Second sentence of Current Rule 274 Source: New Source: Second sentence of Current Rule 272 Source: Sixth sentence of Current Rule 272 Disposition: First sentence of new Rule 274(2)

3. Obscured or Concealed Objections or Requests. When ~~the complaining party's~~ an objection~~,~~ or requested ~~question, definition, or instruction is, in the opinion of the appellate court,~~ obscured or concealed by voluminous unfounded objections or requests, minute differentiations, or numerous unnecessary objections or requests, such objection or request shall be ~~untenable~~ not preserve ~~error~~ appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, instruction, or definition.

Source: Adapted from fourth sentence of Current Rule 278

4. Rulings. The court shall announce its rulings on objections in open court before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

Source: Fourth sentence of Current Rule 272

Source: Acord v. General Motors Corp., 669 S.W.2d 111 (Tex. 1984)

5. Evidentiary Sufficiency Complaints. A claim that there was no evidence to support the submission of a question, or that the answer to the question was established as a matter of law, may be made for the first time after the verdict. A claim that there was factually insufficient evidence to support the jury's answer to a question, or that the answer to the question was against the great weight and preponderance of the evidence, must be made after the verdict. Any of such claims may be made regardless of whether the submission of the question was requested by the complainant.

Source: Adapted from fourth sentence of Current Rule 279

~~RULE 275. CHARGE READ BEFORE ARGUMENT~~ [Repealed]

Amended Text	Sources and Dispositions
~~Before the argument is begun, the trial court shall read the charge to the jury in the precise words in which it was written, including all questions, definitions, and instructions which the court may give.~~	Disposition: Third sentence of New Rule 271

~~RULE 276. REFUSAL OR MODIFICATION~~ [Repealed]

Amended Text	Sources and Dispositions
~~When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall endorse thereon "Refused," and sign the same officially.~~	Disposition: Requirement repealed
~~If the trial judge modifies the same the judge shall endorse thereon "Modified as follows: (stating in what particular the judge has modified the same) and given, and exception allowed" and sign the same officially.~~	Disposition: Requirement repealed
~~Such refused or modified instruction, question, or definition, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.~~	Disposition: Third sentence of New Rule 274(1), in modified form

~~RULE 277. SUBMISSION TO THE JURY~~ [Repealed]

Amended Text	Sources and Dispositions
~~In all jury cases the court shall, whenever feasible, submit the cause upon broad form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.~~	Disposition: New Rule 272(2)(b) Disposition: New Rule 272(3)(a)
~~Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.~~	Disposition: New Rule 272(2)(e) Disposition: New Rule 272(3)(b)
~~In any cause in which the jury is required to apportion the loss among the parties the court shall submit a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the persons found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage question or questions upon affirmative findings of liability.~~	Disposition: Omitted as substantive Disposition: Omitted as too case-specific for inclusion in the Rules of Civil Procedure Disposition: New Rule 272(2)(c), in modified form
~~The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.~~	Disposition: New Rule 272(2)(d)
~~The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.~~	Disposition: New Rule 272(3)(c)

~~RULE 278. SUBMISSION OF QUESTIONS, DEFINITIONS, AND INSTRUCTIONS~~
[Repealed]

Amended Text	Sources and Dispositions
~~The court shall submit the questions, instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party.~~	Disposition: New Rules 272(2)(a) and 272(3)(a)
~~Nothing herein shall change the burden of proof from what it would have been under a general denial.~~	Disposition: Omitted as unnecessary
~~A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question.~~	Disposition: New Rule 272(1)
~~Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party.~~	Disposition: Omitted as unnecessary
~~Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.~~	Disposition: Third sentence of New Rule 274(3) Disposition: First sentence of New Rule 274(1), in modified form Disposition: First sentence of New Rule 274(1), in modified form

RULE 279. OMISSIONS FROM THE CHARGE

Amended Text

Sources and Dispositions

1. Omission of Entire Ground. ~~Upon appeal all~~ **Any** independent grounds of recovery or of defense **which is** not conclusively established under the evidence and ~~no element of which is submitted or requested~~ **all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon** ~~are~~ **is** waived.

2. Omission of One or More Elements. When a**n independent** ground of recovery or defense consists of more than one element, ~~if~~ **and** one or more of ~~such~~ **the** elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, ~~are~~ **is** submitted to and found by the jury, and one or more of such elements ~~are~~ **is** omitted from the charge, ~~without request or objection, and there is factually sufficient evidence to support a finding thereon~~, the ~~trial~~ court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements ~~in support of the judgment~~**, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements**. If no such written findings are made, ~~such~~ **the** omitted elements shall be deemed found by the court in such manner as to support the judgment **if such deemed findings are supported by legally and factually sufficient evidence. The legal or factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.** ~~A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.~~

Disposition: Later in same sentence

Disposition: Second sentence of New Rule 279(2)

Disposition: Omitted as unnecessary

Source: Language conformed to Current Rule 299

Source: Second sentence of Current Rule 279

Source: New; to conform to Tex. R. App. P. 52(d)

Disposition: New Rule 274(5), in modified form