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Creative Sanctions for Discovery Abuse in Texas.

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COMMENTS

CREATIVE SANCTIONS FOR DISCOVERY ABUSE IN TEXAS

TRAVIS C. HEADLEY

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"Regrettably, an increasing number of lawyers equate litigation with war. Trampling the truth, taking no prisoners, scorching the earth—doing anything to win, regardless of the consequences, is their modus operandi."[1]

I. Introduction

Pretrial discovery has become the backbone of civil litigation in American courts.[2] Scholars realized early in our legal history that courts should not adjudicate controversies on a "trial by ambush" basis.[3] Consequently, discovery serves the purpose of exposing the relevant facts known by each party and constitutes the primary tool used to determine

1. G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 15 (asserting that attorney's intentionally abuse the discovery process in order to gain an advantage in litigation), WL 6-JUN SCLAW 14.

2. *See* THOMAS A. MAUET, PRETRIAL § 6.1, at 173 (3d ed. 1995) (stating "the discovery stage is where most of the battles are fought and where the war is often won or lost"); *see also* WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 9 (1968) (writing that the expansion of pretrial discovery is one of the most important modern day reforms to the adversary system).

3. *See* Joe K. Longley & Mark L. Kincaid, *Discovery and Sanctions for Discovery Abuse*, 18 ST. MARY'S L.J. 163, 165 (1986) (recognizing the main purpose of discovery is to allow disputes to be decided by revealed facts, not concealed facts); *see also* Timothy G. Pepper, Comment, *Beyond Inherent Powers: A Constitutional Basis for In re* Tutu Wells Contamination Litigation, 59 OHIO ST. L.J. 1777, 1777 (1998) (indicating that the Federal Rules of Civil Procedure were drafted to eliminate surprise at trial).

the truth during litigation.[4] Problems arise, however, when lawyers intentionally subvert the discovery process by engaging in unethical behavior, such as withholding discoverable information from the opposing party.[5] By employing such tactics, many lawyers use discovery to slow the litigation process to a grinding halt, frustrating both courts and litigation opponents alike.[6]

Over the past decade, both federal and state courts have seen an alarming increase in discovery abuse.[7] Trial judges have attempted to impede this trend by imposing sanctions on litigants who abuse the discovery process.[8] In combating discovery abuse, most judges rely upon the rules of civil procedure at both the federal and state level.[9] However, the rules of civil procedure contemplate only a narrow range of sanctions that judges may impose on violating parties.[10] As a result, the time has come to con-

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4. *See* WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 9 (1968) (explaining that discovery allows each party to obtain information from the other before the case is tried); *see also* THOMAS A. MAUET, PRETRIAL § 6.1, at 173 (3d ed. 1995) (stating that "[d]iscovery is the principal fact-gathering method in the formal litigation process").

5. *See* G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 15 (reporting that a survey of litigators suggested that attorneys often draft interrogatory answers with the intent to suppress relevant, unprivileged information), WL 6-JUN SCLAW 14; *see also* WARREN FREEDMAN, THE TORT OF DISCOVERY ABUSE 109 (1989) (writing that discovery abuse often "take[s] the form of deliberate concealment or nondisclosure of information or documents").

6. *See* Timothy G. Pepper, Comment, *Beyond Inherent Powers: A Constitutional Basis for In re* Tutu Wells Contamination Litigation, 59 OHIO ST. L.J. 1777, 1778 (1998) (commenting that litigation can grind to a halt when a party intentionally abuses the discovery process); *see also* William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 770 (1984) (stating that discovery abuse is often used "to make continuation of the lawsuit infeasible or impossible").

7. *See* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 618 (1992) (finding that "the Texas Supreme Court had become exasperated with the rampant abuse of discovery by litigants"); *see also* G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 15 (announcing that judges have seen discovery abuse increase at an alarming pace), WL 6-JUN SCLAW 14.

8. *See, e.g.*, Knox v. Hayes, 933 F. Supp. 1573, 1586 (S.D. Ga. 1995) (ordering the party to pay fees and costs to plaintiffs as a sanction for discovery abuse); Wolstein v. Bernardin, 159 F.R.D. 546, 553 (W.D. Wash. 1994) (rendering default judgment against the violating party as sanction for discovery abuse); Quadrozzi v. City of New York, 127 F.R.D. 63, 79 (S.D.N.Y. 1989) (requiring the violating party to pay reasonable court costs as a result of the party's failure to comply with a discovery order).

9. *See* FED. R. CIV. P. 37; TEX. R. CIV. P. 215.

10. *See* FED. R. CIV. P. 37 (providing the list of available sanctions a judge may impose for discovery abuse); *see also* TEX. R. CIV. P. 215 (setting forth permissible sanctions for discovery abuse).

sider different, creative types of discovery abuse sanctions before further damage to the justice system occurs.[11]

A "creative sanction" may be defined as one not specifically provided for in the applicable rules of civil procedure.[12] *In re E.I. DuPont De Nemours & Co.-Benlate Litigation*[13] provides a useful example of a creative discovery abuse sanction.[14] In this case, the trial court imposed monetary sanctions against DuPont in excess of thirteen million dollars for intentionally withholding discoverable information and refusing to comply with discovery orders.[15] On appeal, the Eleventh Circuit reversed the district court's sanctions, finding the sanctions imposed "overwhelmingly punitive and thus criminal in nature."[16]

On remand, Judge Hugh Lawson directed the U.S. Attorney to proceed with a criminal contempt investigation against DuPont.[17] Before the criminal contempt proceedings began, however, Judge Lawson approved a settlement between DuPont and the plaintiffs.[18] The settlement directed DuPont to pay over eleven million dollars to four law schools in Georgia to "endow professorial chairs devoted to fostering and teaching professionalism and ethics in the practice of law."[19] Although the court did not directly order the law school funding as a discovery abuse sanction, the settlement approved by Judge Lawson, in fact, acted as a sanc-

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11. *See* Timothy G. Pepper, Comment, *Beyond Inherent Powers: A Constitutional Basis for In re* Tutu Wells Contamination Litigation, 59 OHIO ST. L.J. 1777, 1777 (1998) (stating "[a]busive discovery practices have taken a severe toll on the justice system's ability to adjudicate disputes"); *see also* Richard Zitrin & Carol M. Langford, *Actions Speak Louder Than Words: To Stop Discovery Abuses, There Need to be Greater Consequences Than Money*, TEX. LAW., May 17, 1999, at 34 (arguing that judges must impose sanctions other than monetary penalties in order to stop discovery abuse), WL 5/17/1999 TEXLAW 34.

12. *Cf.* Anderson v. Beatrice Foods Co., 900 F.2d 388, 394 n.6 (1st Cir. 1990) (explaining how the elasticity contained in Federal Rule 37 allows judicial discretion).

13. 99 F.3d 363 (11th Cir. 1996).

14. *See In re* E.I. DuPont De Nemours & Co.-Benlate Litig., 99 F.3d 363, 369 (11th Cir. 1996) (reversing the original sanctions imposed by the district court which led to the creative discovery abuse sanction).

15. *Id.* at 366 (describing the sanctions imposed by the district court).

16. *Id.* at 369 (concluding that the district court's sanctions were criminal in nature). After finding that the sanctions were criminal in nature, the Eleventh Circuit concluded that the district court failed to provide DuPont with the proper notice required by the Constitution prior to imposing criminal contempt sanctions. *Id.*

17. *See DuPont, Law Firm to Pay $11.25 Million to Settle Bush Ranch Proceedings*, MEALEY'S EMERGING TOXIC TORTS, Jan. 8, 1999, at 13 (describing how the district judge had authorized the discovery misconduct to go forward as a criminal contempt proceeding), WL 7 No. 19 METT 13.

18. *Id.*

19. *Id.* at 15 (detailing the law school funding).

tion.[20] However, the Federal Rules of Civil Procedure do not specifically provide for this type of sanction.[21] Thus, the court indirectly assessed a creative sanction for discovery abuse against DuPont.[22]

Federal and state courts need to recognize and employ creative discovery abuse sanctions for three primary reasons. First, courts need to restore a higher level of ethical behavior and professional responsibility to the discovery process.[23] Second, courts need to encourage compliance with discovery rules.[24] Third and finally, courts need to deter the abusive litigant, as well as future litigants, from committing discovery abuse.[25]

This Comment analyzes whether courts may legally and feasibly impose creative sanctions for discovery abuse under the current Federal Rules of Civil Procedure, the Texas Rules of Civil Procedure, or the courts' inherent powers. Part II examines the history of discovery abuse sanctions under Federal Rule of Civil Procedure 37 and Texas Rule of Civil Procedure 215. This section also explores examples of cases where a court has imposed a creative sanction for discovery abuse. Part III analyzes how Texas courts have the power to impose creative discovery abuse sanctions. Finally, Part IV proposes a workable system for creative discovery abuse sanctions in Texas.

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20. *See id.* at 13 (stating that the federal judge "approved DuPont's $11 million settlement to fund legal education programs on ethics and professionalism").

21. *See* FED. R. CIV. P. 37 (listing the available sanctions for discovery abuse).

22. *See DuPont, Law Firm to Pay $11.25 Million to Settle Bush Ranch Proceedings*, MEALEY'S EMERGING TOXIC TORTS, Jan. 8, 1999, at 13 (reporting that the federal judge approved the settlement imposing discovery abuse sanctions including funding legal education programs), WL 7 No. 19 METT 13.

23. *See* G. Ross. Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 15-16 (arguing discovery abuse will not stop until attorney's again recognize the traditions of honesty and integrity), WL 6-JUN SCLAW 14; *see also* WARREN FREEDMAN, THE TORT OF DISCOVERY ABUSE 11 (1989) (asserting that discovery is largely an ethical question because lawyers so often abuse it).

24. *See* William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 772 (1984) (announcing that the Supreme Court recognizes coercion of compliance as a legitimate goal of discovery abuse sanctions); *see also* Joe K. Longley & Mark L. Kincaid, *Discovery and Sanctions for Discovery Abuse,* 18 ST. MARY'S L.J. 163, 188 (1986) (stating that "[s]anctions must do more than just obtain compliance of the recalcitrant party").

25. *See* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1785 (1988) (explaining that courts began imposing sanctions to deter future discovery abuse); *see also* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 621-22 (1992) (asserting that the Texas Supreme Court encourages "trial courts to impose sanctions for the purposes of deterring potential abusers").

II. History of the Discovery Process in Federal and State Courts

Before analyzing whether courts may employ creative discovery abuse sanctions, it is necessary to examine the history of the discovery process at the federal and state, specifically Texas, court level. More importantly, an examination of the history, purpose, and structure of rule-based discovery abuse sanctions will help in recognizing why courts need to employ creative sanctions. Furthermore, a brief overview of the few cases that specifically address creative discovery abuse sanctions provides examples of how such a system might work.

A. *Federal Courts*

The Federal Rules of Civil Procedure regulate the discovery process in federal courts.[26] Specifically, Rule 37 provides a "laundry list" of sanctions available to the district court.[27] In the case of *In re Tutu Wells Contamination Litigation*,[28] however, the district court judge chose to forego the rule-based sanctions and imposed a creative discovery abuse sanction.[29]

1. Rule 37, Federal Rules of Civil Procedure

Federal district judges use Rule 37 as the primary tool to sanction litigants abusing the discovery process.[30] Under Rule 37, courts may sanction litigants for such things as "abuse, non-compliance and flagrant disregard of the discovery process."[31] Rule 37 has three primary purposes: (1) secure compliance with the rules of discovery, (2) deter other litigants from violating the discovery rules, and (3) punish parties who violate the rules of discovery.[32] Satisfying these three purposes allows

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26. *See* FED. R. CIV. P. 26-37 (detailing the rules of discovery).

27. *See* FED. R. CIV. P. 37(b)(2) (providing the sanctions available to the trial court).

28. 120 F.3d 368 (3d Cir. 1997).

29. *See In re* Tutu Wells Contamination Litig., 120 F.3d 368, 372 (3d Cir. 1997) (describing how the district court bypassed the sanctions in Rule 37 and imposed the Community Service Sanction Account sanction through its inherent powers).

30. FED. R. CIV. P. 37 (establishing a set of discovery abuse sanctions); 2 DISCOVERY PROCEEDINGS IN FEDERAL COURT 64 (3d ed. 1995) (stating that Rule 37 is the primary basis for discovery sanctions).

31. 535 Broadway Ass'n v. Commercial Corp. of Am., 159 B.R. 403, 406 (S.D.N.Y. 1993); *see also* R. LAWRENCE DESSEM, PRETRIAL LITIGATION 249 (1998) (describing how Rule 37 provides sanctions for failing to comply with a discovery order as well as refusing to provide requested discovery).

32. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (defining the goals of Rule 37); Penthouse Int'l, Ltd. v. Playboy Enters., Inc., 663 F.2d 371, 386 (2d Cir. 1981) (echoing the court's reasoning in *National Hockey League*); Robison v.

courts to meet the ultimate goal of imposing discovery sanctions—ensuring the integrity of the discovery process itself.[33]

Two subsections of Rule 37 set forth the specific sanctions available to a district court judge.[34] Rule 37(b)(2) provides for sanctions when a party refuses to obey a discovery order or fails to provide or permit discovery.[35] These sanctions include taking certain facts as established, prohibiting the disobedient party from introducing certain matters into evidence, dismissing the action or rendering a default judgment, and ordering the party or its attorney to pay reasonable expenses, including attorney's fees.[36] Likewise, Rule 37(c) allows the same sanctions as (b)(2)

Transamerica Ins. Co., 368 F.2d 37, 39 (10th Cir. 1966) (stating that Rule 37's main goal is to secure compliance); *see also* Thomas E. Hoar, Inc. v. Sara Lee Corp., 882 F.2d 682, 687 (2d Cir. 1989) (stating that "the rulemakers framed Rule 37 in recognition of the potential for abuse during the discovery process").

33. *See* BankAtlantic v. Blyth Eastman Paine Webber, Inc., 127 F.R.D. 224, 225 (S.D. Fla. 1989) (announcing that "[o]ur mission is to preserve the integrity of the discovery process"); *see also* ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 8.11, at 8:49 (3d ed. 2000) (stating that courts impose sanctions to secure the "just, speedy, and inexpensive determination of litigation"); Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1781 (1988) (discussing how the Federal Rules allow broad discovery and how Rule 37 attempts to protect this premise).

34. *See* FED. R. CIV. P. 37(b), (c) (providing the sanctions available to the trial court).

35. FED. R. CIV. P. 37(b)(2) (allowing the court to sanction a litigant who fails to comply with a discovery order or cooperate in the discovery process).

36. *See id.* (providing sanctions available to the court in which the action is pending). Rule 37(b)(2) states as follows:

> 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

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when a party fails to disclose information required by Rule 26(a) or 26(e)(1).[37]

For many years following the Supreme Court's creation and implementation of the Federal Rules of Civil Procedure, and Rule 37 specifically, federal district court judges rarely imposed sanctions for discovery abuse.[38] However, since the Supreme Court's ruling in *National Hockey League v. Metropolitan Hockey Club, Inc.*,[39] courts have increasingly sanctioned litigants for abusive discovery tactics.[40] Nonetheless, despite the increase of sanctions under Rule 37, discovery abuse continues to escalate.[41] The effectiveness of Rule 37 remains somewhat questionable because many judges are reluctant to impose harsh sanctions, such as rendering a default judgment against a disobedient party.[42]

> 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.

FED. R. CIV. P. 37(b)(2).

37. *See* FED. R. CIV. P. 37(c)(1) (categorizing the sanctions from subsection (b)(2) that are available under subsection (c)). Rule 26(a) governs the required disclosures during discovery. FED. R. CIV. P. 26(a). Rule 26(e)(1) establishes a duty to supplement the disclosures made pursuant to Rule 26(a). FED. R. CIV. P. 26(e)(1).

38. *See* WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 154-55 (1968) (finding that case law showed that judges used sanctions sparingly if at all); *see also* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1784 (1988) (stating that courts were reluctant to impose discovery sanctions prior to the mid 1970's).

39. 427 U.S. 639 (1976).

40. *See* ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 8.4.2, at 8:12 (3d ed. 2000) (asserting that the Supreme Court's decision in *National Hockey League* was a significant change in discovery sanctions); *see also* Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979) (arguing that "in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where . . . they are clearly warranted").

41. *See* G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 15 (commenting that discovery abuse is increasing and that it must be curbed before permanent damage is done to the justice system), WL 6-JUN SCLAW 14; *see also* Richard Zitrin & Carol M. Langford, *Actions Speak Louder Than Words: To Stop Discovery Abuses, There Need to Be Greater Consequences Than Money*, TEX. LAW., May 17, 1999, at 10 (arguing that large firms readily commit discovery abuse because any monetary sanctions that result are merely seen as business costs), WL 5/17/1999 TEXLAW 34.

42. *See* Richard Zitrin & Carol M. Langford, *Actions Speak Louder Than Words: To Stop Discovery Abuses, There Need to Be Greater Consequences Than Money*, TEX. LAW., May 17, 1999, at 10 (concluding that many judges are unwilling to impose extreme sanctions), WL 5/17/1999 TEXLAW 34; *see also* G. Ross Anderson, Jr., *Discovery Sanctions*,

2. *In re Tutu Wells Contamination Litigation*

In re Tutu Wells Contamination Litigation stands as one of the few federal cases where a district judge imposed a creative discovery abuse sanction.[43] Despite multiple instances of discovery abuse, the court's sanctions centered on Esso Standard Oil's suppression of a report summarizing test results performed where alleged pollution occurred.[44] This suppression, combined with other abusive discovery tactics, greatly increased discovery time, kept other parties from obtaining valuable information, and wasted judicial resources.[45]

Judge Stanley S. Brotman of the District Court for the Virgin Islands imposed unprecedented sanctions against Esso and its attorneys.[46] Instead of utilizing the list of available sanctions provided in Rule 37, Judge Brotman imposed creative discovery abuse sanctions based on the court's inherent powers.[47] The court ordered both Esso and its attorneys to pay a combined $1,000,000 into a "Community Service Sanction Account" designed to fund the construction of a halfway house on St. Thomas, to train inmates, and to renovate the St. Thomas Criminal Justice Complex.[48] Although recognizing the novelty of its sanctions, the court reasoned that the discovery abuse primarily harmed the people of the Virgin Islands.[49]

S.C. LAW., May-June 1995, at 16 (warning that "[t]he crisis will worsen until all judges take a stronger role in preventing discovery misconduct"), WL 6-JUN SCLAW 14.

43. *See In re* Tutu Wells Contamination Litig., 120 F.3d 368 (3d Cir. 1997). A number of private lawsuits were commenced against various defendants for allegedly poisoning the Tutu Wells aquifer on the island of St. Thomas. *See id.* at 373. The litigation sought to assign liability for the contamination of the well and also relief under the Comprehensive Environmental Response, Compensation, and Liability Act. *See id.* Esso Standard Oil Company was the principal defendant. *See id.* at 374.

44. *See id.* at 371-72 (stating that although there were other instances of discovery abuse, the suppression of the report was the primary basis for the sanctions).

45. *See id.* at 374 (explaining Esso and its attorney, Goldman Antonetti, frustrated the discovery process by delaying, oppressing and harassing their opponents which led to unusually high judicial involvement in the discovery process).

46. *See id.* at 372 (opining that "[w]hat specially marks this case is the character and magnitude of the sanctions imposed").

47. *See id.* at 382 (reiterating that the district court used its inherent powers in sanctioning the defendants).

48. *See Tutu Wells*, 120 F.3d at 377 (detailing the specific amounts Esso and Antonetti were ordered to pay into the Community Service Sanction Account and how that money was to be spent).

49. *See id.* (explaining that Judge Brotman believed the people of the island were harmed the most due to the delay in assigning responsibility for the contamination of the aquifer).

As a result, the court held the Virgin Islands was the most appropriate beneficiary of a sanction award.[50]

In a lengthy opinion, the Third Circuit reversed the district court's sanction.[51] The Third Circuit held that Judge Brotman "simply had no power to order Esso and [attorney] Goldman Antonetti to pay money to benefit the St. Thomas penal system."[52] Interestingly, the court of appeals refused to address the appropriateness of the district court's sanctioning based on inherent powers as opposed to the use of rule-based sanctions.[53] Instead, the appellate court simply found that the district court "had no authority under its inherent powers to impose the type of sanction it did."[54]

In analyzing Judge Brotman's sanctions, the Third Circuit first discussed the history of the inherent powers doctrine under federal jurisprudence.[55] Citing *Chambers v. NASCO, Inc.*,[56] the court noted that "because of their very potency, inherent powers must be exercised with restraint and discretion."[57] The court also recognized that the lack of democratic controls on a court's inherent power make discretion even more important.[58]

Ultimately, the Third Circuit found the district court's sanction legislative in nature because the sanction reallocated resources from private

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50. *See id.* (describing Judge Brotman's reasoning for awarding the Criminal Justice Center the funds from the sanction account).

51. *See id.* at 372 (vacating Judge Brotman's ruling with regard to the Community Service Sanction Account). The appellate court also overturned Judge Brotman's suspension of several attorneys because they were not given proper notice. *See id.* Finally, the court upheld the award of attorneys' fees and costs to the opposing parties. *See id.*

52. *Id.*

53. *See id.* at 382-83 (deciding that it was unnecessary to answer such a question).

54. *See Tutu Wells*, 120 F.3d at 383 (rejecting the court's sanction on the basis of inherent powers).

55. *See id.* (indicating that the exact scope of inherent powers is unknown, but listing specific inherent powers recognized by the Supreme Court); *see also* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1787 (1988) (writing that inherent powers "are derived from the duties and responsibilities with which the federal courts have been vested and charged by the Constitution and the Congress").

56. 501 U.S. 32 (1991).

57. *See Tutu Wells*, 120 F.3d at 383 (quoting Chambers v. NASCO, Inc., 501 U.S. 32 (1991)).

58. *See id.* (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)); *see also* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1787 (1988) (echoing the Supreme Court's warning that inherent powers should be used carefully due to the lack of democratic controls).

parties to the public sector.[59] By directing payment to a third party outside the litigation, the Third Circuit held that the district court "ventured well beyond the case and controversy before it."[60] Rather than discussing the "case and controversy" clause of the U.S. Constitution, however, the court continued to analyze the issue through inherent powers by stating that "[n]o matter where one places their origin, it is clear that the power exercised in this case cannot be derived from a court's inherent powers."[61] Furthermore, in a footnote, the Third Circuit stated that it seriously doubted "that Congress provided the courts . . . the power to impose the type of sanction imposed here."[62]

3. Power to Impose Creative Discovery Abuse Sanctions in Federal Courts

Despite the Third Circuit's holding from *In Re Tutu Wells Contamination Litigation,*[63] federal district courts have the power to impose creative discovery abuse sanctions for two critical reasons. First, the plain language of Rule 37 allows a court to impose sanctions beyond those expressed within the Federal Rules of Civil Procedure. Second, the Supreme Court's history of recognizing sanctioning power beyond the boundaries of Rule 37 supports the contention that district courts have the inherent power to impose creative discovery abuse sanctions.[64]

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59. *See Tutu Wells*, 120 F.3d at 384 (concluding that Judge Brotman's sanctions were "essentially legislative in nature," because he alone "chose from whom the resources would be taken and to whom the resources would redound"); *see also* Timothy G. Pepper, Comment, *Beyond Inherent Powers: A Constitutional Basis for In re* Tutu Wells Contamination Litigation, 59 OHIO ST. L.J. 1777, 1783 (1998) (analyzing the Third Circuit's reversal of Judge Brotman's Community Service Sanction Account).

60. *Tutu Wells*, 120 F.3d at 384 (criticizing the court's sanction on the basis of the case or controversy clause).

61. *See id.* at 384-85 (rejecting the notion that a court's inherent power includes the power to redistribute wealth and holding that Judge Brotman's sanctions were not within any permissible bounds of the court's inherent power).

62. *Id.* at 385 n.18 (arguing that Congress did not provide courts with such a power). The court went on to announce a three part test that must be met in order for Congress to provide such a power to the courts: (1) Congress must have the constitutional authority to delegate such power to a coordinate branch; (2) Congress must clearly indicate its intent to delegate this power; and (3) Congress must provide intelligible principles to guide the courts in the exercise of this power. *Id.*

63. 120 F.3d 368 (3d Cir. 1997).

64. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 42-58 (1991) (holding that courts retain the inherent power to sanction even in lieu of statutory- and rule-based sanctions); Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) (concluding that there are situations that warrant a court using its inherent power to sanction); Hutto v. Finney 437 U.S. 678, 689 (1978) (declaring that courts have the inherent power to assess attorney's fees as a sanction for discovery abuse); Link v. Wabash R.R., 370 U.S. 626, 632 (1962) (recognizing the inherent power of a court to sanction a litigant for abusive practices).

a. Creative Sanctions Fall Within Rule 37 Because Its Plain Language Provides for Sanctions Not Specifically Set Forth in the Rule

The United States Supreme Court has never ruled on whether trial courts may impose sanctions not specifically enumerated in Rule 37. However, Rule 37 specifically states that "the court in which the action is pending may make such orders in regard to the failure [to comply with a discovery order] as are just, and among others the following."[65] The plain language permitting creative sanctions centers on the inclusion of the phrase "among others" prior to a listing of available sanctions.[66] Such language indicates an intent for trial courts to have the power to impose sanctions beyond those specifically listed in Rule 37(b)(2).[67]

The Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*[68] implicitly supports this proposition. In *National Hockey League*, the Supreme Court announced deterrence as the primary goal of discovery abuse sanctions under Rule 37.[69] In reviewing a district court's use of dismissal as a discovery sanction, the *per curiam* opinion emphasized that courts should not overturn sanctions on appeal unless the reviewing court determines that the district court abused its discretion.[70]

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65. FED. R. CIV. P. 37(b)(2) (providing the bounds of permissible sanctions).

66. *See* WEBSTER'S DELUXE UNABRIDGED DICTIONARY 59 (2d ed. 1983) (defining "among" as "associated with; making part of the number of"); *id.* at 1268 (defining "other" as "different or distinct from that or those referred to or implied").

67. *See* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1783 (1988) (emphasizing that Rule 37 gives judges broad discretion to impose an appropriate sanction).

68. 427 U.S. 639 (1976).

69. *See* Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (stating that sanctions must be used by district courts in order to deter discovery abuse as well as to punish the violating party); *see also* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1785 (1988) (asserting that the Court's ruling in *National Hockey League* provided that deterrence was a main goal of Rule 37).

70. *See Nat'l Hockey League*, 427 U.S. at 642 (clarifying that "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have [applied the sanction]; it is whether the District Court abused its discretion in so doing"); *see also* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982) (restating the standard for reviewing sanctions imposed under Rule 37); Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1408 (9th Cir. 1990) (stating that discovery sanctions are reviewed under an abuse of discretion standard); Sieck v. Russo, 869 F.2d 131, 134 (2d Cir. 1989) (holding that an appellate court will overturn a Rule 37 sanction if the trial court abused its wide discretion); Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th Cir. 1988) (echoing that a reviewing court may only overturn a discovery sanction if

First, with deterrence as a fundamental goal of Rule 37, creative sanctions can deter abuse where other sanctions fail.[71] The fact that attorneys continue to commit discovery abuse at an alarming rate demonstrates the need for creative sanctions.[72] Quite simply, the specific list of sanctions in Rule 37 has not effectively curbed discovery abuse in federal district courts.[73] Based on *National Hockey League*, the Supreme Court would support a district judge fashioning a creative sanction in order to properly deter future discovery abuse in his or her court.[74]

Second, the *National Hockey League* holding supports creative sanctions by acknowledging a district court's discretion in imposing sanctions for discovery abuse.[75] The Supreme Court recognizes that trial courts are in the best position to determine what type of sanctions are required for particular abuses. Indeed, the ultimate duty to protect the integrity of the discovery process belongs to federal district judges.[76] The Supreme Court's dicta in *National Hockey League* serves to encourage district

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the trial court has made a clear error); Update Art, Inc. v. Modiin Publ'g, Ltd., 843 F.2d 67, 71 (2d Cir. 1988) (announcing that discovery sanctions under Rule 37 are reviewed under an abuse of discretion standard rather than *de novo*); Jones v. Niagara Frontier Transp. Auth., 836 F.2d 731, 734 (2d Cir. 1987) (holding that a trial court's imposition of sanctions should not be overturned unless there has been an abuse of discretion); North Am. Watch Corp. v. Princess Ermine Jewels, 786 F.2d 1447, 1450 (9th Cir. 1986) (adhering to the standard of Rule 37 sanctions being reviewed for abuse of discretion).

71. *See Nat'l Hockey League*, 427 U.S. at 643 (holding that discovery abuse sanctions must be used to deter future abuses); *see also* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1785 (1988) (asserting that beginning in the mid 1970s, courts began imposing sanctions in order to deter discovery abuse).

72. See Timothy G. Pepper, Comment, *Beyond Inherent Powers: A Constitutional Basis for In re* Tutu Wells Contamination Litigation, 59 OHIO ST. L.J. 1777, 1777 (1998) (proclaiming that increased discovery abuse over the past several years has damaged the justice system); G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 15 (stating that discovery abuse is rising at a disturbing rate), WL 6-JUN SCLAW 14.

73. *See* Timothy G. Pepper, Comment, *Beyond Inherent Powers: A Constitutional Basis for In re* Tutu Wells Contamination Litigation, 59 OHIO ST. L.J. 1777, 1778 (1998) (asserting that the judiciary has been unable to curb discovery abuse).

74. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-64 (1980) (reiterating that discovery abuse sanctions must be used to deter future abuse as well as punish the violating party); *Nat'l Hockey League*, 427 U.S. at 643 (requiring that judges impose sanctions meant to deter future litigants from abusing the discovery process).

75. *See Nat'l Hockey League*, 427 U.S. at 642 (holding that the trial court's sanctions may not be overturned absent abuse of discretion); Thomas E. Hoar, Inc. v. Sara Lee Corp., 882 F.2d 682, 687 (2d Cir. 1989) (declaring that discovery abuse sanctions may be overturned only if the trial court abused its "wide discretion").

76. *See* G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 16 (concluding that judges have the final responsibility to stop discovery abuse), WL 6-JUN SCLAW 14; *see also* Richard Zitrin & Carol M. Langford, *Actions Speak Louder Than Words: To Stop Discovery Abuses, There Need to Be Greater Consequences Than Money*,

courts to impose sanctions liberally.[77] To limit a trial judge's discretion when imposing sanctions contradicts this principle. A district judge cannot fully wield broad discretion when imposing sanctions if he or she cannot order sanctions not specifically covered by Rule 37. If such a power did not exist, the Supreme Court would not continue to recognize trial courts' broad discretion when imposing sanctions, as evidenced by the abuse of discretion standard employed for appellate review.[78]

b. Federal District Courts Have the Inherent Power to Impose Creative Sanctions for Discovery Abuse

In addition to the authority to impose creative sanctions under Supreme Court doctrine, federal courts also possess the inherent power to impose creative sanctions for discovery abuse. The Supreme Court's ruling in *Chambers v. NASCO, Inc.*[79] clarifies this inherent power.[80] In *Chambers*, the Court specifically held that trial courts may resort to their inherent power to sanction even though the trial court could also sanction under applicable rules and statutes.[81] Therefore, when a judge believes the sanctions provided in Rule 37 will not properly remedy the discovery abuse, that judge may impose sanctions based on the court's inherent power.[82]

TEX. LAW., May 17, 1999, at 34 (contending that judges must take a more active role in order to stop discovery abuse), WL 5/17/1999 TEXLAW 34.

77. *See Nat'l Hockey League*, 427 U.S. at 642 (recognizing the trial court's discretion to impose sanctions in order to deter future abuse).

78. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982) (reiterating that appellate courts may only overturn the imposition of sanctions if the trial court abused its discretion); *see also* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1783 (1988) (stating that "once the court establishes that sanctions should be imposed, Rule 37 grants judges broad discretion to fashion an appropriate remedy").

79. 501 U.S. 32 (1991).

80. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) (concluding that courts retain the inherent power to sanction); *see also* Cooke v. United States, 267 U.S. 517, 539 (1925) (holding that judges possess the inherent power to sanction in order to protect the court's dignity).

81. *See Chambers*, 501 U.S. at 46 (holding statutory-based sanctioning does not displace a court's inherent power to sanction).

82. *See id.* (stating that "the inherent power [to sanction] must continue to exist to fill in the interstices" not covered by rule based sanctions). *But see* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450-51 (1911) (stating that the use of inherent powers must be exercised with restraint and discretion).

While a court's inherent power to sanction unquestionably exists, the permissible bounds of this power remain unclear.[83] Since *Chambers v. NASCO, Inc.*, the Supreme Court has given no further indication of where to draw the line when relying on the trial court's inherent power to sanction. *In re Tutu Wells Contamination Litigation* stands as a narrow holding that only addresses the specific creative sanction imposed by Judge Brotman and not the theory of creative sanctioning in general.[84] *Tutu Wells* suggests only that the inherent power to sanction does not allow a judge to impose a "Community Service Sanction Account" as Judge Brotman attempted.[85] The Third Circuit's opinion, however, stands alone. Both Judge Brotman and the Third Circuit recognized that no other cases existed addressing creative sanctioning for discovery abuse.[86] If innovative members of the federal judiciary like Judge Brotman continue attempting to impose creative sanctions for discovery abuse, the Supreme Court must eventually expound on its ruling in *Chambers* and provide a definitive resolution to the question of inherent, creative sanctioning power. Until a definitive holding from the Supreme Court or comparable Congressional action addressing a court's power to impose sanctions not provided in Rule 37, the door remains open for a variety of creative sanctions for discovery abuse in federal courts.

B. *Texas State Courts*

Texas state courts regulate discovery through the Texas Rules of Civil Procedure.[87] Texas Rule of Civil Procedure 215, much like Federal Rule 37, provides a list of discovery abuse sanctions available to a trial court.[88] In *TransAmerican Natural Gas Corp. v. Powell*,[89] the Texas Supreme Court examined Rule 215 and set forth specific criteria that a discovery

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83. *See generally Chambers*, 501 U.S. at 50 (stating that sanctioning mechanisms do not prohibit a court from using its inherent powers to sanction bad faith conduct).

84. *See In re* Tutu Wells Contamination Litig., 120 F.3d 368, 385 (3d Cir. 1997) (commenting that although the Community Service Sanction Account had an admirable purpose, the court nevertheless had to disagree with this particular remedy for discovery abuse).

85. *See id.* at 371 (reversing the trial court's use of the "Community Service Sanction Account").

86. *See id.* at 377 (stating the Judge Brotman realized he was "adopting a novel approach to sanctioning"). The court indicated that it was unaware of any other circuit courts that had imposed this type of sanction. *Id.* at 385 n.17.

87. TEX. R. CIV. P. 166-215 (establishing the rules of pretrial procedure, including discovery).

88. TEX. R. CIV. P. 215.2(b) (listing sanctions available to the trial court in which the case is pending).

89. 811 S.W.2d 913 (Tex. 1991).

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abuse sanction must meet.[90] In *Braden v. South Main Bank*,[91] the Fourteenth District Court of Appeals applied the test enumerated in *Trans-American* and upheld a trial court's imposition of a creative discovery abuse sanction.[92]

1. Rule 215, Texas Rules of Civil Procedure

Texas state courts consult Rule 215 when determining appropriate sanctions for discovery abuse.[93] With the 1984 creation of Rule 215, Texas courts began a steady movement favoring the imposition of sanctions against litigants who abuse the discovery process.[94] Much like its federal counterpart, Texas courts have determined that Rule 215 has the following three purposes: (1) secure the parties' compliance with the rules of discovery, (2) deter other litigants from violating the discovery rules, and (3) punish parties that violate the rules of discovery.[95]

Similar to Federal Rule 37, Texas Rule 215 contemplates a wide variety of sanctions available to a trial court to combat discovery abuse.[96] Rule 215.2(b) sets forth sanctions available to the court for failure to comply with a discovery order or request.[97] These sanctions include, but are not limited to: (1) disallowing further discovery by the disobedient party, (2) charging court costs to the disobedient party, (3) taking certain facts as established, (4) prohibiting the disobedient party from supporting or opposing certain claims or defenses, (5) striking pleadings, dismissing the suit or entering a default judgment against the disobedient party, and (6)

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90. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-19 (Tex. 1991) (requiring that discovery sanctions be "just" and comport with due process requirements).

91. 837 S.W.2d 733 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

92. *See* Braden v. S. Main Bank, 837 S.W.2d 733, 742-43 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (holding that the community service sanction satisfied the legitimate purpose of sanctions and the concerns of the Texas Supreme Court's holding in *TransAmerican*).

93. *See* TEX. R. CIV. P. 215 (defining discovery abuse and providing sanctions).

94. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985) (discussing how the use of discovery sanctions by trial courts has developed since the adoption of Rule 215); *see also* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* Transamerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 621-22 (1992) (writing that change in the Texas Rules of Civil Procedure show a pattern of courts imposing discovery sanctions more frequently).

95. *See* Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986) (announcing the purposes of discovery sanctions); *see also* Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (reiterating the purposes of discovery sanctions).

96. TEX. R. CIV. P. 215.2(b); *see* FED. R. CIV. P. 37(b)(2) (providing sanctions for discovery abuse).

97. TEX. R. CIV. P. 215.2(b).

ordering the disobedient party or its attorney to pay reasonable expenses, including attorney's fees.[98] Additionally, Rule 215.3 provides sanctions for abuse of the discovery process when seeking, making, or resisting discovery.[99] Clearly, the authors closely modeled Rules 215.2 and 215.3 after their federal counterparts, Rules 37(b) and 37(c).[100]

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98. *Id.* (setting forth the sanctions available to the court in which the action is pending). Rule 215.2(b) states as follows:

> (b) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:
>
> (1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;
>
> (2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;
>
> (3) an order that the matters regarding which the order was made or any other designated 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 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.
>
> (8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

TEX. R. CIV. P. 215.2(b).

99. TEX. R. CIV. P. 215.3 (providing that the court may impose sanctions "authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b)").

100. *See* William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 769 (1984) (stating that "[a] quick comparison will further reveal that Rule 215 is partially patterned after its counterpart in the Federal Rules

The Texas Supreme Court, as well as lower appellate courts, have affirmed numerous trial court orders for discovery abuse sanctions.[101] As previously noted, the general trend over the past fifteen years indicates an increase in courts sanctioning litigants who abuse the discovery process.[102] Despite the increase in imposing discovery sanctions, however, Rule 215 has not effectively reduced discovery abuse.[103]

2. *TransAmerican Natural Gas Corp. v. Powell*

Since the inception of Rule 215, the most important Texas Supreme Court decision regarding the rule and discovery abuse sanctions arose in *TransAmerican Natural Gas Corp. v. Powell.*[104] In *TransAmerican*, Judge William R. Powell of the 80th District Court sanctioned TransAmerican Natural Gas for discovery abuse in the form of striking its pleadings and dismissing its action against Toma Steel Supply.[105] For the first time since

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of Civil Procedure, Rule 37"). *Compare* FED. R. CIV. P. 37(b)-(c), *with* TEX. R. CIV. P. 215.2-215.3.

101. *See* Koslow's v. Mackie, 796 S.W.2d 700, 705 (Tex. 1990) (affirming the rendering of a default judgment as a discovery abuse sanction); Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242-43 (Tex. 1985) (affirming the striking of an answer as discovery abuse sanctions); Berry-Parks Rental Equip. Co. v. Sinsheimer, 842 S.W.2d 754, 759 (Tex. App.—Houston [1st Dist.] 1992, no writ) (affirming dismissal as sanction for discovery abuse). *But see* Hamill v. Level, 917 S.W.2d 15, 16-17 (Tex. 1996) (reversing dismissal with prejudice as a "death penalty" discovery sanction); Thompson v. Davis, 901 S.W.2d 939, 940 (Tex. 1995) (reversing the order prohibiting further discovery as a discovery abuse sanction); Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1987) (reversing the imposition of joint and several liability on a subsequent intervening plaintiff as a discovery sanction as unjust).

102. *See* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 626 (1992) (recognizing that trial courts in Texas have been encouraged to use discovery sanctions); *see also* Kevin F. Risley, *Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions*, 44 BAYLOR L. REV. 253, 253 (1992) (stating that "[t]he use of sanctions to control the conduct of litigants and their attorneys has become a ubiquitous tool of Texas trial courts").

103. *See* Kevin F. Risley, *Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions*, 44 BAYLOR L. REV. 253, 254 (1992) (declaring that Rule 215 is not curing the problem of discovery abuse); *see also* Richard Zitrin & Carol M. Langford, *Actions Speak Louder Than Words: To Stop Discovery Abuses, There Need to be Greater Consequences Than Money*, TEX. LAW., May 17, 1999, at 34 (commenting that judges' reluctance to use harsher sanctions than the payment of fines has led to increase in discovery abuse), WL 5/17/1999 TEXLAW 34.

104. 811 S.W.2d 913 (Tex. 1991).

105. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 914 (Tex. 1991) (explaining the extent of the district court's ruling).

Rule 215's adoption, the Texas Supreme Court sought to interpret the rule and potentially narrow its application.[106]

The court's analysis reveals a desire to provide a judge with tremendous discretion in issuing discovery sanctions, yet also provides boundaries to be used upon appellate review. The court began by recognizing the breadth of sanctions available to a court under Rule 215.[107] The court then found that both 215.2(b) and 215.3 give the trial court discretion when choosing an appropriate sanction.[108] While recognizing that trial courts have broad discretion in imposing discovery sanctions, however, the Texas Supreme Court chose to focus on the word "just" in order to limit that discretion.[109] The court developed a two-part test to determine whether an imposition of sanctions is just: (1) "a direct relationship must exist between the offensive conduct and the sanction imposed," and (2) the sanction must not be excessive.[110] Additionally, the court ruled that

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106. *See* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 631 (1992) (stating that "the Texas Supreme Court expressly limited the discretion of the trial court in assessing discovery abuse sanctions"); *see also* Berry-Parks Rental Equip. Co. v. Sinsheimer, 842 S.W.2d 754, 758 (Tex. App.—Houston [1st Dist.] 1992, no writ) (concluding that the Texas Supreme Court's holding in *TransAmerican* "set the bounds of permissible sanctions under Rule 215 within which the trial court is to exercise sound discretion").

107. *See TransAmerican*, 811 S.W.2d at 918 (announcing that discovery sanctions are broad under Rule 215).

108. *See id.* at 916-17 (interpreting subsection 215.2(b) and 215.3); *see also* Thompson v. Davis, 901 S.W.2d 939, 940 (Tex. 1995) (finding that the choice of sanctions are left to the discretion of the trial court). *But see* Ray v. Beene, 721 S.W.2d 876, 879 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (holding that a trial court's power to impose discovery abuse sanctions is not unlimited).

109. *See TransAmerican*, 811 S.W.2d at 916 (explaining the requirement in Rule 215.2(b) that the court where the action is pending may "make such orders . . . as are just").

110. *See id.* at 917 (creating a two-part test to be used by courts to determine if a sanction is "just"); *see also* Otis Elevator Co. v. Parmelee, 850 S.W.2d 179, 181 (Tex. 1993) (applying the *TransAmerican* test to determine whether the sanctions imposed by the trial court were "just"); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (reaffirming the test set forth in *TransAmerican*); Cole v. Huntsville Memorial Hosp., 920 S.W.2d 364, 374 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (analyzing the *TransAmerican* test). In *TransAmerican*, the court expounded on each part of the test. *TransAmerican*, 811 S.W.2d at 917 (elaborating on the two part test). With respect to the first part, the court stated that "a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party." *Id.* Regarding the second prong of the test, the court stated, "[t]he punishment should fit the crime." *Id.* Stressing that less stringent sanctions should first be considered to promote compliance, the court stated that "A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes." *Id.*

discovery sanctions must satisfy federal due process requirements.[111] Finally, the court determined such sanctions are subject to mandamus review.[112]

3. *Braden v. South Main Bank*

Braden v. South Main Bank[113] currently stands as the only Texas case on record where a judge successfully imposed a creative sanction for discovery abuse.[114] In *Braden v. South Main Bank*, the trial court imposed sanctions on two attorneys for South Main Bank that included performing ten hours of community service at the Child Protective Services of Harris County.[115] Attorneys Braden and Schulze both received a conditional writ of mandamus from the Texas Supreme Court that ordered the trial court to defer its sanctions until after rendering a final judgment.[116] Notably, in the Texas Supreme Court's opinion granting the writ of mandamus, the court specifically stated that it would not criticize the use of the creative sanction.[117]

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111. *See TransAmerican*, 811 S.W.2d at 917-18 (stating that the Constitution limits courts when imposing case-determinative sanctions for discovery abuse); *see also* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject To Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 629 (1992) (suggesting that "[t]he constitutional limitations imposed upon the trial court were derived by the supreme court exclusively from federal law").

112. *See TransAmerican*, 811 S.W.2d at 920 (holding that a party may seek review of a sanction order by petition for a writ of mandamus to review an order of sanctions if the sanctions are not imposed together with a final, appealable judgment); *see also* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 630 (1992) (summarizing the court's holding that sanctions which preclude a decision on the merits rendered without a final judgment may be reviewed through a writ of mandamus).

113. 837 S.W.2d 733 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

114. *See* Braden v. S. Main Bank, 837 S.W.2d 733, 742 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (finding the attorneys' objections to discovery requests were frivolous, oppressive, and harassing).

115. *See id.* at 736 (describing the trial court's sanctions).

116. *See* Braden v. Downey, 811 S.W.2d 922, 925 (Tex. 1991) (maintaining that it is a clear abuse of discretion to order performance and payment of money sanctions prior to securing an opportunity to appeal their imposition).

117. *Id.* at 930 (holding that although they approve of the community service sanction, the trial court should have delayed the time for performance until after the final judgment).

After the final judgment, the attorneys appealed the sanctions to the Fourteenth Court of Appeals.[118] Braden and Schulze argued that the trial court abused its discretion by imposing the community service sanction.[119] Recognizing that courts may look beyond the sanctions available in Rule 215, the appellate court applied the *TransAmerican* test.[120] The court ultimately found the community service sanction "just" because there was "a relationship between the offensive conduct and the sanction imposed" and the sanction was not excessive.[121]

III. Texas Courts Have the Power to Impose Creative Sanctions for Discovery Abuse

As in federal courts, creative sanctions for discovery abuse are feasible and legally cognizable in Texas state courts. Because Texas modeled its rule after its federal counterpart, creative sanctions that comport with the language in Rule 37 of the Federal Rules of Civil Procedure will comport with Rule 215 of the Texas Rules of Civil Procedure. As a result, much of the justification for the use of creative sanctions in federal courts applies in Texas courts as well.

The law vests Texas trial courts with the power to impose creative sanctions for discovery abuse for three important reasons. First, creative sanctions comport with the plain language of Rule 215[122] and satisfy the requirements of *TransAmerican Natural Gas Corp. v. Powell.*[123] Second, the Texas Supreme Court recognized and supported creative sanctions for discovery abuse in *Braden v. Downey*.[124] Third, Texas courts have the inherent power to impose creative sanctions for discovery abuse.[125]

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118. *See* Braden v. S. Main Bank, 837 S.W.2d 733, 736 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (appealing the trial court's imposition of discovery abuse sanctions following the entry of a final judgment).

119. *See id.* at 739 (arguing that the trial court was not authorized by Tex. R. Civ. P. 215 to impose the community service sanction).

120. *See id.* at 740 (holding that the Supreme Court's ruling in *TransAmerican* allows courts to impose sanctions other than those strictly authorized under Rule 215).

121. *Id.* at 742 (explaining how the community service sanction satisfied *TransAmerican*'s two part test).

122. *See* Tex. R. Civ. P. 215.2(b) (allowing trial courts to order sanctions "among others" listed in the rule).

123. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) (advancing a two-part test to determine if a discovery abuse sanction is just); *see also* Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996) (applying the *TransAmerican* two-part test to reverse a "death penalty" sanction imposed by the trial court).

124. 811 S.W.2d 922, 930 (Tex. 1991) (stating that the court was not criticizing the utilization of creative sanctions).

125. *See In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (holding that courts may sanction attorneys through its inherent powers); Greiner v. Jameson, 865 S.W.2d 493, 499 (Tex.

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A. *Creative Sanctions Fall Within the Texas Supreme Court's Holding in* TransAmerican *and Comport with Rule 215*

Texas courts may impose creative sanctions because such sanctions comport with the plain language of Rule 215 and the Texas Supreme Court's holding in *TransAmerican Natural Gas Corp. v. Powell.*[126] Based on the principles announced in *TransAmerican*, Texas courts should recognize creative sanctions for three primary reasons. First, as the court admitted in *TransAmerican*, Rule 215 permits sanctions other than those specifically listed in 215.2(b).[127] Indeed, the plain meaning of the rule expresses this idea.[128] Rule 215.2(b) distinctly states that "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."[129] The key phrase in the language of that subsection is "and among others."

App.—Dallas 1993, writ denied) (announcing that courts have the inherent power to sanction attorneys in order to protect the judicial process).

126. *See TransAmerican*, 811 S.W.2d at 917 (asserting that Rule 215 gives the trial court discretion when imposing an appropriate sanction); Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986) (holding that a discovery sanction will be overturned only in the event that the trial court abuses its broad discretion); *see also* Seckers v. Ocean Chems., Inc., 845 S.W.2d 317, 318 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding that if the sanctions are within the authority of the trial court, they will be overturned only if a clear abuse of discretion exists); Lawson v. Muckley, 827 S.W.2d 484, 486 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (stating that discovery sanctions may be overturned if the trial court's action "was arbitrary or unreasonable in light of all the circumstances"); United Bus. Mach., Inc. v. Southwestern Bell Media, Inc., 817 S.W.2d 120, 122 (Tex. App.—Houston [1st Dist.] 1991, no writ) (reiterating that discovery sanctions are within the broad discretion of the trial court); Southern Pac. Transp. Co. v. Evans, 590 S.W.2d 515, 518 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (acknowledging that discovery sanctions will be overturned only if the trial court clearly abused its discretion).

127. *See TransAmerican*, 811 S.W.2d at 916-17 (analyzing the language used in Rule 215.2(b) and concluding that the trial court is not limited to the specific list of sanctions); *see also* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 626 (1992) (noting that trial courts have been encouraged to use a broad range of sanctions as long as the sanction chosen is not arbitrary or unreasonable).

128. *See* TEX. R. CIV. P. 215.2(b) (stating that sanctions specifically listed in the rule are not exclusive); *see also* William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 796 (1984) (describing how Rule 215.2(b) permits a trial judge some room to impose sanctions not specifically listed in the Rule).

129. TEX. R. CIV. P. 215.2(b) (providing when and how the trial court may impose sanctions).

A plain reading of "among others" indicates an intent to allow courts to employ creative sanctions.[130] In drafting this rule, the Texas Supreme Court clearly intended to allow courts to impose sanctions other than those listed in 215.2(b).[131] Most significantly, the phrase "among others" immediately precedes the list of specifically authorized sanctions available to a court.[132] Moreover, many Texas Courts of Appeal have upheld trial courts' impositions of sanctions not specifically enumerated in Rule 215.2(b).[133]

Second, creative sanctions, when imposed in appropriate circumstances, fit within the Texas Supreme Court's definition of "just" in *TransAmerican*.[134] To illustrate this point, assume a trial court imposed a sanction requiring attorneys from a disobedient law firm to fund a legal education program on ethics and professionalism at a well-known Texas law school. Additionally, suppose the attorneys repeatedly refused to honor discovery requests or comply with the judge's discovery orders over a long period of time. Furthermore, assume the trial court specifically based its sanction on its power within Rule 215.

Under this hypothetical, an appellate court reviewing such a sanction must apply the two part test set forth in *TransAmerican* to determine if the sanction is just.[135] If the sanction comports with the test, then the

130. WEBSTER'S DELUXE UNABRIDGED DICTIONARY 59 (2d ed. 1983) (defining the word "among" as "associated with; making part of the number of"); *id.* at 1268 (defining "other" as "different or distinct from that or those referred to or implied").

131. *See* William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 796 (1984) (concluding that the language used in 215.2(b) encourages trial courts to choose sanctions other than those specifically listed so as to efficiently redress the particular type of discovery abuse); Joe K. Longley & Mark L. Kincaid, *Discovery and Sanctions for Discovery Abuse*, 18 ST. MARY'S L.J. 163, 190 (1986) (stressing that "[t]he sanctions allowed by Rule 215 are flexible and cumulative, and are not limited to those expressly listed").

132. *See* TEX. R. CIV. P. 215.2(b) (providing a non-exhaustive list of sanctions that are available to a trial judge).

133. *See* Braden v. S. Main Bank, 837 S.W.2d 733, 743 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (affirming community service as a discovery abuse sanction); Firestone Photographs, Inc. v. Lamaster, 567 S.W.2d 273, 277 (Tex. Civ. App.—Texarkana 1978, no writ) (upholding periodic monetary penalties as a sanction for discovery abuse). *But see* Gen. Motors Corp. v. Lawrence, 651 S.W.2d 732, 734 (Tex. 1983) (reversing as overly broad a discovery abuse sanction compelling discovery of non-relevant material).

134. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) (declaring that a "just" sanction must bear a direct relationship with the offensive conduct and must not be excessive); *see also* Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996) (reaffirming that a just sanction must be directly related to the offensive conduct and must not be excessive).

135. *See TransAmerican*, 811 S.W.2d at 917 (indicating that an appellate court reviewing a trial court's imposition of sanctions must determine whether the sanctions were "just" by applying the two part tests); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex.

sanction will be deemed just, and the appellate court must examine whether the trial court abused its discretion.[136] In order to make this assessment, the appellate court must first determine if "a direct relationship . . . exist[s] between the offensive conduct and the sanction imposed."[137] As the court stated in *TransAmerican*, "a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party."[138]

Failing to honor legitimate discovery requests and discovery orders often results from an attorney's lack of ethical conduct and professional behavior.[139] For example, many attorneys fail to comply with discovery requests intending to delay litigation to the point where the opposing party becomes financially unable to continue.[140] Ordering an attorney to fund legal education programs on ethics and professionalism forces the attorney to take responsibility for his actions. Furthermore, the attorney's public admission that his conduct fell below the high moral standards the law demands serves to deter discovery abuse in the future. Additionally, this type of sanction serves to educate future attorneys about the responsibilities of the discovery process and being an attorney.

1992) (acknowledging that two factors determine whether a trial court's discovery abuse sanctions are just).

136. *See TransAmerican*, 811 S.W.2d at 917 (stating a trial court does not abuse its discretion if the sanctions are deemed "just"); Braden v. S. Main Bank, 837 S.W.2d 733, 740 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (reiterating that if the trial court's sanction is "just" the sanction should not be reversed on the ground that it is not specifically authorized by Rule 215).

137. *TransAmerican*, 811 S.W.2d at 917 (declaring that the sanctions must bear a direct relationship with the discovery abuse); *see also* Bair v. Hagans, 838 S.W.2d 677, 680 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (reiterating *TransAmerican's* requirement that the sanction must be directly related to the offensive conduct).

138. *TransAmerican*, 811 S.W.2d at 917 (rephrasing the first prong of the "just" sanction test); *see also* Berry-Parks Rental Equip. Co. v. Sinsheimer, 842 S.W.2d 754, 758 (Tex. App.—Houston [1st Dist.] 1992, no writ) (recognizing that a sanction for discovery abuse must bear the required relationship between the offender and the prejudice suffered by the innocent party).

139. *See* G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 15-16 (addressing the increasing trend of lawyers that forsake the ideas of honesty and justice in favor of the economic well-being of their clients), WL 6-JUN SCLAW 14.

140. *See* William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 770 (1984) (stating that attorneys are motivated to commit discovery abuse in order to drag the litigation to a standstill so that the opposing party cannot continue); *see also* WARREN FREEDMAN, THE TORT OF DISCOVERY ABUSE 111 (1989) (explaining how attorneys "stonewall" during discovery in an effort to increase the opposing party's litigation costs).

Thus, under the proposed hypothetical, a direct relationship exists between the offensive conduct and the sanction imposed.[141]

Next, under the second prong of the *TransAmerican* test, an appellate court reviewing a creative discovery abuse sanction must determine whether the sanction is excessive.[142] In order to avoid excessive sanctioning, "[t]he punishment should fit the crime," and the sanction "should be no more severe than necessary to satisfy its legitimate purposes."[143] As the court in *TransAmerican* noted, a trial court must determine whether lesser sanctions would fully encourage compliance.[144]

As in any application of the *TransAmerican* test, the appellate court's review depends heavily upon the particular facts of the individual case. Applying *TransAmerican* to the given hypothetical reveals that ordering the attorneys to fund legal education programs on ethics and professionalism would not be an excessive discovery abuse sanction for several reasons. First, because a court could trace discovery abuse to an attorney's ethical and professional conduct, the punishment fits the crime.[145] Second, this type of sanction punishes the attorneys for the abuse and not their client, a concern expressed by the *TransAmerican* court.[146] Third,

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141. *See TransAmerican*, 811 S.W.2d at 917 (holding that the sanction must be specifically directed at the type of discovery abuse committed); *see also* Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996) (citing to *TransAmerican*'s requirement of a direct relationship between the conduct and the sanction before sanctions may be levied).

142. *See TransAmerican*, 811 S.W.2d at 917 (advancing the second prong of the test to determine if a sanction is "just"); *see also* Ford Motor Co. v. Tyson, 943 S.W.2d 527, 535 (Tex. App.—Dallas 1997, orig. proceeding), *overruled sub nom In re* Ford Motor Co., 988 S.W.2d 714 (Tex. 1998) (examining the second prong of the *TransAmerican* test).

143. *See TransAmerican*, 811 S.W.2d at 917 (expounding on the requirement that a "just" sanction not be excessive); *see also Hamill*, 917 S.W.2d at 16 (reviewing the requirement that a just sanction not be excessive).

144. *See TransAmerican*, 811 S.W.2d at 917 (mandating that a trial court imposing sanctions consider whether any available, less stringent sanctions would achieve the court's goal); *see also* Berry-Parks Rental Equip. Co. v. Sinsheimer, 842 S.W.2d 754, 758 (Tex. App.—Houston [1st Dist.] 1992, no writ) (echoing that trial courts should consider the possibility of lesser sanctions that would insure compliance).

145. *See TransAmerican*, 811 S.W.2d at 917 (stating that "the punishment should fit the crime" in order for a sanction not to be excessive); *see also* Braden v. S. Main Bank, 837 S.W.2d 733, 742 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (applying the second prong of the *TransAmerican* test).

146. *See TransAmerican*, 811 S.W.2d at 917 (stating that "a party should not be punished for counsel's conduct in which it is not implicated apart from having entrusted to counsel its legal representation"); *see also Braden*, 837 S.W.2d at 740 (reiterating that a discovery sanction should be directed against the offender).

the sanction satisfies the three primary purposes of discovery abuse sanctions—compliance, deterrence, and punishment.[147]

Beyond the confines of the aforementioned hypothetical, the use of creative sanctions has broader, more general implications. While compliance and punishment provide vital goals for a court's use of its sanctioning power, creative sanctioning aimed at deterrence[148] works toward slowing the growing tide of discovery abuse.[149] The sanctions enumerated in the current rules lack the ability to deter or alter the proliferation of discovery abuse. In this respect, a sanction ordering attorneys to fund a legal education program regarding ethics and professionalism during discovery creates a unique and overwhelming deterrent effect. Such a program teaches future litigators that courts do not tolerate discovery abuse,[150] while providing a foundation of professionalism upon which to build their legal careers.

B. *The Texas Supreme Court Implicitly Recognized and Supported Creative Discovery Abuse Sanctions in* Braden v. Downey[151]

As previously discussed, the appellate court in *Braden v. South Main Bank* upheld a trial court's order that required two attorneys to perform community service as a creative sanction for discovery abuse.[152] Before

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147. *See* Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (recognizing the legitimate purposes of discovery sanctions); Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986) (announcing the purposes of discovery abuse sanctions).

148. *See* William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 774 (1984) (explaining that deterrence of future violations is the most important newly recognized purpose of discovery abuse sanctions); Joe K. Longley & Mark L. Kincaid, *Discovery and Sanctions for Discovery Abuse*, 18 ST. MARY'S L.J. 163, 188 (1986) (writing that the deterrence of future abuse is an important and properly recognized purpose of discovery sanctions).

149. *See* G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 15, 19 (stating that discovery abuse will continue until judges begin imposing sanctions that make it unprofitable), WL 6-JUN SCLAW 14; *see also* Kevin F. Risley, *Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions*, 44 BAYLOR L. REV. 253, 254 (1992) (writing that many in the legal community have recognized that the rule-based sanctions have not solved the problems they were meant to address).

150. *See* Joe K. Longley & Mark L. Kincaid, *Discovery and Sanctions for Discovery Abuse*, 18 ST. MARY'S L.J. 163, 164 (1986) (stating that "courts have no patience for those who abuse or impede the discovery process"); Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* Trans-American Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 619 (1992) (proclaiming that the Texas Supreme Court announced their intent to stop discovery abuse).

151. 811 S.W.2d 922 (Tex. 1991).

152. *See* Braden v. S. Main Bank, 837 S.W.2d 733, 742 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (affirming the trial court's order that the attorney must perform community service as a sanction for discovery abuse).

directly appealing the propriety of the particular sanctions, however, the violating attorneys sought mandamus relief from the Texas Supreme Court asserting a denial of adequate remedy on appeal because the trial court ordered performance of the community service prior to the final judgment of the case.[153] The Texas Supreme Court held that the trial court abused its discretion by ordering the attorneys to perform the community service before the sanctions could be appealed.[154] The Texas Supreme Court ordered the trial court to defer the imposition of the sanctions until after rendering a final judgment in the case.[155]

Notably, the Texas Supreme Court opinion addressed procedure without specifically addressing the underlying creative sanction of community service.[156] Indeed, the court specifically stated that it did not "criticize this type of creative sanction."[157] This language indicates that the Texas Supreme Court acknowledges a trial court's power to impose creative sanctions for discovery abuse. Furthermore, adding credence to the use of creative sanctions, the Fourteenth Court of Appeals upheld the community service sanction in *Braden* as falling within the permissible bounds of a "just" sanction.[158]

Although the Texas Supreme Court has never directly heard a case addressing the propriety of creative sanctions for discovery abuse, *Braden* suggests the court would approve of such sanctions as long as they are just under the court's holding in *TransAmerican.*[159] If the court wished to denounce creative sanctions that fell outside the bounds of Rule 215, it certainly could have done so in either the first *Braden* ruling, where the court granted mandamus relief, or upon direct appeal.[160] Instead, the court accepted the trial court's use of the community service sanction by

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153. *See* Braden v. Downey, 811 S.W.2d 922, 925 (Tex. 1991) (granting mandamus relief on a conditional basis).

154. *See id.* at 924-25 (outlining the court's holding).

155. *See id.* at 925 (conditionally granting the mandamus relief directing the district court to modify its ruling).

156. *See id.* at 930 (holding that use of mandamus for discovery abuse claims would render mandamus a non-extraordinary relief, and therefore modifying the district court's holding to allow for direct appeal prior to the enforcement of a discovery abuse penalty).

157. *Id.*

158. *See* Braden v. S. Main Bank, 837 S.W.2d 733, 742 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (applying *TransAmerican* and holding that a community service sanction is not an abuse of discretion as reviewed on appeal).

159. *See* Thompson v. Davis, 901 S.W.2d 939, 940 (Tex. 1995) (reaffirming that discovery sanctions must be "just"); TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) (holding that a trial court does not abuse its discretion where imposing a discovery abuse sanction so long as the sanction is "just").

160. *See* Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991) (granting the mandamus relief but approving creative sanctions).

refusing to hear the case on direct appeal. Thus, the Texas Supreme Court implicitly recognizes and supports creative discovery abuse sanctions.

C. *Texas Courts Have the Inherent Power, Outside of Rule 215, to Impose Creative Discovery Abuse Sanctions*

Although creative sanctions for discovery abuse fall within Texas Supreme Court jurisprudence and comport with Rule 215, the inherent powers of Texas trial courts also provide the ability to impose creative sanctions.[161] While Texas recognizes a trial court's inherent power to sanction, the Texas Supreme Court has never specifically addressed the power to sanction in the context of discovery abuse.[162] However, a few appellate decisions, while not directly addressing the issue, have declined to acknowledge any inherent sanctioning power for discovery abuse.[163] Furthermore, critic Kevin F. Risley argues that Texas courts have not specifically recognized an inherent power to impose sanctions for discovery abuse.[164] The plain language of more recent Texas Supreme Court deci-

161. *See In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (announcing that courts may sanction attorneys through its inherent powers); Greiner v. Jameson, 865 S.W.2d 493, 499 (Tex. App.—Dallas 1993, writ denied) (holding that courts have the inherent power to sanction in order to protect the judicial process). The Texas Supreme court explained the doctrine of inherent powers by stating that "[i]n addition to the express grants of judicial power to each court, there are other powers which courts may exercise though not expressly authorized or described by constitution or statute . . . . [those other powers] are categorized as . . . 'inherent' powers." Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979); *see also Greiner*, 865 S.W.2d at 498 (summarizing a court's inherent powers).

162. *See TransAmerican*, 811 S.W.2d at 916-19 (failing to discuss a court's inherent power to sanction for discovery abuse in a discussion of the propriety of discovery sanctions); *Braden*, 811 S.W.2d at 928-30 (reviewing judicial interpretation of Rule 215 without commenting on a court's inherent power to sanction for discovery abuse).

163. *See* Clone Component Distribs. of Am., Inc. v. State, 819 S.W.2d 593, 597 (Tex. App.—Dallas 1991, no writ) (stating money sanctions for discovery abuse are limited to reasonable expenses caused by the abuse); Owens-Corning Fiberglas Corp. v. Caldwell, 807 S.W.2d 413, 415 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding) (granting mandamus relief to the relator for the trial court's imposition of monetary fines because the court lacked the power under Rule 215); Zep Mfg. Co. v. Anthony, 752 S.W.2d 687, 689 (Tex. App.—Houston [1st Dist.] 1988, orig. proceeding) (stating that there is "no authority for the proposition that a trial court may impose sanctions *sua sponte*"). *But see* Hanley v. Hanley, 813 S.W.2d 511, 521 (Tex. App.—Dallas 1991, no writ) (holding that trial courts are not restricted to imposing only specifically authorized sanctions).

164. *See* Kevin F. Risley, *Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions*, 44 BAYLOR L. REV. 253, 262 (1992) (noting the Texas Supreme Court and the Courts of Appeals decisions fail to specifically acknowledge a court's inherent power to sanction).

sions regarding inherent powers, however, suggests that the Court has no qualms extending inherent powers into the realm of discovery abuse.[165]

A possible scenario justifying discovery abuse sanctions based on inherent powers arises when an attorney continually violates discovery orders, making litigation continue unnecessarily for a number of years. For example, some lawyers delay litigation for the purpose of making the opposing party financially unable to continue.[166] Attorneys taking discovery abuse to this level obviously remain unfazed by the rule-based sanctions imposed by trial judges to properly deter and punish the abuse.[167] When rule-based sanctions fail, the trial court's inherent power to utilize creative sanctions meet the twin goals of deterrence and prevention. As the Fifth Court of Appeals stated in *Greiner v. Jameson*,[168] "[i]nherent power to sanction exists where necessary to deter, alleviate, and counteract bad faith abuse of the judicial process."[169] As previously noted, pretrial discovery operates as the heart and soul of the American judicial system.[170] Therefore, sanctioning abuse

165. *See In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (stating specifically that "[a] court has the inherent power to impose sanctions on its own motion in an appropriate case"); *see also* Lawrence v. Kohl, 853 S.W.2d 697, 700 (Tex. App.—Houston [1st Dist.] 1993, no writ) (expressing that a court's inherent power to sanction exists, but with limitations).

166. *See* WARREN FREEDMAN, THE TORT OF DISCOVERY ABUSE 111 (1989) (describing how attorneys intentionally "stonewall" during discovery in order to increase the opposing party's litigation costs); *see also* G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 16 (reporting that stonewalling and delay are the two most prevalent types of discovery abuse), WL 6-JUN SCLAW 14.

167. *See* Bodnow Corp. v. City of Hondo, 721 S.W.2d 839, 840 (Tex. 1986) (listing deterrence and punishment among the goals of discovery abuse sanctions); *see also* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 621-22 (1992) (explaining that Texas trial courts have been encouraged to impose sanctions in order to deter and punish discovery abuse).

168. 865 S.W.2d 493 (Tex. App.—Dallas 1993, writ denied).

169. Greiner v. Jameson, 865 S.W.2d 493, 499 (Tex. App.—Dallas 1993, writ denied) (concluding that trial courts have the inherent power to sanction in certain instances); *see also* Lawrence v. Kohl, 853 S.W.2d 697, 700 (Tex. App.—Houston [1st Dist.] 1993, no writ) (reiterating that courts have the inherent power to sanction so as to protect the judicial process); Kutch v. Del Mar College, 831 S.W.2d 506, 510 (Tex. App.—Corpus Christi 1992, no writ) (providing the language used in *Greiner* and *Lawrence*).

170. *See* Taylor v. Illinois, 484 U.S. 400, 414 (1988) (announcing that disclosing facts during discovery is vital to upholding the integrity and public confidence in the adversarial process of the judicial system); *see also* WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 9 (1968) (explaining that expanding pretrial discovery is one of the most fundamental modern reforms to the adversary system); THOMAS A. MAUET, PRETRIAL § 6.1, at 173 (3d ed. 1995) (stating that it is crucial for litigators to understand the

of discovery through inherent powers protects the integrity of this process.[171]

Critics assert three seemingly persuasive arguments against courts retaining the authority to sanction through inherent powers. First, some contend that under inherent powers, trial courts lack any objective standards when imposing sanctions.[172] The second argument, extending from the first argument, suggests that a court would possess unlimited power to sanction if based upon inherent powers rather than rule- and statutory-based sanctions.[173] Third, some scholars argue that inherent sanctioning power raises due process concerns.[174]

Satisfying the requirements of *TransAmerican*, however, renders all of these arguments moot. Several good reasons exist to believe that *TransAmerican* applies to sanctions based on inherent powers as well as to sanctions based on Rule 215. *TransAmerican* specifically requires that a discovery abuse sanction be just and consistent with due process.[175] As previously explained, requiring a just sanction simply means finding a direct relationship between the abuse and the sanction imposed and deter-

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discovery process because as the primary fact-gathering tool in litigation it is usually where the case is won or lost).

171. *See* Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) (stating the reasons why courts retain inherent power); *see also* Pub. Util. Comm'n of Texas v. Cofer, 754 S.W.2d 121, 124 (Tex. 1988) (recognizing the need for inherent powers enumerated in *Eichelberger*); Metzger v. Sebek, 892 S.W.2d 20, 51 (Tex. App.—Houston [1st Dist.] 1994, no writ) (restating that courts retain inherent powers in order to preserve their dignity and integrity); *Greiner*, 865 S.W.2d at 499 (reiterating that courts need inherent power in order to protect their independence and integrity).

172. *See* Kevin F. Risley, *Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions*, 44 BAYLOR L. REV. 253, 255 (1992) (arguing that an "inherent power" based sanctioning system lacks objective standards); Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1779-80 (1988) (warning that inherent sanctioning power would "confuse the standards for discovery abuse sanctions").

173. *See* Adam Behar, Note, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 CARDOZO L. REV. 1779, 1798 (1988) (claiming that courts using inherent powers to sanction negates "the legislative function of creating rules"); *see also* Kevin F. Risley, *Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions*, 44 BAYLOR L. REV. 253, 255 (1992) (writing that rule- and statutory-based sanctioning authority serve to limit a court's authority to impose excessive sanctions).

174. *See Greiner*, 865 S.W.2d at 499 (stating that "[d]ue process limits a court's inherent power to sanction"); *see also* Kevin F. Risley, *Why Texas Courts Should Not Retain the Inherent Power to Impose Sanctions*, 44 BAYLOR L. REV. 253, 275 (1992) (describing the conflict between due process requirements and inherent sanctioning power).

175. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917-18 (Tex. 1991) (holding that sanctions must be just and consistent with due process); *see also* Hamill v. Level, 917 S.W.2d 15, 16 (Tex. 1996) (reinforcing the requirements of *TransAmerican*).

mining that the sanction is not excessive.[176] Just like a rule-based sanction, this criteria ensures that a court bases an inherent power sanction on objective standards. Moreover, *TransAmerican* guarantees that a court imposing an inherent power-based sanction does not exceed permissible bounds of authority. As a result, Texas trial courts have the authority to impose creative discovery abuse sanctions through inherent powers.

IV. Proposed Texas Rule of Civil Procedure 215.7—Creative Sanctions

Because Texas courts recognize the use of creative sanctions for discovery abuse, the Texas Supreme Court should develop a workable system of creative sanctions that trial courts could employ on a consistent basis. As noted, Texas courts have the power to impose creative sanctions through Rule 215,[177] the supreme court's holding in *TransAmerican*,[178] and inherent powers.[179] The Texas Supreme Court recently reviewed and reworked the discovery rules with its 1998 amendments;[180] however, the court left Rule 215 untouched. The court and its rules committee are currently working on revisions to Rule 215 and discovery abuse sanctions. Now is the time to insert a system of creative discovery abuse sanctions into Rule 215 that would fully comport with *TransAmerican.*

The Texas Supreme Court could incorporate a system of creative discovery abuse sanctions into Rule 215 through the adoption of a new subsection. Proposed Rule 215.7 would cover all the forms of discovery abuse contemplated by Rules 215.2[181] and 215.3.[182] Most importantly, Proposed Rule 215.7 would adopt the language from Rule 215.2(b) re-

176. *See TransAmerican*, 811 S.W.2d at 917 (establishing the two part test to determine if a sanction is just); *see also* Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (reiterating the two-part test established in *TransAmerican*).

177. *See* Tex. R. Civ. P. 215.2(b) (stating that courts may impose just sanctions other than those specifically listed).

178. *See TransAmerican*, 811 S.W.2d at 917 (holding that trial courts have broad discretion in imposing discovery sanctions, but any sanction must be just).

179. *See In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (concluding that Texas courts have the inherent power to impose sanctions under appropriate circumstances); *see also* Lawrence v. Kohl, 853 S.W.2d 697, 700 (Tex. App.—Houston [1st Dist.] 1993, no writ) (opining that Texas courts do have the inherent power to impose sanctions in limited situations).

180. *See* Tex. R. Civ. P. 190–205 (changing the overall discovery system and repealing Rules 206 through 214).

181. Tex. R. Civ. P. 215.2 (providing sanctions for failure to comply with a court order or discovery request).

182. Tex. R. Civ. P. 215.3 (providing sanctions for abuse in seeking, making, or resisting discovery).

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quiring that any sanction imposed must be "just."[183] Furthermore, like 215.2(b), Proposed Rule 215.7 would allow the trial court in which the action sits to impose creative sanctions other than those specifically listed.[184] Finally, Proposed Rule 215.7 would include four subsections providing suggestions for creative sanctions that a trial court could impose for discovery abuse. Specifically, the body of Proposed Rule 215.7 would read as follows:

> **215.7 Creative Sanctions – Failure to Comply with an Order or with Discovery Request.**
>
> If a party or that party's attorney(s) fail to comply with proper discovery requests or to obey an order to provide or permit discovery, or if the court finds a party is abusing the discovery process in seeking, making or resisting discovery, then the court in which the action is pending may, after notice and hearing, impose such creative sanctions in regard to the violation as are just, and among others the following:
>
> (a) an order requiring the abusive party or attorney(s) to perform community service, the amount of which to be determined by the court depending on the particular facts and circumstances in question;
>
> (b) an order requiring an abusive attorney(s) to attend continuing legal education, the amount of which to be determined by the court depending on the particular facts and circumstances in question;
>
> (c) an order requiring the abusive party to pay a monetary sum to any third party adversely affected by the discovery abuse;
>
> (d) an order requiring the abusive party or attorney(s) to create and fund legal education programs on ethics and professionalism at a designated Texas law school. The purpose of such a program will be to educate future lawyers about ethics and professional responsibility associated with the discovery process. Such a sanction should be reserved for those instances where the abusive party or attorney(s) have acted in gross bad faith.

A. *Proposed Rule 215.7(a) – Ordering Performance of Community Service*

Proposed Rule 215.7(a) allows the trial court to order either the abusive party or responsible attorney to perform community service as pun-

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183. TEX. R. CIV. P. 215.2(b) (requiring that any sanction imposed by the trial court in which the action is pending be just).

184. *Id.* (allowing the trial court to impose sanctions other than those provided for in the rule).

ishment for the discovery abuse. As in all instances of discovery abuse, the court must first determine who committed the abuse. As courts have the authority to sanction both litigant and attorney, "[t]he 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."[185] As the *TransAmerican* court recognized, an innocent litigant should not suffer for its counsel's abuses, yet neither should the law allow an attorney to protect a client against sanctions when the client abuses the discovery process.[186]

As noted, precedent exists in Texas for ordering the performance of community service as a sanction for discovery abuse.[187] The Fourteenth Court of Appeals upheld community service as a discovery abuse sanction in *Braden v. South Main Bank*.[188] The court analyzed the sanction under *TransAmerican* and found that the sanction satisfied the two-prong justness test.[189] Moreover, while reviewing the case on other grounds in *Braden v. Downey*,[190] the Texas Supreme Court specifically stated that it would not "criticize this type of creative sanction."[191] As a result, the Texas Supreme Court should have no problem incorporating this type of sanction into Proposed Rule 215.7.[192]

Deterrence of future abuse remains one of the primary goals of discovery sanctions.[193] A sanction ordering an attorney to perform community service provides a unique deterrent effect because of the value of an attorney's time. Indeed, for an attorney the adage "time is money" rings especially true. Any time spent performing community service equates to time that an attorney cannot bill a client. If a party knew that any abuse

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185. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) (recognizing that the court must determine exactly who committed the discovery abuse before it can impose a just sanction).

186. *See id.*

187. *See* Braden v. S. Main Bank, 837 S.W.2d 733, 742 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (upholding the community service sanction).

188. *Id.*

189. *See id.* (finding that the community service sanction bore a direct relationship to the offensive conduct in question and was not excessive).

190. 811 S.W.2d 922 (Tex. 1991).

191. *See* Braden v. Downey, 811 S.W.2d 922, 930 (Tex. 1991) (commenting on the community service sanction).

192. *Cf. id.* (inferring that since the court did not criticize the community service sanction it could easily accept the sanction as authorized by Proposed Rule 215.7).

193. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985) (contending that the court has encouraged the use of sanctions in order to deter abuse of the discovery process); *see also* Lisa Ann Mokry, Note, *Discovery Sanctions Must Be "Just," Consistent with Due Process, and Are Subject to Mandamus Review:* TransAmerican Natural Gas Corp. v. Powell, *811 S.W.2d 913 (Tex. 1991)*, 23 TEX. TECH L. REV. 617, 621-22 (1992) (asserting that Texas Supreme Court encourages sanctions to be used to deter future discovery abuse).

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of the discovery process could lead to a community service sanction, the party, whether litigant or lawyer, would be much less likely to commit the abuse.[194]

B. *Proposed Rule 215.7(b) – Ordering Performance of Continuing Legal Education*

Subsection (b) of Proposed Rule 215.7 focuses specifically on attorneys violating the discovery process. The utility of this sanction comes from its ability to punish attorneys who commit only minor violations or whose abuse lacks an element of bad faith.[195] As in subsection (a), the court must initially make the determination that the attorney committed discovery abuse.[196] Once established, the court could require the attorney to attend a required number of hours of continuing legal education. More specifically, the court could require that the legal education focus on the discovery process.

Continuing legal education focused on teaching attorneys about the discovery process could not come at a better time. With the overhaul of the discovery system through the 1998 amendments to the Texas Rules of Civil Procedure, many attorneys currently struggle with understanding the new rules.[197] Some attorneys predict that the new rules will lead to greater discovery disputes because many parties, lawyers and clients alike, do not fully understand the changes.[198] Consequently, an attorney may have abused the discovery process simply because he or she did not understand a rule.

Under these circumstances, ordering the performance of continuing legal education would promote both compliance and deterrence.[199] Law-

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194. *See* Retta A. Miller & Kimberly O'D. Thompson, *"Death Penalty" Sanctions: When to Get Them and How to Keep Them*, 46 BAYLOR L. REV. 737, 782 (1994) (suggesting community service sanctions are primarily effective on those who appreciate the value of money).

195. *Cf.* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 877 (5th Cir. 1988) (announcing that discovery sanctions should educate, rehabilitate, and fit the purpose of the rules).

196. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) (requiring the court to determine if it is the party or the lawyer who has violated discovery); *see also* THOMAS A. MAUET, PRETRIAL § 6.14, at 278 (3d ed. 1995) (stating that it is unfair to sanction the client when the attorney has committed the abuse).

197. *See* Mark C. Lenahan, *Practice Makes Perfect: Tips on Avoiding New Rules Pitfalls*, TEX. LAW., Apr. 12, 1999, at 33 (offering advice for attorneys to evade potential problems and alleviate anxiety due to the "new rules"), WL 4/12/1999 TEXLAW 33.

198. *See* Nathan Koppel, *Lawyers Predict New Rules May Spawn More Discovery Spats*, TEX. LAW., Jan. 4, 1999, at 4 (warning that the new rules may lead to more discovery disputes between parties), WL 1/4/1999 TEXLAW 4.

199. *See* Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985) (holding that the court has approved the use of sanctions for the purposes of compliance

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yers who fully understand the discovery process will be much less likely to inadvertently abuse the rules.[200] The Texas Supreme Court could easily organize an annual series of legal education seminars designed to familiarize attorneys with the new discovery rules. If an attorney abused the discovery process, either in good or bad faith, the court could order the attorney to attend a required number of such meetings.

C. *Proposed Rule 215.7(c) – Ordering Monetary Sanctions to Be Paid to Any Party Adversely Affected by the Discovery Abuse*

Subsection (c) of Proposed Rule 215.7 provides the most unique and controversial creative sanction for discovery abuse. Under certain limited circumstances, a judge could order the abusive party to pay a monetary sum to a third party not directly involved with the present litigation, not unlike Judge Brotman's sanction from *In re Tutu Wells Contamination Litigation*.[201] In order to receive the compensation, the discovery abuse would have to adversely affect the benefiting third party.[202]

Although difficult to imagine, scenarios exist where discovery abuse in litigation would affect a third party uninvolved in the case. One possible example would be a situation where the litigation involved a mass toxic tort. Under these circumstances, any discovery abuse that unreasonably prolongs resolution of the litigation becomes a matter of public concern to those individuals affected by the toxic tort. Similar facts led Judge Brotman to impose the Community Service Sanction Account in *Tutu Wells*.[203] Judge Brotman reasoned "that the parties truly harmed by the contamination of the Tutu aquifer and the delay in resolving responsibility over the contamination were the citizens of the Virgin Islands."[204]

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with the discovery process and deterrence of future abuse); *see also* William W. Kilgarlin & Don Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 772 (1984) (listing compliance and deterrence as legitimate aims of discovery sanctions).

200. *Cf.* Nathan Koppel, *Lawyers Predict New Rules May Spawn More Discovery Spats*, TEX. LAW., Jan. 4, 1999, at 4 (noting that at least one attorney feels adequate preparation will ensure adherence to the new discovery rules), WL 1/4/1999 TEXLAW 4.

201. *See* 120 F.3d 368, 377 (3d Cir. 1997) (ordering a party to fund an account for the people of the Virgin Islands, as the court determined the people as the most deserving beneficiaries).

202. *See In re* Tutu Wells Contamination Litig., 120 F.3d 368, 377 (3d Cir. 1997) (explaining that the assignment of community service projects to benefit a third party was an acceptable sanction so long as the beneficiary of the service is justifiable).

203. *See id.* (explaining the facts which led to the sanction benefiting a third party).

204. *See id.* (relating that a previous court opined that the people of the Virgin Islands deserved to receive the benefit of the discovery abuse sanction); *see also* Timothy G. Pepper, Comment, *Beyond Inherent Powers: A Constitutional Basis for In re* Tutu Wells Contamination Litigation, 59 OHIO ST. L.J. 1777, 1782 (1998) (explaining Judge Brotman's reasoning in imposing the Community Service Sanction Account).

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Thus, Judge Brotman reasoned that the people should receive the benefit of the discovery abuse sanction.[205]

As noted, however, the Third Circuit overturned the Community Service Sanction Account in *Tutu Wells*.[206] While a sanction ordering an abusive party to pay money to a third party might not pass muster in federal court, applying the *TransAmerican* test proves such a sanction legitimate in Texas.[207] First, under facts similar to those in *Tutu Wells*, a sanction ordering the abusive party to pay money to a third party affected by the abuse bears a direct relationship to the offensive conduct. The party harmed the most by the abuse, even a third party, has a right to benefit from any sanction imposed by the trial court. Second, the trial court must simply tailor such a sanction in a manner that avoids excessiveness. Of course, this determination would depend on the facts of each particular case.

A judge imposing a sanction under Proposed Rule 215.7(c) must recognize and consider the impact of the ABA Model Code of Judicial Conduct. Canon 2 of the Code states that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."[208] More specifically, subsection B of Canon 2 states in part that "[a] judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."[209] Furthermore, subsection B states that "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."[210] Any judge imposing a sanction under Proposed Rule 215.7(c) must absolutely determine that the discovery abuse harmed the third party benefiting from the sanction. Consequently, before utilizing 215.7(c), a court must determine through clear and convincing evidence that the accused party committed such abuse and that the benefiting third party suffered actual harm. In addition, the court must make these decisions with an eye towards the Code of Judicial Conduct. An appellate court would have no choice but to overturn a sanction imposed pursuant to 215.7(c) if the reviewing court

205. *See Tutu Wells*, 120 F.3d at 377 (recognizing that the citizens of the Virgin Islands were the parties truly harmed).

206. *See id.* at 392 (vacating the district court's order imposing the Community Service Sanction Account).

207. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) (stating that "a direct relationship must exist between the offensive conduct and the sanction imposed," and that the sanction must not be excessive).

208. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) (addressing impropriety in a judge's official capacities).

209. *Id.* (stating that a judge should not allow his personal interests to influence his judicial conduct).

210. *Id.* (mandating that a judge not use his office to advance his personal interests).

determined that the trial judge had some personal interest in the benefiting third party or in any other way violated the Code of Judicial Conduct and, thus, abused the court's discretion.

D. *Proposed Rule 215.7(d) – Ordering the Creation and Funding of Legal Education Programs on Ethics and Professionalism at a Texas Law School*

Subsection (d) of Proposed Rule 215.7 would apply to only the most egregious forms of discovery abuse. Only when a party had repeatedly violated discovery orders and shown complete contempt for both ethical behavior and professional responsibility could a court consider subsection (d) as a sanction. If the discovery abuse rose to this level, the court could order the attorney, firm, or client to fund the creation of a legal education program on ethics and professionalism at a Texas law school.[211] Again, the judge would have to comply with the Model Code of Judicial Conduct, and a school in which the judge had a personal interest could not benefit.

The purpose of these programs would be to teach law students about the ethics and professional responsibility associated with the discovery process. Such programs would deter discovery abuse by educating law students before they become practicing lawyers. Although obviously quite drastic, this type of sanction passes muster under *TransAmerican.* First, the sanction bears a direct relationship with the offensive conduct. Preventing such vile instances of discovery abuse by educating future lawyers about the consequences of their actions during discovery serves to ensure the integrity of the discovery process. Although possibly too late to change the ways of a practicing attorney, the court can strike at future offensive conduct before it occurs. Second, the court could tailor the sanction in such a way so as to avoid excessiveness. This would require the court to "consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance."[212] Again, such a determination would depend heavily on the facts of each case.

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211. Milo Geyelin, *DuPont, Atlanta Law Firm Agree to Pay Nearly $11.3 Million in* Benlate *Matter*, WALL ST. J., Jan. 4, 1999, at A18 (describing a federal court order in Georgia which provides an example of a discovery sanction wherein a firm funded an ethics program), WL 1/4/99 WSJ A18.

212. *See TransAmerican*, 811 S.W.2d at 917 (requiring the trial court to consider lesser sanctions).

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V. CONCLUSION

As we enter the twenty-first century, our judicial system faces many challenges. Of these challenges, discovery abuse remains at the top of the judiciary's list of problems. In order to restore faith and integrity to the legal system, courts must stop discovery abuse as early as possible. Conversely, lawyers must gain the respect of the courts in which they practice. Abusive litigation practices cause judges to lose confidence in the probity of attorneys.[213]

Discovery promotes the fact-finding process so that parties do not suffer through "trial by ambush" litigation. Attorneys should not, and must not, use discovery as a tool for undermining the legal process. Moreover, discovery cannot deteriorate into nothing more than a high stakes game. Judges must use every tool available in curbing discovery abuse before such abuse inflicts further damage on the justice system.

Over the past decade, federal and Texas state trial courts have used the sanctions available to them under Federal Rule 37 and Texas Rule 215 with increasing frequency. These sanctions failed in their intended deterrent effect, however, because discovery abuse continues to rise. Creative sanctions for discovery abuse alleviate the inadequacies of rule-based sanctions. A new rule providing a statutory basis for creative sanctions serves the twin purposes of protecting a court's authority to employ creative sanctions and establishing a clear rule under which a court may issue such sanctions.

Lawyers have a duty to advocate vigorously for their clients.[214] However, lawyers also have a duty to act morally and ethically while searching for the truth.[215] These two ideas often collide during discovery and lead to abuse of the discovery process. Judges must begin to impose sanctions on abusive litigants that restore ethical behavior and professional responsibility to discovery. Although many rule- and statute-based sanctions inflict harsh penalties on abusive litigants who abuse the discovery process, such sanctions have proven ineffective in slowing the increasing trend of discovery abuse. Creative sanctions are not only necessary, but essential to achieve the goals of compliance, deterrence, and punishment.

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213. *See* Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984) (stating that the heaviest sanction abusive attorneys suffer is the court's lack of respect for them).

214. *See* G. Ross Anderson, Jr., *Discovery Sanctions*, S.C. LAW., May-June 1995, at 15 (stating that lawyers have an initial duty to advocate vigorously and maintain the confidence of their client), WL 6-JUN SCLAW 14.

215. *See id.* (commenting that the search for truth depends on the integrity of the lawyers).

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