St. Mary's Law Journal

Volume 39 | Number 3 Article 2

1-1-2008

In the Wake of Low v. Henry: Is Pre-Suit Discovery Now a Reality in Texas.

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IN THE WAKE OF *LOW v. HENRY*: IS PRE-SUIT DISCOVERY NOW A REALITY IN TEXAS?

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I. INTRODUCTION

The issue of when an attorney can be held liable for filing what the court considers to be a "groundless pleading"[1] has, until recently, not been an issue at the forefront of Texas jurisprudence. However, following the Texas Supreme Court's recent decision in *Low v. Henry*,[2] this may no longer be the case.[3] While the imposition of sanctions against attorneys for filing frivolous or false pleadings has been commonplace within the Texas Rules of Civil Procedure and the Texas Civil Practice and Remedies Code for years, this issue has not necessarily been at the forefront of the minds of Texas attorneys. This recent decision, however, ought to have the Bar's attention piqued, and attorneys throughout the state should consider much more closely the verity of their motions and pleadings. In reprimanding an egregious case of attorney conduct, did the Texas Supreme Court effect a further tightening of the Texas Rules of Civil Procedure, thereby increasing the duties and responsibilities of all Texas attorneys by establishing what may very well amount to pre-suit discovery?

The purpose of this article is to examine the court's recent decision and its likely effect on Texas jurisprudence; specifically, its impact on the filing of pleadings and motions in Texas. Furthermore, this article will discuss whether *Low* marks another step by the Texas Supreme Court to "federalize" Texas courts and civil procedure by mandating that attorneys engage in pre-suit

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1. TEX. R. CIV. P. 13. Groundless, as used in the rules discussed in this article, "means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." *Id.*; *see* GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 730–31 (Tex. 1993) (orig. proceeding) (holding that even if GTE was not entitled to summary judgment, it cannot be said that the motion had no basis in law or fact, therefore sanctions imposed by Rule 13 were inappropriate).

2. Low v. Henry, 221 S.W.3d 609 (Tex. 2007) (orig. proceeding).

3. *Id.* at 612. (upholding the trial court's sanctions against an attorney for submitting a frivolous pleading).

discovery before any pleadings are filed. First, however, a discussion of the applicable sanctions rules and the previous state of Texas sanctions jurisprudence is in order.

II. THE RULES GOVERNING THE FILING OF MOTIONS AND PLEADINGS

An attorney is considered to be a guarantor as to the verity and validity of any motion or pleading that he signs.[4] Thus, an attorney is attesting that the pleading or motion he is signing is being brought in good faith and with sufficient evidentiary support.[5] An attorney who files a pleading or motion in bad faith, or without sufficient evidentiary support (as defined in the rules), may be subject to sanctions.[6] The applicable rules governing the filing of motions and pleadings are chapters 9 and 10 of the Texas Civil Practice and Remedies Code, Rule 13 of the Texas Rules of Civil Procedure, and Rule 3.01 of the Texas Disciplinary Rules of Professional Conduct (the Rules).

A. *Chapter 9 of the Texas Civil Practice and Remedies Code*

Chapter 9 of the Texas Civil Practice and Remedies Code[7] was enacted in 1987 to deal with the filing of frivolous pleadings.[8]

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4. TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001, 10.001 (Vernon 2002); *see GTE*, 856 S.W.2d at 730 ("By its express language, Rule 13 applies only to pleadings, motions, and other papers signed by attorneys.").

5. *See* TEX. R. CIV. P. 13 (requiring that pleadings and motions not be brought in bad faith or to harass).

6. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(1)–(3) (Vernon 2002) (mandating that factual contentions have sufficient evidentiary support, legal contentions and claims be warranted by existing law, and that the motion or pleading not be brought for an improper purpose); *see also* Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 878 (Tex. 2001) (stating that the filing of a frivolous lawsuit can constitute litigation misconduct and subject the attorney to sanctions).

7. TEX. CIV. PRAC. & REM. CODE ANN. § 9.011 (Vernon 2002). The rule states:

> The signing of a pleading as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry, the pleading is not:
>
> (1) groundless and brought in bad faith;
>
> (2) groundless and brought for the purpose of harassment; or
>
> (3) groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation.

Id.

8. Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.01, 1987 Tex. Gen. Laws 37, 38

Chapter 9 contains virtually identical wording to chapter 10 of the Code and to Texas Rule of Civil Procedure 13, and at first glance may create some confusion as to which statute applies. However, in 1987 the Texas Supreme Court, pursuant to its rulemaking authority, repealed Chapter 9 to the extent of any conflicts with Rule 13; thus, Rule 13 controls.[9] Furthermore, Chapter 9 was amended in 1999 to include language stating that Chapter 9 sanctions do not apply when either Chapter 10 or Rule 13 sanctions apply.[10] Because of these decisions and amendments, Chapter 9 is "no longer operative as a basis for sanctions," except in regard to a provision not in conflict with either Rule 13 or Chapter 10.[11] The notable provision of Chapter 9 not included in Rule 13 or Chapter 10 requires a court to report an attorney who "has consistently engaged in activity that results in sanctions . . . to an appropriate grievance committee."[12]

Another of Chapter 9's interesting provisions essentially provides a grace period in order to withdraw or amend pleadings.[13] Under this section, a court may not assess the

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(current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001–.014 (Vernon 2002 & Supp. 2007)).

9. *See* Sydney B. Hewlett, Comment, *New Frivolous Litigation Law in Texas: The Latest Development in the Continuing Saga*, 48 BAYLOR L. REV. 421, 443 (1996) ("[E]ven though Chapter 9 is still in effect, the stricter Rule 13 sanctions govern."); *accord* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[b][i] (2007) (explaining that Chapter 9 is only available in the limited situations where Chapter 10 or Rule 13 do not apply).

10. TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(h) (Vernon 2002) ("This section does not apply to any proceeding to which Section 10.004 or Rule 13, Texas Rules of Civil Procedure, applies."); *see also* Low v. Henry, 221 S.W.3d 609, 614 (Tex. 2007) (original proceeding) (stating that Chapter 9 applies only in proceedings wherein neither Chapter 10 nor Rule 13 apply); *accord* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[b][i] (2007) ("[S]anctions may not be imposed under Chapter 9 in any proceeding governed either by the sanctions provision of Chapter 10 or by Rule 13.").

11. 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[b][i] (2007).

12. TEX. CIV. PRAC. & REM. CODE ANN. § 9.013(a) (Vernon 2002); *see* Sydney B. Hewlett, Comment, *New Frivolous Litigation Law in Texas: The Latest Development in the Continuing Saga*, 48 BAYLOR L. REV. 421, 442 (1996) ("If the offending party is an attorney who routinely engages in activity that violates the Chapter, the rule requires the court to report its finding to the grievance committee.").

13. TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(d) (Vernon 2002); *see* Skinner v. Levine, No. 04-03-00354-CV, 2005 WL 541341, at *3 (Tex. App.—San Antonio Mar. 9, 2000, no pet.) (mem. op., not designated for publication) (holding that sanctions under Chapter 9 are inappropriate when the pleading is amended or withdrawn "within ninety days after the trial court determines the pleading was signed in violation of section 9.011"); Sydney B. Hewlett, Comment, *New Frivolous Litigation Law in Texas: The Latest Development in the Continuing Saga*, 48 BAYLOR L. REV. 421, 441 (1996) ("[T]he

expenses of the opposing party as sanctions against the offending party if the offending party withdraws or amends the improper pleadings within ninety days of the date on which the court found a violation.[14] While a similar ninety-day grace period existed under a previous version of Rule 13, the 1990 amendments eliminated this language and the grace period from Rule 13.[15] In sum, Chapter 9 has been effectively repealed, and, except for one provision, is no longer significant to sanctions jurisprudence in Texas. The provision discussed above—mandating that a trial court refer an attorney to a grievance committee if that attorney has consistently engaged in sanctionable conduct—is still effective and, since it is not in conflict with Rule 13, presumably still applies.[16]

B. *Chapter 10 of the Texas Civil Practice and Remedies Code*

Pursuant to chapter 10 of the Texas Civil Practice and Remedies Code:

> The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a *certificate by the signatory* that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:
>
> (1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary

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offending party has a ninety-day safe harbor period within which to correct or withdraw the pleading and thereby avoid sanctions.").

14. TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(d) (Vernon 2002); *see* Tex. Prop. & Cas. Guar. Ins. Ass'n v. Primeco, Inc., No. 03-00-00182-CV, 2000 WL 1707012, at *2 (Tex. App.—Austin Nov. 16, 2000, no pet.) (not designated for publication) (holding that even though the offending party offered to dismiss its claim within the ninety day grace period provided by section 9.012(d), sanctions were still appropriate under Chapter 10 and Rule 13); *accord* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][ix] (2007) (discussing the grace period contained in Chapter 9 and also in the previous version of Rule 13).

15. *See* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][ix] (2007) (stating that the 1990 amendment to Rule 13 omitted the grace period, and because Rule 13 supersedes Chapter 9, the grace period in section 9.012(d) no longer applies). *Compare* Cloughly v. NBC Bank-Seguin, 773 S.W.2d 652, 657 (Tex. App.—San Antonio 1989, writ denied) (stating the court cannot issue sanctions if the pleading or motion is amended or withdrawn to the court's satisfaction), *with* Booth v. Malkan, 858 S.W.3d 641, 644 (Tex. App.—Fort Worth 1993, writ denied) (explaining that nothing in the present Rule 13 would prevent sanctions simply because the offending party has removed the pleading).

16. *See* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][viii] (2007) (noting that the grievance provision in Chapter 9 has not been rendered ineffective because it does not conflict with Rule 13).

> delay or needless increase in the cost of litigation;
> (2) *each* claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) *each* allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .[17]

Under Chapter 10, an attorney is certifying that any pleading or motion (this chapter applies only to pleadings and motions)[18] that the attorney signs meets each of the requirements put forth in the statute: i.e., such pleading or motion is not being brought for an improper purpose, such as to harass or to cause delay.[19] Further, the attorney certifies that *each* claim or defense contained in such pleading or motion is based upon existing law, or on a "non-frivolous argument" for a change in the current law.[20] Finally, *each* factual contention or allegation in the pleading or motion has sufficient evidentiary support, or will have it following a "reasonable opportunity for further investigation or discovery."[21]

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17. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001 (Vernon 2002) (emphases added).

18. *See* Sydney B. Hewlett, Comment, *New Frivolous Litigation Law in Texas: The Latest Development in the Continuing Saga*, 48 BAYLOR L. REV. 421, 446 (1996) (stating that since Chapter 10 omitted the words "and other papers," as found in Federal Rule 11, Chapter 10 would apply only to motions and pleadings, and Rule 13 would encompass documents not covered by Chapter 10).

19. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(1) (Vernon 2002); *see* Law Offices of Windle Turley, P.C. v. French, 164 S.W.3d 487, 491–92 (Tex. App.—Dallas 2005, no pet.) (affirming the trial court's decision that the suit was filed for an improper purpose because the appellant had filed the suit in an attempt to circumvent an adverse ruling in a different court); Martin v. Zieba, No. 03-03-00584-CV, 2004 WL 904077, at *3 (Tex. App.—Austin Apr. 29, 2004, no pet.) (mem. op., not designated for publication) (approving a sanctions order where the husband attempted to file a pleading for a custody suit for a purpose other than attempting a change in custody).

20. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(2) (Vernon 2002); *see* Gen. Elec. Credit Corp. v. Midland Cent. Appraisal Dist., 826 S.W.2d 124, 125 (Tex. 1991) (holding that a lawsuit was not frivolous since its arguments, "even if unconvincing, had a reasonable basis in law and constituted an informed, good-faith challenge"); Donwerth v. Preston II Chrysler-Dodge, Inc., 775 S.W.2d 634, 637 (Tex. 1989) (holding a lawsuit is not frivolous if it is based on a "good-faith argument for the extension, modification, or reversal of existing law").

21. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(3) (Vernon 2002); *see* Low v. Henry, 221 S.W.3d 609, 616 (Tex. 2007) (orig. proceeding) (stating that respondent could

When an attorney files a frivolous pleading—one that violates Chapter 10 as set forth above—either (1) the opposing party can make a motion for sanctions, specifically describing the offensive conduct, or (2) the court, *sua sponte*, may enter an order specifically describing the offensive conduct and directing the alleged violator to show cause why such conduct was not in violation of Chapter 10.[22] A party against whom a motion for sanctions is filed must receive notice of the allegations against him and be given "a reasonable opportunity to respond."[23]

When a party prevails on a motion for sanctions under Chapter 10, the court may award that party (1) attorney's fees and other reasonable expenses incurred in filing the motion, and (2) if no due diligence is shown, out-of-pocket expenses and all other costs for inconvenience and harassment.[24] Sanctions available to a court under Chapter 10 include (1) directing the offending party to do or refrain from some act, (2) ordering the offending party to pay a penalty to the court, and (3) ordering the offending party to

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not have sufficient evidentiary support for his claim that petitioner prescribed a drug to the plaintiff in the underlying suit when respondent had possession of plaintiff's medical records that clearly proved the contrary); Loeffler v. Lytle Indep. Sch. Dist., 211 S.W.3d 331, 348–49 (Tex. App.—San Antonio 2006, pet. struck) (holding that sanctions were appropriate because the claim was without evidentiary support since, with "reasonable inquiry on the legal and factual basis" of the claims, the party would have known she could not establish all of the elements of her adverse possession claim).

22. TEX. CIV. PRAC. & REM. CODE ANN. § 10.002(a)–(b) (Vernon 2002); *see In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997) (orig. proceeding) ("A court has the inherent power to impose sanctions on its own motion in an appropriate case."); Trantham v. Isaacks, 218 S.W.3d 750, 752 (Tex. App.—Fort Worth 2007, no pet.) ("[S]anctions can be ordered for a violation of section 10.001.").

23. TEX. CIV. PRAC. & REM. CODE ANN. § 10.003 (Vernon 2002); *see Low*, 221 S.W.3d at 618 (explaining that lower courts must provide persons subject to sanctions with notice and opportunity to respond); Green v. Young, 174 S.W.3d 291, 298 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (reciting that a trial court is required to comply with requirements of notice and hearing before exercising its sanction power); Finlay v. Olive, 77 S.W.3d 520, 524 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (asserting that section 10.003 requires notice and an opportunity to respond when a party is subject to a motion for sanctions); *see also* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[b][ii] (2007) (stating that Chapter 10 requires the trial court to provide notice of the allegations to the alleged offender and an opportunity to respond to such allegations).

24. TEX. CIV. PRAC. & REM. CODE ANN. § 10.002(c) (Vernon 2002); *see* Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 310 (Tex. 2000) (noting the district court's sanction of attorney's fees and appellate attorney's fees if the opposing party pursued an appeal); Law Offices of Windle Turley, P.C. v. French, 164 S.W.3d 487, 493 (Tex. App.—Dallas 2005, no pet.) (stating that an award of appellate attorney's fees as a part of a sanction is appropriate because the fees are conditional and not incurred until after an unsuccessful appeal is taken).

pay the reasonable expenses incurred by the opposing party (including attorney's fees) as a result of the pleading or motion.[25] Chapter 10 limits the extent of any sanction imposed to that which is sufficient to deter such conduct by the offender—or anyone "similarly situated"—and thus limits the court's discretion to impose overly severe sanctions.[26]

Finally, when imposing sanctions, a court must describe the offensive conduct and explain the basis relied upon in imposing the sanction.[27] The purpose of this requirement is two-fold. First, in order to determine whether a sanction is "just" under the circumstances, a reviewing court must be able to determine whether the sanction imposed is directly related to the offensive conduct.[28] Second, the reviewing court must be able to ascertain whether the trial court considered the availability and effectiveness of lesser sanctions.[29] While the Texas Supreme Court has previously declined to require an explanation in the record for all sanctions imposed,[30] the court stated in *Low v.*

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25. TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(c) (Vernon 2002); *see Low*, 221 S.W.3d at 618 (noting that an order to pay a monetary penalty to the court is a sanction available under Chapter 10); *Law Offices of Windle Turley, P.C.*, 164 S.W.3d at 493 (rejecting appellant's claims that appellate attorney's fees are not recoverable as a part of a sanction); Sterling v. Alexander, 99 S.W.3d 793, 798 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (referring to the laundry list of sanctions a trial court might impose).

26. TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(b) (Vernon 2002); *see Low*, 221 S.W.3d at 620 (explaining that the only limit on the amount of a sanction is that which would deter the conduct or the similar conduct of others); *Sterling*, 99 S.W.3d at 799 (stating a permissible basis for sanction is deterring repetitive conduct); Herring v. Welborn, 27 S.W.3d 132, 145 (Tex. App.—San Antonio 2000, pet. denied) (concluding that an outright dismissal with prejudice of the case would go beyond what would deter similar conduct under the present facts).

27. TEX. CIV. PRAC. & REM. CODE ANN. § 10.005 (Vernon 2002); *see also Low*, 221 S.W.3d at 620 (providing that a trial court must include some explanation as to the basis for the sanctions imposed); Loeffler v. Lytle Indep. Sch. Dist., 211 S.W.3d 331, 349 (Tex. App.—San Antonio 2006, pet. struck) (explaining that, pursuant to Chapter 10, a trial court must describe the offensive conduct specifically and the basis for the sanctions in its order).

28. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding).

29. *Id.*

30. *See* IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 442 (Tex. 1997) (explaining that written findings for sanctions are not required because they are often unnecessary and would impose an undue burden upon trial courts); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 852 (Tex. 1992) (orig. proceeding) (reasoning that requiring trial courts to render written findings in all sanctions cases would unduly burden them, and

Henry that "the absence of an explanation of how a trial court determined [a specific] amount of sanctions when those sanctions are especially severe is inadequate."[31]

C. *Rule 13 of the Texas Rules of Civil Procedure*

Rule 13 of the Texas Rules of Civil Procedure provides, in part:

> The signatures of attorneys or parties constitute a *certificate by them* that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.... If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction ... upon the person who signed it, a represented party, or both.[32]

Sanctions available under Rule 13 are the discovery sanctions found in Rule 215(2)(b) of the Texas Rules of Civil Procedure.[33]

While tracking some of the same language found in Chapter 10, Rule 13 differs from Chapter 10 in several distinct ways. First, the terminology used in Rule 13 differs from that found in Chapter 10. For instance, Rule 13 uses the term "groundless," whereas that term is not present in Chapter 10.[34] This difference, however, is

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declining to impose such a burden).

31. Low v. Henry, 221 S.W.3d 609, 620 (Tex. 2007) (orig. proceeding). *But see also* GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 730 (Tex. 1993) (orig. proceeding) ("No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order.").

32. TEX. R. CIV. P. 13 (emphasis added); *see* Childs v. Haussecker, 974 S.W.2d 31, 43 (Tex. 1998) (stating that claims based on mere suspicion or subjective belief do not justify a lawsuit); *GTE*, 856 S.W.2d at 731 (concluding that although the party "was not entitled to summary judgment," the motion for summary judgment did not warrant sanctions under Rule 13).

33. TEX. R. CIV. P. 215(2)(b)(1)–(8); *see Low*, 221 S.W.3d at 614 ("Rule 13 authorizes the imposition of the sanctions listed in Rule 215.2(b) ...."); Am. Flood Research, Inc. v. Jones, 192 S.W.3d 581, 582 (Tex. 2006) (noting that the plaintiff had moved for sanctions under Texas Rules of Civil Procedure 13 and 215).

34. TEX. R. CIV. P. 13; *see Low*, 221 S.W.3d at 621 ("The trial court also concluded that the lawsuit was groundless, as defined in Texas Rule of Civil Procedure 13."); Tarrant Restoration v. TX Arlington Oaks Apartments, Ltd., 225 S.W.3d 721, 733 (Tex. App.—Dallas 2007, pet. denied) ("Under Rule 13, if an attorney or party signs a pleading, motion, or other paper that is groundless and either brought in bad faith or brought for the purpose of harassment, the trial court, after notice and hearing, shall impose an appropriate sanction available under rule 215.2(b), which includes an award of the other

only semantic. Groundless, for the purposes of Rule 13, is defined as that which has "no basis in law or fact and [is] not warranted by good faith argument for the extension, modification, or reversal of existing law."[35] This tracks the language of section 2 of Chapter 10 identically except for the substitution of "good faith argument" for "nonfrivolous argument."[36]

Terminology aside, the two rules differ substantially in their scope and applicability. Rule 13, unlike Chapter 10, applies to pleadings, motions, *and other filings* that are groundless.[37] Further, in addition to being groundless—having no basis in either law or fact, and not justified by a "good faith argument" for reversing, modifying, or extending existing law—a pleading or motion must also be brought either in bad faith or to harass in order to fall under the purview of Rule 13.[38] Rule 13 applies only in those instances where an attorney is explicitly filing a motion or pleading simply in order to harass, or for some other malicious purpose.[39] Thus, Rule 13 is reserved for "those egregious situations where the worst of the bar uses [the] honored [legal]

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side's expenses.").

35. TEX. R. CIV. P. 13; *see GTE*, 856 S.W.2d at 731 (stating that it could not be said that the motion for summary judgment had no basis); Appleton v. Appleton, 76 S.W.3d 78, 86 (Tex. App.—Houston [14th Dist.] 2002, no pet.) ("Based on the clear language of the rule, a party cannot obtain Rule 13 sanctions unless he proves the claims are groundless and that the opposing party brought the claim in bad faith or to harass the party.").

36. TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(2); *see also* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][i] (2007) (discussing the fact that the two rules differ as to their treatment of "nonfrivolous" and "good faith").

37. TEX. R. CIV. P. 13; *see GTE*, 856 S.W.2d at 730 (stating that although Rule 13 applies to "other papers signed by attorneys," the district court abused its discretion in applying Rule 13 to affidavits, since they were not signed by an attorney); Howell v. Tex. Workers Comp. Comm'n, 143 S.W.3d 416, 448 (Tex. App.—Austin 2004, pet. denied) (stating it is an abuse of discretion for the trial court to sanction under Rule 13 based on affidavits not signed by an attorney).

38. TEX. R. CIV. P. 13; *see Low*, 221 S.W.3d at 614 ("Generally, courts presume that pleadings and other papers are filed in good faith. The party seeking sanctions bears the burden of overcoming this presumption of good faith."); *GTE*, 856 S.W.2d at 731 ("To impose sanctions under Rule 13, the district court was also required to find that [appellant's] assertions were made in bad faith or for the purpose of harassment.").

39. TEX. R. CIV. P. 13. "Bad faith" is not defined explicitly in the rule; however, courts have determined bad faith to refer not to simple negligence or poor judgment, but rather a conscious act for a malicious or dishonest purpose. Stites v. Gillum, 872 S.W.2d 789, 794–96 (Tex. App.—Fort Worth 1994, writ denied); *accord* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][i] (2007) (instructing that bad faith is not merely negligence, "but the conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose").

system for ill motive without regard to reason and the guiding principles of the law."[40]

Chapter 10, on the other hand, applies only to a motion or pleading (while Rule 13 applies to other documents as well) filed for *any* improper purpose, including harassment, the inducement of delay, or cost increase.[41] Further, Chapter 10 applies to motions or pleadings lacking either (1) evidentiary support,[42] or (2) a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[43] Therefore, Rule 13 controls in situations involving bad faith and egregious conduct on the part of an attorney, or when a document other than a motion or pleading is involved. On the contrary, Chapter 10 controls when a document or pleading is not filed in bad faith or to harass, but rather is simply lacking in evidentiary support, lacking a basis in current law,[44] or is filed for an improper purpose other than harassment.[45]

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40. Dyson Descendant Corp. v. Sonat Exploration Co., 861 S.W.2d 942, 951 (Tex. App.—Houston [1st Dist.] 1993, no writ); *accord* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][iii] (2007) (quoting *Dyson*).

41. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(1) (Vernon 2002); *Low*, 221 S.W.3d at 614; Law Offices of Windle Turley, P.C. v. French, 164 S.W.3d 487, 491 (Tex. App.—Dallas 2005, no pet.).

42. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(3) (Vernon 2002); Low v. Henry, 221 S.W.3d 609, 614 (Tex. 2007) (orig. proceeding); *Law Offices of Windle Turley, P.C.*, 164 S.W.3d at 491.

43. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(2) (Vernon 2002); *accord* TEX. R. CIV. P. 13 (containing similar language); *see Low*, 221 S.W.3d at 614 (quoting the statute); *Law Offices of Windle Turley, P.C.*, 164 S.W.3d at 491 (quoting the statute).

44. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(2) (Vernon 2002). The fact that a claim or contention lacks a basis in current law is not dispositive, as Chapter 10 permits a claim or defense that lacks a basis in current law, so long as it may be supported by a "nonfrivolous argument" to change the law. *Id.* However, if the current law is well settled, such that no lawyer could reasonably believe that such a change could occur, the alleged claim or defense may be considered groundless. *See Stites*, 872 S.W.2d at 790–92 (finding that the attorney couched what was essentially a claim for alienation of affection in different terms in an attempt to circumvent the abolition of that cause of action by the Family Code); *accord* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][iii] (2007) (citing *Stites*).

45. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(1)–(3) (Vernon 2002). It is important to note that Chapter 10 applies to motions or pleadings filed to harass, as does Rule 13. However, Chapter 10 controls (meaning Rule 13 does not apply) when the improper purpose is something other than harassment, for Rule 13 applies only to groundless documents filed in bad faith or to harass.

Once a party or the court, *sua sponte*, moves for sanctions, notice must be provided to the alleged offender, and an evidentiary hearing must be held.[46] There is a presumption under Rule 13 that all pleadings, motions, and other documents are filed in good faith; as such, the moving party bears the burden of overcoming this presumption.[47] If the court finds that an attorney has signed a pleading, motion, or other document in violation of Rule 13, the court may impose the sanctions available under Rule 215 (discovery sanctions).[48] However, no sanction may be imposed without good cause, "the particulars of which must be stated in the sanction order."[49]

If good cause is found for imposing sanctions, the court may impose any of the sanctions enumerated under Texas Rule of Civil Procedure 215.[50] Among the myriad sanctions available, a court

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46. *See* McCain v. NME Hosps., Inc., 856 S.W.2d 751, 757 (Tex. App.—Dallas 1993, no writ) (holding that plaintiffs' original petition alone could not serve as the sole support of a violation of Rule 13); N.Y. Underwriters Ins. Co. v. State Farm Mut. Auto. Ins. Co., 856 S.W.2d 194, 206 (Tex. App.—Dallas 1993, no writ) (concluding summary judgment is an inappropriate method for determining the credibility and motives of a suspected groundless petition); Home Owners Funding Corp. of Am. v. Scheppler, 815 S.W.2d 884, 889 (Tex. App.—Corpus Christi 1991, no writ) ("[I]n determining whether Rule 13 has been violated, a trial court must examine the facts available to the litigant and the circumstances existing at the time the pleading is filed."); *accord* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][vii] (2007) ("Before imposing sanctions, the court must conduct an evidentiary hearing . . . .").

47. TEX. R. CIV. P. 13; *see Low*, 221 S.W.3d at 614 ("Generally, courts presume that pleadings and other papers are filed in good faith. The party seeking sanctions bears the burden of overcoming this presumption of good faith."); GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 731 (Tex. 1993) (orig. proceeding) ("Rule 13 prescribes that courts presume that papers are filed in good faith. Thus, the burden is on the party moving for sanctions to overcome this presumption."); *accord* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][i] (2007) (citing *GTE*).

48. TEX. R. CIV. P. 13; *GTE*, 856 S.W.2d at 730; Appleton v. Appleton, 76 S.W.3d 78, 86 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

49. TEX. R. CIV. P. 13; *see also* Gaspard v. Beadle, 36 S.W.3d 229, 239 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) ("A trial court's failure to specify the good cause for sanctions in a sanction order may be an abuse of discretion."); Alexander v. Alexander, 956 S.W.2d 712, 714 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (noting that Texas Rule of Civil Procedure 13 requires that the court identify the acts or omissions considered when imposing sanctions).

50. TEX. R. CIV. P. 13; *see also* Keith v. Keith, 221 S.W.3d 156, 174 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (noting that Texas Rule of Civil Procedure 215 outlines appropriate sanctions); Johnson v. Smith, 857 S.W.2d 612, 617 (Tex. App.—Houston [1st Dist.] 1993, no writ) (indicating that Texas Rule of Civil Procedure 13 permits the

may require the offender to pay the attorney's fees and reasonable expenses of the opposing party; the court may also strike portions of the offending party's pleadings or dismiss the action completely.[51]

Both Rule 13 and Chapter 10 impose a duty on an attorney to make a "reasonable inquiry into the facts supporting a pleading."[52] Hence an attorney is acting in bad faith when he fails to make such an inquiry into the facts before signing a pleading or motion, or when discovery puts the attorney on reasonable notice that his or her knowledge of the facts may be erroneous.[53] The imposition of this duty to inquire—and whether this amounts to pre-suit discovery in light of *Low*—is not only the topic of this article, but a topic that will garner much discussion among Texas attorneys if *Low* is not clarified or overruled by the court in a subsequent decision.

D. *Texas Disciplinary Rules of Professional Conduct Rule 3.01*

The filing of frivolous pleadings is also proscribed under the Texas Disciplinary Rules of Professional Conduct.[54] According to

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imposition of a sanction found in Rule 215(2)(b) of the Texas Rules of Civil Procedure).

51. TEX. R. CIV. P. 215(2)(b)(5), (8); *see also In re* Dynamic Health, Inc., 32 S.W.3d 876, 880–81 (Tex. App.—Texarkana 2000, pet. denied) (indicating that a trial court may impose "discovery sanctions having the effect of precluding a decision on the merits of a party's claims—such as by striking pleadings, dismissing an action, or rendering a default judgment"); Altus Commc'ns, Inc. v. Meltzer & Martin, Inc., 829 S.W.2d 878, 884 (Tex. App.—Dallas 1992, no writ) (upholding the trial court's award of attorney's fees under Texas Rule of Civil Procedure 215(2)(b)(8)).

52. 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][vi] (2007); *see also* Monroe v. Grider, 884 S.W.2d 811, 819 (Tex. App.—Dallas 1994, writ denied) ("[A] party acts in bad faith when discovery puts him on notice that his understanding of the facts may be incorrect and he does not make a reasonable inquiry into the facts before filing a pleading."); Bloom v. Graham, 825 S.W.2d 244, 248 (Tex. App.—Forth Worth 1992, writ denied) (noting that even an attorney who is no longer the attorney of record when the judge issues a sanction order is subject to sanction for filing a groundless pleading).

53. *See* P.N.L., Inc. v. Owens, 799 S.W.2d 439, 440–41 (Tex. App.—El Paso 1990, no writ) (upholding the sanction ordered by a trial court when "the attorney acknowledged that he was advised that he had served the wrong party and continued boldly on with the lawsuit"); 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][vi] (2007) ("Civil Procedure Rule 13 imposes a duty of reasonable inquiry into the facts supporting a pleading."). *But see* GTE Comm'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 730 (Tex. 1993) (orig. proceeding) (indicating that a court, due to discovery abuse, may not prevent a party from asserting its right to present the merits of a case before determining that the party hindered the discovery process to the extent that a presumption that the party's claim lacks merit is justified).

54. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01, *reprinted in* TEX. GOV'T CODE

Rule 3.01, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."[55] The scope of Rule 3.01 tracks that of the previously discussed rules, prohibiting "the filing of frivolous or knowingly false pleadings, motions or other papers."[56] According to the legislative notes to Rule 3.01:

> [A document] is frivolous if it is made primarily for the purpose of harassing or . . . if the lawyer is unable either to make a good faith argument that the [allegations are] consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law.[57]

Language nearly identical to that found in the legislative notes for Rule 3.01 is found in Texas Rule of Civil Procedure 13 and chapter 10 of the Texas Civil Practice and Remedies Code.

E. *The Duties Imposed on Attorneys Under the Rules*

The significant portions of these rules mandate that an attorney must certify that any pleading or motion signed by him is being

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ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9); *see also* Nguyen v. State, 11 S.W.3d 376, 378 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (emphasizing that attorneys are "under an ethical obligation to refuse to prosecute a frivolous appeal"); Pena v. State, 932 S.W.2d 31, 32 (Tex. App.—El Paso 1995, writ denied) ("An attorney, whether appointed or retained, is under an ethical obligation to refuse to prosecute a frivolous appeal.").

55. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01; *see In re* Lerma, 144 S.W.3d 21, 26 (Tex. App.—El Paso 2004, pet. denied) (restating Rule 3.01 of the Texas Disciplinary Rules of Professional Conduct, which prohibits frivolous claims); *Ex parte* Lafon, 977 S.W.2d 865, 868 (Tex. App.—Dallas 1998, no pet.) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.").

56. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01 cmt. 2; *see also* Porter v. Tex. Dep't of Protective & Regulatory Servs., 105 S.W.3d 52, 56 (Tex. App.—Corpus Christi 2003, pet. denied) ("Appellant's counsel remains obligated to zealously pursue the rights and interests of his client, but the obligation does not include arguing matters that are wholly frivolous and without merit."); Bradt v. Sebek, 14 S.W.3d 756, 762 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (noting that the trial court held that the appellant filed groundless pleadings, not fictitious or knowingly false pleadings).

57. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01 cmt. 2; *see also* Loeffler v. Lytle Indep. Sch. Dist., 211 S.W.3d 331, 348–49 (Tex. App.—San Antonio 2006, pet. denied) (holding that a claim that is not made in good faith "for the extension, modification, or reversal of existing law" is "groundless and brought in bad faith"); McIntyre v. Wilson, 50 S.W.3d 674, 687 (Tex. App.—Dallas 2001, pet. denied) (upholding the trial judge's finding that "each of the plaintiff's claims have no basis in law or fact and make no good faith argument for the extension, modification, or reversal of existing law").

brought in good faith, has sufficient evidentiary support or basis in the law, is not being brought simply to harass the other party, and is not being brought in order to cause delay or an increase in litigation costs.[58] There is, however, leeway to make allegations that still require evidentiary support, since an attorney is certainly not expected to have all of the evidence and information relevant to the case before discovery has begun. Thus, as long as a claim or defense has some basis either in the current law, or in a possible modification of existing law, a court will not find a motion or pleading to be groundless. It is also important to note that simply because relief is ultimately denied, the claims or defenses set forth in such pleading or motion are not considered groundless under the rules.[59]

Further, as was the law before *Low*, an attorney can make allegations in his pleadings that are not fully supported by the evidence, as long as the evidence can be acquired upon reasonable discovery; yet an attorney must not put forth allegations that he knows cannot be supported, even after discovery. Following *Low*, however, an attorney must know that making such allegations may expose him to liability (by way of sanctions) if the evidence is ultimately not acquired during discovery and the court determines that the attorney's conduct violated either chapter 10 of the Texas Civil Practice and Remedies Code or Texas Rule of Civil Procedure 13.

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58. TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(1)–(3) (Vernon 2002); *see also* Low v. Henry, 221 S.W.3d 609, 615 (Tex. 2007) (orig. proceeding) (holding that, under Texas law, a reasonable basis must exist for all alternative allegations). *But see In re* A.W.P., 200 S.W.3d 242, 246 (Tex. App.—Dallas 2006, no pet.) (noting that section 10.001 of the Texas Civil Practice & Remedies Code applies to trial court motions filed under the Texas Rules of Civil Procedure, but not to motions filed or sanctions requested in appellate court).

59. *See* Parker v. Walton, 233 S.W.3d 535, 541 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("[W]e do not find[] any authority holding that the court's refusal to submit a claim to the jury in itself establishes that the claim was groundless."); Yang Ming Line v. Port of Houston Auth., 833 S.W.2d 750, 752–53 (Tex. App.—Houston [1st Dist.] 1992, no writ) (declining to impose sanctions against an attorney who filed suit in order to avoid the statute of limitations and later dismissed the suit upon realizing that the claim was groundless); *accord* 1 William V. Dorsaneo III, *Texas Litigation Guide* § 3.07[c][ii] (2007) ("A claim or defense set forth in a pleading is not groundless under Civil Procedure Rule 13 merely because relief is ultimately denied.").

III. PRE-*LOW V. HENRY* SANCTIONS JURISPRUDENCE

A. *Determining Whether Sanctions Are Just*

The seminal case outlining the requirements for appropriate sanctions is *TransAmerican Natural Gas Corp. v. Powell*,[60] wherein the Texas Supreme Court promulgated a two-part test for determining "whether an imposition of sanctions is just."[61] First, there must exist a direct relationship, or nexus, between the sanction imposed and the offensive conduct.[62] A court must ensure that any sanction imposed is directed specifically at the offensive conduct, and thereby directed at remedying any injury or prejudice suffered by the innocent party.[63] This also means that the sanction must be directed explicitly towards the offending party, thus precipitating a determination by the court as to whether culpability lies solely with the attorney, the party, or both.[64] Second, in order for a sanction to be just, it must not be excessive—meaning it should not be more severe than needed to effectuate its purpose.[65] Therefore, courts must consider whether less stringent sanctions would promote compliance before resorting to more severe sanctions.[66]

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60. TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991) (orig. proceeding).

61. *Id.* at 917.

62. *Id.*

63. *Id.*; *see also* Pennington v. Singleton, 606 S.W.2d 682, 690 (Tex. 1980) (stating that when determining whether a sanction is excessive, of paramount importance is "whether it is fixed with reference to the object it is to accomplish" (citing St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919))).

64. *See TransAmerican*, 811 S.W.2d at 917 ("[T]he sanction should be visited upon the offender."); *see also* Am. Flood Research, Inc. v. Jones, 192 S.W.3d 581, 584 (Tex. 2006) (stating that a court may impose sanctions on the attorney only if, according to the evidence, the offensive conduct can be attributed solely to the actions of counsel).

65. *See, e.g.*, *TransAmerican*, 811 S.W.2d at 917 (stating that the sanction should be proportionate to the offense); *see also Am. Flood*, 192 S.W.3d at 585 ("[W]here an appellate court reviews a sanctions order, it must ensure not only that sanctions are visited upon the true offender, but that less severe sanctions would not promote compliance."); Cire v. Cummings, 134 S.W.3d 835, 839 (Tex. 2004) ("[A] trial court may not impose a sanction that is more severe than necessary to satisfy its legitimate purpose.").

66. *See TransAmerican*, 811 S.W.2d at 917 (stating that the trial court has discretion to impose sanctions; however, that discretion is subject not only to the two-part *TransAmerican* test, but also constitutional due process). In regard to due process, the Texas Supreme Court has recognized that states can impose civil fines within their discretion, as long as the "penalty prescribed is [not] so severe and oppressive as to be

The Texas Supreme Court has, although not explicitly, promulgated an additional ad hoc requirement for the imposition of sanctions: inclusion of the trial court's reasoning and consideration in the record.[67] This requirement, as stated by the court, has at least three desirable effects: (1) written findings in the record aid appellate review by allowing the reviewing court to see that the judgment of the trial court was "guided by a reasoned analysis of the purposes sanctions serve and the means of accomplishing those purposes according to the *TransAmerican* and *Braden* standards," (2) written findings promote confidence that the judgment was the result of "thoughtful judicial deliberation," and (3) the deterrent effect of the sanctions is enhanced by the court's articulation of its analysis.[68]

The supreme court has stated that it does not intend to overburden trial courts by requiring written findings in all instances in which sanctions are imposed.[69] In fact, the most poignant discussions on the topic seem to apply the requirement only in the case of extreme, or "death penalty," sanctions.[70] However, a review of the relevant case law, and of the recent *Low* decision, seems to apply this standard in cases that do not

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wholly disproportionate to the offense and obviously unreasonable." *Pennington*, 606 S.W.2d at 690 (quoting *St. Louis*, 251 U.S. at 66–67); *see also Am. Flood*, 192 S.W.3d at 585 (holding that sanctions must not only be visited upon the offender, but lesser sanctions must not promote compliance); Spohn Hosp. v. Mayer, 104 S.W.3d 878, 883 (Tex. 2003) (reiterating the second prong of *TransAmerican*, that less stringent sanctions must be considered before severe sanctions are imposed); Braden v. Downy, 811 S.W.2d 922, 929 (Tex. 1991) (reasoning that when considering the appropriateness of monetary sanctions, the court should take into account the prejudice caused the opposing party).

67. Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 852 (Tex. 1992) (orig. proceeding) (citing Braden v. Downey, 811 S.W.2d 292 (Tex. 1991)).

68. *Id.*

69. *Id.*; *accord* IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 442 (Tex. 1997) (reasoning that findings in the record for imposing sanctions are not required in every case because often they are unnecessary, and such a requirement would impose an undue burden on trial courts).

70. *See* Ross v. Nat'l Ctr. for the Employment of the Disabled, 197 S.W.3d 795, 798 (Tex. 2006) (stating that the trial court failed to include in the record its consideration of lesser sanctions before resorting to death penalty sanctions, which was one of the reasons the trial court abused its discretion in imposing such severe sanctions); *see also Chrysler*, 841 S.W.2d at 852 (discussing the effects of, and requirements for, sanctions in the context of death penalty sanctions). *See generally* State v. Bristol Hotel Asset Co., 65 S.W.3d 638, 647 (Tex. 2001) (defining "death penalty sanctions" as those that "terminate a party's right to present the merits of its claims"). The court goes on to say that a death penalty sanction "is based on the party's conduct during discovery" and effectively "adjudicates a party's claims without regard to their merits." *Bristol Hotel*, 65 S.W.3d at 647.

necessarily involve death penalty sanctions.[71] This sentiment had been mentioned in previous cases. However, its legitimacy is most apparent from the court's disposition in the *Low* case. In *Low*, the case was remanded due to the trial court's failure to include any explanation of its decision-making process—such as the consideration of lesser sanctions and the satisfaction of the *TransAmerican* standards—in imposing sanctions.[72] Hence, it can be inferred that a trial court must include some explanation of its imposition of sanctions in the record in order for the sanctions to be upheld upon review. This type of requirement—additional written findings in the record—is a prime example of the tightening, or federalization, of Texas civil procedure that is the focus of this article.[73]

B. *Failure to Comport*

While the test for the justness of sanctions was put forth in *TransAmerican*, the progeny of sanctions cases that followed saw the Texas Supreme Court reluctant to uphold sanctions for reasons

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71. *See* Low v. Henry, 221 S.W.3d 609, 620 (Tex. 2007) (orig. proceeding) (holding that the absence of any explanation in the record of how the trial court arrived at the amount of sanctions imposed was inadequate). The lack of indication in the record was the main reason for the supreme court remanding the case back to the trial court for further consideration, and this case did not involve death penalty sanctions. *Id.* at 621; *see also Chrysler*, 841 S.W.2d at 853 (stating that the record must evince the findings and analysis of the trial court in cases wherein the record is voluminous and the case complex). Again, this statement applies this requirement to cases that are "complex," with no delineation as to whether death penalty sanctions were imposed. *See* Spohn Hosp. v. Mayer, 104 S.W.3d 878, 883 (Tex. 2003) ("[T]he record should contain some explanation of the appropriateness of the sanctions imposed."); *In re* Ford Motor Co., 988 S.W.2d 714, 718 (Tex. 1998) (holding that the sanctions imposed by the trial court were unjust because their findings were not supported in the record); GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 730 (Tex. 1993) (orig. proceeding) (stating that sanctions may only be imposed for good cause, "the particulars of which must be stated in the sanction order").

72. *Low*, 221 S.W.3d at 620–21.

73. *Compare* FED. R. CIV. P. 52 (mandating that findings of fact and conclusions of law be included in any judgment from a nonjury trial), *with* TEX. R. CIV. P. 296 (stating that a court is only required to file findings of fact and conclusions of law upon written request by a party). This disparity between the federal rules and the Texas rules—regarding additional requirements placed on trial courts—is a paradigmatic example of the differences that existed between both sets of rules before the supreme court began to tighten Texas procedure. While it appears that the *Low* court is beginning to move toward a requirement of written findings (on an ad hoc basis) in sanctions cases, currently Texas trial courts are not required to include findings of fact and conclusions of law absent the written request of one of the parties. TEX. R. CIV. P. 296.

ranging from failure to comport with or apply the *TransAmerican* test to lack of support for the sanctions in the record.[74] A review of the relevant case law reveals a trend by the court of viewing the imposition of sanctions in a highly technical manner, such that any failure to comport with the requisite elements put forth in *TransAmerican* mandates a vacating of the sanctions order.[75]

Further, on numerous occasions, the Texas Supreme Court has determined that the imposition of sanctions against attorneys was not an issue significant to the state's jurisprudence by denying petitions for review.[76] Hence, the court's recent disposition in *Low* may signify a significant change not only in the attention given attorney sanctions by the court, but possibly in the court's regulation of attorneys' pre-suit conduct, vis-à-vis the imposition

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74. *See* Am. Flood Research, Inc. v. Jones, 192 S.W.3d 581, 585 (Tex. 2006) (stating that the trial court failed to apply the two-part test promulgated in *TransAmerican*); *Spohn Hosp.*, 104 S.W.3d at 879 ("We ... hold that the sanctions imposed by the trial court do not comport with the standards we established in *TransAmerican*."); Otis Elevator Co. v. Parmelee, 850 S.W.2d 179, 179 (Tex. 1993) (determining that the sanctions imposed did not comport with *TransAmerican*); *GTE*, 856 S.W.2d at 729 (holding that the trial court abused its discretion in imposing sanctions, and that the record must reflect the consideration of lesser sanctions by the court); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849–50 (Tex. 1992) (orig. proceeding) (vacating the sanctions order for failing to meet the *TransAmerican* and *Braden* standards). The supreme court held that the sanctions order by the trial court "failed to meet the ... standards in four ways." *Chrysler*, 841 S.W.2d at 849. First, there was no direct nexus between the sanction imposed by the trial court and the offensive conduct. *Id.* Second, the sanctions imposed by the trial court were more severe than necessary to achieve their legitimate purpose. *Id.* at 850. Third, the trial court failed to consider the availability and effectiveness of less stringent sanctions. *Id.* And finally, (and applicable only to discovery sanctions, not the topic of this article) the "death penalty sanctions" imposed effectively denied the offending party a trial on the merits. *Id.*

75. *See, e.g.*, *Chrysler*, 841 S.W.2d at 849–50 (holding that the sanctions order failed to comply with both the *TransAmerican* and *Braden* standards). The court held that the sanctions imposed by the trial court did not have a sufficient nexus to the offensive conduct, were more severe than needed to effectuate their legitimate purpose, and that the trial court failed first to impose a lesser sanction. *Id.*; *see also Spohn Hosp.*, 104 S.W.3d at 882 (concluding that the trial court did not adequately comply with the *TransAmerican* test); *GTE*, 856 S.W.2d at 731 (stating that the sanctions imposed by the trial court were excessive and thus violated the *TransAmerican* requirements).

76. *See* Dolenz v. Boundy, 197 S.W.3d 416, 422 (Tex. App.—Dallas 2006, pet. denied) (upholding the trial court's imposition of sanctions for filing a petition in bad faith); Sterling v. Alexander, 99 S.W.3d 793, 798 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (finding that the trial court complied with the requirements of section 10 of the Texas Civil Practice & Remedies Code); Skepnek v. Mynatt, 8 S.W.3d 377, 383 (Tex. App.—El Paso 1999, pet. denied) (stating that the trial court did not abuse its discretion in imposing sanctions).

of more stringent duties and responsibilities arising before suit is even filed.

C. *Tightening of Texas Civil Procedure*

Over the past decade, the Texas Rules of Civil Procedure have gradually been federalized, a term denoting an alignment with the Federal Rules of Civil Procedure, and thus a tightening of the prevailing Texas rules. Civil procedure in Texas, until recently, had long been what most attorneys would consider "loose," or, put another way, the opposite of the highly structured and complex system of federal procedure. An example of this "looseness" is the Texas practice of allowing a defendant to file a general denial which serves as a response to each of the plaintiff's allegations.[77] The federal counterpart of this rule requires specific denials to each allegation in the plaintiff's petition.[78]

The tightening of the rules has had an effect on the practice of law in Texas, namely in regard to allegations in pleadings. Before the tightening, attorneys in Texas could file "shotgun pleadings," wherein all possible allegations could be made, with the intent to focus those allegations during and upon completion of discovery. While this type of shotgun pleading is not explicitly proscribed in the rules, it is readily apparent that as a result of the *Low* decision, an attorney now subjects himself to potential liability for filing such pleadings if the evidence is not acquired during discovery. Additionally, pursuant to the more stringent sanctions rules, attorneys are responding differently to shotgun pleadings put forth by the opposing attorney. Previously, when faced with a plaintiff's shotgun pleading, an attorney resorted to the use of special

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77. TEX. R. CIV. P. 92. This rule states that a general denial may be filed by a defendant to "matters pleaded by the adverse party which are not required to be denied under oath." *See* Estrada v. Dillon, 44 S.W.3d 558, 562 (Tex. 2001) ("If a party files a general denial in the trial court, that pleading puts a plaintiff to his or her proof on all issues, including liability; its effect extends to contesting liability in the event of remand on appeal."); Williamson v. New Tires, Inc., 980 S.W.2d 706, 712 (Tex. App.—Fort Worth 1998, no pet.) ("A general denial sufficiently puts in issue all matters contained within the plaintiff's pleadings.").

78. FED. R. CIV. P. 8(b). Federal Rule of Civil Procedure 8(b) requires that "'[a] party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.'" Sullivan v. Disc. Plumbing, No. 5:04-CV-144-C, 2004 WL 1836760, at *1 (N.D. Tex. Aug. 17, 2004).

exceptions,[79] verified denials,[80] or a motion for summary judgment[81] in order to narrow the allegations. The current trend however, in lieu of attacking the plaintiff's pleadings, is to attack the opposing attorney with a motion for sanctions under Chapters 9 and 10 as well as Rule 13. By simply making an allegation that an attorney has filed a groundless pleading, or has failed to conduct a reasonable inquiry into the facts, a party can circumvent the use of the procedural tools to attack the pleadings themselves by threatening sanctions against the opposing attorney. This gives a party a potent tool to intimidate the opposing attorney that was heretofore unavailable, and in this regard fails to properly serve the interests of justice.

Additionally, and worth noting, the adoption of the no evidence summary judgment in 1997 also works to discourage attorneys from filing factually-anemic pleadings by allowing a party to move for summary judgment—without presenting any summary judgment evidence—on the ground that one of the essential elements of a claim or defense relied upon by the opposing party lacks evidence.[82]

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79. TEX. R. CIV. P. 91. "[S]pecial exceptions are generally considered to be the means by which an adverse party may force clarification of vague pleadings." Centennial Ins. Co. v. Commercial Union Ins. Cos., 803 S.W.2d 479, 483 (Tex. App.—Houston [14th Dist.] 1991, no writ). "Generally speaking, the office of a special exception is to furnish the adverse party a means by which he may force clarification of and specifications in pleadings that are vague, indefinite or uncertain." McFarland v. Reynolds, 513 S.W.2d 620, 626 (Tex. Civ. App.—Corpus Christi 1974, no writ).

80. TEX. R. CIV. P. 93. The rule "requires that certain pleas, unless the truth of such matters appear of record, shall be verified by affidavit. Rule 93 contains sixteen subsections concerning certain matters that require verification by affidavit." Reyna v. Nat'l Union Fire Ins. Co., 883 S.W.2d 368, 370 (Tex. App.—El Paso 1994), *rev'd on other grounds*, 897 S.W.2d 777 (Tex. 1995).

81. TEX. R. CIV. P. 166A. *See* IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004) ("A movant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim.").

82. TEX. R. CIV. P. 166A(i). "After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense." Abdel-Hafiz v. ABC, Inc., 240 S.W.3d 493, 504 (Tex. App.—Fort Worth 2007, pet. filed); *see also* Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 207 (Tex. 2002) (stating that a party may be granted summary judgment on a cause of action when there was no evidence to support an element of that claim). "The purpose of a no-evidence summary judgment motion is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Reynosa v. Huff, 21 S.W.3d 510, 512 (Tex. App.—San Antonio 2000, no pet.).

The focus of much of the federalization of Texas procedure has taken place within the discovery rules. In 1999, the Texas Rules of Civil Procedure were revamped to include specific limitations on the discovery process, including, among other things, limitations on interrogatories and depositions.[83] Pursuant to these amendments, discovery control plans were promulgated which limited interrogatories to twenty-five per party[84] and oral depositions to six hours under level one or fifty hours under level two.[85] Moreover, the amendments have given Texas courts the power to limit the scope of discovery *sua sponte*, a power that was theretofore found only in the federal rules.[86]

The import of these limitations, as they pertain to this article, lie in their effect on litigation strategy. Before the 1999 amendments, multi-day depositions and one-hundred-plus question interrogatories were commonplace in Texas discovery practice, thus these limitations restrain an attorney's discovery options and ultimately constrain litigation.

IV. *LOW V. HENRY*

Low v. Henry, besides being the focal point of this article, may perhaps mark the transition in the application of the rules by the Texas Supreme Court in regard to attorney sanctions. The original proceeding that spawned the sanction trial was a negligence action arising from the death of the plaintiff's husband, Henry White,

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83. TEX. R. CIV. P. 190. *See generally* James C. Winton, *Corporate Representative Depositions in Texas—Often Used but Rarely Appreciated*, 55 BAYLOR L. REV. 651, 656–65 (2003) (discussing corporate representative theories and the limitations on interrogatories and depositions set forth in the Texas Rules of Civil Procedure).

84. TEX. R. CIV. P. 190.2(c)(3); TEX. R. CIV. P. 190.3(b)(3); s*ee, e.g.*, *In re* SWEPI L.P., 103 S.W.3d 578, 589 (Tex. App.—San Antonio 2003, pet. denied) ("Rule 190.3 limits the parties in this case to no more than twenty five interrogatories."). "Unless a suit is governed by a discovery control plan under Rules 190.2 or 190.4, discovery must be conducted in accordance with Rule 190.3 of the Texas Rules of Civil Procedure." Burgess v. Feghhi, No. 12-04-00367-CV, 2007 WL 2178544, at *5 n.3 (Tex. App.—Tyler July 31, 2007, pet. denied) (mem. op.). Under level three discovery, there is no limit on the number of interrogatories. TEX. R. CIV. P. 190.4.

85. TEX. R. CIV. P. 190.2(c)(2); TEX. R. CIV. P. 190.3(b)(2). The time allowed for oral depositions under a level two discovery plan can be expanded to allow six extra hours for each additional expert witness designated beyond two. TEX. R. CIV. P. 190.3(b)(2).

86. *Compare* FED. R. CIV. P. 26(b)(2), *with* TEX. R. CIV. P. 192.4 (showing the alignment of the Texas discovery rules with the federal rules of discovery, as they contain identical limitations on the scope of discovery).

following admission to the hospital after a stroke.[87] The crux of the allegation involved the drug Propulsid (used to treat gastric reflux) and alleged issues pertaining to the safety and efficacy of Propulsid, as well as complaints that the drug was negligently administered to the decedent.[88] The defendants were the manufacturer, designer, and distributor of Propulsid,[89] along with several doctors who, at some point, treated the decedent and were allegedly negligent in their administration of the drug to Mr. White.[90]

Thomas J. Henry was plaintiff's counsel and he filed the original petition; however, he "filed a motion to withdraw as counsel on the same day he filed the petition."[91] Henry continued to serve as plaintiff's counsel until the trial court granted his motion for withdrawal, approximately five months after the petition was filed.[92] Less than a month later, Drs. Smith and Low, two of the defendant physicians, filed motions for sanctions against the plaintiff and Thomas J. Henry, alleging violations of Rule 13 of the Texas Rules of Civil Procedure as well as chapters 9 and 10 of the Texas Civil Practice and Remedies Code.[93] The basis of the doctors' motions for sanctions was that none of the medical

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87. Low v. Henry, 221 S.W.3d 609, 613 (Tex. 2007) (orig. proceeding). The decedent, Henry White, was admitted to the emergency room following a stroke. *Id.* He was transferred a few days later to another hospital while in a coma. *Id.* He died in December of 1999, a few weeks after the initial stroke in November. *Id.*

88. *Low*, 221 S.W.3d at 616–17. Specifically, the petition alleged negligence, negligence per se, strict liability for defective design, manufacture, marketing, and distribution of Propulsid, as well as fraud and misrepresentation claims against Johnson & Johnson, Janssen Pharmaceutica, and Janssen Research Foundation. *Id.*

89. *Id.* at 613. The manufacturers, designers, and distributors of Propulsid were Johnson & Johnson, Inc., Janssen Pharmaceutica, Inc., Janssen Pharmaceutica, N.V., and Janssen Research Foundation. *Id.* at n.1.

90. *Id.*

91. *Low*, 221 S.W.3d at 613.

92. *See* Low v. Henry, 221 S.W.3d 609, 613 (Tex. 2007) (orig. proceeding) (showing that plaintiff sued the defendants on January 31, 2002, and Henry's motion to withdraw as counsel was granted by the trial court on May 6, 2002).

93. *Id.* at 614–15 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 10.001 (Vernon 2002), for the proposition that "[t]he signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry[,] . . . each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief"). The physicians later indicated that they would not seek sanctions against the plaintiff, Joyce White; only Thomas Henry would be pursued. *Id.* at 613 n.3.

records, which had been in Henry's possession for months before the petition was filed, contained any reference to Propulsid being prescribed or administered by either Dr. Smith or Dr. Low.[94] Less than a month after the motions for sanctions were filed against Henry, the plaintiff nonsuited the case; however, the motions for sanctions remained.[95]

A. *Adjudication by the Trial Court and Review by the Court of Appeals*

The trial court held a hearing on the physicians' motions, but Henry did not attend; he was, however, represented by counsel.[96] The day following the hearing, the trial court granted the motions for sanctions, ordering Henry to pay $50,000 in total sanctions: $25,000 for each motion.[97] In response to the order granting the motions for sanctions, Henry moved for a new trial, and concomitantly filed a motion to "vacate, modify, correct, or reform the sanctions order."[98]

The court of appeals, reviewing en banc, reversed the ruling of the trial court, ruling that sanctions under chapter 10 of the Texas Civil Practice and Remedies Code were not applicable because the allegations levied against Drs. Smith and Low were made in the alternative.[99] Further, the court "held that the physicians' motions did not support sanctions under Chapter 10 for unrelated prior litigation and that the trial court's order failed to meet the specificity requirements of Chapter 10."[100] The Texas Supreme Court granted the physicians' petition for review.[101]

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94. *Id.* at 613.

95. *Id.*

96. *Low*, 221 S.W.3d at 613.

97. *Id.*

98. *Id.* These were not the only motions filed by Henry; he also filed a supplemental motion, as well as a motion to reconsider, attempting to challenge "the trial court's findings of fact and conclusions of law." *Id.* This article is not, however, focused on the procedural aspects of the case, so a detailed discussion of those matters is omitted.

99. *Id.* at 614 (citing Henry v. Low, 132 S.W.3d 180, 187 (Tex. App.—Corpus Christi 2004, *rev'd*, 221 S.W.3d 609 (Tex. 2007)).

100. Low v. Henry, 221 S.W.3d 609, 614 (Tex. 2007) (orig. proceeding) (citing Henry v. Low, 132 S.W.3d 180, 187–88 (Tex. App.—Corpus Christi 2004)). *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 10.005 (Vernon 2002) ("A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated section 10.001 and explain the basis for the sanction imposed.").

101. *Low*, 221 S.W.3d at 614. Interestingly, the Texas Supreme Court granted review

B. *Ultimate Disposition by the Texas Supreme Court*

1. Standard of Review

The imposition of sanctions is reviewed under an abuse of discretion standard.[102] The test in an abuse of discretion review "is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action, but 'whether the court acted without reference to any guiding rules and principles.'"[103] Thus, an appellate court can reverse the ruling of a trial court only "if it was arbitrary or unreasonable."[104] Courts presume that pleadings and motions are filed in good faith, and the party moving for sanctions bears the burden of rebutting this presumption.[105]

As discussed in section III of this article, the Texas Supreme Court put forth a two-part test, now referred to as the *TransAmerican* test, to determine whether a sanction is just.[106] The first requirement is that a direct relationship exists between the sanction imposed and the offensive conduct, such that the sanction is directed at the abusive conduct and at "remedying the prejudice caused [to] the innocent party."[107] Hence, a trial court must make a determination as to whether the offensive conduct is attributable only to counsel, only to the party, or to both counsel and the party.[108]

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of this case on December 17, 2004, and the case was argued on February 15, 2005; an opinion was not issued for over two years, until April 20, 2007. *Id.* at 609.

102. *Id.* at 614 (citing Am. Flood Research, Inc. v. Jones, 192 S.W.3d 581, 583 (Tex. 2006); Cire v. Cummings, 134 S.W.3d 835, 838 (Tex. 2004)).

103. *Cire*, 134 S.W.3d at 838–39 (quoting Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241 (Tex. 1985)).

104. *Id.* at 839.

105. GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 731 (Tex. 1993) (orig. proceeding).

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

107. *Id.*; *see also* Spohn Hosp. v. Mayer, 104 S.W.3d 878, 882 (Tex. 2003) (citing the *TransAmerican* test); *Am. Flood*, 192 S.W.3d at 583 (reiterating the two requirements of the *TransAmerican* test); *Cire*, 134 S.W.3d at 839 (discussing the requirements of the *TransAmerican* test).

108. *TransAmerican*, 811 S.W.2d at 917. In *Low v. Henry*, the moving party decided not to pursue sanctions against Mrs. White, the plaintiff—only her counsel, Mr. Henry, was sought for sanctions. Low v. Henry, 221 S.W.3d 609, 613 n.3 (Tex. 2007) (orig. proceeding). Thus the trial court did not have to make a determination of culpability between Mrs. White and Mr. Henry. *But see Cire*, 134 S.W.3d at 843–44 (upholding death penalty sanctions against Cummings, the party, for "exceptional" discovery abuses, as well as upholding a monetary sanction against her in favor of her former attorney).

The second prong of the *TransAmerican* test requires that any sanction imposed not be excessive.[109] Hence, a trial court cannot impose a sanction that is "more severe than necessary to satisfy its legitimate purpose."[110] In accordance with this second requirement, the Texas Supreme Court has mandated that trial courts "consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance."[111] Additionally, several cases have held that the record must reflect the consideration of lesser sanctions by the trial court.[112]

2. Sanctions Reviewed Under Chapter 10 of the Texas Civil Practice and Remedies Code

Since the trial court ordered Henry to pay $50,000 in sanctions, which were not based on "expenses, court costs, or attorney's fees" (the only sanctions allowed by Rule 13), and because the order of the trial court explicitly stated that the sanctions were ordered pursuant to Chapter 10, the imposition of sanctions was only reviewed by the Texas Supreme Court "in light of [C]hapter 10."[113] According to the court, pursuant to chapter 10 of the Texas Civil Practice and Remedies Code, Drs. Smith and Low:

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109. *TransAmerican*, 811 S.W.2d at 917.

110. *Cire*, 134 S.W.3d at 839.

111. *See TransAmerican*, 811 S.W.2d at 917 (stating additionally that the imposition of severe sanctions is not only proscribed by the two-part test now promulgated, but also by constitutional due process, which provides a constitutional limitation upon a court's power); *see also* GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding) (reiterating the second requirement of the *TransAmerican* test that sanctions must not be excessive).

112. *See, e.g.*, Otis Elevator Co. v. Parmelee, 850 S.W.2d 179, 181 (Tex. 1993) (stating that the record must reflect that the trial court considered the availability of lesser sanctions); *GTE*, 856 S.W.2d at 729 (citing *Otis* and reiterating that the record must evince the trial court's consideration of the effectiveness of less stringent sanctions); Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 853 (Tex. 1992) (orig. proceeding) (holding that, especially in complex cases, the imposition of sanctions must both conform to the *TransAmerican* guidelines and be supported by the record).

113. Low v. Henry, 221 S.W.3d 609, 614 (Tex. 2007) (orig. proceeding). As previously discussed, sanctions under Chapter 9 only apply when *neither* Chapter 10 nor Rule 13 applies. Thus, since Rule 13 did not apply due to the imposition of sanctions that were not provided for under the rule, sanctions under Chapter 9 could not be imposed. Rule 13 authorizes the use of sanctions pursuant to Rule 215.2(b) of the Texas Rules of Civil Procedure, which provides only for a "monetary penalty based on expenses, court costs, or attorney's fees." *Id.*

> [W]ere not required to specifically show bad faith or malicious intent, just that Henry certified [that] he made a reasonable inquiry into all of the allegations when he did not and that he certified that *all* the allegations in the petition had evidentiary support, or were likely to have evidentiary support, when some allegations did not.[114]

The court further explained that *each* allegation and claim made in a pleading or motion must satisfy Chapter 10, and, as such, must have sufficient evidentiary support or at least the reasonable certainty of evidentiary support following a reasonable inquiry.[115] This requirement cannot be circumvented by the fact that a claim or allegation is levied against numerous defendants, or is plead in the alternative.[116] "Each claim against each defendant must satisfy Chapter 10."[117]

The court noted that Drs. Smith and Low presented "undisputed evidence" during the trial that "neither doctor ever prescribed [n]or administered Propulsid to White and that a pre-suit review of White's medical records would have confirmed that fact."[118] In fact, Dr. Smith's testimony established that he cared for White "for less than an hour in the emergency room."[119] The court discussed that the evidence put forth during the hearing on the sanctions motions established that, at the time the suit was filed by Henry, the allegations made against Drs. Smith and Low did not have evidentiary support, nor were they "likely to have evidentiary support after a reasonable opportunity for further investigation."[120] Thus, the Texas Supreme Court held that Thomas Henry had violated the duties set forth in chapter 10 of the Texas Civil Practice and Remedies Code.[121]

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114. *Id.* at 617 (emphasis added).

115. *Id.* at 615.

116. *Id.*

117. *Low*, 221 S.W.3d at 615..

118. *Id.* at 617.

119. *Id.* It was also established that Dr. Low, who was a doctor of internal medicine, only provided care to White for four days after he arrived—before he was transferred to a facility in Corpus Christi. *Id.*

120. *Id.*

121. *See* Low v. Henry, 221 S.W.3d 609, 617 (Tex. 2007) (orig. proceeding) (holding that the trial court did not abuse its discretion in finding that the respondent failed to meet the standards required by Chapter 10).

a. Past Conduct

While only briefly mentioned in the *Low* decision, one of the factors considered by the trial court was Henry's past offensive conduct.[122] Intuitively, an attorney's past offensive conduct seems relevant when examining the possibility of imposing sanctions for such conduct, especially considering one of the goals of sanctions is to thwart such behavior in the future.[123] The reason this is of interest is that past conduct is not one of the factors to be considered by a trial court when imposing sanctions under the Texas Civil Practice and Remedies Code; it is, however, a factor the American Bar Association has designated to be considered when determining whether to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure.[124]

Chapter 10 of the Texas Civil Practice and Remedies Code does not contain a reference to the past conduct of the attorney, and neither does Rule 215 of the Texas Rules of Civil Procedure (under which sanctions are levied for violations of Rule 13).[125] The only mention of the offender's past conduct is contained in chapter 9 of the Texas Civil Practice and Remedies Code, in regard to referral of an attorney to a grievance committee.[126] Pursuant to Chapter 9, if a court imposes sanctions against an

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122. *Id.* at 621.

123. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(b) (Vernon 2002) (stating that a sanction should "deter repetition of the conduct . . . by others similarly situated"); *Low*, 221 S.W.3d at 621 (explaining that section 10.004(b) serves as the only limitation on the authority of the trial court to assess sanctions); Skepnek v. Mynatt, 8 S.W.3d 377, 381 (Tex. App.—El Paso 1999, pet. denied) (upholding a $25,000 sanction when imposed to deter conduct).

124. Am. Bar Ass'n, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 125–26 (1998); *see also Low*, 221 S.W.3d at 620–21 n.5 (putting forth the factors promulgated by the American Bar Association in regard to Federal Rule 11); *TransAmerican*, 811 S.W.2d at 920–21 (Gonzalez, J., concurring) (discussing the factors put forth by the ABA to assess sanctions under Federal Rule 11).

125. TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001–.005 (Vernon 2002); *see also* Low v. Henry, 221 S.W.3d 609, 621 (Tex. 2007) (orig. proceeding) (suggesting the availability of the ABA report as a source of guidelines in analyzing Chapter 10 sanctions, implicitly recognizing the lack of guidelines Chapter 10 provides in regards to sanctions for past conduct of attorneys); Jefa Co. v. Mustang Tractor & Equip. Co., 868 S.W.2d 905, 909 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (upholding sanctions for past conduct of attorneys without referring to any specific portion of the rule authorizing sanctions for prior bad conduct).

126. TEX. CIV. PRAC. & REM. CODE ANN. § 9.013(a) (Vernon 2002).

attorney, and the court finds a pattern of sanctionable conduct under Chapter 9, the court shall report such finding to the appropriate grievance committee.[127] The presence of past sanctionable conduct, in this context, pertains only to the ability of a trial court to refer an attorney to a grievance committee. Under the ABA guidelines, however, "any prior history of sanctionable conduct on the part of the offender" is a factor to be considered by a trial court in imposing sanctions under Federal Rule 11.[128]

While the Texas Supreme Court did not specifically address the trial court's consideration of Henry's past conduct, it was mentioned in the opinion in passing, and no objection was made by the supreme court to its inclusion in the decision of the trial court.[129] Thus, it appears that a trial court acts within its discretion in considering the past conduct of the attorney when imposing sanctions pursuant to the ABA guidelines, a fact that should not go unnoticed by Texas attorneys.

3. Amount of Sanctions

Chapter 10 provides a trial court with the authority to impose sanctions against the offending party to be paid into the registry of the court.[130] The only restriction being that the "'sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated.'"[131] Further, a sanction must not be excessive or assessed without appropriate guidelines.[132] Although the Texas Supreme Court has not specifically put forth the factors that must be considered by a trial court when imposing sanctions under Chapter 10, "the absence of an explanation of how a trial court determined [the] amount of

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127. *Id.*

128. Am. Bar Ass'n, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 125 (1998); *see* Low v. Henry, 221 S.W.3d 609, 621 (Tex. 2007) (orig. proceeding) (recognizing the ABA factors as guideposts in determining monetary sanctions); *TransAmerican*, 811 S.W.2d at 917 n.6 (adopting the principle that the trial court's discretion must be guided by a reasoned analysis of the purposes of sanctions without deciding that the ABA guidelines were the appropriate reasoned analysis).

129. Low v. Henry, 221 S.W.3d 609, 621 (Tex. 2007) (orig. proceeding).

130. *See id.* at 620 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(c) (Vernon 2002)) (setting forth the types of sanctions which may be considered).

131. *Id.* (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(b) (Vernon 2002)).

132. *Id.* (citing *TransAmerican*, 811 S.W.2d at 917).

sanctions [imposed] when those sanctions are especially severe is inadequate."[133]

The trial court concluded that Henry's allegations against Drs. Smith and Low did not satisfy the evidentiary requirements in Chapter 10, and that the suit was groundless.[134] Further, the trial court noted that Henry had "'consistently engaged in a similar pattern of conduct'" and imposed sanctions accordingly.[135] The supreme court ultimately held that the trial court did not abuse its discretion in imposing sanctions under Chapter 10.[136] However, since the trial court did not specify its basis for arriving at the amount of the sanctions imposed, the supreme court remanded the case to allow the trial court, if necessary, to reconsider the amount of the sanctions. The supreme court noted that, "in the interest of justice," the parties should be allowed to put forth evidence in light of the guidelines stated in the court's opinion.[137]

V. WHAT THIS MEANS FOR ATTORNEYS IN TEXAS

The decision in *Low* may have several ramifications for attorneys practicing in Texas. First and foremost, it reemphasizes the duty of an attorney to file motions and pleadings that are not groundless or filed in bad faith. As stated in section 10.001 of the Texas Civil Practice and Remedies Code, the signing of a pleading or motion by an attorney is a certification by that attorney that *each* claim, defense, or legal contention in that motion or pleading is either supported by existing law or by a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[138] Further, an attorney is certifying

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133. *Id.* at 620.

134. *Low*, 221 S.W.3d at 621.

135. *Id.* The term "groundless" was used in this case as defined by Rule 13 of the Texas Rules of Civil Procedure. *Id.*

136. *Id.*

137. *Id.*

138. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(2) (Vernon 2002); *see* Trantham v. Isaacks, 218 S.W.3d 750, 755 (Tex. App.—Forth Worth 2007, pet. denied) (holding that appellant violated section 10.001(2) since there was no basis for his claims); Hardy v. Mitchell, 195 S.W.3d 862, 867 (Tex. App.—Dallas 2006, pet. denied) (denying sanctions because a party's argument had some basis for the extension of the law); *In re* Richards, 991 S.W.2d 30, 32 (Tex. App.—Amarillo 1996, pet. denied) (stating that section 10.001 provides that by signing a pleading an attorney is certifying that each claim is warranted by existing law or by a good faith argument for the extension of the law).

through his signature that each factual contention or allegation contained in a pleading or motion has sufficient evidentiary support, or is likely to have such support following a "reasonable opportunity for further investigation or discovery."[139] Finally, an attorney also must certify that the motion or pleading is not being filed in bad faith.[140]

Of course, the Texas Supreme Court has noted that these requirements do not necessitate proof of an entire case before discovery has even begun. However, an attorney will not be excused for filing a claim against a party when that attorney "possesses information that a reasonable inquiry would have determined negated some of the claims made."[141] Thus the court, through its decision, has reemphasized the duty of attorneys to be

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139. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(3) (Vernon 2002); *see Low*, 221 S.W.3d at 615 (stating that under section 10.001 each allegation must have or be likely to have evidentiary support after reasonable inquiry); Mantri v. Bergman, 153 S.W.3d 715, 717 (Tex. App.—Dallas 2005, pet. denied) (stating that one of the requirements of section 10.001 is that each claim be likely to have evidentiary support after a reasonable inquiry); Tex. Dep't of Pub. Safety v. Friedel, 112 S.W.3d 768, 772 (Tex. App.—Beaumont 2003, no pet.) (stating that a pleading must have some evidentiary support); Univ. of Tex. at Arlington v. Bishop, 997 S.W.2d 350, 357 (Tex. App.—Fort Worth 1999, pet. denied) (listing the requirements of section 10.001).

140. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(1) (Vernon 2002) (stating that a motion must not be presented to harass, cause delay, or needless increases in litigation costs, as well as any other improper purpose); *see also Low*, 221 S.W.3d at 614 (comparing section 10.001 with Federal Rule of Evidence 11, which also requires that a pleading not be made for an improper purpose); *Trantham*, 218 S.W.3d at 754–55 (holding that the trial court did not err when it found that 10.001(1) had been violated since the pleading was filed for an improper purpose); Ramirez v. Encore Wire Corp., 196 S.W.3d 469, 477–78 (Tex. App.—Dallas 2006, no pet.) (refusing to uphold sanctions since the suit was not brought in bad faith or for the purposes of harassment); *Hardy*, 195 S.W.3d at 867 (concluding that section 10.001(1) had not been violated since there was neither bad faith nor an improper purpose); Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist., 198 S.W.3d 300, 321 (Tex. App.—Texarkana 2006, pet. denied) (construing improper purpose to be the equivalent of the bad faith requirement in Texas Rule of Civil Procedure 13); *Friedel*, 112 S.W.3d at 772 (equating improper purpose and bad faith for the purpose of imposing sanctions).

141. *Low*, 221 S.W.3d at 622. *Compare id.* at 622 (stating that while attorneys are not required to possess all evidence needed to prove their cause before discovery, an attorney will not be excused for filing frivolous claims when a reasonable inquiry into the information within that attorney's possession would negate some of the allegations made), *with* Yang Ming Line v. Port of Houston Auth., 833 S.W.2d 750, 753 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (reasoning that an attorney will not be held liable for filing a frivolous pleading when the attorney attempted in good faith to protect her client's rights by filing the motion on the eve of the expiration of the statute of limitations and later nonsuiting).

cognizant of the claims and allegations put forth in their pleadings and motions. And the fact that an allegation is made in the alternative, or that it is too early to possess any evidence to back up factual allegations, will not excuse an attorney from the filing of a groundless, or frivolous, lawsuit or appeal.[142]

Hence, the Texas Supreme Court is, in effect, disallowing the practice of including any and all possible claims in a pleading with the intention that evidentiary support will be acquired during discovery. Before *Low*, an attorney could include claims in a pleading despite the fact that he did not yet have evidentiary support, in the hope that such evidence would be acquired during discovery, and if not, the allegations could be withdrawn.[143] While chapter 10 of the Civil Practice and Remedies Code specifically allows this manner of pleading—so long as such allegations are likely to have the requisite evidentiary support following discovery[144]—an attorney must now realize that the failure to acquire such evidentiary support may result in sanctions. Effectively, this new requirement imposes a pre-suit discovery duty on an attorney, and thus increases both the costs and burdens of litigation. It operates as a "tax on litigation."[145]

The ramifications of this requirement are significant. First, this pre-suit discovery requirement restricts attorneys' options in regard to the allegations put forth in a pleading, serving as an additional check on plaintiffs' litigation strategies. Second, this requirement increases plaintiffs' litigation costs, operating as a potential bar to the legal system for those clients who cannot afford legal fees. Lastly, this requirement increases the amount of time plaintiff's attorneys must spend on each case, perpetuating the overburdening of attorneys.

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142. *See Low*, 221 S.W.3d at 615 (stating that neither "group pleadings" nor pleading in the alternative obviate an attorney's duty to comport with the requirements of Chapter 10 regarding evidentiary support).

143. *See, e.g.*, *Yang Ming Line*, 833 S.W.2d at 752–53 (stating that an attorney would not be held accountable for filing in good faith a claim for her client and then dismissing it upon later finding that there was nothing upon which to base the claim).

144. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001(3) (Vernon 2002); *see Low*, 221 S.W.3d at 622 (affirming imposition of sanctions because attorney could have concluded that claims had no evidentiary support after a reasonable inquiry); *Mantri*, 153 S.W.3d at 717 (stating that for each contention there must be evidentiary support).

145. Interview with L. Wayne Scott, Professor of Law, St. Mary's Univ. Sch. of Law, in San Antonio, Tex. (Oct. 18, 2007).

While one might argue that the costs of discovery are simply being shifted from pre-trial to pre-suit and thus overall litigation costs are not increasing, this argument lacks a basis in the realities of practice. Simply because a suit is filed does not mean the case will go to trial—most do not. The effect of pre-suit discovery in this regard is that a potential plaintiff's costs to file suit are increased due to the extra time and expense incurred in carrying out discovery before suit is even filed. Given the fact that a large percentage of cases settle prior to trial, increased costs attributable to pre-suit discovery make early settlement or mediation more difficult.

Upon settlement negotiation or mediation, the amount of money already spent in pre-suit discovery will become germane and thus it will become more difficult to settle. A plaintiff who has incurred thousands in pre-suit discovery costs will require a higher settlement in order to cover the costs already incurred. Another possible reason could be the concept of inertia—the unwillingness of a person to move from the position he has taken—whereby a plaintiff who has already spent thousands in pre-suit litigation costs would be reluctant to abandon the suit and settle the case due to his perceived commitment to the case (i.e., a financial commitment).

While the overall costs of litigation will not be increased by pre-suit discovery in cases that go all the way to trial, the fact that the vast majority of cases do not go to trial means that pre-suit discovery will have a significant effect on the majority of plaintiffs. When viewed from that angle, pre-suit discovery front-loads the costs of litigation onto the plaintiff before suit is filed, acting not only as a bar to litigation for some plaintiffs, but makes settling cases more difficult. Any difficulty in settling cases could result in more cases appearing on courts' dockets, which would contribute to the overburdening of courts. In this regard, pre-suit discovery may not only increase up-front costs to plaintiffs—making cases harder to settle—it might also change the role of discovery in the litigation process.

Discovery has, until now, been the vehicle through which an attorney analyzes the strength of his case. Allegations are made, and through discovery, those allegations are either proven or not proven, and the case proceeds accordingly. Now, however, an attorney must engage in what essentially amounts to pre-suit

discovery, as well as traditional pre-trial discovery. This extra step further complicates the process by increasing the cost to the client as well as the workload for the attorney, and amounts to another step towards federalizing Texas civil procedure. As previously discussed, Texas courts have, for many years, operated under a relatively "loose" set of formal procedures, unlike the sometimes-byzantine federal procedural rules. The *Low* decision marks another step by the Texas Supreme Court towards a tightening of Texas procedure, thus increasing the duties placed upon Texas attorneys.

VI. CONCLUSION

While the Texas Supreme Court has, in recent years, moved towards a tightening of Texas procedural rules, the *Low* decision may result in unintended, adverse consequences. Henry was adjudged guilty of conduct proscribed by chapter 10 of the Texas Civil Practice and Remedies Code. However, his actions may have been solely the result of carelessness, or reliance on the previously-acquiesced practice of putting forth allegations in the pleading and seeking to prove them during discovery. The court, however, intending to not only punish Henry but thwart such future abuses by other attorneys, may have instituted a requirement whose effects were not fully considered at the time.

It is possible that the court did not intend to further restrict litigation by implementing what amounts to a requirement for pre-suit discovery. The court's intention, however, is irrelevant, as this requirement now possesses precedential value (unless overruled or otherwise abdicated by the court). Thus, while the court may not have intended to implement such a cumbersome requirement, attorneys ought now to conduct themselves as though such a restriction was fully intended, or else subject themselves to the possibility of sanctions. It is axiomatic that "bad facts make bad law," and thus perhaps the unsavory facts of this case resulted in a decision that may have burdensome effects on the practice of law in Texas. Only time will tell whether the court will uphold and further this precedent or seek to remedy this particular aspect of their ruling. However, for the time being, *Low*'s the law, and attorneys would do well to heed its warning.