Appellate Sanctions

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SELECTED PUBLICATIONS

Texas Supreme Court Practice, State Bar of Texas, Advanced Personal Injury Law Course, Summer 2002.
Help! The Other Side Has Filed a Petition for Review — What Do I Do Now? State Bar Of Texas, Texas Supreme Court Practice, June 2002.
The Texas Supreme Court by the Numbers: A Statistical Survey, University of Texas School of Law, Tenth Annual Conferences on Techniques for Handling Civil Appeals in State and Federal Court, May 2001 (co-author).
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Petitions for Review: Frequently Asked Questions, 12 APPELLATE ADVOCATE 3 (June 1999).
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Appellate Sanctions

By Tim Patton and Pamela Stanton Baron

I. INTRODUCTION

> The mere fact that an . . . appeal is theoretically possible does not mean one should be filed. . . . An appeal must be based upon more than wishful thinking.

Elmcreek Villas Homeowners Ass'n v. Beldon Roofing & Remodeling Co., 940 S.W.2d 150, 156 (Tex. App.—San Antonio 1996, no writ) (imposing sanctions on appeal); *see also Campos v. Investment Management Props., Inc.*, 917 S.W.2d 351, 356 (Tex. App.—San Antonio 1996, writ denied) (Green, J., concurring) ("A bad result below, by itself, is simply not a reason to appeal — not every case is properly appealable.").

In other words, just because there is a right to an appeal does not mean that it is right to appeal. Appellate courts have broad discretion under current procedural rules to impose sanctions on parties and counsel who abuse the privilege to appeal.

II. APPELLATE RULES ON SANCTIONS

A. Civil Appeals

1. Court of Appeals: TRAP 45

Rule 45 of the Texas Rules of Appellate Procedure is titled "Damages for Frivolous Appeal in Civil Case." Rule 45 provides:

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

Tex. R. App. P. 45; *see generally* 2 Hedges & Liberato, TEXAS PRACTICE GUIDE—CIVIL APPEALS § 13:248 to § 13:269 (2000); 6 McDonald & Carlson, TEXAS CIVIL PRACTICE § 3:18 (2d ed. 1998); 3 Wicker, TEXAS CIVIL TRIAL & APPELLATE PROCEDURE § 19-3(j) (2000).

2. Texas Supreme Court: TRAP 62

Rule 62 of the Texas Rules of Appellate Procedure is titled "Damages for Frivolous Appeals." Rule 62 provides:

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

Tex. R. App. P. 62; *see generally* 10 Dorsaneo, TEXAS LITIGATION GUIDE § 151.08[1][e] (2001); 6 TEXAS CIVIL PRACTICE at § 23:14.

3. Impact of 1997 TRAPs

a. Differences Between Current Rules 45 and 62 and Former Rules 84 and 182(b)

Effective September 1, 1997, appellate rules 45 and 62 replaced rules 84 and 182(b) respectively. Rules 45 and 62 are essentially identical. TEXAS LITIGATION GUIDE at § 151.08[1][e]. The only distinction between the two rules is that one governs appeals to the court of appeals while the other applies to appeals to the Texas Supreme Court. *Id.* For simplicity and because almost all case law involving appellate sanctions comes from courts of appeals, this

paper will primarily refer to Rule 45.

There are significant differences between the current and former rules governing appellate sanctions. Under former Rule 84, an appellate court was only authorized to award sanctions when an appeal was "filed for delay and without sufficient cause" as opposed to permitting sanctions when an appeal is "frivolous." *See* Tex. R. App. P. 45 *Notes and Comments*; Tex. R. App. P. 62 *Notes and Comments*; *see also Mid-Continent Cas. Co. v. Safe Tire Disposal Corp.*, 2 S.W.3d 393, 396-97 (Tex. App.—San Antonio 1999, no pet.). Former Rule 84 also limited appellate sanctions to "ten percent of the amount of damages" or "ten times the total taxable costs" while sanctions are not capped under current Rule 45. *See* Tex. R. App. P. 45 *Notes and Comments* ("The limit on the amount of the sanction that may be imposed is repealed."); *see also* TEXAS LITIGATION GUIDE at § 150.02[7][i].

Under Rule 45 and Rule 62, the appellate court is obligated to provide the parties with notice and a reasonable opportunity to respond before imposing sanctions. *See* Tex. R. App. P. 45 *Notes and Comments*; Tex. R. App. P. 62 *Notes and Comments*. Previously, notice and opportunity to respond were not required under the rules. *See id*.

Despite these changes, at least initially, many courts of appeals interpreted Rule 45 by relying on the same standards used under former Rule 84. *See, e.g., Faddoul, Glasheen & Valles, P.C. v. Oaxaca*, 52 S.W.3d 209 (Tex. App.—El Paso 2001, no pet.); *Chapman v. Hootman*, 999 S.W.2d 118, 125 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Keever v. Finlan*, 988 S.W.2d 300, 315 (Tex. App.—Dallas 1999, pet. dism'd); *see also* 6 TEXAS CIVIL PRACTICE at § 3:18 n.95 ("Although the wording of the Rule 45 has changed, courts interpret it using the same standard as under former Rule 84.").

Beginning with the decision in *Mid-Continent Cas. Co.*, 2 S.W.3d at 396-97, a growing number of courts have recognized that Rule 45 is a substantive revision of the legal principles governing the imposition of sanctions on appeal. *See also* Cayce, Gardner & Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L. REV. 867, 1012 (1997) ("Rules 45 and 62 substitute the former grounds for appellate court sanctions with an entirely new and more liberal standard"); TEXAS LITIGATION GUIDE § 150.2[7][i] ("Although the rules after the 1997 amendments adopt a new standard for imposition of sanctions, *much* of the former case law is applicable.") (emphasis added).

The standards for imposing sanctions under the appellate rules are discussed in more detail in Section IV(B).

b. Issues Left Open by Current Sanctions Rules

Rules 45 and 62 do not attempt to address some significant aspects of appellate sanctions. Neither rule defines the word, "frivolous," nor provides any guidance into factors an appellate court may consider when deciding whether an appeal is frivolous. *See* 2 TEXAS PRACTICE GUIDE—CIVIL APPEALS at § 13:249. The meaning of the term, "just damages," is similarly left open by the rules. *See* Tex. R. App. P. 45; Tex. R. App. P. 62. There is also no indication from the 1997 amendments whether proof of a culpable mental state (i.e., conscious indifference, bad faith, etc.) is a prerequisite to imposing sanctions. *See Mid-Continent Cas. Co.*, 2 S.W.3d at 396-97 (rejecting "bad faith" as being dispositive or even material to the imposition of appellate sanctions under Rule 45); *see generally* Section IV(B), *infra*.

Lastly, neither Rule 45 nor Rule 62 specifies whether the sanction may be imposed against an attorney or if it may be imposed against the party alone. *See* TEXAS LITIGATION GUIDE at § 150.02[7][i] ("It should be presumed that the appellate court may impose a sanction" against either the appellate attorney, the party or both); *see also Campos*, 917 S.W.2d at 358 (Green, J., concurring) (concluding that former Rule 84 only authorized sanctioning client and not client's attorney although recognizing that appellate court has inherent power to discipline attorneys for misconduct).

B. Original Proceedings: TRAP 52.11

Prior to the passage of the 1997 amendments, there was no specific provision that

authorized courts to impose sanctions in mandamus proceedings. TEXAS LITIGATION GUIDE at § 152.05[3]; *see also* Tex. R. App. P. 52.11 *Notes and Comments* ("A provision for sanctions is added."). Rule 52.11 of the Texas Rules of Appellate Procedure, titled "Groundless Petition or Misleading Statement or Record," cures that omission. The rule provides that, upon the motion of any party or sua sponte, the appellate court may, after notice and a reasonable opportunity to respond, impose "just sanctions" on a party or attorney who is not acting in good faith as demonstrated by any of the following:

> (a) Filing a petition that is clearly groundless;
>
> (b) Bringing the petition solely for delay of an underlying proceeding;
>
> (c) Grossly misstating or omitting an obviously important or material fact in the petition or response; or
>
> (d) Filing an appendix or record that is clearly misleading because of the omission of obviously important and material evidence or documents.

Tex. R. App. P. 52.11. Surprisingly, in the five years since the adoption of Rule 53.11, only a handful of cases have imposed mandamus sanctions. *See In re Cotton*, 972 S.W.2d 768 (Tex. App.—Corpus Christi 1998, orig. proceeding) (imposing $5,000 as sanctions for filing groundless petition that grossly misstates or omits to state material facts and for filing misleading appendix); *In re Colonial Pipeline Co.*, 960 S.W.2d 272 (Tex. App.—Corpus Christi 1997, orig. proceeding) (issuing show cause order on why relators should not be sanctioned under Tex. R. App. P. 52.11 for failure to cite critical adverse authority); *In re Gilchrist,* 1999 Tex. App. Lexis 3949 (Tex. App.—San Antonio May 26, 1999, orig., proceeding) (unpublished) (issuing show cause order when relator repackaged request for emergency relief and refiled without mentioning that prior identical request had been denied).

In *In re Guevara*, 41 S.W.3d 169 (Tex. App.—San Antonio 2001, orig. proceeding), the court imposed sanctions against relators' attorney for filing a groundless mandamus petition and for misrepresenting the holdings in the cases by the court of appeals and the Supreme Court. The court found that the attorney had acted in bad faith by signing affidavits stating that the contents of the petition and stay motion were true and correct when they were not. The court imposed three sanctions: $5,000 in attorney's fees, a requirement that the attorney complete a CLE course in advanced civil procedure within 6 months, and a cease and desist order to prevent filing frivolous motions and pleadings, violation of which would result in contempt.

C. Other TRAPs Qualifying as Sanctions or Quasi-Sanctions

There are a variety of other provisions in the appellate rules that, in essence, empower the Texas Supreme Court and courts of appeals to punish parties for failing to comply with briefing and filing requirements. Rule 9.4(i) broadly authorizes appellate courts to strike documents not conforming to the appellate rules. *See* Tex. R. App. P. 9.4(i); *see also* Section V, *infra*. Appellate courts also have the authority to return any document failing to conform with the appellate rules to the filing party for revision, or return the nonconforming document and decide the case without allowing the document to be revised. *See* Tex. R. App. P. 53.9; Tex. R. App. P. 55.9; *see also* Tex. R. App. P. 38.9(b). Rule 42.3(c) allows an appellate court, upon motion or sua sponte after ten days' notice to all parties, to dismiss an appeal or affirm the appealed judgment "because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time." *See* Tex. R. App. P. 42.3(c).

III. OTHER BASES FOR SANCTIONS, INCLUDING DISCIPLINARY AND ETHICAL RULES

A. Disciplinary Rules

When discussing the disciplinary rules in the context of Rule 45, the rule most often invoked by appellate courts is Rule 3.03, "Candor Toward

the Tribunal." *See Guajardo v. Conwell*, 30 S.W.3d 15, 18 n.3 (Tex. App.—Houston [14th Dist.] 2000), *aff'd*, 46 S.W.3d 862 (Tex. 2001); *American Paging v. El Paso Paging, Inc.*, 9 S.W.3d 237, 241 (Tex. App.—El Paso 1999, pet. denied); *see also Schlafly v. Schlafly*, 33 S.W.3d 863, 873 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 145 (Tex. App.—Texarkana 2000, no pet.). Rule 3.03(a)(1) prohibits counsel from knowingly making a false statement of material fact to a tribunal. *See* Tex. Disciplinary R. Prof. Conduct 3.03(a)(1). As one court recognized when imposing sanctions under Rule 45, the disciplinary rules do not merely bar direct misrepresentations but also prohibit appellate counsel from failing to disclose facts when nondisclosure is equivalent to an affirmative misrepresentation. *See American Paging*, 9 S.W.3d at 241.

The duty of candor imposed by Disciplinary Rule 3.03 prohibits appellate counsel from misrepresenting the facts or law — by omission or commission — to the appellate court. As summarized in one treatise: "Applying these standards to the appeal, appellate counsel should not misstate the record to the appellate court, and should not misstate the law, nor fail to advise the court of adverse legal authorities not disclosed by the opposing party." *See* 6 TEXAS CIVIL PRACTICE at § 5:12 (citing cases); *see also* 1 TEXAS PRACTICE GUIDE—CIVIL APPEALS at § 2:18 (citing Disciplinary Rule 3.01 as prohibiting counsel from bringing frivolous or meritless appeal).

Justice Paul Green of the San Antonio Court of Appeals has emphasized that a lawyer responsible for the pursuit of a frivolous appeal — particularly a lawyer who misrepresents the law or facts — should be sanctioned, stating:

> When they are identified, frivolous appeals should be promptly disposed of and the lawyers and parties who file them should be sanctioned in accordance with the applicable rules and regulations. In time, those who would continue to abuse the judicial system will learn that they do so at their own peril. . . . Even though the lawyer is responsible for advising his client for writing the brief on appeal, the consequences of filing a frivolous appeal must rest at least in part with the client because, ultimately, the decision to appeal is the client's. But the consequences for the misrepresentation of the facts or the law before this court should fall exclusively upon the lawyer, who is an officer of the court.

Campos, 917 S.W.2d at 357, 358 (Green, J., concurring). As Justice Green observed in that case: "Judges are required by the Code of Judicial Conduct to take "appropriate action" when learning of disciplinary rules violations by lawyers. Tex. Code of Judicial Conduct, Canon 3, pt. D(2) . . .." *Id.* at 357 n.5. "Appropriate action includes referral to the General Counsel of the State Bar of Texas for disciplinary action. *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997) (order on rehearing).

It is not just the rules themselves that can be the basis for court discipline. Several courts have invoked the preamble to the rules, which states:

> A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is the lawyer's duty, when necessary, to challenge the rectitude of official action it is also a lawyer's duty to uphold legal process.

Tex. Disc. R. Prof. Conduct preamble ¶ 4; *see also id.* § 8.02(a) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office."). These provisions have been invoked as a basis for referring to the grievance committee lawyers who file briefs that insult the legal system. *See, e.g., Havner*, 953 S.W.2d at 732. Appellate court action in response to inflammatory briefing is

discussed in more detail in Section VI, below.

B. Standards for Appellate Conduct

The Appellate Section of the State Bar prepared standards for counsel engaged in appellate practice which were approved by the Texas Supreme Court on February 1, 1999. *See* 6 McDonald & Carlson, TEXAS CIVIL PRACTICE § 5:24 (2d ed. 1998 & Supp. 2000); *see also Standards for Appellate Conduct*, 12 THE APPELLATE ADVOCATE 26-28 (June 1999).

Under these Standards, appellate counsel is obligated not to "misrepresent, mischaracterize, misquote or miscite" the record or law. *See id*. In addition, counsel is obligated to not attempt to gain an advantage over the opposing party by manipulating brief margins and type size to evade the limitations found in the appellate rules. *See id*.

Theoretically, these Standards are advisory only. Opinions from several courts of appeals nevertheless illustrate that violations of these Standards through pursuing a frivolous appeal or misrepresenting the facts or law may result in appellate counsel being harshly admonished, sanctioned, or referred to the State Bar. *See, e.g., In re Goldblatt*, 38 S.W.3d 802 (Tex. App.—Fort Worth 2001, orig. proc.); *Schlafly*, 33 S.W.3d at 873-74; *Ex Parte Lafon*, 977 S.W.2d 865, 868 (Tex. App.—Dallas 1998, no pet.); *In the Matter of J.B.K.*, 931 S.W.3d 581, 583-84 (Tex. App.—El Paso 1996) (referring disciplinary matter to General Counsel, State Bar of Texas).

C. The Texas Lawyer's Creed

The Texas Supreme Court and the Court of Criminal Appeals have also issued a set of standards of conduct for lawyers. In November 1989, the two courts adopted "The Texas Lawyer's Creed — A Mandate for Professionalism." The Creed requires that a lawyer's conduct at all times be characterized by honesty, candor, and fairness. Specifically, the Creed requires the lawyer to pledge: "I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage." Texas Lawyer's Creed, Lawyers and Judges ¶ 6.

Like the appellate standards, the Creed is advisory only. Nonetheless, some courts have viewed the Creed as additional authority for imposing sanctions, issuing admonishments, or referring counsel to the State Bar. *See Schlafly*, 33 S.W.3d at 873 & n.9; *In the Matter of J.B.K.*, 931 S.W.3d at 583-84.

D. Civil Practice and Remedies Code

Sections 10.001-.006 of the Texas Civil Practice and Remedies Code provide for sanctions in the event a pleading is frivolous, filed for delay or to harass, or factually unsupported. Although the language of the statute requires a pleading under the Texas Rules of Civil Procedure, the Texas Supreme Court has suggested that it might provide a basis for the imposition of appellate sanctions. *See Havner*, 953 S.W.2d at 732 ("The Legislature has also provided a mechanism for courts to sanction counsel who file pleadings presented for an improper purpose or to harass.").

E. Pro Hac Vice Rules

The appearance in Texas courts by a non-resident is subject to the Rules Governing Admission to the Bar, including Rule XIX. *Havner*, 953 S.W.2d at 732. Under these provisions, the court may bar an out-of-state attorney from practicing in Texas courts. *See id.*

F. Inherent Disciplinary Power

As the Supreme Court recognized in *Havner*, 953 S.W.2d at 732, courts possess inherent power to discipline an attorney's behavior:

> "'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (further observing that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it) (quoting *Anderson v. Dunn*, 19 U.S. (1 Wheat.) 204, 227 (1821)); *see also Public Util. Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988); *Johnson v. Johnson*, 948 S.W.2d 835, 840-41

(Tex. App.—San Antonio 1997, writ denied).

IV. SANCTIONS FOR FRIVOLOUS APPEALS: IN DETAIL

A. General Principles

1. Public Policy Issues

When determining whether an appeal is frivolous, appellate courts are guided by public policy considerations. Appellate sanctions both punish and dissuade litigants and counsel from straining judicial resources in bad faith. *Herring v. Welborn*, 27 S.W.3d 132, 146 (Tex. App.—San Antonio 2000, pet. denied). Frivolous appeals not only injure the appellee who is forced to defend the clearly unmeritorious appeal but other litigants and the judicial system as a whole. As stressed by one court:

> There is no room at the courthouse for frivolous litigation. When a party pursues an appeal that has no merit, it places an unnecessary burden on both the appellee and the courts. More importantly, it unfairly deprives those litigants who pursue legitimate appeals of valuable judicial resources.

Chapman, 999 S.W.2d at 125; *accord Bridges v. Robinson*, 20 S.W.3d 104, 119 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

2. Discretionary Nature of Ruling on Appellate Sanctions Motion

Nonetheless, courts do not impose sanctions lightly. Whether to grant sanctions has been viewed as falling within the discretion of the reviewing court. *See Herring*, 27 S.W.3d at 145. The discretionary decision by an appellate court to grant sanctions has been described as one which should be exercised with prudence and caution, after careful deliberation, with sanctions being imposed only in circumstances that are "truly egregious." *See Angelou v. African Overseas Union*, 33 S.W.3d 269, 282 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Guajardo*, 30 S.W.3d at 18; *Kistler v. Stran*, 22 S.W.3d 103, 106 (Tex. App.—Houston [14th Dist.] 2000), *aff'd*, 52 S.W.3d 734 (Tex. 2001). Ineptitude or poor lawyering is not enough. *James v. Hudgins*, 876 S.W.2d 418, 424 (Tex. App.—El Paso 1994, writ denied).

B. The Test(s) for Determining Whether an Appeal Is Frivolous

The Texas Supreme Court has not issued an opinion construing its sanctions provision, appellate Rule 62. Nor has that court reviewed an opinion from a court of appeals assessing sanctions under appellate Rule 45. Although the Texas Supreme Court reviewed the propriety of sanctions assessed by an intermediate appellate court under former Rule 84, the court did not attempt to announce an all-encompassing test for determining when appellate sanctions are appropriate. *See General Elec. Credit Corp. v. Midland Central Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex. 1991); *see also Ames v. Ames*, 776 S.W.2d 154, 159 (Tex. 1989), *cert. denied*, 494 U.S. 1080 (1990).

The courts of appeals have adopted a variety of standards for determining whether sanctions should be imposed under Rule 45. Courts have relied on several tests. The tests used are not substantively identical and, at times, appear inconsistent. For the most part, courts of appeals do not appear to acknowledge that different, inconsistent tests are being used under Rule 45. *But see Mid-Continent Cas. Co.*, 2 S.W.3d at 396-97.

1. Test #1: Objectively Frivolous Appeal and Injury to Appellee

While courts have announced a variety of tests under Rule 45, there appears to be a growing consensus toward adoption of the test delineated in *Mid-Continent Cas. Co. v. Safe Tire Disposal Corp.*, 2 S.W.3d 393, 396-97 (Tex. App.—San Antonio 1999, no pet.). The San Antonio Court of Appeals concluded in that case that current Rule 45 constitutes a substantive revision of former Rule 84. 2 S.W.3d at 396-97. According to the San Antonio court, the presence or absence of bad faith is irrelevant to the discretionary decision to impose damages under Rule 45. *See id*. Describing the adoption of Rule

45 as a reaction, in part, to the narrowing effect of a 1986 amendment to the appellate sanctions rule, the court stated:

> Under the current rule, "just damages" are permitted if an appeal is objectively frivolous and injures the appellee. . . . Bad faith is thus no longer dispositive or necessarily even material.

Id. at 397.

Despite *Mid-Continent*'s disavowing of bad faith as an appropriate element in a sanctions determination under Rule 45, other panels of the San Antonio court in subsequent opinions have evidently viewed a showing of "good faith" as significant. *See Herring*, 27 S.W.3d at 145 ("As long as Lemuel's argument has a 'reasonable basis in law and constituted an informed, good faith challenge to the trial court's judgment,' this court's award of sanctions probably would not be appropriate."); *see also King v. Graham*, 47 S.W.3d 595 (Tex. App.—San Antonio 2001, pet. denied).

The First Court of Appeals followed *Mid-Continent* in *Smith v. Brown*, 51 S.W.3d 376 (Tex. App.—Houston [1st Dist.] 2001, no pet.). There the court held that "bad faith is no longer dispositive or necessarily even material to deciding whether an appeal is frivolous. . . . The presence of bad faith could be relevant, however, to determine the amount of the sanction." 51 S.W.3d at 381. Sanctions may be imposed based on a objective determination by the court that the appeal is frivolous. *Id.* Other courts of appeals appear to have also embraced the *Mid-Continent* approach. *See Port Arthur Indep. School Dist. v. Klein & Assoc.*, 2002 Tex. App. Lexis 1203 (Tex. App.—Beaumont Feb. 14, 2002) (Walker, C.J., concurring) (agreeing with *Mid-Continent* analysis); *Njuku v. Middleton*, 20 S.W.3d 176, 178 (Tex. App.—Dallas 2000, pet. denied) (quoting *Mid-Continent*'s objectively frivolous and injury to appellee test but also referring to disjunctive reasonable expectation/bad faith test); *Puckett v. Robinson*, 2001 Tex. App. Lexis 2967 (Tex. App.—Dallas May 8, 2001) (unpublished) (reciting *Mid-Continent* standard).

2. Test #2: No Reasonable Expectation of Reversal and Bad Faith

Several courts of appeals have concluded that the test for determining the propriety of sanctions under Rule 45 is a showing that appellant had no reasonable expectation of reversal and pursued the appeal in bad faith. *See, e.g., Easter v. Providence Lloyds Ins. Co.*, 17 S.W.3d 788, 792 (Tex. App.—Austin 2000, pet. denied). Sometimes, rather than couching this standard in terms of "bad faith," the dispositive inquiry is phrased as whether the appellant had no reasonable expectation of reversal and failed to pursue the appeal "in good faith." *See, e.g., Faddoul, Glasheen & Valles, P.C. v. Oaxaca*, 52 S.W.3d 209 (Tex. App.—El Paso 2001, no pet.); *American Paging*, 9 S.W.3d at 240.

3. Test #3: No Reasonable Expectation of Reversal or Bad Faith

The cases cited in the previous section seemingly require a showing of both the absence of a reasonable expectation of reversal and the presence of bad faith or the lack of good faith. Other courts appear to view these two elements disjunctively rather than conjunctively. "In determining whether sanctions are appropriate, we must decide whether Rivera had a reasonable expectation of reversal *or* whether she pursued the appeal in bad faith." *Diana Rivera & Assocs., P.C. v. Calvillo*, 986 S.W.2d 795, 799 (Tex. App.—Corpus Christi 1999, pet. denied) (emphasis added); *accord Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 723 (Tex. App.—Corpus Christi 2000, pet. denied); *see also Mid-Continent Cas. Co.*, 2 S.W.3d at 396. The Fourteenth Court of Appeals has looked to bad faith as a factor, assessing whether the appellant had a reasonable expectation of reversal or pursued the appeal in bad faith. *See Tate v. E.I. Du Pont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *Guajardo*, 30 S.W.3d at 18; *Bridges*, 20 S.W.3d at 115; *Chapman*, 999 S.W.2d at 125.

C. Time Frame for Applying the Test(s) for Determining Whether an Appeal Is Frivolous

Some courts of appeals have concluded that in determining whether sanctions are appropriate,

the court should consider the record from the appellant's point of view at the time the appeal was "filed." *See Bridges*, 20 S.W.3d at 115. Other courts have stated that the record should be considered from the appellant's perspective at the time the appeal was "perfected." *See Guajardo*, 30 S.W.3d at 18. And still other courts have focused on the time the appeal was "taken." *See Campos*, 917 S.W.2d at 356; *In Interest of S.R.M.*, 888 S.W.2d 267, 269 (Tex. App.—Houston [1st Dist.] 1994, no writ).

Even assuming the date an appeal is "filed" is the same as the date it is "perfected" or "taken," that date should not automatically be the pivotal time for determining whether an appeal is frivolous. For example, a clear-cut change in the law after the date of perfection could transform an initially arguable appeal into a frivolous one. *See Bainbridge v. Bainbridge*, 662 S.W.2d 655, 658 (Tex. App.—Dallas 1983, no writ) ("A litigant who perfects an appeal from an unfavorable judgment, and, on further study, concludes that he does not have sufficient grounds, should ordinarily be able to withdraw his appeal promptly without penalty and thus minimize the expense for all concerned.").

D. Factors Viewed as Demonstrating that an Appeal Is Frivolous

No one factor has been viewed as being dispositive of whether an appeal is frivolous. Invariably, the appellate court will rely on multiple factors when concluding that a particular appeal is frivolous. *See, e.g., Faddoul,* 52 S.W.3d at 213; *Bridges*, 20 S.W.3d at 116; *American Paging*, 9 S.W.3d at 241; *In the Interest of S.R.M.*, 888 S.W.2d at 269. The following is a list of factors cited by courts of appeals when discussing whether an appeal was taken without just cause and for purposes of delay under former Rule 84 or was frivolous under current Rule 45.

1. <u>The brief or oral argument contained material misstatements of fact either through affirmative misrepresentations or non-disclosures</u>.

This has to be the easiest and most common way to annoy the court sufficiently that it will impose sanctions. In fact, in one case, the court of appeals levied sanctions for misrepresentations of fact in connection with a point that the court did not even need to reach because the party had already obtained a reversal on other grounds. *Schlafly*, 33 S.W.3d at 873. The court explained:

> Counsel who mischaracterize or misrepresent the facts in the appellate record impose a tremendous hardship on the reviewing court and its staff. The voluminous case load and the sheer size of the appellate records in many cases often make for a very time-consuming appellate review. When counsel misrepresent the facts on which their legal arguments are based, they not only delay the entire process by unnecessarily adding to the court's workload but also render a tremendous disservice to their clients. It is also very poor strategy to misrepresent the record because any material misstatements and/or omissions will almost certainly be detected by opposing counsel, the appellate panel, and/or the court's alert and able staff. In this case, Mike's factual representations constituted such an obvious mischaracterization of the record that the discrepancies were apparent to all.
>
> Our adversary system contemplates that each party's advocate will present and argue favorable and unfavorable facts in the light most advantageous to his client; it does not contemplate misrepresentation or mischaracterization of those facts. While a lawyer may challenge the legal effect of unfavorable facts, he may not misrepresent them to the court. Where the record contains unfavorable facts, the appellate advocate should fairly disclose and portray them in his brief. Of course, having done so, he may then zealously and vigorously challenge their impact on the case or argue for the application of law which would minimize or eliminate the court's valid consideration of them. Failure to

> observe these very basic standards of appellate practice erodes the ethical standards on which the legal profession and the appellate process are based.

Id.; see Starcrest Trust v. Berry, 926 S.W.2d 343, 356 (Tex. App.—Austin 1996, no writ) ("Although we cannot say all the discrepancies between the record and appellant's brief were purposeful, they exceeded acceptable bounds and showed an absence of good faith on appellant's part."); *American Paging*, 9 S.W.3d at 241-42 (failure to state that a hearing was held on the motion for new trial and that opposing party offered evidence of proper notice of trial setting); *Harris v. Schepp*, 818 S.W.2d 530, 531 (Tex. App.—Fort Worth 1991, no writ) (the "brief makes unqualified assertions of fact, not supported by record references . . ..; these assertions are bald misrepresentations"); *Triland Inv. Group v. Tiseo Paving Co.*, 748 S.W.2d 282, 285 (Tex. App.—Dallas 1988, no writ); *Swate v. Cook*, 991 S.W.2d 450, 455 (Tex. App.—Houston [1st Dist.], 1999, pet. denied) (pro se lawyer repeated misrepresentation to appellate court how many children he had since prior child support order).

This includes failure to address adverse facts when necessary to obtain the desired disposition. *Chapman*, 999 S.W.2d at 124 ("Chapman neither addressed the operative provision of the contract nor proffered any reason why it was not applicable."); *Bridges*, 20 S.W.3d at 116 (completely ignoring damaging contrary testimony and representing that there were no material disputed facts).

2. The appellant's brief or oral argument contained misstatements of the law.

Appellate courts are also prone to impose sanctions when a party or counsel egregiously misrepresent the law. *See Campos*, 917 S.W.2d at 358 (Green, J., concurring) (party's "embellishment of statutory language" constitutes a material misrepresentation of law); *Bridges*, 20 S.W.3d at 116, 118-19 (arguing authority was binding without revealing it was a dissenting opinion); *Swate*, 991 S.W.2d at 456 (brief "presented his distorted version of the law"); *Smith v. Brown*, 51 S.W.3d at 382 (claiming at oral argument that authority "on all fours" when did not address central issue).

3. Appellant ignored well-settled adverse law without making any effort to argue for change in that law.

Taking an appeal that is clearly contrary to settled law is also a frequent basis for sanctions. *See Swate*, 991 S.W.2d at 456 (party showed "a conscious indifference to established law"); *Diana Rivera & Assocs.*, 986 S.W.2d at 799; *see also Bradt v. West*, 892 S.W.2d 56, 79 (Tex. App.—Houston [1st Dist.] 1994, writ denied) ("Showing conscious indifference to settled rules of law – i.e., turning a 'blind eye' to established law – is one factor to consider in deciding whether to award rule 84 damages."); *Naydan v. Naydan*, 800 S.W.2d 637, 643 (Tex. App.—Dallas 1990, no writ) (after counsel stated at argument that he had not studied and was not prepared to discuss adverse authority cited by opposing party, court concluded that appellant prosecuted appeal with deliberate purpose of ignoring existing law because "a non-frivolous appellant would meet these cases 'head-on,' distinguish them, or argue erroneous reasoning, and ask that we not follow them, thus inviting the Supreme Court to resolve the matter.").

4. The appellate record clearly demonstrated that the appeal was being pursued for purposes of delay.

Indications in the briefing or the record that a party seeks to delay final disposition of the case is also a consideration in imposing sanctions. *See Bridges*, 20 S.W.3d at 118 (counsel had yelled that party "would keep this case tied up on appeal until the millennium"; party also obtained trial delay by indicating would petition Supreme Court to review interlocutory appeal but never sought such review).; *American Paging*, 9 S.W.3d at 241; *Diana Rivera & Assocs.*, 986 S.W.2d at 799; *Hill v. Thompson & Knight*, 756 S.W.2d 824, 826 (Tex. App.—Dallas 1988, no writ).

5. The appellant either failed to file a reporter's record at all or filed an incomplete record when a complete record was an indispensable prerequisite to review of appellant's complaints.

Failing to file a record necessary to support the claims on appeal may be viewed as an indication that the appeal is frivolous. *See, e.g., American Paging*, 9 S.W.3d at 241; *Tate*, 954 S.W.2d at 875; *Daniel v. Esmaili*, 761 S.W.2d 827, 830 (Tex. App.—Dallas 1988, no writ).

6. The appeal — particularly an interlocutory appeal — was pursued despite a clear absence of any statutory basis for invoking the court of appeals' jurisdiction.

An appeal brought when the court clearly has no jurisdiction is frivolous, particularly where the party makes no effort to assert why jurisdiction is proper. *See Elmcreek Villas Homeowners Ass'n, Inc. v. Beldon Roofing & Remodeling*, 940 S.W.2d 150, 155-56 (Tex. App.—San Antonio 1996, no writ) (attempted interlocutory order from unappealable order compelling arbitration, coupled with attempt to cast as an appeal of a temporary injunction); *Bridges*, 20 S.W.3d at 117 (private company has no right to interlocutory appeal based on claim of official immunity); *Diana Rivera & Assoc.*, 986 S.W.2d at 799 (filing unavailable interlocutory appeal rather than available mandamus in order to obtain automatic statutory stay of trial date). *But see Lipshy Motorcars, Inc. v. Sovereign Assocs., Inc.*, 944 S.W.2d 68, 70-72 (Tex. App.—Dallas 1997, no writ) (appellate court, lacking jurisdiction over merits of appeal, has no jurisdiction to award appellate sanctions).

7. Appellant raised issues for the first time on appeal or raises a factual sufficiency complaint without having filed a motion for new trial.

An obvious attempt to present unpreserved error may also be a basis for sanction. *See Tate*, 954 S.W.2d at 875; *Bradt*, 892 S.W.2d at 79; *Daniel*, 761 S.W.2d at 830 (failure to file new trial motion); *see also American Paging*, 9 S.W.3d at 241.

8. The appellant did not respond to the motion for sanctions or failed to explain adequately why sanctions should not be imposed.

Courts often recite, before imposing sanctions, that the sanctioned party has failed to respond to the show cause order or to offer any defense of the unacceptable conduct. *See, e.g., Njuku*, 20 S.W.3d at 178; *American Paging*, 9 S.W.3d at 242; *Tate*, 954 S.W.2d at 875; *Bridges*, 20 S.W.3d at 116; *Bradt*, 892 S.W.2d at 79-80 (when asked at oral argument to explain why the appellant's appeal was not frivolous, appellant's counsel was unable to provide any explanation or at least a satisfactory explanation to the court of appeals).

9. Counsel for the appellant failed to appear at oral argument.

While not usually a basis for sanctions standing alone, failure of counsel to appear at argument often appears in a list of a party's indiscretions. *See Archer v. Wood*, 771 S.W.2d 631, 633 (Tex. App.—Dallas 1989, no writ) (in addition to filing brief not complying with appellate rules and asserting one point of error that wasn't preserved and a second point entirely without merit, appellant's counsel "requested oral argument, then failed to appear when scheduled"); *see also Faddoul,* 52 S.W.3d at 213; *American Paging*, 9 S.W.3d at 241.

10. The appeal represented one of the appellant's repeated attempts to re-litigate issues previously decided.

Relitigating issues already finally decided can be a basis for sanctions. *See Njuku*, 20 S.W.3d at 178; *Smith v. Brown*, 518 S.W.3d at 382; *Bullock v. Sage Energy Co.*, 728 S.W.2d 465 (Tex. App.—Austin 1987, no writ) (sanction imposed for continuing to enforce rule previously struck down by court in an unpublished opinion).

11. The appellant failed to support the arguments in its appellate briefing with cites to the record or to the law or provides only irrelevant cites.

Briefing with no citations to the record or to legal authorities can be viewed as showing that an appeal is frivolous. *See Chapman*, 999 S.W.2d at 124-25; *Tate*, 954 S.W.2d at 875;

Casteel-Diebolt v. Diebolt, 912 S.W.2d 302, 306 (Tex. App.—Houston [14th Dist.] 1995, no writ) (as to most points, "she fails to cite to any authority or make any accurate references to the record to support her arguments"); *Lewis v. Deaf Smith Elec. Coop, Inc.*, 768 S.W.2d 511, 514 (Tex. App.—Amarillo 1989, no writ) ("[H]e makes only a cursory reference to one page of the statement of facts. The statement of the case portion of his brief consists of only three sentences. The statement, argument, and authorities section under his first point contains only two sentences, is without references to authority on the record and is only tenuously related to the stated point of error. The statement, argument and authorities portion under his second point consists of three sentences, one reference to the record, and a citation to a single case, which does not stand for the proposition argued.").

This includes briefs that waste the court's time by including too many authorities. *See Hill*, 756 S.W.2d at 824 (in eight pages of argument, appellant "cites 107 cases, almost none of which have anything to do with the issues raised").

12. The appellant's brief was poorly written and failed to raise any arguable points of error.

A lack of any arguable point is tantamount to a frivolous appeal. *See American Paging*, 9 S.W.3d at 241; *Jim Arnold Corp. v. Bishop*, 928 S.W.2d 761, 772 (Tex. App.—Beaumont 1996, no writ); *see also Starcrest Trust*, 926 S.W.2d at 356 ("Appellant's brief was at best confusing and at worst misleading and served no more than to cloud the straightforward issues of this case.").

13. In its briefing, appellant asked for a reversal and rendition when the only conceivable remedy available was a reversal and remand.

A failure to pray for proper relief may give rise to sanctions. *See Chapman*, 999 S.W.2d at 124.

14. The record disclosed that appellant had a pattern of filing frivolous lawsuits or appeals.

Repeat litigants are more likely to be sanctions. *See Birdo v. Schwartzer*, 883 S.W.2d 386, 388 (Tex. App.—Waco 1994, no writ) ("Birdo has flooded our sister courts of appeals with his lawsuits."); *Smith v. Brown*, 51 S.W.3d at 382 (attaching affidavit listing cases brought by same appellant, described by court as a "vexatious litigant").

15. The party appealed despite agreeing in writing not to pursue an appeal.

Violating an agreement not to appeal can be a factor in imposing sanctions. *See Matter of Marriage of Long*, 946 S.W.2d 97, 99-100 (Tex. App.—Texarkana 1997, no writ); *see also Casteel-Diebolt*, 912 S.W.2d at 306 (complaining about jury charge submitted by agreement, failing to cite legal authorities and not including accurate record references warranted appellate sanctions); *see also Starcrest Trust*, 926 S.W.2d at 356 (unexplained refusal to comply with terms of settlement mediated on appeal).

16. The party relies on materials not part of the record on appeal.

It is improper to rely on extra-record materials; such reliance may give rise to sanctions. *Harris*, 818 S.W.2d at 531 (not only relying on extra-record materials, but misrepresenting their content).

E. Factors Viewed as Demonstrating that an Appeal Is Not Frivolous

Perhaps because of due process implications and the serious monetary and even professional ramifications of imposing sanctions on appeal, appellate courts tend to provide greater detail in opinions imposing sanctions than when denying sanctions. Often, sanctions will be denied with a conclusory observation that the record failed to reflect that the appellant brought the appeal in bad faith or lacked reasonable grounds to believe that the judgment would be reversed or with similarly worded cursory language. *See, e.g., Provencio v. Paradigm Media, Inc.*, 44 S.W.3d 677 (Tex. App.—El Paso 2002, no pet.); *King v. Graham*, 47 S.W.3d 595 (Tex. App.—San Antonio 2001, pet. denied); *In re M.A.M.*, 35 S.W.3d 788, 791 (Tex. App.—Beaumont 2001, no pet.); *Angelou*, 33 S.W.3d at 282; *Mercier*, 28 S.W.3d at 723; *Fair Deal Auto Sales v. Brantley*, 24 S.W.3d 543, 547 (Tex. App.—Houston [1st

Dist.] 2000, no pet.) (declining to impose sanctions even though party's "arguments ignore the applicable standard of review"); *Denton County v. Howard*, 22 S.W.3d 113, 120 (Tex. App.—Fort Worth 2000, no pet.). There are, however, a number of factors that courts of appeals have cited when deciding that appellate sanctions were not warranted under former Rule 84 or current Rule 45.

1. The case law applicable to the appeal was conflicting, inconsistent, or unclear.

Uncertainty in the case law is a mitigating factor. *See Guajardo*, 30 S.W.3d at 18 ("Although we believe supreme court authority clearly mandates a finding that appellant's notice of appeal in this case was untimely filed, we decline to find that this renders the appeal frivolous given the conflicting case law on this issue."); *Kistler*, 22 S.W.3d at 106 (same).

2. The statutory law applicable to the controversy was unclear or conflicting.

The same is true with respect to statutory law. *See Howell Aviation Servs. v. Aerial Ads, Inc.*, 29 S.W.3d 321, 324 (Tex. App.—Dallas 2000, no pet.) ("Although we have agreed with Aerial concerning its jurisdictional arguments, this Court has not previously resolved the statutory conflict . . .."); *Herring* 27 S.W.3d at 146 ("The law of probate jurisdiction is less than perfectly clear.")..

3. The appellant's brief contained arguable points of error sufficiently supported by legal and record references or was well-written and researched.

Just because the argument is wrong does not make it sanctionable, particularly where the brief appears to make an effort. *See General Elec. Credit Corp. v. Midland Central Appraisal Dist.*, 826 S.W.2d 124, 125 (Tex. 1991) ("GECC's arguments, even if unconvincing, had a reasonable basis in law and constituted an informed, good-faith challenge to a trial court judgment."); *Faddoul,* 52 S.W.3d at 213 ("Appellants have written a very thorough brief, which includes a statement of facts, and counsel for Appellants did appear at oral argument."); *Mercier*, 28 S.W.3d at 723 ("MidTexas brought forward sufficient arguments and citations for our consideration."); *Herring*, 27 S.W.3d at 146 (observing that party's "interpretation of previous courts' opinions in the area of probate jurisdiction, and their application to the present case, is not out of touch with reality"); *Boudreaux Civic Ass'n v. Cox*, 882 S.W.2d 543, 551 (Tex. App.—Houston [1st Dist.] 1994, no writ) ("appellant's appeal has presented an issue of legal interest for this Court's review. . . . The brief was well researched and argued . . ..").

4. The appellant had at least one of its points of error sustained on appeal.

An appeal is not usually frivolous where a party obtains relief on appeal. *See Keever*, 988 S.W.2d at 315 ("We have sustained one of the points of error and are reforming the trial court's judgment accordingly. Consequently, we cannot conclude that Keever had no reasonable grounds to believe that the judgment should be reversed."); *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 135 (Tex. App.—Houston [14th Dist.] 1997, no writ) (noting that court had sustained one point of error in part); *Hur v. City of Mesquite*, 893 S.W.2d 227, 235 (Tex. App.—Amarillo 1995, writ denied) "Inasmuch as we have sustained the Hurs' sixth point of error, we conclude that the appeal was not taken with insufficient cause and merely for delay"). *But see Schlafly*, 33 S.W.3d at 873 (imposing sanctions for misrepresentations in connection with point court did not reach because party had already obtained relief on alternative grounds).

5. The appellant made a good faith argument for changing existing law.

Courts are understanding when a party argues contrary to existing law if the party makes a reasonable attempt to explain why existing law should be changed. *See Guzman v. Guzman*, 827 S.W.2d 445, 448 (Tex. App.—Corpus Christi) ("Although we disagree, she has raised a legitimate argument for the change of existing law."), *writ denied per curiam*, 843 S.W.2d 486 (Tex. 1992).

6. Although the appeal was presented ineptly, there was no evidence that it was being pursued in bad faith or solely for purposes of delay.

Courts are sometimes sympathetic when a party has simply hired inept counsel. *See Tacon Mech. Contractors v. Grant Sheet Metal, Inc.*, 889 S.W.2d 666, 676 (Tex. App.—Houston [14th Dist.] 1994, writ denied) ("We will not punish Tacon for the inadequacies of its attorney unless the circumstances indicate that the appeal was brought for purposes of delay and without sufficient cause."); *see also Daniel*, 761 S.W.2d at 831 ("A court should not punish the client simply for the inadequacies of his attorney.").

7. The trial court essentially invited the losing party to appeal its ruling.

When a party is encouraged to take an issue up, the appellate court is unlikely to impose sanctions. *See Siegert v. Seneca Resources Corp.*, 28 S.W.3d 680, 684 (Tex. App.—Corpus Christi 2000, no pet.) (in addition to record reflecting that trial judge believed both litigants were acting in good faith to determine applicable law, judge also said "and probably I'm going to let the court of appeals rule on that portion").

8. The complexity of the issues presented on appeal mitigated against the conclusion that the appeal was frivolous.

Courts may be more forgiving when the issues are so complex that they may be beyond the party's comprehension. *See Muniz v. State Farm Lloyds*, 974 S.W.2d 229, 237 (Tex. App.—San Antonio 1998, no pet.) ("However, because the Munizes may have brought this appeal because of an inability to grasp the complex principles of issue preclusion, we overrule State Farm's cross-point seeking sanctions."); *Loyd*, 956 S.W.2d at 135 ("As is readily apparent from the lengthy discussion of the points of error in this case, the issues presented are complex."); *see also* TEXAS CIVIL TRIAL & APPELLATE PROCEDURE at § 19.3(j).

9. The interlocutory appeal did not delay trial of the underlying case.

Occasionally, courts will take a no harm, no foul approach with respect to an appeal. *See Faddoul,* 52 S.W.3d at 213 (noting that trial had been reset and that interlocutory appeal had not slowed final disposition in the trial court).

10. And maybe it is helpful to be famous.

There may be some benefit to star power. *See Angelou*, 33 S.W.3d at 269, 279, 282 (declining to impose sanctions against the "former poet laureate of the United States" even though some contentions "simply stretch the bounds of credible argument").

F. Damages Recoverable Under Rule 45

Under former Rule 84, the court of appeals was precluded from awarding sanctions in an amount in excess of ten percent of damages or ten times costs. *See* TEXAS LITIGATION GUIDE at § 150.02[7][i]. Under current Rule 45, sanctions are not capped and the appellate court is authorized to impose "just damages" as sanctions. *See id.*; *see also* Tex. R. App. P. 45. The Texas Supreme Court is likewise authorized to award "just damages" as sanctions under Rule 62. *See* Tex. R. App. P. 62. Neither Rule 45 nor Rule 62, however, defines the term "just damages" or provides any guidance into the factors or the amounts an appellate court may appropriately consider when imposing sanctions.

The Texas Supreme Court, however, has considered the meaning of what is "just" in a sanctions context. In determining whether a trial court had abused its discretion in imposing discovery sanctions, the Court wrote:

> In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. This means that a just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. It also means that the sanction should be visited upon the offender. . . . Second, just sanctions must not be excessive. The punishment should fit the crime. A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its

legitimate purposes. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). A similar analysis may apply to "just damages." It is likely that the focus will be on the expense caused to the opposing party in defending against a frivolous appeal.

Counsel for the movant for sanctions will thus be required to prove the amount of damages caused by the frivolous appeal. When such damages cannot be ascertained from the record, the movant should file affidavits in support of the request for sanctions. *See* 2 TEXAS PRACTICE GUIDE-CIVIL APPEALS at § 13:252; *see also Diana Rivera & Assocs.*, 986 S.W.2d at 799 (appellate court awarded $8,800 in attorney's fees under Rule 45 based on documentation furnished by appellee at court's request).

Often when sanctions are awarded under Rule 45, the appellate court's opinion does not disclose how those damages were calculated or proven. *See Njuku*, 20 S.W.3d at 178 (assessing $5,000 twice as damages for each appeal in consolidated appeals); *Bridges*, 20 S.W.3d at 119 (imposing a total of $10,000 in sanctions allocated among six appellants in amounts ranging from $6,000 to $40); *Chapman*, 999 S.W.2d at 125 (ordering appellant to pay $5,000 as the "sum representing the reasonable attorney's fees and related expenses" incurred by appellee in responding to the appeal); *Swate*, 991 S.W.2d at 456 ("The mother [appellee] has requested $5,000 in attorney's fees as damages in responding to this appeal. We find this is a just and reasonable amount.").

In other opinions, courts have discussed the factual basis for the amount of the sanctions awarded. When finding that an appeal was frivolous, the San Antonio court concluded that the appellee had been injured at least to the extent of $5,000 in reasonable and necessary attorney's fees that appellee had proven at trial it would incur if any appeal were filed. *See Mid-Continent Cas. Co.*, 2 S.W.3d at 397. Another court of appeals fixed the damages at an amount equal to the attorney's fees the appellant's attorney had agreed to accept in the negotiated settlement underlying the frivolous appeal. *See Parker v. State Farm Mut. Auto. Ins. Co.*, 4 S.W.3d 358, 365-66 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *see also* TEXAS CIVIL TRIAL & APPELLATE PROCEDURE at § 19.3(j). In another case, the El Paso court imposed a penalty of $20,925, an amount equal to 50% of the actual damages awarded in the trial court plus post-judgment simple interest at the rate of 10% per annum, exclusive of attorney's fees and interest previously awarded by the trial court. *See American Paging*, 9 S.W.3d at 242; *see also Diana Rivera & Assocs.*, 986 S.W.2d at 799.

V. THE TEXAS SUPREME COURT'S USE OF RULE 9.4(i)

Rule 9.4(i) of the Texas Rules of Appellate Procedure provides:

> (i) *Nonconforming Documents.* Unless every copy of a document conforms to these rules, the court may strike the document and return all nonconforming copies to the filing party. The court must identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format. If another nonconforming document is filed, the court may strike the document and prohibit the party from filing further documents of the same kind. The use of footnotes, smaller or condensed typeface, or compacted or compressed printing features to avoid the limits of these rules are grounds for the court to strike a document.

The Texas Supreme Court has not hesitated to resort to Rule 9.4(i) to enforce the appellate rules governing the form and content of petitions, motions, and appendices. When striking nonconforming materials, the court invariably provides an opportunity to the party who filed the stricken material to resubmit the document in a conforming format. *See* Tex. R. App. P. 9.4(i).

VI. Inflammatory Briefing and Attorney Discipline

Occasionally, a party will file a brief that is so inflammatory that the appellate court will take action against the brief and its author. Both the Supreme Court and several courts of appeals have imposed either sanctions against the author or referred the attorney to the grievance committee for offensive briefing.

The most notorious example is *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997) (order on rehearing). There the Court denied the respondent's motion for rehearing but at the same time issued an opinion because "the tenor of that motion requires that [the Court] address the conduct of Respondents' counsel." The Court quoted extensively with approval a court of appeals' opinion:

> A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public's confidence in the judicial process. Even were this court willing to tolerate the personal insult levied by [counsel], we are obligated to maintain the respect due this Court and the legal system we took an oath to serve.

953 S.W.2d at 732, *quoting In re Maloney*, 949 S.W.2d 385, 388 (Tex. App.—San Antonio 1997, no writ) (en banc) (per curiam). The Supreme Court then recited numerous bases for its authority to take disciplinary action under these circumstances: (1) inherent power; (2) Tex. Disciplinary R. Prof. Conduct preamble ¶ 4 ("A lawyer should demonstrate respect for the legal system and for those who serve it, including judges . . . ."); (3) Tex. Disciplinary R. Prof. Conduct 8.02(a) ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office."); (4) Tex. Civ. Prac. & Rem. Code §§ 10.001-10.005 (sanctions for improper pleadings); and (5) Rules Governing Admission to the Bar XIX (pro hac vice rules).

The Court identified pages of the rehearing motion that raised particular concerns and afforded counsel the opportunity to brief why the Court should not impose monetary sanctions, refer each of the three counsel to appropriate disciplinary authorities, and bar the out-of-state attorney joining the brief from practicing in Texas courts. Although the Court did not identify particular phrases or sentences as offensive, the following excerpts are a few of the more likely candidates:

- "The Texas Supreme Court, fervent to follow the law laid out for it by those who would kill and injure for profit, stand stiffly in a row, nine nutty professors . . . ."
- "[The opinion] is no more than a detailed, 58-page science fiction, filled with skewed observations and prissy platitudes . . . ."
- Multiple references to a fund-raising letter written by Petitioner's counsel on behalf of the re-election campaign of one of the justices.
- "A simple, painful truth: No little girl, or anyone else, will take away corporate money, no matter what – not on our watch."
- "Justice is no longer for sale in Texas, the money has been escrowed, the deed has been signed, the deal has been done."

Motion for Rehearing at 1-5.

In response to the show cause order, the three attorneys were not in the least contrite. The response repeated certain allegations raised in the motion, argued the rhetoric was no worse than used in dissenting opinions (quoting extensively), raised procedural objections, and claimed constitutional privileges. Two of the attorneys also raised the fact that they had not signed the pleading. This should be a cautionary tale for attorneys whose names appear on signature

blocks on briefs they have neither written nor reviewed. In any event, the apparent result was that the Court referred only the signing attorney to the grievance committee, with Justice Spector dissenting. While agreeing that the rhetoric in the motion was intemperate, she nonetheless would not impose any sanctions that would interfere with the freedom to criticize the judiciary, citing U. S. Supreme Court authority addressing criticism in a newspaper and not a court document.

The Texas Supreme Court continues to monitor offensive pleadings. In *Dziedzic v. Stephanou*, 43 Tex. Sup. Ct. J. 609 (April 15, 2000), the Court struck a motion for rehearing pursuant to Tex. Disc. R. Prof. Conduct preamble ¶ 4. While the Court's order does not specify the offensive portions of the motion, the following are the most likely candidates:

- "Petitioners' counsel has endured the injustice of this Court's opinions for over 45 years. He can no longer tolerate the Court's blatant disregard of the law to 'protect negligent physicians' when his client suffers from the fraud of the appellate courts in misrepresenting the record to affirm an illegal and unjust directed verdict."

- Repeated statements that the appellate court below made "false findings."

- "THE SUPREME COURT PERPETUATES A JUDICIAL FRAUD ON [PETITIONER] IN DENYING HER PETITION TO REVIEW SUCH FALSE FINDINGS [OF THE APPELLATE COURT]."

- "The Court's affirmance . . . is 'judicial fraud,' gross incompetence in review of the evidence, and an illegal holding of the Court . . . . ."

- "WILL THE SUPREME COURT JUSTICES RISK A COMPLAINT BY [PETITIONERS] AND THEIR ATTORNEY WITH THE JUDICIAL GRIEVANCE COMMITTEE JUST TO PROTECT RESPONDENTS?"

Motion for Rehearing at 2, 3, 16.

Courts of appeals have also not hesitated to act when an offensive brief attacking the court or the parties is filed. In the court of appeals in *Havner*, the court struck certain pleadings as offensive and referred counsel to the grievance committee, stating that: "The documents charge conduct that, if true, constitutes clear violations of the Code of Judicial Conduct. The language of the two documents being considered is insulting, disrespectful, and unprofessional." *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 907 S.W.2d 565, 566 (Tex. App.—Corpus Christi 1994) (en banc) (per curiam).

The San Antonio court of appeals also has taken firm action against offensive briefing. In *In re Maloney*, 949 S.W.2d 385, 386-87 (Tex. App.—San Antonio 1997, no writ) (en banc) (per curiam), the court referred appellate counsel to the grievance committee for "direct attacks on the integrity of the justices of this Court." The motions for rehearing in that case, as described by the court, "ascribe improper political motivations for the court's decision and imply that the court misrepresented the record in its opinion," including the following:

- "Politics should not win the day over incapacitated rape victims," and "Plaintiffs can think of no reason for this opinion other than politics."

- "It must be embarrassing to take such a pro-rapist, pro-big-insurance-defense-firm position with so appallingly non-existent legal or logical basis . . . ."

- "[The] Court should admit it is writing new law to assist the insurance companies of a sleazy nursing home that happen to be represented by an insurance defense firm."

- The motion describes the court's reasoning as "specious" and states that the court "goes on to make some rather outlandish representations which are not supported by the record, the transcript, or by any matter before the court."

949 S.W.2d at 386-67. Like in *Havner*, the attorney was not repentant in the response to the show cause order. Although she "initially apologizes if she was inappropriate or offensive; . . . the substance of her response supports [the court's] interpretation of her initial remarks," repeating claims of political motivation by members of the court. *Id.* at 388.

The appellate courts will also take action when a party attacks the lower court. In *Johnson v. Johnson*, 948 S.W.2d 835, 840 n.1 (Tex. App.—San Antonio 1997, writ denied), the party stated in its brief that: "The trial court's pathetic determination to 'take from the rich and give to the poor,' regarding the entire Record of the matter of Richard's separate property, is a classic example of disregard for the law and the facts, by a man incompetent to comprehend the case at hand." Similar statements were made at oral argument as well. 948 S.W.2d at 840. The court sanctioned the attorney $500 and referred him to the grievance committee, observing that:

> While attorneys are granted great latitude in presenting arguments in an appellate court, when attorneys speak disrespectfully of the trial court, they "exceed their rights and evidence a want of proper respect for the court . . . ." *Mossop v. Zapp*, 179 S.W. 685, 685 (Tex. Civ. App.—Galveston 1915, no writ). Counsel stated that it "pained" him to say what he did about the trial court, but justified his comments as necessary to the representation of his client. An attorney's resort to personal attacks on the trial judge in the interest of "serving his client" serves neither the client nor the legal profession. Zealous representation does not and cannot include degrading the court in the hopes of gaining a perceived advantage.

Id. at 840-41.

These cases reaffirm the advice that an attorney should always have a third party read a brief before filing it. This advice is doubly or triply applicable to motions for rehearing, which appear to be the most frequent source of intemperate briefing. At a recent seminar, two Texas Supreme Court justices advised against insulting or offensive rehearing motions. Nathan L. Hecht, Motions for Rehearing of Causes in the Texas Supreme Court, State Bar of Texas, Practice Before the Supreme Court of Texas (June 21, 2002) ("So while quibbling and demurring won't work, neither will insisting that the Court either lacks intellect or integrity. An abusive motion will be struck."); Wallace B. Jefferson, Motions for Rehearing on Denial of Petition, State Bar of Texas, Practice Before the Supreme Court of Texas (June 21, 2002) (advising against using a rehearing motion "to vent frustration or to launch a withering attack on the Court or its judgment"). This approach is not only ineffective, but may result in sanctions.

VII. CONCLUSION

Remember that the right to appeal is a privilege that should not be abused in the name of zealous advocacy. The appellate courts recognize a clear line between advocacy and sanctionable conduct. But courts are generally not quick to sanction, reserving penalties for egregious conduct. Consequently, avoiding sanctions is not difficult. Don't lie about the law or the record; don't insult the appellate court or the trial court; don't bring an appeal that has no arguable basis.

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