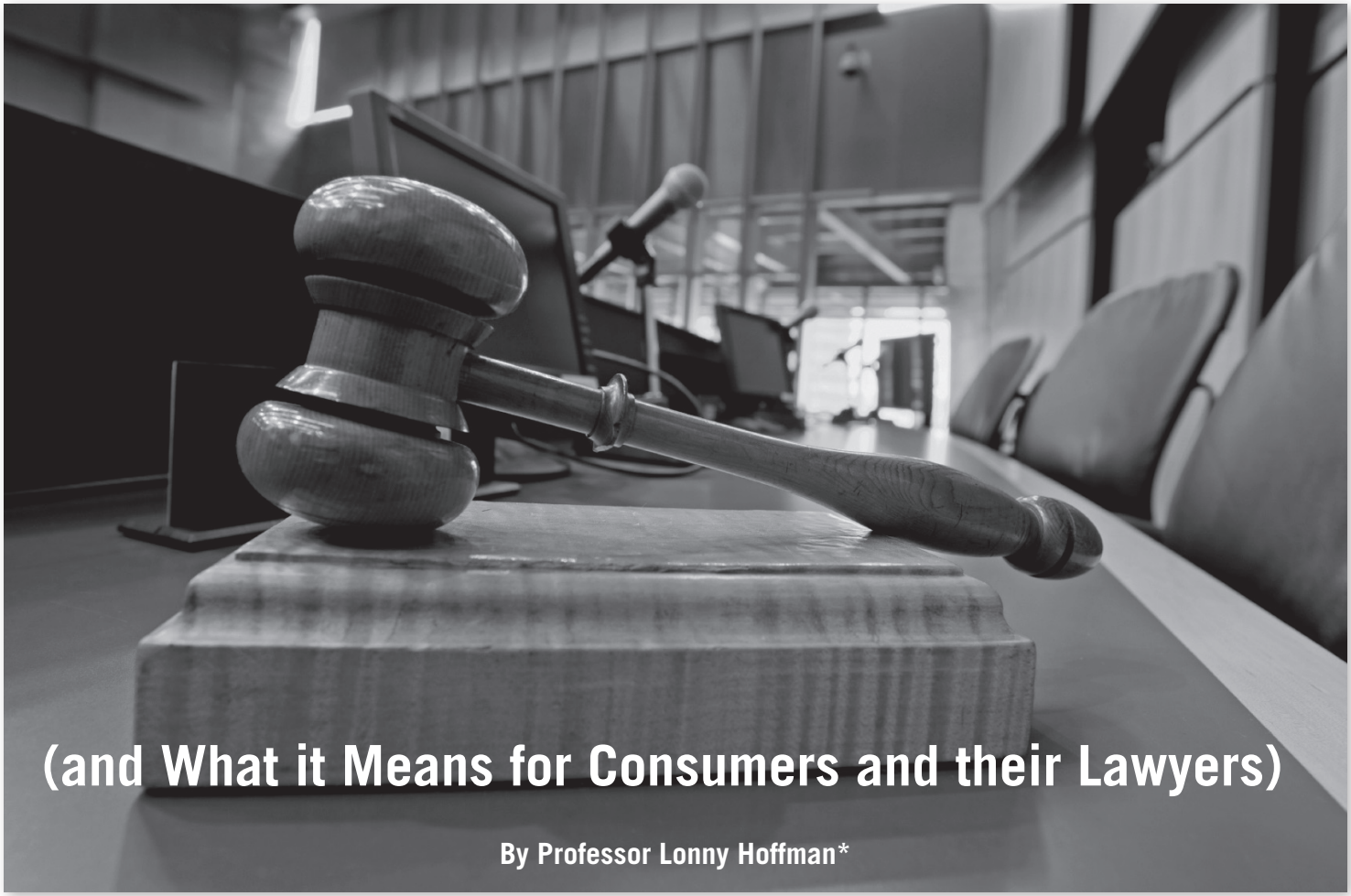
The Peculiar Case of James Vasilas



(and What it Means for Consumers and their Lawyers)

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Introduction

This is a tale that begins with a "not guilty" verdict and ends, years later, with another "not guilty" verdict. The first "not guilty" verdict, in 2003, was earned by Justin Goff. Goff was arrested for selling marijuana. Goff hired James Vasilas, a criminal defense lawyer in Dallas to represent him. Bucking the odds, Vasilas and Goff took the case to trial and, improbably, won.[2] Goff was found not guilty of the charge of selling a controlled substance, though he was convicted of the lesser-included offense of possession of marijuana (which, because of the small amount he had, was only a misdemeanor under the law). Thereafter, Vasilas filed a petition for expunction of his client's arrest record, a right statutorily accorded to him from winning an acquittal. This is where our story takes a strange twist. The next thing that Vasilas learns, courtesy of the police officers who show up at his door one morning, is that he, Vasilas, has been charged with having committed a felony for making allegedly false statements in the petition for expunction he filed on his client's behalf. Specifically, in a December 2003 indictment, the state charged that Vasilas was guilty of "tampering with governmental records" in violation of Tex. Pen. C. §37.10. Vasilas faced up to two years in prison if found guilty. Eventually, after five years of battling in the appellate courts, the case was sent back for trial and after an unexpectedly brief bench trial, the judge found Vasilas "not guilty" of all charges. For Vasilas, the nightmare was finally over.

For the rest of us, however, the legacy of the Vasilas case lives on. The case is likely to have profound effects on the practice of law in Texas. Two pernicious legal precedents issued from the Court of Criminal Appeals (CCA), the state's highest criminal court, that expand the scope of state power over lawyers and their clients, not just in criminal cases but in civil litigation as well. In the aftermath of the Vasilas case, I propose to reexamine the legal questions decided by the CCA. There are at least three reasons why this work is important. First, reexamination of Vasilas' case demonstrates that the Court of Appeals' interpretation of §37.10 misconstrued the Legislature's intent in enacting that penal code provision: it was never meant to apply to the pleadings, motions and other papers that lawyers file in judicial proceedings. Erroneous as it may have been, the CCA's construction of the law permits prosecution of other lawyers. This expanded regulatory power over lawyers raises troubling public policy concerns, concerns that offer a second reason for refocusing attention on the case now. With a more accurate understanding of §37.10, it may be possible to enrich a healthy debate about the dangers that such an expanded state regulatory power poses to the administration of justice. Unless and until the CCA's decisions are reversed, however, the third reason for returning to the Vasilas case is that it underlines the need to pay closer attention than most of us, probably, give to what we file in judicial cases. Pressing caseloads and unforgiving deadlines may be the causal factors here, but that's surely more explanation than excuse and, after the CCA's decisions in this case, an inadequate one.

The paper proceeds as follows Part I sketches the procedural history of the Vasilas case; Part II then demonstrates that the CCA was wrong in finding that the Legislature intended §37.10 to apply to the documents created by lawyers and filed in judicial proceedings; finally, Part III concludes by considering the normative implications of expanding state criminal power under §37.10 to the documents lawyers file when they represent their clients in civil and criminal cases.

I. Prologue and Procedural History

A. A Criminal Case Begins, then Abruptly Ends, when the Indictment is Quashed

The Vasilas story begins with Justin Goff's arrest and indictment for the state jail felony of delivering marijuana. Goff pleaded not guilty, went to trial and won: the jury acquitted him of selilng marijuana, convicting him only of the lesser-included misdemeanor of possession. Thereafter, Vasilas signed and filed a civil petition for expunction to clear his client's record of the delivery arrest.

After Vasilas filed the petition, an indictment was issued charging Vasilas with violation of Chapter 37.10 of the Texas Penal Code. That provision, "Tampering with Governmental Records" has no apparent facial applicability. Nevertheless, the government claimed that in the petition for expunction Vasilas authored three statements that were false. Specifically, it focused on these three allegations:

1. No case was filed charging Petitioner with the [felony] offense;

2. This case was dropped by the Collin County District Attorney's Office;

3. The charge has not resulted in a final conviction and is no longer pending.

On December 16, 2003, the state brought a four-count indictment against Vasilas under §37.10.[3] The state's position was that the petition for expunction constituted a "governmental record" within the meaning of the statutory language and that by making statements he knew to be false in the document, he was "tampering" with the record.

Vasilas responded by filing a motion to quash the indictment. The first ground for dismissal, he argued, was that the Legislature did not intend §37.10 to apply to the documents filed by lawyers in civil proceedings. In this regard, he maintained that a more specific civil sanctions rule, Rule 13 of the Texas Rules of Civil Procedure, was applicable to the conduct of lawyers in civil cases. This more specific language governing a lawyer's conduct in civil cases trumped the general language in §37.10, demonstrating, he argued, that the legislature did not intend the more general language to apply. Vasilas also argued that in any event §37.10 was inapplicable. According to §37.01(2)(a), "governmental record" is "anything belonging to, received by, or kept by government for information, including a court record." Based on this definition, Vasilas argued that governmental records did not include pleadings originally created by lawyers that they filed in civil proceedings.

It is significant—and we will return to this shortly—that Vasilas pointed only to Rule 13, the sanctions rule found in the Texas Rules of Civil Procedure. He could have, but did not, cite to several equivalent statutory enactments, most notably, Chapters 9 and 10 of the Texas Civil Practice and Remedies Code, that provide for sanctions against lawyers under circumstances similar to Rule 13. Ultimately, when the Court of Criminal Appeals rejected his argument that the legislature did not intend §37.10 to apply to the conduct of lawyers in civil cases, it did so on the ground that the in pari materia doctrine—the statutory construction tool

Vasilas urged the court to use to divine legislative intent—was inapplicable. In other words, the CCA would later rule that it is only appropriate to use *in pari materia* when comparing two different statutes, not a general statute and a more specific rule of procedure. Had Vasilas cited the comparable statutory provisions in Chapters 9 and 10 from the start, the CCA may not have been able to avoid addressing the legislative intent question by parsing the in pari materia doctrine so finely. We'll return to this point again, but first, here's what happened with the case.

The trial court ruled in favor of Vasilas, quashing all four courts of the indictment. Undaunted, the state appealed to Dallas's Fifth Court of Appeals, contesting only the trial court's decision as to the fourth count, which concerned §37.10(a)(5). The intermediate court affirmed the trial court's dismissal on the ground that the petition for expunction filed by Vasilas was not a "governmental record" within the meaning of §37. *State v. Vasilas*, 153 S.W.3d 725, 727 (Tex. App.—Dallas 2005). It reasoned that the definition of "governmental records" facially did not include documents not created by "government." It also specifically rejected the State's assertion that the petition for expunction created by Vasilas became a governmental record when it was filed. It noted that the legislature's 1997 amendments of §37.01 "narrowed the extremely broad definition of 'governmental record' insofar as that definition addressed records associated with a court."

The 1997 amendment added this definition of court record in §37.01(1)(A): A "Court record" means a decree, judgment, order, subpoena, warrant, minutes, or other document issued by a court." Following this amendment, the Court of Appeals found,

> a "court record" is now limited to a document actually issued by a court. By defining so narrowly what was *in* the category of "court records," the legislature effectively defined *out* of the scope of "governmental records" the many other types of records-including pleadings-that are created by a party or attorney and merely filed with a court. In other words, to give meaning to the definition of "court record" added by the legislature, we must read it to exclude documents filed with a court by a party.

Having found the petition Vasilas filed was not a "governmental record," the Dallas Court of Appeals concluded it did not need to reach Vasilas' other argument regarding the legislature's more specific language in the civil sanctions provisions. The State then sought and succeeded in obtaining further review from the Texas Court of Criminal Appeals.

B. CCA Broadly Expands Reach of Penal Code to Reach Documents Filed by Lawyers in All Judicial Proceedings

In March 2006, the Court of Criminal Appeals reversed, finding that the legislature's definition of a governmental record was "clear and unambiguous." *State v. Vasilas*, 187 S.W.3d 486 (Tex. Crim. App. 2006). The CCA reasoned that the case's resolution "depends on the meaning of the word "including" in the definition of "governmental record" in §37.01(2)(A)." The CCA found that the lower court had erred because the phrase, "including court records," expanded the definition of "governmental records" in §37.01(2)(A).[4] According to the CCA, "[b] y employing the word "including" to illustrate an example of a governmental record, the legislature did not by its plain language intend to exclude documents that were filed with the court from the definition of §37.01(2)(A)." This reading of "including" as a word of enlargement was also consistent, the CCA further found, with the use of the term "anything" in the "governmental records definition—as in "anything belonging to, received by, or kept by government for information"—as further evidencing the legislature's intent that governmental records be read as expansively as possible. Thus, according to the CCA, "court records"—which, by statutory definition, were limited only to documents *issued* by a court—was merely one, not the only, category of "governmental records" covered by 37.10. Having determined that documents issued by a court were no longer the only kinds of judicial records covered within the definition of "governmental record" then, it readily followed for the CCA that a document initially created by a lawyer can nevertheless become a governmental record once it is filed and received by the clerk of the court. Thus, the petition for expunction that Vasilas drafted became a governmental record at the moment it was filed in Goff's case.

C. On Remand, and then Back to the CCA Again

Although the CCA's reading of "governmental records" does not stand up to scrutiny (more on this in a moment), its decision reversing the intermediate court resulted in the case being sent back to the Dallas Court of Appeals so that it could address Vasilas' other basis for quashing the indictment. This was Vasilas' argument that, applying the *in pari materia* doctrine, a court should find the more specific language in Texas Rule of Civil Procedure 13 demonstrated the legislature did not intend the general language of §37.10 to apply to the filing of documents by lawyers in civil cases.

Taking its cue from the expansive decision of the CCA, the Dallas Court of Appeals ruled in August 2006 that Rule 13 was not *in pari materia* with §37.10(a)(5). *State v. Vasilas*, 198 S.W.3d 480, 486-87 (Tex. App.—Dallas 2006). Vasilas then sought discretionary review from the CCA and, for the second time, the CCA agreed to hear the case. Any lingering hope that the CCA agreed to take up the case again (on this different, but related issue) because it was having second thoughts about its previous, expansive reading of §37.10, were soon shown to be misplaced.

The second time around, the CCA focused its inquiry on a very specific question: whether §37.10 and Rule 13 were *in pari materia*. *State v. Vasilas*, 253 S.W.3d 258 (Tex. Crim. App. 2008). Framing the question this way was critical because it meant the issue, as the CCA saw it, was whether the *in pari materia* doctrine could be applicable in comparing, side-by-side, a statute and a court-made rule. Not surprisingly, the CCA found that it could not. *In pari materia,* the court observed, "has traditionally been applied only to a comparison of two or more statutes." The purpose of the doctrine "is to harmonize the different provisions of the law passed by the same governmental entity: the legislature:

> But no such justification exists for applying the *in pari materia* doctrine to a statute and a court-made rule, each of which is created by a different branch of government for its own particular purposes. Indeed, it would be like comparing apples and oranges to apply the doctrine to two such diverse legal sources.

I pause in this summary of the procedural history of the Vasilas case to underline a point about the CCA's conclusion that the *in pari materia* docrtrine was inapplicable. As I observed earlier, if Vasilas had cited the comparable statutory provisions in Chapters 9 and 10 from the start, the CCA could not have limited itself to the doctrinally unremarkable observation that the doctrine is inapplicable where a statute and rule are being prepared. Nevertheless, by the time the case reached the CCA the second time, Vasilas was no longer focusing his argument exclusively on Rule 13 in demonstrating that the legislature

did not intend the general language of §37.10 to apply to the documents lawyers file. Instead, he specifically pointed out that several statutory enactments provided, in harmony with Rule 13, specific guidelines for civil sanctions against lawyers who make false statements in pleadings, motions or other papers filed in civil cases (he also noted that another statutory provision in the code of criminal procedure tracked Rule 13 almost to the word: it covers lawyers who make false statements in pleadings, motions or other papers they file in criminal cases). The CCA ignored these specific statutory provisions in which the legislature established a sanctions regime governing that which lawyers file in judicial cases. The upshot is that while a direct contest between the statutory sanctions laws (mainly, Chapters 9 and 10 of the Civil Practice and Remedies Code, and Article 1.052 of the Code of Criminal Procedure), and §37.10 has still never been made before the CCA, the Court's narrow opinion suggests that in the CCA's view, §37.10 will forever after be applicable to the documents lawyers file in civil or criminal cases.

D. In the Aftermath of the Appellate Court Decisions

Back before the trial court, Vasilas geared up for trial, but the case ended almost as abruptly as it began when the trial court found him not guilty. The judge based his conclusion on the straightforward factual determination that Vasilas's "pleading could easily have been a mistake of law or a mistake of fact or the result of carelessness." *State v. Vasilas*, No. 380-82535-03 (Tex. Dist. Ct. 2008). This determination was straightforward because, as will be recalled, Vasilas recited in the petition for expunction that the State had "dropped" the felony charge of marijuana delivery against his client, Mr. Goff. As noted above, what had actually happened was Mr. Goff went to trial, was acquitted of the offense of delivery of marijuana, and convicted only of the lesser, misdemeanor offense of possession. The State insisted Vasilas knew his averment was false, even though it is not clear what motivation he had to lie. After all, Vasilas' client was statutorily entitled to have his records expunged for having been found not guilty of the charged crime of delivery. *See* Tex. Crim. Proc. Code. art. 55.01(a)(1)(A). Indeed, it is not even clear that his client would have been entitled to expunction on the ground that the State had "dropped" the delivery charge. Of course, Vasilas had made all of these points to prosecutors years earlier, in an unsuccessful bid to get them to dismiss the suit. Eventually, he was able to convince the trial judge, years later, that the statements that he was alleged to have made with knowledge of their falsity were, at best, factual mistakes not punishable under §37.10. Thus, after years of battling in the appellate courts over the legal meaning and breadth of the CCA's reading of §37.10, the trial court's factual findings ended Vasilas' ordeal.

II. The Court of Appeals's Erroneous Reading of §37.10

The CCA got it wrong— twice. The Legislature never intended "governmental records" in §37 to include documents lawyers prepare themselves. Nor did it mean for §37.10(a)(5) to apply at all to lawyers representing their clients in routine civil and criminal litigation.

A. The Error in the First CCA Decision: Pleadings are Not "Governmental Records"

The CCA's first Vasilas decision in which it concluded "governmental records" could include the pleading Vasilas filed is peculiar, to say the least. To read "governmental record" as not excluding any document filed by a lawyer or party in a judicial case renders superfluous the legislature's separate inclusion of "court record" within §37.10. There would have been no reason to separately define a "court record" as "a decree, judgment, order, subpoena, warrant, minutes, or other document issued by a court" if "governmental record" already encompasses "anything"—that is, any document—"belonging to, received by or kept by" the clerk of the court. This statutory construction is patently inconsistent with the CCA's prior leading precedents regarding statutory construction. *Boykin v. State*, 818 S.W.2d 782, 786 (Tex. Crim. App. 1991) ("It would be illogical to presume the Legislature intended a part of the Statute to be superfluous."). If "government records" is read, instead, to plainly and unambiguously refer to any document belonging to, received by or kept by any non-*judicial* government office, then the separate inclusion of a "court record" within the scope of §37.10 can be presumed to have been used for a meaningful purpose: namely, to extend §37.10 to the making and use of fraudulent court *orders*, which is exactly what the legislative history behind the 1997 amendment reveals what the legislature was up to when it added "court record" to the scope of the penal code chapter.

This reading of "governmental records" in §37.01(2)(A) to refer only to non-judicial governmental records is also consonant with the longstanding distinction the legislature has drawn in other statutes between "governmental records" and judicial documents. *See, e.g.,* Public Information Act (formerly known as the "Open Records Act), Tex. Gov't. Code Ann. §552.003(1)(B) (Vernon 2004) (expressly providing that judicial information is not "public information" subject to the act); *State v. Ford*, 179 S.W.3d 117 (Tex. App.—San Antonio 2005, no pet.). In construing Tex. Pen. Code §37.10 it is appropriate to consider the legislature's traditional exemption of judicial documents from "governmental records." *See Williams v. State*, 674 S.W.2d 315, 322 (Tex. Crim. App. 1984); *Texas Bank & Trust Co. v. Austin*, 115 Tex. 201, 204 (1926); *Guthery v. Taylor*, 112 S.W.3d 715 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (when a similar term is used by the legislature in multiple places, it is appropriate to assume it has the same meaning, unless there are indications to the contrary).

B. The CCA's Second Opinion in the Vasilas Case

The second time around, the CCA rejected Vasilas's argument that, even if his pleading was a governmental record within the meaning of §37, the Legislature never intended §37.10(a)(5) to apply to all uses of all papers filed by lawyers or litigants in civil cases. In reaching this decision, the CCA misconstrued the plain language of the law, and the clear legislative history behind §37.10, which shows that the penal code provision was not meant to criminalize advocacy of pleadings and motions signed by lawyers and litigants already governed by the civil sanctions law. Although it may be doctrinally proper to begin with the statutory language, I turn first to the legislative history of §37 because it powerfully demonstrates how wrong the CCA was.

1. The Legislative History of §37.10 Further Demonstrates That It Is Not Meant to Apply to the Routine Filing and Use By Lawyers and Parties of Pleadings and Motions in Judicial Cases

The earliest statutory predecessors to §37.10 date to 1858, when Article 753a made it a crime for any person to "take or carry away any record book or filed paper from any clerk's office, public office, or other place where the same may be lawfully deposited or from the lawful possession of any person whatsoever, with intent to destroy, suppress, alter or conceal, or in any wise dispose of the same, so as to prevent the lawful use of such record book or filed paper." Acts approved Nov. 12, 1857, 7th Leg., R.S., tit. 20, ch. 9 § 1, 1858 Tex. Gen. Laws 181. This language appears to be the original source for current §37.10(a)(3) which provides that one tampers with a governmental record if one "intentionally destroys, conceals, removes, or otherwise impairs the

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verity, legibility or availability of a governmental record." Tex. Pen. Code §37.10(a)(3).

In 1879 the legislature promulgated Articles 230-239 which addressed false certifications of "any instrument or writing" by commissioners and other governmental officers, Act approved Feb. 21, 1879, 16th Leg., R.S., Ch. 5 arts. 230-239, 1879 Tex. Gen Laws 32-33, and recodified former Article 753a as Article 741 in the 1879 Act. *See id*., art. 741, at 96. Over the years, the penal laws were codified, recodified and shuffled around. *See* Rev. Stat. P.C. 1895, arts 246 to 255, 255a, 875; Rev. Stat. P.C. 1911, arts. 352 to 362, 943, 1346; Vernon's Ann. P.C. (1925), arts. 354 to 364, 438c, 438d, 1002, 1002a, 1427; Act of June 2, 1951, 52d Leg., R.S. ch. 364, 1951 Tex. Gen. Laws 616; Act of June 2, 1951, 52d Leg., R.S. ch. 387, 1951 Tex. Gen. Laws 670; Act of June 1, 1971, 62d Leg., R.S., ch. 546, 1971 Tex. Gen. Laws 1858. No version of §37.10 or any of its statutory antecedents has ever governed advocacy or other use by a lawyer of pleadings or motions in judicial cases, however.

When the 63rd Legislature recodified the entire Penal Code in 1973, §37.10 first appeared in substantially the same form as it appears today, though the language in (a)(5) had not yet been added. Act of Jan. 1, 1974, 63rd Leg., ch. 390, §1, 1974, 1973 Tex. Gen. Laws 883. It is significant, however, that in adding §37.10 and titling it "Tampering with Governmental Record" there is absolutely no indication in the legislative history the Legislature intended the section—for the first time and without any discussion or debate—to criminalize the advocacy of pleading and motions filed by lawyers in cases containing statements known to be false. This comes within the canon of construction known affectionately as the "dog didn't bark" canon, which is to say it comes within "the presumption that a prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule." *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 101 (1994) (*citing Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991)).

The legislative history reveals that the addition of §37.10 in 1973 was meant to govern a number of acts involving tampering with governmental records, consistent with the scope of the statutes in existence prior to 1973, but advocacy by a lawyer or litigant of a pleading or motion filed in a case was not one of them. Thus, the Committee Notes explain that §37.10(a)(1)—which has remained substantively unchanged since its adoption in 1973—was modeled on a 1933 case decided by the CCA, *Nogueria v. State*, 59 S.W.2d 831 (Tex. Crim. App. 1933), where the indictment dealt with a charge of altering a financial entry in a ledger book kept by a court clerk. *See* Chapter 37.10, State Bar Committee Notes. Similarly, §37.10(a)(2) and (a)(3), which, like (a)(1), remain substantively the same today, cover "fabricated governmental records" and "the intentional destruction, concealment, or any other means" of governmental records, not advocacy or other use of pleadings and motions filed by lawyers or parties in judicial cases. *See id*.

In two subsequent sessions, the Legislature made significant amendments to §37.10. In 1991, the 72nd Legislature amended §37.10(a) to add a fourth subsection of conduct which also constituted tampering with governmental records. Acts 1991, 72nd Leg., ch. 565, §5, eff. Sept. 1, 1991. The language—"makes, presents, or uses a governmental record with knowledge of its falsity"—is what now appears in §37.10(a)(5). This new language was not aimed at lawyers or litigants filing pleadings in judicial cases, however. The language originated in the Special Joint Committee on Insurance Reform, led by Senator Montford, and as the bill wound its way through the legislative process, changes that were made to it concerned the subject of insurance fraud. The bill analyses prepared by Senator Montford's office and the Senate Research Center indicate plainly the testimony the committee heard concerned insurance fraud. Sen. Comm. on Eco. Dev., Bill Analysis, Tex. S.B. 4, 72d Leg., R.S. (1991). There is no indication in any of this legislative history that the amendment to §37.10 was meant to criminalize for the first time under Texas law the advocacy, or other use in a judicial proceeding, of pleadings and motions containing knowingly false statements.

In 1997, the Legislature made several other significant revisions to §37.10, including the reference to a "court record" in §37.01. This change was prompted by concern, as the accompanying bill analysis notes, over "the filing by certain individuals and organizations of fraudulent judgment liens with the secretary of state and many county and district court clerks throughout the state." *See* Sen. Juris. Comm., Bill Analysis, Tex. H.B. 1185, 75th Leg., R.S. (1997). This was a reference to efforts to pass off fraudulent liens by some members of the group known as the Republic of Texas, and the Legislature felt that the existing sanctions laws were insufficiently broad to punish them. The House Research Organization's bill analysis highlights the argument of H.B. 1185's advocates: "[S]tatutes dealing with frivolous lawsuits and fraud would not adequately cover the problems being raised by the filing of fraudulent documents." *See* House Comm. on Criminal Juris., Bill Analysis, Tex. H.B. 1185, 75th Leg., R.S. (1997), at 10. Such false filings would, however, squarely violate §37.10, as amended by H.B. 1185. The "court records" meant to be actionable under §37.10, then, were those fraudulent liens that were being filed and to which the Legislature was concerned the sanctions law were inapplicable.

What is even more significant about the legislative history from 1997 is that in the same bill that amended §37.10 with respect to fraudulent liens, the Legislature also amended Chapter 1 of the Code of Criminal Procedure by adding art. 1.052. The new article expressly borrowed the civil sanctions rule in Tex. R. Civ. P. 13 to address the problem of frivolous filings. These two legislative reforms in the same bill could not be more striking. In the same legislation that amended §37.10 to deal with the particular problem of concern to legislators—the filing of fraudulent liens by members of a renegade organization—the Legislature saw fit to address, by copying the civil sanctions rule in Tex. R. Civ. P. 13, the separate problem of groundless pleadings filed by defense lawyers and defendants in criminal cases. Not only

does this reflect the conscious legislative choice to leave the filing of pleadings, including those that are clearly groundless because they contain knowingly false statements of fact, to be governed by the civil sanctions law, but it also powerfully underscores the legislative confidence in the sanctions regulatory regime for deterring and, where necessary, punishing the filing of groundless pleadings.

Collectively, the legislative history surrounding §37.10 is consistent with proper construction of the statute. This history demonstrates that the Legislature did not intend §37.10 to apply to any document filed and used in a judicial proceeding by lawyers and litigants. Indeed, this legislative history demonstrates the confidence the Legislature placed in sanctions laws as an effective means of deterring and punishing lawyer and party misconduct in connection with the filing and use of pleadings and motions in judicial proceedings.

2. Plain Language of Statute Also Establishes its Inapplicability

Beyond the statute's legislative history, use of recognized canons of statutory construction also make clear that the legislature did not intend §37.10 to apply to the documents lawyers file in civil and criminal cases.

A recognized, fundamental canon of statutory construction is that the words of a statute are to be read in their context, taking note of their place in the overall statutory scheme. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also State v. Newton*, 179 S.W.3d 104, 109 (Tex. App.—San Antonio 2005, no pet.) ("We are, however, required to construe the two statutes so that they work together in order to bring about the legislature's intent."); *Gonzalez v. Tippett*, 167 S.W.3d 536, 541 (Tex. App.—Austin 2005, no pet.) ("To determine the effect of the statutory change in language, we compare the two statutes in context"); *Southwestern Bell Tel. Co. v. Public Utility Com'n of Texas*, 31 S.W.3d 631, 637 (Tex. App.—Austin 2000), *aff'd* 92 S.W.3d 434 (Tex. 2002) ("Where possible, courts are required to interpret statutory language in a manner that harmonizes and gives effect to all relevant laws.").

In *Brown & Williamson Tobacco*, the United States Supreme Court emphasized that in undertaking to interpret statutory language "a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The CCA itself has made plain repeatedly that courts "strive to construe statutes so that all are given effect." *Ex parte Kuester*, 21 S.W.3d 264, 267 (Tex. Crim. App. 2000); *Ex parte Taylor*, 36 S.W.3d 883, 886 (Tex. Crim. App. 2001) ("The court has a duty to give effect to all the statutes if a reasonable construction will do so."). When laws are in conflict the specific controls over the general, *Cheney v. State*, 755 S.W.2d 123 (Tex. Crim. App. 1988), and, even in the absence of a conflict between different laws, this Court has made clear the obligation to read statutes in context and attempt to harmonize them:

> In the event the statutes conflict to the extent that the same conduct is treated differently within each statute, as for example different punishments prescribed for the same generic offense, the more specific provision controls. On the other hand, if the two statutes are not found to be *in pari materia*, analysis should still focus on whether the statutes may be harmonized or are in irreconcilable conflict with one another.

Id. at 127; *see also In re Dotson*, 76 S.W.3d 393, 400 (Tex. Crim. App. 2002) (even when two statutes are not *in pari materia*, the statute that "because of its plain wording applies more directly" to the conduct at issue is to be applied under established rules of statutory construction); *see also Ex Parte Wilkinson*, 641 S.W.2d 927 (Tex. Crim. App. 1982) (holding that when two statutes are not *in pari materia,* the "special statute"—the statute that "deals with a subject in comprehensive terms"—should be applied).

a. When Read in Context, the Legislature's Intent is Given Effect That §37.10 Applies to the Use of Documents in Judicial Proceedings Only In Those Circumstances In Which the Sanctions Laws Do Not

When the penal code provision is read in context with the civil and criminal sanctions laws, it is clear the Legislature intended §37.10 to apply only and specifically in those circumstances in which the civil and criminal sanctions laws do not otherwise apply.

In civil cases, Chapters 9 and 10 of the Civil Practice and Remedies Code, along with Rule 13 of the Texas Rules of Civil Procedure, expressly set forth certification standards for lawyers and parties filing and using pleadings, motions and other papers, such as the petition for expunction Vasilas filed. Chapter 9 of the Civil Practice and Remedies Code, entitled Frivolous Pleadings and Claims," initially directs that "[t]he signing of a pleading as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory. . . " Tex. Civ. Prac. & Rem. Code. §9.011. Chapter 10 of the Civil Practice and Remedies Code is entitled "Sanctions for Frivolous Pleadings and Motions" and §10.001 outlines, in similar scope, that "[t]he signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory. . ." Tex. Civ. Prac. & Rem. Code. §10.001. The third of the general civil sanctions rules is Rule 13 of the Texas Rules of Civil Procedure. It is entitled, "Effect of Signing of Pleadings, Motions and Other Papers; Sanctions," and it provides similar certification requirements on lawyers and parties in civil cases: "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. . ." Tex. R. Civ. P. 13.

Chapters 9 and 10, and Rule 13, also expressly authorize various sanctions as punishment for lawyers and litigants who fail to meet the established certification standards, such as those who knowingly make and present false statements in documents they have filed, as the Dallas Court of Appeals and numerous other courts have recognized. *See, e.g.*, *McIntyre v. Wilson*, 50 S.W.3d 674 (Tex. App.—Dallas, 2001, pet. denied); *Elkins v. Stotts-Brown*, 103 S.W.3d 664 (Tex. App.—Dallas, 2003, no pet.).

Article 1.052 of the Code of Criminal Procedure—which was modeled on the civil sanctions laws—is entitled "Signed Pleadings of Defendant" and establishes certification requirements in criminal cases to govern pleadings, motions and other papers signed by attorneys and by unrepresented "defendants." This statute also authorizes various sanctions, including a sanction of criminal contempt, when the certification requirements are violated. Tex. Crim. Proc. Code art. 1.052(d).

Equally important is the recognition that the legislature has directed—except where it has specifically provided otherwise—that the sanctions laws are meant to be the exclusive regulator of lawyer and litigants who file and later advocate pleadings, motions and other papers that they have signed. Thus, §9.002(c) expressly provides:

> In an action to which this chapter [§9] applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

In clarifying how conflicts within the civil sanctions law are to be handled, the Legislature has made clear its endorsement of Rule 13, specifically, as an integral part, along with §§9 and 10, as a primary source of authority setting forth certification standards for lawyers and litigants filing and using documents in judicial proceedings and authorizing sanctions when those standards are not met. After it added §10 in 1995, the legislature subsequently amended §9 to provide that the earlier adopted section "does not apply to any proceeding to which Section 10.004 or Rule 13, Texas Rules of Civil Procedure, applies." Tex. Civ. Prac. & Rem. Code §9.012(h).

Where it meant for other or additional penalties beyond the sanctions laws to apply to a lawyer or litigant's conduct, the Legislature has specifically said so. For example, the Legislature has enacted §§21.002 and 82.061 of the Texas Government Code, which permit a court to impose fines and imprisonment as punishment for one who has been held in contempt of court for committing certain acts (or omitting to do acts that the court has required). Tex. Gov't. Code Ann. §§21.002, 82.061 (Vernon 2004, 2005). These provisions have been found applicable to such matters as a lawyer's failure to file a brief for an indigent habeas corpus defendant as the court directed, *In re Van Orden*, 559 S.W.2d 805 (Tex. Crim. App. 1977), and to one who verbally assaulted the judge outside the courtroom. *In re Bell*, 894 S.W.2d 119 (Tex. Spec. Ct. Rev. 1995). Such behavior, though clearly within the ambit of the Government Code, is beyond the reach of the civil and criminal sanctions laws.

Still other examples abound where the Legislature has provided for other or additional regulations and penalties beyond the sanctions laws to apply to a lawyer or litigant's conduct. For instance, and in sharp contrast to the absence of comparable language in § 37.10, the Texas Disciplinary Rules of Professional Conduct expressly provide that they are not meant to replace the sanctions laws.[5] *See* Tex. State Bar R., art. X, §9, *reprinted in* Tex. Gov't. Code. Ann., tit. 2, subtit. G app. A, at Preamble, ¶11 (Vernon 1998) ("The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."). Separately, the Texas Supreme Court has also promulgated Rule 215, pursuant to the authority legislatively given to it, which specifically authorizes lawyers and litigants who engage in discovery abuse in civil cases to be punished. *See* Tex. R. Civ. P. 215.

Even with regard to the Penal Code, where the Legislature intended the criminal law to apply to false statements made by lawyers or other persons in connection with judicial proceedings, it has said so expressly. In contrast to the language in §37.10(a)(5), which does not take specific aim at lawyers and litigants in judicial cases, other provisions of the Penal Code do so expressly. *See, e.g.,* Tex. Pen. Code Ann. §38.12 (Vernon 2003) (governing barratry and the solicitation of professional employment); §38.122 (concerning falsely holding oneself out as a lawyer); and § 38.123 (regulating the unauthorized practice of law).

Section 37.10(a)(5) has been applied to some uses of certain governmental records, such as to the submission of false information on a component part log form provided by the Texas Department of Transportation required to prevent resale of stolen automobile component parts, *see State v. Kinkle*, 902 S.W.2d 187 (Tex. App.—Houston [14th Dist.] 1995, no pet.), and to the destruction of records relating to a county jail commissary by a county sheriff and his wife. *See Mills v. State*, 941 S.W.2d 204 (Tex. App.—Corpus Christi 1996, pet. ref'd.). Section 37.10(a)(5) has also been found applicable to the use of some documents in judicial proceedings, such as the placing by a justice of the peace of a false statement in an arrest warrant. *See Lewis v. State*, 773 S.W.2d 689 (Tex. App.—Corpus Christi 1989, pet. ref'd.).

Yet, in contrast to the plain language in the sanctions laws, as well as in specific statutes that expressly regulate the conduct of lawyers and parties in judicial proceedings, neither §37.10(a)(5) nor any portion of §37.10 plainly applies to the filing and use by a lawyer or litigant of documents in judicial cases. Nowhere in §37.10 did the Legislature include any plain reference to filing and later advocating a pleading or motion on behalf of a client as sufficient to constitute "tampering with governmental record." No court before the CCA in Vasilas case had ever held that §37.10(a)(5) may be read in this way. The stark difference between the wording of the Penal Code provision and the plain and specific applicability of other laws that expressly regulate the conduct of lawyers and parties in judicial proceedings underscores that the Legislature did not intend §37.10 to apply to the conduct of lawyers and litigants in connection with court filings.

When §37.10 is read in context with the civil and criminal sanctions laws the Legislature's intent is plain: §37.10 applies to the use of documents in judicial proceedings only and specifically in those circumstances in which the civil and criminal sanctions laws do not govern the conduct at issue. Read in this manner, §37.10 is consistent with the plain language in the sanctions

Application of the in *pari materia* doctrine further establishes that the Legislature did not intend the general prohibition in §37.10 against "tampering with a governmental record" to trump the specific regulatory scheme set forth in the sanctions laws.

laws that do not expressly cover all pleadings, motions and other papers filed by any person in a judicial proceeding. For example, Rule 13 and §§9 and 10 literally only apply to pleadings, motions or other papers that are signed by lawyers and parties.[6] Thus, a pleading, motion or other paper not signed by a lawyer or party appears to be outside the plain language of the civil sanctions laws but would be covered by the Penal Code.

Additionally, the sanctions laws reach only lawyers and parties. Nonparties are expressly outside the reach of Rule 13 and §§9 and 10. *See* §9.012 (addressing pleading abuse only by a party); *see also City of Houston v. Chambers*, 899 S.W.2d 306, 309 (Tex. App.—Houston [14th Dist.] 1995, orig. proceeding). Similarly, Article 1.052 of the Code of Criminal Procedure applies only to those pleadings, motions or other papers filed by an attorney or "defendant." Thus, for example, if an expert witness were to file a report that contained statements the witness knew to be false, such a filing would be covered by the Penal Code section even though it is clearly outside the ambit of the sanctions laws.

3. Application of the *In Pari Materia* Doctrine Further Establishes that the Legislature Did Not Intend § 37.10 to Apply to Court Documents, Such as Vasilas' Petition for Expunction, Which is Governed By More Specific Statutes

Application of the *in pari materia* doctrine further establishes that the Legislature did not intend the general prohibition in §37.10 against "tampering with a governmental record" to trump the specific regulatory scheme set forth in the sanctions laws. This doctrine provides that when two statutes concern the same general subject matter, same persons or class of persons, or serve the same general purpose, proper statutory construction requires the more specific statute to control over the more general one, unless the Legislature has plainly manifested its intent that the general provision prevail. Tex. Gov't. Code Ann. §311.026 (Vernon 2005). As the CCA has previously put it, "It is well settled by this Court that, where two statutes are found to be *pari materia,* effort is made to harmonize and give effect to both statutes with the special or more specific statute governing the general statute in the event of any conflict." *Cheney v. State*, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988). *Accord Columbia Hosp. Corp. v. Moore*, 92 S.W.3d 470, 473 (Tex. 2002) (referencing "the statutory construction principle that the more specific statute controls over the more general one").

Where courts have found two statutes not to cover the same subject matter or class of persons, one reason is that the statutes regulated entirely different conduct. *See, e.g., Cheney v. State*, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988) (rejecting the conclusion that two statutes were *in pari materia* where "[t]he gravamen of an offense under [the first statute] is the making of a false or misleading statement. . . By contrast, [the second statute] was intended to criminalize the unlawful acquisition of property."); *see also Mills v. State*, 722 S.W.2d 411, 413-14 (Tex. Crim. App. 1986). In *Vasilas*, §37.10, at least as it had been interpreted by the CCA, necessarily concerned the same subject matter—that is, Vasilas' filing of the petition for expunction—as the sanctions laws.

Section 37.10, as interpreted by the CCA in *Vasilas*, also serves the same purposes as the sanctions laws. This is especially significant since, as the CCA had previously directed, similarity of purpose or object is the most important factor in assessing whether two provisions are *in pari materia*. *Alejos v. State*, 555 S.W.2d 444, 450 (Tex. Crim. App. 1977). Where two statutes have been found not to be *in pari materia*, it is usually because the two statutes share little common ground or purpose. For example, in *Burke v. State*, 28 S.W.3d 545 (Tex. Crim. App. 2000) the defendant was convicted both of aggravated assault with serious bodily injury and intoxication assault. He argued on appeal that the two statutes he was convicted of violating were *in pari materia* and, therefore, he could only be punished under one of them. The court rejected his argument, finding little common ground or purpose in the two statutes. According to the court, other than sharing a single common fact—"that the defendant's actions cause[d] serious bodily injury to another—they share nothing else. The two sections don't apply to the same class of people, were designed to serve different purposes, appear in different chapters of the Code, and were not apparently intended to be considered together." *Id*. at 548. By contrast, the purposes of the civil and criminal sanctions law closely parallel those in §37.10, on the assumption that the latter does not apply to the conduct of lawyers at all.

The Texas Supreme Court and numerous lower courts have observed that sanctions may be imposed under Tex. Civ. Prac. & Rem. Code §§9 and 10 and Tex. R. Civ. P. 13 for a variety of reasons and that "punishment and deterrence are legitimate purposes for sanctions." *See TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991); *see also id*. at 922 (Gonzalez, J., concurring) (sanctions can be "compensatory, punitive or deterrent in nature"). In applying the civil sanctions laws, the courts are instructed to assess the type of sanction that most likely will prevent a recurrence of the offending conduct. "Sanctions are tools to be used by a court to right a wrong committed by a litigant. Any given sanction should be designed to accomplish that end." *TransAmerican*, 811 S.W.2d at 922 (Gonzalez, J., concurring).

The sanctions laws were specifically enacted to punish those lawyers who practice at the fringes of the profession: those who file and advocate in pleadings, motions or other papers legal or factual positions they know to be false, in violation of the civil and criminal sanctions laws. As the First Court of Appeals has put it, speaking of the civil sanctions rule, "Clearly, Rule 13 is a tool that must be available to trial courts in those egregious situations where the worst of the bar uses our system for ill motive without regard to reason and the guiding principles of the law." *Dyson Descendant Corp. v. Sonat Exploration Co.*, 861 S.W.2d 942, 951 (Tex. App.—Houston [1st Dist.] 1993, no writ); *Laub v. Pesikoff*, 979 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). A similar legislative purpose animated passage of Article

1.052. *See Ayers v. State*, 1999 WL 424276 at *1 (Tex. App.—Dallas, June 25, 1999, no pet.) (not designated for publication) (describing that the Legislature's purpose in regard to Tex. Crim. Proc. Code, art. 1.052 was "to provide a basis for sanctioning defense counsel for filing groundless or improper pleadings with the trial court").

Indeed and further, the civil sanctions laws are even often discussed in criminal terms: "The court should also consider the relative culpability of the counsel and client when selecting the appropriate sanction. The foregoing guidelines are simply suggestions to guide a trial court in its struggle to make the punishment fit the crime." *TransAmerican*, 811 S.W.2d at 922 (Gonzalez, J., concurring); *see also id*. (Mauzy, J., concurring) (noting that, *inter alia*, courts "must determine who is actually responsible for the offensive conduct and the extent of their culpability" and "trial judges have an obligation, when imposing sanctions, to ensure that the punishment must fit the crime"). Of course, Tex. Crim. Proc. Code, art. 1.052 expressly contemplates criminal contempt as one available punishment. *See* Tex. Crim. Proc. Code, art. 1.052(d).

In sum, even if a "governmental record" within the meaning of §37.01(2)(A) does not exclude the petition for expunction Vasilas filed, proper application of the *in pari materia* doctrine demonstrates that the Legislature did not intend the general prohibition on "tampering with a governmental record" in §37.10 to apply when the more specific sanctions laws already govern Vasilas' filing and use of the petition.

III. Policy Implications

The CCA's interpretation of §37.10 is not merely inconsistent with the plain language of the law and §37.10's legislative history. That interpretation also portends disasterous consequences to the administration of justice.

A. Reading §37.10 as Applicable to Advocacy of Pleadings and Motions Would Spur Unnecessary Satellite Litigation and Encourage Gamesmanship in Legal Practice

The first consequence to reading §37.10 as applicable to advocacy or other use of pleadings and motions filed in judicial cases is that it would likely spur unnecessary satellite litigation and gamesmanship among litigants. We have been down this road before. Rule 11 is the Federal Rule of Civil Procedure that sets certification requirements on lawyers filing pleadings, motions and other papers in civil cases. Since its adoption in 1938, the rule remained unchanged until 1983. "The major purpose of the 1983 amendment," as Carl Tobias has noted, "had been to deter frivolous litigation by encouraging lawyers to 'stop and think' before filing papers and by requiring that judges impose sanctions when attorneys and litigants contravened Rule 11." Carl Tobias, *Why Congress Should Reject Revision of Rule 11*, 160 F.R.D. 275, 275 (1995). The view is widely shared by lawyers, commentators, state and federal rulemakers, and judges that adoption of the 1983 amendments to Fed. R. Civ. P. 11 was the most controversial and ill-advised in the history of the federal rules. *See generally* Margaret Sanner and Carl Tobias, *Rule 11 and Rule Revision*, 37 Loy. L.A. L. Rev. 573 (2004) ("[n]umerous observers of modern civil practice, whose views range across a comparatively broad spectrum, consider the 1983 amendment to Federal Rule of Civil Procedure 11 the most controversial revision since the United States Supreme Court promulgated the original Federal Rules of Civil Procedure in 1938").

Some of the main difficulties with the 1983 version of Rule 11, as Paul Carrington has chronicled, were that it

> (1) gave rise to a new industry of Rule 11 motion practice adding to cost and delay; (2) stimulated incivility between lawyers; (3) was aimed at plaintiff's counsel, leaving defense counsel unrestrained in the assertion of unfounded denials; and, (4) encouraged judges to indulge their occasional personal animus toward individual lawyers, sometimes by belated *sua sponte* rulings coming after a dispute that seemed to have been resolved.

Paul Carrington and Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 Loy. L.A. L. Rev. 563, 566 (2004). Even the strongest initial supporters of the 1983 amendments to Rule 11 soon came to be greatly concerned over the resulting phenomenon of satellite litigation. *See* William Swartzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988). In contrast to the very few cases reported during the first half century of the rule's existence, nearly 7,000 decisions on Rule 11 were reported in the decade after 1983 went into effect. *See* Georgene Vairo, *Rule 11 and the Profession*, 67 Ford. L. Rev. 589, 626 (1998). And these are the published decisions; there were surely a great deal more cases in which sanctions were sought but for which no published opinion was issued. A study by the Third Circuit Court of Appeals discovered that less than 40% of the Rule 11 sanctions cases were reported as published opinions. *See* Stephen B. Burbank, American Judicature Society, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, at 59 (1989) (hereinafter "Third Circuit Rule 11 Task Force").

The acute problems with satellite litigation and gamesmanship over sanctions unrelated to the merits of the dispute were similarly felt on the civil side in state court in Texas, in particular as a result of amendments in the early 1980s to Tex. R. Civ. P. 215 and several decisions by the Texas Supreme Court seeming to approve a more robust sanctions practice. As Alex Albright has observed, "The 1984 amendments [to Rule 215] encouraged courts to impose sanctions freely, assuming punishment would discourage gamesmanship in civil litigation. By the late 1980s, however, the opposite happened. The new sanctions rules were being used simply as another tool for gamesmanship." *See* Alex Albright, Texas Courts: A Survey 515 (1st Ed. 2006). As a sitting justice on the Texas Supreme Court, Craig Enoch observed that the rules and codes that were enacted to curb perceived litigation abuses and incivility "have spurred and threaten to continue to spur additional litigation and have compounded the incivility problem." Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. Rev. 199, 200 (1994). Charles Herring has similarly described this period as filled with "instant death penalty sanctions and intricate pretrial maneuvering designed to win cases by setting up outcome-determinative 'sanctions torts,' rather than by litigating on the merits." Charles H. Herring, Sanctions and Liability, State Bar of Texas 11th Annual Advanced Personal Injury Law Course (June-August 1995).

Mirroring the experience on the federal side, however, by the late 1980s even those who favored a more stringent version of the rule to address perceptions of discovery abuse soon came to see that "the cure was far worse than the disease." *See, e.g.,* William W. Kilgarlin, *Sanctions for Discovery Abuse: Is the Cure Worse than the Disease*, 54 Tex. Bar J. 658 (1991); *see also* Charles Herring, Jr., *The Rise of the "Sanctions Tort,"* Tex. Law., Jan 28, 1991 at 22. at 22. Thus, by the end of the decade efforts to curtail the unhealthy sanctions practice began in earnest both on the federal and state side. By then, the Federal Advisory Committee on the Civil Rules had received a deluge of criticism of the mandatory sanctions rule. That body ultimately recommended that the

Supreme Court amend Rule 11 again, which the Court did in 1993. *See* Carrington and Wasson, 37 Loy. L.A. L. Rev. at 567-68; *see also* Attachment B to Letter from Hon. Sam C. Pointer, Jr. to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure Chairman, Advisory Committee on Civil Rights 2-5 (May 1, 1992), *reprinted in* 146 F.R.D. 519, 523 (1993) (listing numerous complaints raised by critics of 1983 version of the rule, prompting rulemakers to propose its replacement in 1993 with the present version). In Texas, the need for a rule amendment was muted by the Texas Supreme Court's decision in several cases, primarily *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991) and *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991). Along with these decisions, the legislature's promulgation of Chapter 10 of the Civil Practices and Remedies Code, the language of which closely parallels the 1993 version of Fed. R. Civ. P. 11, sought to address the twin problems of satellite litigation and gamesmanship in sanctions practice.

Because of the CCA's decisions in *Vasilas*, the problems of unnecessary satellite litigation and improper gamesmanship, equivalent to the experience under former Rule 11 and prior state sanctions practice, may end up being replicated in Texas again, only on an even more troubling scale. In particular, one can reasonably expect abuse of §37.10 as lawyers and litigants seek to gain litigation advantage by suggesting violations to prosecutors based on the advocacy or other use of pleadings and motions filed by their adversaries in judicial cases. The CCA's interpretation of §37.10 perversely incentivizes lawyers and their clients to refer the opposing lawyer and/or party to prosecutors. Referencing the Rule 11 experience on the federal side, Craig Enoch has noted that under the 1983 version of the federal rule "litigators reported that the main reason they request Rule 11 sanctions was to obtain the best possible result for clients - to win the lawsuit on the merits." Enoch, 47 SMU L. Rev. at 200. There is much additional support for this view. *See* Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 309-10 (1991) ("In the real world of litigation, lawyers face considerable incentives to threaten or seek sanctions against legal arguments that are not frivolous, but dangerous."); *see also* Schwarzer, 101 Harv. L. Rev. at 1018 (referring to the "readiness of lawyers to resort to any device available to exert pressure on their opponents"); *Gaiardo v. Ethyl Corp*., 835 F.2d 479, 485 (3d Cir. 1987) (commenting on the "use of Rule 11 as an additional tactic of intimidation and harassment").

These concerns about incentivizing the criminal referral of lawyers and their clients and spawning dangerous satellite litigation that could be used to delay or entirely derail the underlying judicial proceeding threatens a return to the worst excesses of the prior sanctions experience under state and federal law. And with the ability of litigants, on their own initiative, to seek criminal charges against their adversary (and/or their adversary's lawyer), the potential is quite real for the problems of the past to spiral even more wildly out of control and, thereby, impede judicial access and the fair administration of justice.

B. The CCA's Interpretation of §37.10 Would Have Disproportionate Impact on Litigants in Civil Rights Cases and Other Resource-Poor Litigants

Beyond encouraging unnecessary satellite litigation and undesirable gamesmanship, the CCA's interpretation of §37.10 also poses a particularly severe threat to plaintiffs and their lawyers in civil rights and other resource-poor litigants. There is considerable empirical evidence and commentary to suggest that this was exactly the disproportionate impact which the 1983 version of Fed. R. Civ. P. 11 produced. It is well understood today that plaintiffs under the 1983 version of Rule 11 were disproportionately the target of sanctions motions and that there was an even greater imbalance in the frequency with which sanctions were successfully obtained against plaintiffs. *See* Lawrence C. Marshall, et al., *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943, 953-54 (1992) (plaintiffs' side was the target in 57.6% of sanctions motions and in 70.3% of cases in which sanctions were imposed); *see also* Federal Judicial Ctr., Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States 14-15 (1991) (in five judicial districts studied, plaintiffs' side was the target in 52% to 72% of sanctions motions and in 61% to 81% of cases in which sanctions were imposed). Plaintiffs in civil rights and other non-mainstream litigation were impacted most heavily. Speaking of the mandatory federal rule, Professor Carl Tobias has piercingly summarized:

> Rule 11's application has disadvantaged civil rights plaintiffs more than any other category of civil litigant. Courts have found civil rights plaintiffs in violation of Rule 11 at a higher rate than other types of plaintiffs and have imposed substantial sanctions on them. Civil rights plaintiffs have been required to participate in expensive, unnecessary satellite litigation involving this provision. Indeed, a new study of Rule 11 activity in the Fifth, Seventh, and Ninth Circuits indicates that judges sanction civil rights plaintiffs as frequently as all other classifications of parties and that the Rule has led civil rights attorneys to advise clients to abandon potentially meritorious claims.

Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 Iowa L. Rev. 1775 (1992). Professor Melissa Nelken separately concluded after empirical study that the impact of the 1983 changes to Rule 11 on civil rights plaintiffs was significant. Melissa Nelken, *Sanctions Under Rule 11: Some "Chilling" Problems in the Struggle Between Compensation and Deterrence*, 74 Geo. L. J. 1313, 1327 (1986) (observing, *inter alia*, that "[a]lthough civil rights cases accounted for only 7.6% of the civil filings between 1983 and 1985, 22.3% of the Rule 11 cases involve civil rights claims").

Other studies in the field also bear out these conclusions, including most notably, the 1989 report by the Third Circuit Task Force on Rule 11, led by Professor Stephen Burbank. The task force concluded that judges applied the rule inconsistently in different cases; that Rule 11 was causing enormous increases in satellite litigation; and, finally, that the threat and imposition of sanctions under Rule 11 was impacting "resource-poor litigants" such as civil rights claimants. *See* Third Circuit Rule 11 Task Force, *supra,* at 13–24, 60–61, 68–72. As Professor Danielle Hart has observed, Rule 11's "chilling effects" essentially took two distinct but related forms:

> First, Rule 11 stifled the development of the common law by "inhibit[ing] vigorous and creative lawyering," thereby chilling creative advocacy. More specifically, because of the threat of Rule 11 sanctions, lawyers were much less likely to file some novel but meritorious claims that they might otherwise have pursued. Second, Rule 11 had a disproportionate impact on certain types of litigants and their attorneys; the threat of sanctions "pose[d] special threats to small plaintiffs' attorneys and to public interest and pro bono attorneys, thereby inhibiting court access for certain social groups, especially those asserting novel legal theories or reordered social understandings in the form of legal rights.").

Danielle Hart, *Still Chilling After All These Years*, 37 Val. U.L. Rev. 1, 12 (2002).

The concerns raised by critics and commentators of the 1983 version of Rule 11 over dampening civil rights, public interest and other non-mainstream litigation is one of the primary reasons the federal rule was amended. The current version now expressly permits pleaders to bring suit even when there is no right to recover under current law. That is, under the current federal rule, one is permitted to file suit even when the law does not support the allegations made, so long as a good faith argument can be made that the law may or should be changed. The same is true of state law today. *See* Tex. Civ. Prac. & Rem. Code §10.001(2) (the lawyer or litigant must certify only that "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"); *see also* Tex. R. Civ. P. 13 ("'Groundless' for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law."). State law also permits factual allegations to be made even "without evidentiary support" so long as they are "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." *See* Tex. Civ. Prac. & Rem. Code §10.001(3).

Yet, while permissible under the civil sanctions laws, the CCA's interpretation of §37.10 would render these filings to be in violation of the penal code. If such a law had existed in Mississippi in the 1940s and 1950s, Thurgood Marshall and other NAACP civil rights lawyers would have been subject to criminal punishment for civil suits they filed in support of striking down racially discriminatory laws and practices.

The danger here is real. As Professor Nelken noted in her study of the impact of the 1983 version of Fed. R. Civ. P. 11, "the threat of sanctions may deter not only frivolous cases, but also potentially meritorious cases from being filed and pursued." Nelken, 74 Geo. L. J. at 1341. The chilling effect problem is most severe when lawyers are needed to serve primarily on a pro bono basis. Pro bono organizations are able to provide malpractice insurance to cover lawyers who do this work now, but cannot insure against the threat of criminal prosecution.

C. The CCA's Interpretation of §37.10 Threatens Disproportionate Impact on Lawyers in Cases Where the Government is a Party

The CCA's interpretation of §37.10 will also likely lead to the inequitable application of the penal law against lawyers and litigants involved in judicial proceedings where some arm or agency of the government is involved. Since governmental prosecutors are going to be less aware of pleadings and motions filed in the vast majority of civil litigation in which the government is not a party, it seems inevitable lawyers and litigants involved in litigation where their adversary is the government are likely to be subject to criminal prosecution more often than those where the parties are all nongovernmental actors. *Vasilas* vividly illustrates this concern insofar as the petition for expunction Vasilas filed was in a civil case in which the government was on the other side.

Indeed, the peculiar characterization of an expunction proceeding as a "civil" proceeding ought not to obscure the potent scope of the CCA's reading of §37.10 as applicable to all filings in both civil and criminal cases. This suggests, framing the problem most starkly, that the lawyers most in danger of being prosecuted *by* the government under §37.10 will likely turn out to be those who represent defendants in criminal proceedings *against* the government. In short, to read § 37.10(a)(5) as the CCA has done is to ignore the inequitable application of the penal law such a statutory construction seems likely to produce.

It seems inevitable lawyers and litigants involved in litigation where their adversary is the government are likely to be subject to criminal prosecution more often than those where the parties are all nongovernmental actors.

D. The CCA's Interpretation of §37.10 Invites Prosecutorial Error and Abuse

Finally, the CCA's interpretation of §37.10 also invites prosecutorial error and abuse. Asking criminal prosecutors to evaluate whether use of a pleading or motion in a separate civil suit violates §37.10 ignores positional differences between the criminal prosecutor and participants in the civil litigation. Prosecutors practice in the field of criminal law, not in the civil litigation arena, and asking them to evaluate pleadings and motions that are filed in civil cases is asking them to undertake a task for which they are not nearly as well equipped as the civil litigants and presiding judge in the civil suit.

Beyond the lack of routine experience with civil litigation, prosecutors are unavoidably less well positioned for evaluating the merits of factual allegations made in civil litigation in which they have not been participants. The lawyers and presiding judge in the civil case are much more capable of evaluating the propriety of pleadings and motions filed.

In terms of criminal cases, the concern has already previously been raised that because the government is going to be most aware of those matters in which it is already a party, the lawyers most in danger of being prosecuted by the government under §37.10 will likely turn out to be those who represent defendants in criminal proceedings against the government.

For both civil and criminal cases, one should not suppose it self-evident that a document filed by a lawyer or party does (or does not) contain statements the signer knew to be untrue. Vasilas recited in the petition for expunction that the state had "dropped" the felony charge of marijuana delivery against his client. As noted above, what had actually happened was that his client went to trial, was acquitted of the offense of delivery of marijuana and convicted only of the lesser, misdemeanor offense of possession. The government insisted that Vasilas knew his averment was false, even though it is not at all clear what motivation he had to lie (Vasilas' client was statutorily entitled to have his records expunged for having been found not guilty of the charged crime of delivery. *See* Tex. Crim. Proc. Code. art. 55.01(a)(1)(A)). This underscores, if additional emphasis is necessary, that it is not always self-evident that a document contains statements the signer knew to be false.

There are surely instances when lawyers intentionally cross over the line and file, maliciously and knowingly, false

statements in pleadings but the facts of this case seem about as far away from that line as one can imagine. Yet, the charge against Vasilas was that he knowingly filed a false statement in a pleading, violating §37.10(a)(5). In other words, it is implausible to suggest that §37.10(a)(5) is only and simply applicable to lawyers who file obviously false pleadings. Given the subjectivity necessarily involved in the determination, and taking as illustrative the criminal charges brought against Vasilas giving prosecutors discretion to decide what conduct in litigation violates §37.10 is destined to encourage abuse.

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Disclosure: I argued on Vasilas's behalf before the CCA the second time that court heard the case. This article is dedicated to Peter Barrett who, having argued valiently on behalf of Vasilas, is the real hero of this story.

1 For instance, according to the 2008 Annual Report prepared by the Office of Court Administration, of the 248,472 pending felony and misdemeanor cases in Texas state courts as of September 2007, only 1,048 were disposed of as a result of an acquittal (.0048%). See http://www.courts.state.tx.us/pubs/AR2008/toc.htm for a link to all published OCA reports, including the most current data.

2 Section 37.10 of the Texas Penal Code provides:

> (a) A person commits an offense if he:
> (1) knowingly makes a false entry in, or false alteration of, a governmental record;
> (2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record;
> (3) intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record;
> (4) possesses, sells, or offers to sell a governmental record or a blank governmental record form with intent that it be used unlawfully;
> (5) makes, presents, or uses a governmental record with knowledge of its falsity; or
> (6) possesses, sells, or offers to sell a governmental record or a blank governmental record form with knowledge that it was obtained unlawfully.
> (c) (1) . . . [A]n offense under this section is a Class A misdemeanor unless the actor's intent is to defraud or harm another, in which event the offense is a state jail felony.

3 *Id.* at 489-90.

4 The TDRPC, of course, specifically forbid lawyers from filing pleadings or motions that contain false statements. See State Bar R., Art. X, §9, Rule 3.01, 3.03(a)(1).

5 By virtue of Tex. R. Civ. P. 59, however, some documents which are attached to pleadings or motions may be considered as part of the signed filing and, thus, within the civil sanctions law. See, e.g. Skepnek v. Mynatt, 8 S.W.3d 377, 381 (Tex. App.—El Paso 1999, pet.denied).