

NO. 2945

IN THE INTEREST OF

[REDACTED]

A MINOR CHILD

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IN THE DISTRICT COURT

51ST JUDICIAL DISTRICT

OF SCHLEICHER COUNTY, TEXAS

**MOTION FOR SANCTIONS
PURSUANT TO RULES 13 AND 21b
OF THE TEXAS RULES OF CIVIL PROCEDURE
AND REQUEST FOR INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES [REDACTED], Movant herein, and files this Motion for Sanctions Pursuant to Rule 13 and 21b of the Texas Rules of Civil Procedure in the above-entitled and numbered cause and respectfully shows the Honorable Court the following:

1. Under Rule 13 of the Texas Rules of Civil Procedure, the court shall impose an appropriate sanction when a party signs an instrument which is either groundless and brought in bad faith or groundless and brought for the purpose of harassment. These sanctions can be imposed upon the person who signed it, a represented party, or both.
2. Under Rule 21b of the Texas Rules of Civil Procedure, the court shall impose an appropriate sanction when a party fails to serve on or deliver to the other parties a copy of any pleading, plea, motion, or other application to the court for an order in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure. Upon a violation of Rule 21b, the Court may impose an appropriate sanction available under Rule 215.2(b) of the Texas Rules of Civil Procedure.
3. Texas Department of Family and Protective Services, through its counsel (hereinafter

“Counsel”), has violated Rules 13 and 21b in the following ways:

a. On or about July 24, 2008, Counsel filed a “Request to Stay Discovery and For Issuance of Discovery Control Plan Order Under TRCP 190.4 and Motion for Severance.” In violation of Rule 21b, Counsel failed to serve a copy of the motion on any of the eleven attorneys from Texas Rio Grande Legal Aid (hereinafter “TRLA”), who represent 46 Respondent mothers in this case. Counsel’s certificate of service does not reflect which counsel, if any, were served, also in violation of Rule 21b of the Rules of Civil Procedure. Counsel’s *ex parte* communications with the court also violate Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct.

b. When Movant’s attorney was informed by Department Attorney Charles Childress just before noon on July 24, 2008 that he had already presented the Department’s motion to the court, the undersigned attorney requested she be faxed a copy of the motion; Attorney Childress declined, stating that it would be mailed to her, via postal delivery, with a copy of the court’s signed order. Movant’s attorney received a copy of the motion, via email, twenty-four hours **after** the Department obtained a signed, *ex parte* order from the court.

c. In violation of Rule 13 of the Rules of Civil Procedure and Rule 3.01 of the Texas Disciplinary Rules of Professional Conduct, Counsel made a bad faith or groundless statement in its Request to Stay Discovery. Specifically, Counsel represented to the Court that “efforts to reach agreements on the timing and contents of discovery have been unsuccessful.” Attached hereto as Exhibits A and B are copies of two signed Rule 11 agreements between Counsel and two TRLA attorneys (Rebecca G. Flanigan and Amanda Chisholm) to extend discovery deadlines in eight cases, about half of which fell under former Cause No. 2902 (now, Cause Nos. 2792, 2793, 2893, 2901, 2933, 2945, 2950, 2958, 2967 and 2991). In addition, Counsel and two

other TRLA attorneys (Kevin Dietz and Julie Balovich) agreed to discovery extensions, attached hereto as Exhibit C, and were awaiting the Department's signature on the Rule 11 agreement, an agreement that would have affected 10 other cases. The Department requested, and was granted, additional time within which to reply to TRLA's discovery requests. Furthermore, it was only after the Department ignored a request in mid-June to meet with legal aid attorneys to formulate a discovery plan, that discovery requests issued. When no meeting with the Department transpired, TRLA attorneys, including the undersigned attorneys, propounded discovery.

4. The foregoing acts of misconduct by Counsel are not isolated instances. The Department of Family and Protective Services has evidenced a pervasive pattern and practice of violations of the rules of civil procedure and professional conduct (e.g. Rules 3.01, 3.02, 3.04 and 3.05 of the Texas Disciplinary Rules of Professional Conduct), having consistently taken actions that interfere with this litigation, obstruct access to evidence, and delay resolution of these cases:

a. On July 18, 2008, Department attorney Kathy Phillips represented to TRLA attorney Julie Balovich that she would sign, and that day file, an agreed motion to sever TRLA had prepared, reflecting agreement by attorneys ad litem, which had been revised to include the Department's edits. Four days later, on July 22, 2008, Ms. Phillips admitted she neither signed nor filed the motion and, instead, requested additional editing.

b. Following a conference between Department and TRLA attorneys Rebecca G. Flanigan and Julie Balovich on July 17, 2008, Department attorney Kathy Phillips agreed to provide Movant's attorney with file-stamped copies of the Amended Petitions which the Department may have filed but were never served on Respondent mothers or their attorneys. At this writing, no copies have been provided.

c. In June 2008, TRLA attorneys repeatedly requested a meeting with Department

counsel and attorneys from TRLA and LANWT (Legal Aid of Northwest Texas which represents over 40 respondent mothers) to work on a discovery control plan. TRLA attorney Kevin Dietz was informed that new “lead counsel” for the Department would soon be designated and Counsel would thereafter agree to meet with legal aid attorneys to discuss a discovery control plan. TRLA received no further response to the request for a meeting.

d. Following the decision by the Texas Supreme Court and after the conference held by the trial court on May 30, 2008, TRLA and LANWT attorneys Kevin Dietz and John Kennedy negotiated an agreement with Department attorneys Gerry Williams, Beth Page, and Gary Banks regarding an agreed order to vacate temporary orders that would be presented to this court based on the court’s declaration at that conference that the court would sign an order if signed by all legal aid clients. In reliance on that agreement, TRLA and LANWT attorneys spent well over 50 hours that weekend obtaining signatures of 41 clients who, like their children, were scattered across the state. On June 1, 2008, the Department, through attorney Gary Banks, was presented with the order signed by all 41 mothers who were named in the mandamus; Mr. Banks, however, refused to sign the negotiated, agreed order.

e. During the week status hearings were held, on May 27, 2008 and for two days thereafter, the Department proffered sworn testimony through its caseworkers that the Department would train providers for court-ordered parenting classes by June 2, 2008. Nevertheless, as of July 11, 2008, according to Department attorneys, contracts with trainers had not been signed, contracts with providers had not been signed, and providers had not been trained to provide parenting classes. At this writing, parenting classes are scheduled to commence in August, more than two months after Respondent parents were ordered to attend and complete those classes.

f. On or about April 21, 2008, the Department, through attorney Gary Banks, appeared *ex parte* before the court with a proposed order for the placement of children, resulting in the immediate separation of children from their mothers at the Coliseum who had no knowledge of where their children would be going. Attorney Banks presented his *ex parte* request to the court after receiving notice that morning that TRLA attorneys Julie Balovich and Amanda Chisholm would appear in court to seek a temporary restraining order to prevent such a separation without any information regarding the children's placement. As a result of the *ex parte* order, nursing mothers were separated from infants, siblings groups were separated, and children were hospitalized for *days* before mothers were able to obtain information about their children's whereabouts.

g. The Department continued to erroneously report to the media and general public that it had used "best efforts and the best information it had" to keep sibling groups together. *See, e.g.* Press Release, http://www.dfps.state.tx.us/About/News/2008/2008-04-30_Eldorado_Senate.asp. The Department repeatedly suggested that DNA testing was necessary to clear the confusion created by parent misinformation. The DNA results, in fact, merely serve to confirm what Respondent mothers have consistently asserted, whether in response to repeated interrogations by caseworkers or in pleadings filed with the court: they are the mothers of these children at issue, the same children who were the subject of Department-authored service plans with Respondent mothers in May, the same children who had limited or no access to their mothers for more than six weeks in April and May 2008.

h. On April 14, 2008, Department attorneys Eric Tai and Gary Banks denied access to TRLA and LANWT attorneys Julie Balovich and Todd Stephens to see Respondent mothers in the Coliseum. Mr. Tai stated that there were "logistical" problems because all mothers were

being moved from Fort Concho to the Coliseum. In fact, half of the mothers were being forcibly separated from their children and being sent home. Despite the fact that legal aid counsel had been communicating with Counsel by cell phone all afternoon, and had left a number of messages with Department Counsel, the legal aid attorneys learned of this information from CNN. When Department Counsel refused to call back legal aid attorneys about when they could see their clients, legal aid attorneys prepared a lawsuit to seek a temporary restraining order to prevent the Department from continuing to deny them access to clients. Only after Gary Banks was faxed a copy of this lawsuit did he call the attorneys and notify them that they could have access. Even then, the Department did not allow mothers in the Coliseum any contact with their attorneys until the afternoon of Tuesday, April 15, 2008, less than 48 hours before the adversary hearing, and then only in-person contact.

5. The Rules of Civil Procedure and the Rules of Professional Conduct require that counsel not cast doubt on the impartiality of the tribunal by seeking *ex parte* contacts, or make assertions in pleadings that are baseless or made for the purpose of creating delay or expense in litigation. *Ex parte* requests should be substantiated by urgent and verified facts, which preclude reasonable notice and the opportunity for affected parties to be heard. The Department has violated the Rules time and time again throughout this litigation. As a result, legal aid attorneys have spent countless hours trying to locate children that the Department moved without notice, propounding discovery that the Department is now seeking to evade, and drafting motions and obtaining signatures for agreements that the Department subsequently and consistently reneges. Most importantly, the Respondents' due process rights have been violated as the Department has taken actions designed to interfere with their access to the courts and their ability to litigate their cases. This Court must grant sanctions to end this pervasive pattern and practice of unethical behavior

by the Department. The sanctions Movant seeks directly correlate to the Department's conduct in this case.

6. Movant seeks a court order:
 - a. Striking the Department's "Request to Stay Discovery and For Issuance of Discovery Control Plan Order Under TRCP 190.4."
 - b. Setting aside the Order Staying Discovery.
 - c. Directing the Department to file a certificate of conference before filing any motion with the court, and requiring the Department make a good faith effort to meet and confer with TRLA attorneys before filing any motion pertaining to TRLA's clients with the court;
 - d. Requiring the Department to e-file future motions through Texas Online;
 - e. Directing the Department to comply with Rules 21 and 21a regarding the filing and serving of pleadings;
 - f. Ordering the Department to pay all costs and attorneys' fees associated with this motion;
 - g. For such other and further relief to which she may be entitled.

WHEREFORE, PREMISES CONSIDERED, Movant prays that:

1. the Court set this matter for hearing;
2. after notice and hearing, the Court impose sanctions on TX DEPT OF FAMILY & PROTECTIVE SERVICES and its counsel in accordance with Rules 13, 21b, and 215 of the Texas Rules of Civil Procedure;
3. Movant will be granted reasonable attorney's fees and expenses incurred to obtain this order; and

4. Movant will be granted such other and further relief, special or general, legal or equitable, as may be shown that Movant is justly entitled to receive.

Respectfully submitted,

Texas Rio Grande Legal Aid, Inc.
102 Pueblo
Corpus Christi, TX 78405
Tel. 361.880.5434
Fax. 361.883.7615

[MATERIAL REDACTED]