No. 05-02-01683-CV

In the Court of Appeals
Fifth District of Texas at Dallas

UDO BIRNBAUM
Defendant, Counter-claimant, Third Party Plaintiff - Appellant

vs.

THE LAW OFFICES OF G. DAVID WESTFALL, P.C.
Plaintiff, Counter Defendant - Appellee

G. DAVID WESTFALL
Third Party Defendant, Sanction Movant - Appellee

CHRISTINA WESTFALL
Third Party Defendant, Sanction Movant - Appellee

STEFANI PODVIN
Third Party Defendant, Sanction Movant - Appellee

Appeal from the 294th Judicial
District Court of Van Zandt County, Texas
The Honorable Paul Banner, by assignment
Trial cause No. 00-00619

Petition for Rehearing En Banc

The Panel's Opinion is devoid of Constitutional considerations

The Panel micro-procedurally upholds a patently unlawful $62,000 punitive sanction for having made a civil RICO (civil racketeering) pleading

---

"clearly established that filing a lawsuit was constitutionally protected conduct " *Rutan* , 497 U.S. 62

"criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt." *Hicks v. Feiock*, U.S. Supreme Court, 485 U.S. 624 (1988)

NOTE: Appendix bound separately

UDO BIRNBAUM, *Pro Se*
540 VZ CR 2916
Eustace, TX 75124
(903) 479-3929

IDENTITY OF PARTIES AND COUNSEL

The Law Offices of G. David Westfall, P.C.[1] Plaintiff, Counter-defendant	Frank C. Fleming[2] PMB 305, 6611 Hillcrest Ave. Dallas, Texas 75205-1301 (214) 373-1234 (214) 373-3232 (fax)
Udo Birnbaum[3] Defendant, Counter-claimant, Third party plaintiff	Udo Birnbaum, *pro se* 540 VZ 2916 Eustace, Texas 75124 (903) 479-3929 (903) 479-3929 fax
G. David Westfall[4] Third party defendant	Frank C. Fleming
Stefani Podvin[5] Third party defendant	Frank C. Fleming
Christina Westfall[6] Third party defendant	Frank C. Fleming
Hon. Paul Banner[7], trial judge	

[1] Suit initially brought by attorney G. David Westfall in behalf of the "Law Office", claiming an unpaid OPEN ACCOUNT for LEGAL FEES. There of course never was an open account, not with a $20,000 NON-REFUNDABLE prepayment "for the purpose of insuring our [lawyer's] availability", and the lawyer reserving the "right to **terminate**" for "your [Birnbaum] **non-payment** of fees or costs".

[2] Somehow appeared as "co-counsel" for the "Law Office" shortly before trial. Then the only lawyer. But no document "of record" of his appearance for the "Law Office".

[3] Nincompoop for having let G. David Westfall talk him into paying non-refundable $20,000 UP FRONT money for a **civil racketeering** suit against state judges and other state officials. (suit had ***no worth***)

[4] Told me I had "a very good case" in suing 294th District Judge Tommy Wallace, and others under civil RICO, for what they had done to me with their "BEAVER DAM" scheme on me.

[5] Attorney daughter of G. David Westfall, and OWNER of the "Law Office" (at least on paper).

[6] Wife of G. David Westfall and long time BOOKKEEPER at the "Law Office"

[7] "Visiting judge", literally. Did not go through regular court-coordinator Betty Davis, nor had clerk or bailiff present during trial. Did it all by himself. See Appeals issues.
Listed as a participant because of Appeals Issue 5 (denied motion for recusal). Also because of unlawful (**punitive**, not coercive) $62,255 "frivolous lawsuit" sanction (Issue 4)

Petition for Rehearing En Banc

Panel finds ***"[$62,000] sanction does not meet requirements of rule 13"***.
Then rules that I "waived" such "error" by supposedly untimely objection

Upholding a **sanction** for having made a civil RICO claim offends the Constitution
("clearly established that filing a lawsuit was constitutionally protected conduct " *Rutan* , 497 U.S. 62)

Honorable Judges:

Introduction

The Panel's Opinion (A.2)[8] is a micro-procedural analysis, devoid of Constitutional and statutory [9] considerations. Nowhere does the panel address my key point that unconditionally assessing a $62,000 sanction for having made a civil RICO pleading actually violates the Law.[10] Also the sanction is punitive in nature, not "coercive", requiring full criminal process, including a finding of "beyond a reasonable doubt."

Furthermore, the sheer number of erroneous "facts" expressed indicates that the "Opinion" is not the product of three (3) independent judicial considerations, but of a single whitewash.

---

[8] **Note:** All references in this Petition such as "(A.2)" refer to the Appendix **to this Petition**.

[9] "**Any person** injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *18 U.S.C.* § *1964(c) "civil RICO"*

[10] "It was, however, clearly established that **filing a lawsuit** was **constitutionally protected conduct**. See Milhouse v. Carlson, 652 F.2 d 371, 37 3-74 (3d C ir. 1981); see also California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (access to courts is one aspect of the First Amendment right to petition the government for grievances). Moreover, it was also clearly established that the government cannot retaliate against someone for engaging in constitutionally protected activity in a way that would chill a reasonable person in the exercise of the constitutional right. See *Rutan v. Republican Party of Illinois*.", 497 U.S. 62, 73 , 76 n.8 (1990).

Statement of the Case and ***Statement of the Facts***

Suit against me was initially brought by attorney G. David Westfall in behalf of the "Law Office", claiming an unpaid OPEN ACCOUNT for LEGAL FEES. There of course never was an open account, not with a $20,000 NON-REFUNDABLE prepayment "for the purpose of insuring our [lawyer's] availability", and the lawyer reserving the "right to **terminate**" for "your [Birnbaum] **non-payment** of fees or costs".

It all started with a suit brought against me in 1995 in the 294th District Court over a BEAVER DAM[11] . The $20,000 retainer was for suing then 294th district judge Tommy Wallace and other state judges in the Dallas Federal Court[12] under the anti-racketeering statute ("civil RICO"). Long after I fired him, Westfall fabricated an $18,000 "bill", and brought this supposed "open account" case.

I asked for appointment of an auditor under RCP Rule 172. Then several months later I made civil RICO claims against "The [three] Westfalls" that were bringing this suit against me in the name of their Law Office[13].

Details can be found in my ***Appeals Briefs*** and among the comments and footnotes in this ***Petition***.

Overview of my original issues on Appeal

I will, however, repeat my ***[initial appeal] Issues Presented*** to permit an intelligent overview of this whole matter:

> **1. WHETHER THE $59,280.66 JUDGMENT IS UNLAWFUL.** It does not conform to the pleadings and the verdict
> **2. WHETHER DEFENDANT BIRNBAUM HAD A RIGHT TO A COURT-APPOINTED AUDITOR.** Due process demanded appointment of an auditor per RCP Rule 172 to address the issue of fraud

---

[11] *William B. Jones v. Udo Birnbaum*, No. 95-63, 294th District Court of Van Zandt County, 1995. Case still active.
[12] *Udo Birnbaum v. Richard L. Ray, et al*, No. 3:99-CV-0696-R, Dallas Federal Court, 1999.

[13] These are the same "the Westfalls" in *Westfall v. King Ranch No. 05-92-00262-CV Fifth District of Texas at Dallas (1993)* ***("King Ranch alleges that for almost eighteen months the Westfalls engaged in a campaign of delay, deceit, and disobedience to prevent King Ranch from getting the requested discovery"***)

3. WHETHER THE "RICO RELIEF" SUMMARY JUDGMENT IS ALSO UNLAWFUL. I have the Right to show my best defense, claim, and evidence. The Rules of Procedure and the law do not allow a judge to weigh the evidence to grant summary judgment on civil RICO claims.

4. WHETHER THE $62,255.00 "SANCTION" JUDGMENT IS ALSO UNLAWFUL. It is a criminal punishment without due process for having made a civil RICO claim

5. WHETHER THE TRIAL JUDGE SHOULD HAVE BEEN RECUSED FROM THE CASE. For not abiding by statutory law, the Rules of Procedure, and the mandates of the Supreme Court

6. WHETHER THERE WAS FRAUD, FRAUD, AND MORE FRAUD. FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression

7. WHETHER DUE PROCESS DEMANDS A NEW TRIAL. I am entitled to appointment of an auditor, enforcement of the rules of discovery, and my best defense, claim, and evidence under civil RICO.

Overview of this Petition for Rehearing En Banc

With such said, I present an overview of this ***Petition*** by touching on just a few of the Panel's erroneous and constitutionally devoid findings, again to permit an intelligent overview of this whole matter. Again, details can be found in my ***Appeals Briefs*** and among the comments and footnotes in this ***Petition***:

$62,000 Sanction (A.18)

"Birnbaum's only complaint about the specificity of the order was made in an untimely request for findings of fact and conclusions of law filed more than twenty days after the date of the sanctions order. … Therefore, the trial judge did not have the opportunity to correct the erroneous order, and ***error was not preserved****.*

ERRONEOUS: My ***Request for Findings*** (A.27) filed Sept. 3, 2002, WAS within 20 days of the time the Sanction Judgment was "signed with the clerk"[14] on Aug. 21, 2002. I also provided the Clerk with my ***Notice of Past Due Findings*** (A.32), to be immediately sent to Judge Banner. Also ***Motion to Reconsider the $62,000 Sanction***. Also again my ***Motion to Produce Findings*** (A.34) in this Appeals Court. (Denied)

"did not have "opportunity to correct"? ERRONEOUS

[14] Although Judge Banner put Aug. 9 above his signature, he did not let anyone know he had signed it, until he sent it to the Clerk apparently Aug. 21, 2002. They mailed me notice on Aug. 22, and the first notice I had that Judge Banner had actually signed the Order was Aug. 23, 2002.

The Panel did find that the $62,000 sanction against me does not meet the requirements[15] of Rule 13[16]. Then, noting that *"Birnbaum has appeared pro se throughout all proceedings"*, the Panel rules that I supposedly *"waived"*[17] this point because *"Birnbaum's only complaint about the specificity of the order was made in an **untimely request for findings** of fact and conclusions of law filed more than twenty days after the date of the sanction order"*.

But my appeals issue on this sanction, however, reached far beyond Rule 13. This **$62,000 sanction** is not coercive, but unconditional, for a completed act (making a "civil RICO" claim TWO years back), imposed after ***Final Judgment*** (A.11), making it purely punitive.

> "The distinction between civil and criminal contempt has been explained as follows: The purpose of civil contempt is remedial and **coercive** in nature. A judgment of civil contempt exerts the judicial authority of the court to persuade the contemnor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional upon obedience and therefore the civil contemnor carries the keys of (his) prison in (his) own pocket. In other words, it is civil contempt when one may procure his release by compliance with the provisions of the order of the court. Criminal contempt on the other hand is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemnor is being **punished** for some **completed act** which **affronted** the dignity and authority of the court." The **Texas Court of Criminal Appeals**, No. 73,986 (June 5, 2002)

Punishment, no matter how designated, of course requires full criminal process, including a finding of "beyond a reasonable doubt". This $62,000 sanction is null

---

[15] "We agree with Birnbaum that the trial court's order awards sanctions without stating the basis for the award, and therefore does not meet the requirements of rule 13. See Murphy v. Friendswood Dev. Co., 965 S.W.2d 708"

[16] The sanction order, of course, stated no particulars at all, NOTHING, and did not even mention Rule 13. Rule 13, of course only allows attorney fees for effort expended in bringing a motion for violative conduct (of which there was none), NOT $62,000 attorney fees for a TWO YEAR proceeding. It is a mystery how this Panel decided that this was supposedly a Rule 13 violation.

[17] In order for one to "waive" a right, he must do it knowingly and be possessed of the facts. Barnhill v. Rubin, D.C.Tex., 46 F.Supp. 963, 966

and void. Period. It also does not matter how the trial judge got there, this sanction is unlawful.

> "These distinctions lead to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the **Constitution requires of criminal proceedings**, including the requirement that the offense be proved **beyond a reasonable doubt**." Pp. 631-635. *Hicks v. Feiock*, U.S. Supreme Court, 485 U.S. 624 (1988) (emphasis added)

The sanction is also objectively unreasonable in light of a finding, as caught by the court reporter at the very end of the sanctions hearing (A.20), that I was **"well-intentioned"** in making my civil RICO claim.

Also objectively unreasonable is the trial judge himself weighing the evidence that it did not show a RICO violation. And of course all civil RICO defendants scream "frivolous". That is why I had asked for determination by jury.

$59,000 Judgment (A.11)

"nothing preserved for review on issue whether judgment conformed to pleadings, because complaint could not be raised for first time on appeal, and without [complete] reporter's record, no showing was made that appellant received trial court determination on issue. ***We overrule appellant's first issue****."*

ERRONEOUS. Raised for the first time on appeal? Over my ***Objections*** (A.38), and then again ***[hand-written] Objections*** (A.40) just before submission to the jury, the trial judge would not submit the proper "due process" jury questions!

I raised the issue again in my ***Motion to Reconsider the $59,000 Judgment***, that the judgment does not and cannot "conform to the pleadings and the verdict"

Then I raise the issue again in my ***Notice of Past Due Findings*** (A.32): "Judge, how did you do this, without a determination of all of the elements by a jury?"

This judgment (A.11) has no support in the verdict (A.41). It does not "conform to the pleadings and the verdict" (RCP Rule 301). Period. It is unlawful.

My appeals issue on this judgment is upon "due process", i.e. that the wrong questions were put to the jury, despite my objection. Yes, the judge had a jury sitting there, but he did not use it.

And this Panel, instead of addressing my appeals issue (wrong jury **questions**), makes a finding on instructions:

> *"Because Birnbaum filed only a partial reporter's record …… we are unable to review these complaints. …… (with only partial reporter's record, court could not determine whether giving improper jury **instructions** was harmful error)"*

Appointment of Auditor

*"he [Birnbaum] did not receive a ruling on the motion [to appoint an auditor]. Therefore he **did not preserve his complaint for appeal**."*

ERRONEOUS. *"**IT IS FURTHER ORDERED, ADJUDGED and DECREED** that Udo Birnbaum's Motion for Appointment of Auditor is in all things denied". **Pretrial Order*** (A.95). ERRONEOUS.

Summary Judgment

"this evidence was not submitted to the trial court."
ERRONEOUS. Judge Banner ruled against ALL of my summary judgment evidence. ***Pretrial Order*** (A.95) [18]**.**

*"He [Birnbaum] does not, however, offer summary judgment evidence regarding how mailing this **fraudulent bill** constitutes a pattern of racketeering activity, or furthers a recognizable scheme formed with specific **intent to defraud**"*?
How constitutes a "pattern of racketeering activity"? Jury issue, of course.
How furthers a scheme *"with specific intent to defraud"?* **Can there be fraud, without specific intent to defraud?**

Fraud

"Therefore, we presume the omitted portions of the record support the trial court's judgment. … Birnbaum's sixth issue is overruled."

ERRONEOUS. *"Omitted portions of the record support the judgment"?* The judgment is supposed to be supported by the PLEADINGS and the VERDICT. (the jury made no finding on all the elements of the pleaded "open account" for "legal fees", nor of a breach of contract either)

[18] Pretrial Order, Nov. 13, 2002. The day before the scheduled trial for Nov. 14, 2002.

Due Process

"[Birnbaum] complains of the same rulings addressed in other parts of his brief. The issue presents nothing for our review."
ERRONEOUS. How about the trial Judge going in and out of the jury room, even during deliberations? How about surprise [wrong] jury issues "popped" just before submission to the jury? How about the issue of absurdly excessive legal fee "damages"? How about my issue that the sanctions judgment is actually unlawful?

With such said, I will go directly to the Panel's Opinion (A.2), to highlight the issues that detail the above, and bear on this ***Petition for Rehearing En Banc***. Complete details are in my ***Appeals Briefs***, ***Clerk's Record***, and ***Civil Appendix***.

Note: All references in this Petition such as "(A.15)" refer to the Appendix to this Petition.

The pattern below shows:

- The Appeals Court Panel makes up some "facts"
- finds something in a law book that sounds good
- but it does not fit.

Detail of Issues raised by the Panel's Opinion

Copied below is each and every word of the Panel's Opinion (A.2), followed by such issues as bear on this petition. ("All answers shall be preceded by the question"). My ***Conclusion and Prayer*** is at the end of this ***Petition***.

§

OPINION

Before Justices Whittington, Wright, and Bridges
Opinion By Justice Whittington

"Appellant Udo **Birnbaum appeals a jury verdict and judgment** in favor of appellee The Law Offices of G. David Westfall, P.C ("Law Office"). **Birnbaum also appeals orders on motions** for summary judgment, **for sanctions**, and to recuse the trial judge, and complains of the trial judge's failure to appoint an auditor. We affirm."

- *"Birnbaum appeals a jury verdict and judgment"*? I am not appealing on the answers by the jury[19], but on a judgment that does not conform to the pleadings and the verdict (and due process).
- *"Birnbaum also appeals orders on motions for [ ] sanctions"*? As shown above, this is not an "order" (to "coerce") at all, but unlawful **punishment**[20] for having made a "civil RICO" pleading.

Background

"Law Office filed a suit on a **sworn account** against Birnbaum for legal fees allegedly **owed**. Birnbaum filed an answer and affidavit denying the claim. Birnbaum also filed a counterclaim against Law Office and added G. David Westfall, Christina Westfall, and Stefani Podvin as parties to the lawsuit ("Third Party Defendants"). He alleged violations of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (2000 and Supp. 2003) ("RICO") against Third Party Defendants. Law Office and Third Party Defendants moved for summary judgment on the claims against them. **Third Party Defendants' motions were granted**. **Birnbaum filed motions to appoint an auditor and to recuse the trial judge**. **There is no order on Birnbaum's motion to appoint an auditor in the clerk's record**."

- *"There is no order on Birnbaum's motion to appoint an auditor in the clerk's record"*. ERRONEOUS. See ***Pretrial Order*** (A.95)
- *"Birnbaum filed motions to appoint an auditor"?* Moving for an auditor under RCP Rule 172[21] was one of the first things I [Birnbaum] did upon being sued.

---

[19] Except to the extent that the jury was not presented with the correct ("due process") jury questions

[20] "It was, however, clearly established that **filing a lawsuit** was **constitutionally protected conduct**. See Milhouse v. Carlson, 652 F.2 d 371, 37 3-74 (3d C ir. 1981); see also California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (access to courts is one aspect of the First Amendment right to petition the government for grievances). Moreover, it was also clearly established that the government cannot retaliate against someone for engaging in constitutionally protected activity in a way that would chill a reasonable person in the exercise of the constitutional right. See *Rutan v. Republican Party of Illinois*.", 497 U.S. 62, 73 , 76 n.8 (1990).

[21] **Rule 172. Audit:** When an investigation of accounts or examination of vouchers appears necessary for the purpose of justice between the parties to any suit, **the court shall appoint an auditor** or auditors to state the accounts between the parties and to make report thereof to the court as soon as possible. **The auditor shall** verify his report by his affidavit stating that he has carefully examined the state of the account between the parties, and that his report contains a true statement thereof, so far as the same has come within his knowledge. Exceptions to such

- *"Third Party Defendants' motions [for summary judgment] were granted"?* This was a full year into the case, and Judge Banner would not appoint an auditor, no matter how hard I tried, for me to show that there was no "open account" nor accounting at Law Office.[22]
- *"Birnbaum filed motions …… to recuse the trial judge"?* For, among other matters, not appointing an auditor under RCP Rule 172.[23] Also for denying me my "civil RICO" claim, my best cause and evidence. Summary judgment[24] is of course not available under civil RICO[25].

"At trial, **a jury made affirmative findings** on Law Office's claim against Birnbaum **for breach of contract** and negative findings on Birnbaum's claim against Law Office for violations of the Texas Deceptive Trade Practices Act. TEX. BUS. & COM. CODE ANN. §§ 17.41 *et seq*. (Vernon 2002) ("DTPA"). The trial judge entered judgment for Law Office which included an award of attorneys' fees as found by the jury. **Third Party defendants filed a motion for sanctions under Rule 13** of the Texas Rules of Civil Procedure, which was granted in part and denied in part. The partial reporter's record submitted with this appeal is the closing argument from the jury trial and a portion of the sanctions hearing. **Birnbaum has appeared *pro se*** throughout all proceedings."

---

report or of any item thereof must be filed within 30 days of the filing of such report. The court shall award reasonable compensation to such auditor to be taxed as costs of suit.

[22] Also, "The Westfalls" never even designated which "element" of my civil RICO claim supposedly lacked support. Civil RICO of course has no "elements" in the tort sense, only [jury] "issues of fact". (summary judgment is not even available under civil RICO)

[23] Despite numerous motions and hearing, I could not get Judge Banner to even respond to my motion to appoint an auditor under RCP Rule 172. For that, among other issues, I asked for his recusal after he ruled summary judgment upon my VOLUMES of summary judgment evidence, including court findings, numerous affidavits, and painstakingly detailed depositions. Judge Banner DID finally DENY my motion for an auditor on Nov. 13, 2002. ***Pretrial Order*** (A.95)

[24] Details in my Briefs. Civil RICO is statutory law, has no "elements" in the tort sense, only "issues of fact". Judge can't grant summary judgment on the ultimate [jury] issue of whether there was a RICO violation, and whether I was injured "by reason of the violation". All jury issues.

[25] "**Material issues of genuine fact** existed with respect to existence of an enterprise as defined by this chapter, association of defendant printing company with such enterprise, association of the alleged enterprise with organized criminal activity, the intent and knowledge of defendant concerning the underlying predicate acts and the existence of injury caused by alleged violation of this chapter, **precluding summary judgment** in favor of defendant in action alleging the kickback scheme. *Estee Lauder, Inc. v. Harco Graphics, Inc., D.C.N.Y.1983, 558 F.Supp.83.*

- *"a jury made affirmative findings … … for breach of contract"?* The jury did **NOT** find on all the elements of a breach of contract. (See ***Court's Charge***, A.41) The jury was not asked 1) if there had really been a contract, 2) whether Law Office had abided by it, my "Excused" issue (A.38, A40), 3) whether I had failed to abide by it. The trial judge decided all this, and only asked the jury "What sum of money, etc"[26]. I of course had asked for trial by jury (on **all** the elements, of course). Plaintiff of course had pleaded only unpaid **"open account",** NOT breach of contract.
- *"Third Party defendants filed a motion for sanctions under Rule 13"?* **$62,000** sanctions for legal fees of the entire proceeding is of course **not permitted** under RCP Rule 13, only fees relating to abuse of discovery, of which there was **none** on my part. (only RCP Rule 215-2b sanctions available under Rule 13)[27]

Judgment

"In his first issue, Birnbaum asserts the trial court's judgment on the jury's verdict was "unlawful" because (1) the trial judge erred in refusing to submit jury issues on whether Birnbaum was excused from performing the attorney's fees contract and whether Law Office's services were of no worth; and **(2) the judgment does not conform to the pleadings because the jury was questioned regarding a breach of contract but Law Office pleaded a suit on sworn account**. **Because Birnbaum filed only a partial reporter's record** limited to closing argument and a portion of the sanctions hearing, **we are unable to review these complaints**. See *Nicholes v. Tex. Employers Ins. Ass'n*, 692 S.W.2d 57, 58 (Tex. 1985) (per curiam) (with only partial reporter's record, **court could not determine whether giving improper jury**

[26] QUESTION 1: What sum of money, if paid now in cash, would fairly and reasonably compensate the Law Offices of G. David Westfall, P.C., for its damages, if any, that resulted from Defendant, Udo Birnbaum's failure to comply with the agreement between the Plaintiff and the Defendant?

[27] The ONLY Rule 13 monetary sanction available is under RCP 215-2b(7): "In lieu of any of the forgoing orders or in addition thereto, the court shall require the **party failing to obey the order** or the attorney advising him, or both, to pay, at such **time as ordered** by the court, the reasonable expenses, including attorney fees, **caused by the failure**, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment. **THERE WAS NO UNDERLYING ORDER!**

instructions was harmful error); *A.V.A. Servs., Inc. v. Parts Indus. Corp.*, 949 S.W.2d 852, 854 (Tex. App.-Beaumont 1997, no pet.) (**nothing preserved for review on issue whether judgment conformed to pleadings, because complaint could not be raised for first time on appeal**, and without reporter's record, no showing was made that appellant received trial court determination on issue). We overrule appellant's first issue."

- *"Because Birnbaum filed only a partial reporter's record …… we are unable to review these complaints [if the judgment conforms to the pleadings and the verdict]?* **ERRONEOUS**. All that is needed is the pleadings (A.35), the verdict (A.41), and the judgment (A.11), and they were **all** in the Clerk's Record and the Civil Appendix! That is all that counts in a **jury trial**.
- *"court could not determine whether giving improper jury instructions was harmful error"?* **ERRONEOUS.** My appeals issue is **improper jury questions**!
- *"nothing preserved for review on issue whether judgment conformed to pleadings, because complaint could not be **raised for first time on appeal**"?* **ERRONEOUS**. My Brief is full of evidence of my **OBJECTING** in the trial court, a detailed chronology of Law Office proposed jury issues and my objections, even copying them into my Appeal Brief, even providing a copy of my ***Objections*** (A.38) and again LAST MINUTE ***handwritten OBJECTIONS*** (A.41) and including them in the ***Clerk's Record*** and the ***Civil Appendix***!
- *"complaint could not be raised for the first time on appeal"?* **ERRONEOUS.** Was raised in my ***Rule 276 Request For Endorsement By The Court of "Refusals" and "Modifications" (A.46)***. Raised in my ***Motion to reconsider the $59,000 judgment***. Raised in my ***Request for Findings (A.27)***. Raised in my ***Notice of Overdue Findings (A.32)***. NO RESPONSE. Again raised in my ***Motion*** (A.34) before this very same Panel in this Appeals Court to make the trial judge produce Findings.

Appointment of Auditor

"In his second issue, Birnbaum urges the trial court erred in failing to appoint an auditor pursuant to Rule 172 of the Texas Rules of Civil Procedure. **While Birnbaum did file a motion to appoint an auditor with the trial court, he did not receive a ruling on the motion. Therefore, he did not preserve his complaint for appeal**. See TEX. R. APP. P. 33.1; *Reyna v. First Nat'l Bank*, 55 S.W.3d 58, 67 (Tex. App.-Corpus Christi 2001, no pet.). We overrule appellant's second issue."

- *"While Birnbaum did file a motion to appoint an auditor with the trial court, he **did not receive a ruling** on the motion. Therefore, he did not preserve his complaint for appeal"?* **ERRONEOUS**. See ***Pretrial Order*** (A.95). I moved to appoint an Auditor. I put in a supplement thereto. I requested hearings thereon. At every hearing, I presented the trial judge with a three-ring notebook with all the un-addressed motions, with a summary list on the cover. I moved for recusal for not appointing auditor. I sought **mandamus** (A.100) to make trial judge appoint auditor (denied). Finally, on Nov. 13, 2002, Judge Banner formally **DENIED MY MOTION** [28].
- Despite my claim of fraud, racketeering, obstruction of discovery, affidavits by numerous persons regarding the fraud, and my right to a court-appointed auditor under RCP Rule 172, this trial judge would not do so. If there ever was a case that required an auditor, this case was it! Also see my ***Summary Judgment Appendix*** (A.72)

Summary Judgment

"Birnbaum next complains of the trial court's no-evidence summary judgment on his RICO claims. **We review a no-evidence summary judgment** under the same legal sufficiency standard used to review a directed verdict, to determine whether the nonmovant produced **more than a scintilla** of probative evidence to raise a fact issue on the material questions presented. *Gen. Mills Rest., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 832-33 (Tex. App.-Dallas 2000, no. pet.)."

[28] Pretrial Order, Nov. 13, 2002. ***"motion for appointment of Auditor is in all things denied."***

- *"We review a no-evidence summary judgment … [for] more than a scintilla"?* I provided the trial judge with hours of depositions, and documents showing that Law Office did not even have an accounting system, VOLUMES and VOLUMES of court transcripts, court findings of "bad faith" on G. David Westfall, numerous person's affidavits regarding Westfall's fraud, etc.[29] See my ***Summary Judgment Appendix*** (A.72)

"Birnbaum asserted claims under sections 1962(a) and (c) of RICO. Under subsection (a), a person who has received income from a pattern of racketeering cannot invest that income in an enterprise, and under subsection (c), a person who is employed by or associated with an enterprise cannot conduct the enterprise's affairs through a pattern of racketeering. See *Whelan v. Winchester Prod. Co.*, 319 F.3d 22225, 231 n.2 (5th Cir. 2003). Elements common to all subsections of RICO are: (1) a person who engages in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *Whelan*, 319 F.3d at 229.

"Racketeering activity" is defined in section 1961(1) in terms of a list of state and federal crimes. See 18 U.S.C. $ 1961(1); *Bonton v. Archer Chrysler Plymouth, Inc.*, 889 F. Supp. 995, 1001 (S.D. Tex. 1995). It includes acts indictable under 18 U.S.C. 1341, relating to mail fraud. See 18 U.S.C. $ 1961(1)(B); *Whelan*, 319k F.2d at 231. The individual acts of "racketeering activity" are usually described as the "predicate offenses". *Bonton*, 889 F.Supp. at 1001. Any act that does not fall within RICO's definition of predicate offenses is not "racketeering activity." See *Heden v. Hill*, 937 F. Supp. 1230, 1242 (S.D. Tex. 1996) (citing H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989)). To establish continuity, plaintiffs must prove continuuity of racketeering activity, or its threat. Word of Faith, 90 Ff.3d at 122.

A "pattern of racketeering activity" requires at least two acts of racketeering activity. See *Whelan*, 319 F.3d 231 n.4. Although at least two acts of rackettring are necessary to constitute a pattern, two acts may not be sufficient. *Bonton*, 889 F.Supp. at 1003. To establish a pattern of racketeering activity, a plaintiff must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996) (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)). To establish continuity, plaintiffs must prove continuity of racketeering activity, or its threat. *Word of Faith*, 90 F.3d at 122.

Birnbaum asserts Law Office is a RICO enterprise through which Third Party Defendants conducted a pattern of racketeering. He alleges Third Party Defendants conducted a scheme whereby Law Office's clients were encouraged to file RICO suits against public officials, but failed to receive "honest service" or regular billing. Birnbaum asserts Third Party Defendants

[29] The trial judge ruled on all of it, and ruled it did not show a "civil RICO" case, and granted summary judgment. See ***Pretrial Order*** (A.95)

engaged in mail fraud in furtherance of this scheme because "almost every document on file in this case" was mailed at one time, including the fraudulent bill on which Law Office's claim was premised. Thus, he alleges the predicate act for purposes of RICO was mail fraud.

Mail fraud under 18 U.S.C. section 1341 "requires that (1) the defendant participate in a scheme or artifice to defraud, (2) the mails be used to execute the scheme, and (3) the use of the mails was 'caused by' the defendant or someone else associated with the scheme." *Bonton*, 889 F. Supp. At 1002. As noted in *Bonton*, "[a] RICO claim asserting mail fraud as a predicate act must allege how each act of mail fraud actually furthered the fraudulent scheme, who caused what to be mailed when, and how the mailing furthered the fraudulent scheme." *Bonton*, 889 F. supp. At 1002. The mail fraud statute "does not reach every business practice that fails to fulfill expectations, every breach of contract, or every breach of fiduciary duty." *Bonton*, 889 F. Supp. At 1002-1003. A plaintiff may not convert state law claims into a federal treble damage action simply by alleging that wrongful acts are a pattern of racketeering related to an enterprise. *Heden*, 937 F. supp. At 1242.

As summary judgment evidence, **Birnbaum filed affidavits of several unhappy clients of Law Office**. **Although Birnbaum also referred to deposition testimony** and pleadings from other lawsuits in his summary judgment response, **this evidence was not submitted to the trial court**. See *Quanaim v. Frasco Rest. & Catering*, 17 S.W.3d 30, 42 (Tex. App.-Houston [14th Dist.] 2000, pet. Denied) (verified summary judgment response was not summary judgment proof)."

- *"Birnbaum filed affidavits of several unhappy clients of Law Office"?* This evidence, looked at "in light most favorable", of course showed G. David Westfall's "pattern of racketeering activity", as did the transcript of G. David Westfall's involuntary bankruptcy proceeding, as did various courts' and the State Bar's finding of "bad faith".
- *"Although Birnbaum also referred to deposition testimony …… this evidence was **not submitted to the trial court**"*? **ERRONEOUS.** At summary judgment, Judge Banner ruled that each and every document I had did not show a civil RICO case, and denied each and every bit of my civil RICO evidence, and my civil RICO claim. See ***Pretrial Order*** (A.95) and ***Order Sustaining Motions for Summary Judgment*** (A.97).
- The trial judge denied me my best cause and evidence under civil RICO, by weighing the evidence himself. (I had asked for trial by jury)

"Birnbaum's summary judgment evidence establishes that several Law Office clients were encouraged to file RICO suits and did not receive regular billings from Law Office. Birnbaum alleges a scheme to defraud himself and others through these suits, and he offers his affidavit testimony to establish the bill mailed to him by Law Office was fraudulent. **He does not, however, offer summary judgment evidence regarding how mailing this fraudulent bill constitutes a pattern of racketeering activity**, or **furthers a "recognizable scheme formed with specific intent to defraud**," or presents a continued threat of criminal activity. See *Bonton*, 889 F. Supp. At 1003; see also *Word of Faith*, 90 F.3d at 122-24 (no continuity where alleged predicate acts are part of a single, lawful endeavor). Further, Birnbaum did not offer summary judgment evidence that Third party Defendants invested income from a pattern of racketeering activity in the alleged RICO enterprise or that his injury flowed directly from the use or investment of that income. Without such evidence, Birnbaum did not raise a genuine issue of material fact on his claim under RICO $ 19629a). See *Nolen v. Nucentrix Broadband Networks, Inc.*, 293 926, 929 (5th Cir.), cert. denied, 537 U.S. 1047 (2002) (for section 1962(a) claim, alleging injury from predicate racketeering acts themselves insufficient; injury must flow from use or investment of racketeering income). Summary judgment on Birnbaum's RICO claims was proper. We overrule Birnbaum's third issue."

- *"He [Birnbaum] does not, however, offer summary judgment evidence regarding how mailing this fraudulent bill constitutes a pattern of racketeering activity, or furthers a recognizable scheme formed with specific intent to defraud"*? How can there be fraud, without intent to defraud?
- *" how mailing this fraudulent bill constitutes a pattern of racketeering activity?"* Mailing a fraudulent bill is of course one predicate act of "mail fraud". Bringing a suit upon it, "using the mail", is another. Fraud in bankruptcy, from which this suit upon me came, another. PRESTO, a "pattern of racketeering activity" for the jury to see. See my responses to motions for summary judgment. Whole thing is of course a JURY issue.
- The panel makes a pretty good statement about the requirements of civil RICO.
- But I had downloaded the U.S. Fifth Circuit civil RICO "pattern jury instructions", and pleaded to each and every "issue of fact", and for summary judgment designated specific evidence to each and every issue of

fact raised by these instructions. See my ***Response to Westfall Motion for Summary Judgment*** (A.50). Similar responses to the other parties.[30]

- I had asked for **trial by jury** on my civil RICO cause and evidence, in a trial court, of course, not before this appeals panel.

Sanctions Order

"In his fourth issue, Birnbaum complains of the order imposing sanctions against him in favor of Christina Westfall and Podvin. He argues the sanction order is unlawful because it is a criminal sanction "imposed without full due criminal process," and does not state the basis for the sanctions award as required by rule 13 of the Texas Rules of Civil Procedure. **We agree with Birnbaum that the trial court's order awards sanctions without stating the basis for the award, and therefore does not meet the requirements of rule 13**. See *Murphy v. Friendswood Dev. Co.*, 965 S.W.2d 708, 709-10 (Tex. App.-Houston [1st Dist.] 1998, no pet.) ("Rule 13 is clear: the particulars of good cause 'must be stated in the sanction order.' . . . [T]he order here did not recite the particular reasons supporting good cause to issue the sanctions and did not include findings of fact and conclusions of law supporting good cause . . . we hold that the sanction order does not comply with Rule 13."). **This error, however, may be waived**. See *McCain v. NME Hospitals, Inc.*, 856 S.W.2d 751, 756 (Tex. App.-Dallas 1993, no writ)."

- *"We agree with Birnbaum that the trial court's order awards sanctions without stating the basis for the award, and therefore does not meet the requirements of rule 13*. THAT MAKES IT UNLAWFUL. PERIOD.
- *"This error, however, may be waived"*. "Waived" means knowingly giving up a right. **Why would I knowingly give up a right about an unlawful sanction against me. NONSENSE.**
- And what about my point that it is UNLAWFUL, because it is unconditional punishment[31], for a completed act, (i.e. not "coercive"), ***"imposed without full due criminal process"***? [32] SILENCE!

---

[30] Similar complete response was made to **Law Office**, **Christina Westfall**, and **Stefani Podvin**. Clerk's Record.

[31] Whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. **U.S. Supreme Court** in *United Mine Workers v. Bagwell, 512 U.S. 821 (1994)*

- Upholding a $62,000 unlawful sanction on purely procedural grounds offends the Constitution! (See also RCP Rule 1: "these rules shall be given a liberal construction")

"**Birnbaum did not bring either of his complaints about the sanctions order to the attention of the trial judge**. To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. See TEX. R. APP. P. 33.1. An objection must not only identify the subject of the objection, but it must state specific grounds for the ruling desired. Without a proper presentation of the alleged error to the trial court, a party does not afford the trial court the opportunity to correct the error. See McCain, 856 S.W.2d aat 755. While Birnbaum filed a motion to reconsider the sanctions, **he did not object to the specificity of the order or to the criminal nature of the sanctions**. **Birnbaum's only complaint about the specificity of the order was made in an untimely request for findings of fact** and conclusions of law filed more than twenty days after the date of the sanctions order. See TEX. R. CIV. P. 296 (request for findings of fact and conclusions of law shall be filed within twenty days after judgment is signed). **Therefore, the trial judge did not have the opportunity to correct the erroneous order**, and error was not preserved. See *McCain*, 856 S.W.2d at 755. Appellees have since filed a motion to allow filing of findings of fact and conclusions of law by the trial judge regarding the sanctions order, which was opposed by Birnbaum. We need not reach the question of whether the findings and conclusions may be filed at this time, as Birnbaum did not preserve his complaints about the sanctions order. We overrule appellant's fourth point of error."

- *"Birnbaum did not bring either of his complaints about the sanctions order to the attention of the trial judge"?* ERRONEOUS. See my ***Request for Findings*** (A.27), ***Notice of Past Due Findings*** (A.32), etc.
- *"he [Birnbaum] did not object to the specificity of the order or to the criminal nature of the sanctions"?* ERRONEOUS. See my ***Request for Findings*** (A.27), ***Notice of Past Due Findings*** A.32), etc.

[32] Whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. **U.S. Supreme Court** in *United Mine Workers v. Bagwell, 512 U.S. 821 (1994)*

- *"Birnbaum's only complaint about the specificity of the order was made in an untimely request for findings of fact"*? **ERRONEOUS**. The trial judge put *"Aug. 9"* on his ***Order on Motions for Sanctions*** (A.18), but did not ***"sign with the clerk"***, or let anybody know that he had "signed" it, till Aug. 21, and I first got notice of it on Aug. 22, 2002. **My Request filed Sept. 3, 2002 WAS timely filed**.
- How could these three honorable appeals judges have come to such erroneous opinion on *"untimely"*, when the stamp on my ***Request for Findings*** (A.27) clearly showed it was timely? (It also has a complete explanation about the "signed with the clerk" matter)
- *"Therefore, the trial judge did not have the opportunity to correct the erroneous order"?* What about my ***Notice of Past Due Findings*** (A.27), even my ***Motion*** (A.34) before this very same panel, to have him make Findings?
- Besides, the Panel's procedural analysis is devoid of Constitutional considerations: **The Sanction is patently unlawful.**

Recusal of Trial Judge

"Birnbaum complains the trial judge should have been recused. An evidentiary hearing was held before Judge Ron Chapman on Birnbaum's motion to **recuse Judge Paul Banner**, and Judge Chapman denied the motion. No reporter's record of this hearing is included in our record. Without a record of the proceedings, we cannot review **Judge Chapman's order** for abuse of discretion, and **nothing is presented for review**. See *Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439, 445 (Tex. App.-El Paso 1994), writ denied); *In re M.C.M.*, 57 S.W.3d 27, 33 (Tex. App.-Houston [1st Dist.] 2001, pet. Denied); TEX. R.CIV. P. 18a (f). Appellant's fifth point of error is overturned."

- *"nothing presented for review"* ? My issue is whether Judge Paul Banner should have been recused, not about *"Judge Chapman's order"*. One of the

points for my motion for recusal, was of course to "preserve" this point for appeal.

- I had asked for Judge Banner's recusal for not abiding by the Rules of Procedure, statutory law, and the mandates of the U.S. Supreme Court. That was and still is my point before this appeals court.

Fraud

"In his sixth issue, Birnbaum complains of "fraud, fraud, and more fraud." In his argument in support of this issue, **he contends he made no agreements with Law Office** regarding attorneys' fees and never accepted the terms of the retainer agreement. **The issue regarding any contractual relationship between Birnbaum and Law Office was resolved by jury**. We have no record of the testimony relevant to Birnbaum's acceptance of the contract. **Therefore, we presume the omitted portions of the record support the trial court's judgment**. See *Schafer v. Conner*, 813 S.W.2d 154, 155 (Trex. 1991) (per curiam) (in absence of a complete statement of facts, it is presumed that omitted evidence supports trial court's judgment). Birnbaum's sixth issue is overruled."

- *"he [Birnbaum] contends he made no agreements with Law Office"* ? **I made no such statement in by Brief**. I stated that our attorney retainer agreement was neither "open account" nor "contract", only a prepaid $20,000 *"to insure our [Westfall] availability in your matter"*, and that he [Westfall] *"reserved the right to terminate"* for NON-PAYMENT. That was his **ONLY remedy**. FRAUD, FRAUD, FRAUD
- *"The issue regarding any contractual relationship between Birnbaum and Law Office was resolved by jury"*? The jury was **not asked** the due process questions, i.e. whether there had been an agreement, whether it still existed, i.e. whether Westfall had abided by the agreement (not to incur large expenses without my approval, the "excused" issue). See ***Court's Charge*** (A.41) and my objections (A.38) and (A.40).

- *"Therefore, we presume the omitted portions of the record support the trial court's **judgment**"?* This was of course a **jury trial**, and I am not attacking the sufficiency of the evidence for the jury verdict. Only that the **VERDICT does not support the trial court's JUDGMENT**.

Due Process

"In his seventh issue, Birnbaum contends "due process demands a new trial." The argument presented does not contain citation to authority and **complains of the same rulings addressed in other parts of his brief. The issue presents nothing for our review**. See TEX. R. APP. P. 38.1 (h) (brief must contain clear and concise argument for contentions made, with appropriate citations to authorities and to the record). In his reply brief, Birnbaum also complains of incurable jury argument, and includes a reporter's record of the closing argument from trial in the appellate record. However, the record reveals Birnbaum did not object to the argument at the time it was made, and so has failed to preserve error. See *Barras v. Monsanto Co.*, 831 S.W.2d 859, 865 (Tex. App.-Houston [14th Dist.] 1992, writ denied) (complaint of error in closing argument waived by failure to object). Birnbaum's seventh issue is overruled.

- *"complains of the same rulings addressed in other parts of his brief"?* My Brief refers to my ***Motion for New Trial*** (excruciatingly detailed, with affidavits and exhibits), with seven (7) specific Points:
- Point 7, **"For jury misconduct by the judge himself"**, for going into the jury room for long periods, even during deliberations. There was no bailiff or other court personnel.
- Point 4, **"For allowing Plaintiff to submit 'surprise' jury issues not in its pleadings"?** (handed them to me, last day of trial, just before Argument. I of course objected, even in hand-writing, and immediately filed, but to no avail)
- Point 2, **"For not making Plaintiff [Westfalls] abide by the rules of discovery**. These the same "The Westfalls" in Westfall v. King Ranch No. 05-92-00262-CV, Fifth Circuit Dallas ***("King Ranch alleges that for almost eighteen months the Westfalls engaged in a campaign of delay, deceit, and***

disobedience to prevent King Ranch from getting the requested discovery")

- Point 9, **"For absurdly excessive 'legal fee' damages"**.
- *"The issue presents nothing for review"*? How about the trial judge not making the Westfalls abide by discovery, allowing surprise jury issues, and jury misconduct by the trial judge himself by mixing with the jury, for absurdly excessive 'legal fee' damages? In both the $59,000 judgment, and in the whapping $62,000[33] "sanction judgment" for having made a civil RICO pleading[34]. And how about **TWO** (2) judgments, in the same cause[35]?

"Having overruled Birnbaum's issues, we affirm the judgment and orders of the trial court.

_____
MARK WHITTINGYTON
JUSTICE"

CONCLUSION AND PRAYER

The Panel's analysis is purely procedural, and devoid of Constitutional considerations. Nowhere does the Panel address my key point that assessing a punitive sanction for having made a civil RICO pleading violates the LAW.[36]

---

[33] A trial court must first consider ***and*** impose less stringent sanctions to determine whether lesser sanctions will promote compliance and discourage further abuse. *Jones v. Andrews*, 873 S.W.2d 102, 106 (Tex. App.--Dallas 1994, no writ). As quoted in *Rawles v. Builders Structural Services*, Texas 5th No. 05-96-00467-cv

[34] **Rule 13 requires the trial court to examine the acts or omissions of a party or counsel, not the legal merit of a party's pleadings**. *See id.*; *McCain*, 856 S.W.2d at 757. As quoted in *Rawles v. Builders Structural Services*, Texas 5th No. 05-96-00467-cv

[35] RCP Rule 301. Judgments. "**THE** JUDGMENT of the court shall conform, etc." The ***"Order on Motions for Sanctions"*** states : THIS JUDGMENT RENDERED ON JULY 30, 2002, AND SIGNED THIS 9TH day of Aust, 2002. (Not actually "signed with the clerk" till August 21, 2002. I received NO KNOWLEDGE of it till August 22, 2002. My Request for ***Findings and Conclusions*** WAS TIMELY, as was my ***Notice of Past Due Findings and Conclusions***.

[36] "It was, however, clearly established that **filing a lawsuit** was **constitutionally protected conduct**. See Milhouse v. Carlson, 652 F.2 d 371, 37 3-74 (3d C ir. 1981); see also California Motor Transport Co. v. Trucking Unlimited,

Through the prism of this UNLAWFUL judgment, it is also abundantly clear that the entire proceedings in the trial court were also unlawful, and that the **TWO** (2) judgments[37] against me should and must be officially declared null and void.

Assessing a [criminal] punishment of $62,255 for having made a civil RICO defense is NOT OBJECTIVELY REASONABLE either, and especially so in light of a finding that:

> *"Mr. Birnbaum may be **well-intentioned** and may believe that he **had** some kind of real claim as far as RICO there **was** nothing presented to the court in any of the proceedings since I've been involved that suggest he **had** any basis in law or in fact to support his [civil RICO] suits against the individuals"* (all completed acts, making the sanction purely punitive)

Also, the Panel's analysis is out of step with the U.S. Supreme Court:

> *"[a] Congressional objective [in enacting civil RICO with treble damages] of encouraging civil litigation not merely to compensate victims but also to turn them into **private attorneys general**, supplementing Government efforts by **undertaking litigation in the public good**". Rotella v. Wood et al., 528 U.S. 549 (2000)*

---

404 U.S. 508, 510 (1972) (access to courts is one aspect of the First Amendment right to petition the government for grievances). Moreover, it was also clearly established that the government cannot retaliate against someone for engaging in constitutionally protected activity in a way that would chill a reasonable person in the exercise of the constitutional right. See *Rutan v. Republican Party of Illinois*.", 497 U.S. 62, 73 , 76 n.8 (1990).

[37] The ***"Order on Motions for Sanctions"*** is unconditional, not "coercive" : "THIS JUDGMENT RENDERED"

Documents in the cause on file with the clerk. If the trial judge had duly appointed an AUDITOR per RCP Rule 172, it would have cut through all the fraud of "open account" for "legal services" *(*Westfall: *"We just simply keep time records")*[38], and the suit against me not expanded as it did!

If there ever was a case that would have benefited from the appointment of an auditor per RCP Rule 172, this was it, and we would all not be here today.

Sincerely,

_____

Udo Birnbaum, pro se
540 VZ CR 2916
Eustace, Texas 75124
(903) 479-3929 phone and fax

Certificate of Service

This is to certify that on this the _____ day of November, 2003 a copy of this document, together with the referenced Civil Appendix, was sent by Certified Mail to attorney Frank C. Fleming at PMB 305, 6611 Hillcrest Ave., Dallas Texas 75205-1301.

_____

Udo Birnbaum

[38] Deposition of Westfall, Civil Appendix starting page 66, and specifically page 73 line 11 through page 74 line 8. Part of my summary judgment evidence. (Clerk's Record 213, Exhibit 9, 215 Exhibit 9A: "Account Work Sheet")