

**OVERVIEW OF TEXAS LAW
ON SPOILIATION**

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OVERVIEW OF TEXAS LAW ON SPOILIATION

The leading Texas Supreme Court case on spoliation -- which is the improper destruction of evidence relevant to a case -- is *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998). See also *Walker v. Thomasson Lumber Co.*, 203 S.W.3d 470, 477 (Tex. App.--Houston [14th Dist.] 2006, no pet.) (spoliation is the improper destruction of evidence); *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 919 n.3 (Tex. App.--Houston [14th Dist.] 2002, pet. denied) (same); *Malone v. Foster*, 956 S.W.2d 573, 577 (Tex. App.--Dallas 1997) (same), *aff'd*, 977 S.W.2d 562 (Tex. 1998). In the case of *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003), the Texas Supreme Court revisited spoliation after five years of the appellate courts interpreting *Trevino* -- focusing on the giving of a jury instruction. Generally, it agreed with and summarized that development of spoliation law. *Id.* at 721-24.

I. THRESHOLD QUESTIONS TO DETERMINE WHETHER SPOILIATION OCCURRED

There are several threshold questions that need to be answered once an allegation of spoliation is made -- all of which are legal questions for the trial court. *Trevino*, 969 S.W.2d at 954-55 (Baker, J., concurring); *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 666 (Tex. App.--Houston [1st Dist.] 1998, no pet.); *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 471 (Tex. App.--San Antonio 1998, pet. denied). Those questions are: (1) whether there was a duty to preserve evidence; (2) whether the alleged spoliator breached that duty; and (3) whether the spoliation prejudiced the non-spoliator's ability to present its case or defense. See, e.g., *Trevino*, 969 S.W.2d at 954-55 (Baker, J., concurring); *Adobe Land Corp. v. Griffin, L.L.C.*, ___ S.W.3d ___, 2007 WL 2012804, *3 (Tex.App.--Fort Worth July 12, 2007, no pet. h.); *Offshore Pipelines*, 984 S.W.2d 654, 666 (Tex. App.--Houston [1st Dist.] 1998, no pet.).

A. Duty to Preserve?

The first inquiry is whether the alleged spoliator was under any obligation or duty to preserve evidence. *Johnson*, 106 S.W.3d at 722. That duty may be statutory, regulatory, or ethical. *Trevino*, 969 S.W.2d at 955 (Baker, J., concurring). Unless there is a statute specifically governing a certain type evidence, the duty to preserve evidence pre-litigation is a separate duty inquiry. Such a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control has potential materiality and relevancy to that claim. See, e.g., *Johnson*, 106 S.W.3d at 722; *Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 58 (Tex. App.--San Antonio 2006, no pet.); *Martinez v. Abbott Laboratories*, 146 S.W.3d 260, 270 (Tex. App.--Fort Worth 2004, pet. denied). However, the duty is not so encompassing as to require a litigant to keep or retain every document in its

possession. *Trevino*, 969 S.W.2d at 957 (Baker, J., concurring). Basically, the trial court must determine whether evidence was destroyed pre-filing of suit where the alleged spoliator knew or should have known or it was reasonably foreseeable that litigation would ensue. *Trevino*, 969 S.W.2d at 956 (Baker, J., concurring). Justice Baker suggests using the *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993)(orig. proceeding), analysis with the modification that the non-spoiling party need not prove subjective anticipation of a lawsuit. It is simply a fact question for the trial court to decide.

The second part of the duty inquiry is what evidence must a party preserve. The answer is that a party is under a duty to preserve what it knows or reasonably should know is relevant to the case, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, or is the subject of a pending discovery sanction. *Trevino*, 969 S.W.2d at 956 (Baker, J., concurring); *see also Adobe Land Corp.*, 2007 WL 2012804, at *4, 6 (court rejects argument that defendant did not have duty to preserve allegedly contaminated chemical until plaintiff provided it with the “lot number” of the chemical that was applied to their fields; rather, duty arose when plaintiff filed its petition to preserve all samples of the chemical that were then in its possession and *potentially* relevant to the claims being asserted).

Appellate inquiry into the duty is based on an objective standard of determining whether a party had notice of both the underlying claim and of the potential relevance of the evidence in question -- not the movant’s subjective interpretation of the alleged spoliator’s actions. *Johnson*, 106 S.W.3d at 722; *Adobe Land Corp.*, 2007 WL 2012804, at *5 (finding a duty to preserve).

B. Breach of Duty?

The next threshold question is whether the duty to preserve was breached. *Trevino*, 969 S.W.2d at 957 (Baker, J., concurring). Parties need not take extraordinary measures to preserve evidence; however, they must exercise reasonable care in preserving evidence. Thus, Justice Baker would hold parties accountable both for negligent and intentional spoliation. The distinction between the two would lie in the severity of the sanction. *Id.* at 957; *Adobe Land Corp.*, 2007 WL 2012804, at *5 (finding a duty to preserve).

The alleged spoliator can defend against the charge of spoliation by providing other explanations for the destruction -- *i.e.*, it was beyond his control, or done in the ordinary course of business. Because these threshold questions are questions of law for the court, the trial court will decide whether there was a breach of the duty to preserve evidence. *Trevino*, 969 S.W.2d at 957 (Baker, J., concurring).

C. Prejudice to Nonspoliator?

In order for the nonspoliator to be entitled to a remedy, he must establish prejudice to his case, to wit: the spoliation of evidence hinders his ability to present his case or defense. *Id.* at 957-58; *see Brewer*, 862 S.W.2d at 159-60 (spoliation instruction not justified in absence of evidence showing harmful nature of missing evidence and whether there was other evidence available that was cumulative of such proof). The primary focus of the prejudice requisite for a spoliation instruction is the relevancy of the destroyed evidence. The more relevant, the more harm the spoliator should suffer from its destruction. In determining prejudice, the trial court must consider whether the destroyed evidence was cumulative of other competent evidence the party can use and whether the evidence supports a key issue in the case. *Trevino*, 969 S.W.2d at 958 (Baker, J., concurring); *see also, e.g., State v. Gonzalez*, 82 S.W.3d 322, 330 (Tex. 2002) (“[w]e need not decide whether the spoliation instruction was erroneous. That is because Gonzalez produced no evidence showing that the missing logbook would have contained any information relevant to the ‘actual notice’ issue under subsection (a)(3)”); *Capital One Bank v. Rollins*, 106 S.W.3d 286, 297 (Tex. App.--Houston [1st Dist.] 2003, no pet.) (destruction of envelopes could not give rise to spoliation claim in context of suit to recover late fees because envelopes would not have demonstrated when defendant received customers’ payments); *Armstrong v. Norris Cylinder Co.*, 922 S.W.2d 210, 212 (Tex. App.--Texarkana 1996, writ dism’d w.o.j.) (“master sheet,” which listed names of employees who might be affected by reduction in workforce was irrelevant to plaintiff’s worker’s compensation retaliation claim; thus, no spoliation); *Brewer*, 862 S.W.2d at 159-60 (evidence was irrelevant and, thus, no prejudice resulted from its destruction).

In making the determination of harm or prejudice, the court should also look at the availability of other evidence to take the place of the missing information. *Trevino*, 969 S.W.2d at 958 (Baker, J., concurring); *Offshore Pipelines*, 984 S.W.2d at 666; *see also Spector v. Norwegian Cruise Line Ltd.*, 2004 WL 637894 (Tex. App.--Houston [1st Dist.] Mar. 30, 2004, no pet.) (not designated for publication). For example, a party is not prejudiced if it has other evidence available to it that contains the same information as the evidence that was destroyed. *See Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 227 (Tex. App.--Amarillo 2003, no pet.) (verbatim hand-written copy of missing nurse’s notes available to plaintiffs at trial); *Malone*, 977 S.W.2d at 562 (available nursing report incorporated contents of destroyed incident report); *but see Adobe Land Corp.*, 2007 WL 2012804, at *7 (plaintiff did not have access to any other evidence which would provide them with the same information they sought to obtain by testing a sample of the chemical sprayed on their fields; therefore, the spoliation severely hindered their ability to present their case).

D. Preliminary Hearing

The trial court may conduct a preliminary hearing to take testimony regarding the reasons for the unavailability of the evidence, the importance of the missing evidence, and the availability of other cumulative proof. *Trevino*, 969 S.W.2d at 954 (Baker, J., concurring); *Offshore Pipelines*, 984 S.W.2d at 667. If after hearing the testimony, the trial court determines that the evidence is relevant, that the accused party had a duty to preserve evidence, which it breached, either negligently or intentionally, and that loss will prejudice the other party, the trial court must then exercise its discretion and decide what the appropriate remedy for spoliation is.

II. REMEDIES FOR SPOLIATION

A trial court has broad power to protect against spoliation and has discretion “to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available.” *Johnson*, 106 S.W.3d at 721; *Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 58 (Tex. App.--San Antonio 2006, no pet.). The remedies a nonspoliator might seek include discovery sanctions, exclusion of evidence or expert testimony based on the destroyed object or document, and a jury instruction on presumption. *Trevino*, 969 S.W.2d at 958-60 (Baker, J., concurring); *Kang v. Hyundai Corp.*, 992 S.W.2d 499, 502 (Tex. App.--Dallas 1999, no pet.).

A. Sanctions for Discovery Abuse

Under TRCP 215(3), a trial court has broad discretion to sanction parties for discovery abuse, which would include destruction of evidence during discovery. If the destruction occurs pre-litigation, the courts have inherent power to sanction because such interferes with the court’s ability to hear evidence and accurately determine the facts. *Trevino*, 969 S.W.2d at 958-59.

1. Discovery Sanctions

Discovery sanctions may include: dismissal of the lawsuit, entry of a default judgment, disallowing discovery by the offending party, assessing discovery or court costs against the spoliating party or his attorney, striking part of the party’s pleadings, or holding the party in contempt. *See id.* at 959; Katz & Muscaro, “Spoilage of Evidence--Crimes, Sanctions, Inferences, and Torts,” 29 TORT & INS. L. J. 51, 54 (1993). The choice of sanctions is within the trial court’s discretion -- with willful violations justifying severe sanctions. *San Antonio Press, Inc. v. Custom Bilt Machinery*, 852 S.W.2d 64, 67 (Tex. App.--San Antonio 1993, no writ); *Plorin v. Bedrock Foundation & House Leveling Co.*, 755 S.W.2d 490, 490-92 (Tex. App.--Dallas 1988, writ denied).

Important factors to weigh include the degree of the spoliator's culpability and the prejudice the nonspoliator suffers. *San Antonio Press*, 852 S.W.2d at 67.

2. If Death Penalty Sanction, Must Meet Requisites of *TransAmerican*

Both the United States and the Texas Supreme Courts have made it clear that the imposition of case-determinative sanctions invoke constitutional due process considerations because they deprive a party of the right to have its case heard on the merits; therefore, death penalty sanctions are a remedy of last resort to be employed only in the most egregious of circumstances. See *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-08, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); *Hamill v. Level*, 917 S.W.2d 15, 16 (Tex. 1996). The following "death penalty sanctions" analysis is as equally applicable to a spoliation case, as to the more common discovery abuse cases from which these principles are primarily derived. See *Trevino v. Ortega*, 969 S.W.2d 950, 959 (Tex. 1998) (Baker, J., concurring)(in spoliation case, death penalty sanctions are reserved for the most egregious cases because of constitutional due process considerations).

Sanctions that terminate or inhibit the presentation of the merits of party's claims for decision are authorized by Texas Rule of Civil Procedure 215 and include exclusion of evidence. *Daniel v. Kelley Oil Corp.*, 981 S.W.2d 230, 234 (Tex. App.--Houston [1st Dist.] 1998, pet. denied). Although a trial court has broad discretion in imposing sanctions, when sanctions are so severe as to preclude presentation of the merits, that discretion is limited by the requirement that the sanctions be "just." *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917-18 (Tex. 1991). The four factors to consider when determining whether the sanctions are just are: (1) the sanction must bear a direct relationship to the offensive conduct; (2) the sanction must not be excessive; (3) the trial court must first impose a less stringent sanction; and (4) the trial court should not deny a trial on the merits, unless it finds that the sanctioned party's conduct "justifies a presumption that its claims or defenses lack merit" and that "it would be unjust to permit the party to present the substance of that position . . . before the court." *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849-50 (Tex. 1992)(orig. proceeding); *TransAmerican*, 811 S.W.2d at 918. Thus, the record must reflect that the court considered the availability of less stringent sanctions before imposing a death penalty sanction. *Otis Elevator Co. v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993).

The court should also apply sanctions on a case-by-case basis and be cognizant of constitutional due process considerations in order to avoid depriving a party of the right to have his case heard on the merits. *TransAmerican*, 811 S.W.2d at 959; see also *San Antonio Press, Inc. v. Custom Bilt Machinery*, 852 S.W.2d 64, 67 (Tex. App.--San Antonio 1993, no writ) (important factors to weigh in spoliation case include the degree of the spoliator's culpability and the prejudice the nonspoliator suffers). Sanctions that by their severity prevent a decision on the merits of a case cannot be justified "absent a

party's flagrant bad faith or counsel's callous disregard for the responsibilities of discovery." *TransAmerican*, 811 S.W.2d at 918. Even then, lesser sanctions must first be tested to determine whether they are adequate to secure compliance, deterrence, and punishment of the offender. *Id.*; see also *In re Barnes*, 956 S.W.2d 746, 749 (Tex. App.--Corpus Christi 1997, orig. proceeding)(sanction order not "just" because court did not implement lesser sanctions before imposing death penalty sanction of dismissal). As the Supreme Court has often emphasized,

Case determinative sanctions may be imposed in the first instance only in exceptional cases when they are clearly justified and it is fully apparent that no lesser sanctions would promote compliance with the rules.

GTE Communications Systems Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex. 1993)(orig. proceeding)(holding that there was no reason on that record that lesser sanctions would not have promoted compliance with discovery).

Given the foregoing principles, death penalty sanctions have rarely been upheld by appellate courts and when they have the circumstances have been egregious and far different from the record in the instant case. In Texas, the only reported death penalty sanction for spoliation of evidence that has been affirmed is that in *Daniel v. Kelley Oil Corp.*, 981 S.W.2d 230 (Tex. App.--Houston [1st Dist.] 1998, pet. denied)(*en banc*). There the trial court found that the plaintiff had manufactured evidence by way of a tape recording with the defendant employer, which had been altered. 981 S.W.2d at 235. The majority in *Daniel* concluded that the striking of plaintiff's pleadings and entry of a take-nothing judgment were "just" because the fabrication of physical evidence is a third degree felony; accordingly, such intentionally egregious behavior warranted punishment that placed the guilty party in a worse position than she had been in. The lesser sanction of simply excluding the tape from evidence would not have punished the plaintiff because she would not have been placed in any worse position; therefore, death penalty sanctions were warranted. *Id.* at 235.

Even in that egregious situation, the dissent, joined by three justices, would not have upheld the death penalty sanctions because the case was a hotly contested "swearing match" where the plaintiff denied altering the tape in any way, arguing that the gaps were caused by the fact that the tape recorder was on "auto mode." *Id.* at 236 (Mirabal, J., dissenting). The dissent articulated its concern as follows:

I am very concerned by the prospect that a trial judge can mete out the death penalty of striking pleadings and entering a take-nothing judgment based on the trial judge believing one set of witnesses in a hotly contested matter. I agree with the following principle articulated by the Corpus Christi Court of Appeals:

[A] trial court may not effectively adjudicate the merits of a case based on testimony of a party during a sanctions hearing because he was later impeached on testimony given at the hearing. The witness' credibility should be tested when the case is tried. Otherwise, a trial court could at any time interrupt a trial proceeding if it believed a witness was being untruthful, and simply enter a default against the party procuring that witness for that reason. *Lanfear v. Blackmon*, 827 S.W.2d 87, 91 (Tex. App.--Corpus Christi 1992, orig. proceeding).

Id. at 236 (Mirabal, J., dissenting).

In *TransAmerican*, the Texas Supreme Court held that discovery sanctions must be measured by two overarching standards:

First, a direct relationship must exist between the offensive conduct and the sanction imposed. . . . Second, just sanctions must not be excessive. . . . A sanction imposed for discovery abuse should be no more severe than necessary to satisfy its legitimate purposes.

811 S.W.2d at 917. Thus, the Supreme Court concluded that a court may not use a death penalty sanction to deny a litigant a decision on the merits unless the court finds the sanctioned party's conduct "justifies a presumption that its claims or defenses lack merit." *Id.* at 918; *Zappe v. Zappe*, 871 S.W.2d 910 (Tex. App.--Corpus Christi 1994, no writ)(trial court abused discretion in striking pleadings because discovery abuse did not rise to the level of flagrant abuse).

B. Exclusion of Evidence

Exclusion of evidence or testimony the spoliating party is attempting to admit adduced from the destroyed evidence is another remedy available to the nonspoliating party. *Trevino*, 969 S.W.2d at 960 (Baker, J., concurring).

In addition, the issue of whether evidence concerning the spoliation is admissible is within the trial court's discretion. *Malone*, 977 S.W.2d at 563; *Lively v. Blackwell*, 51 S.W.3d 637, 641 (Tex. App.--Tyler 2001, pet. denied); TEX. R. EVID. 104(a). That ruling is reviewed for abuse of discretion. *Lively*, 51 S.W.3d at 641. In *Lively*, the court recognized Lively's frustration at not having an opportunity to introduce a crucial piece of evidence such as the videotape that was supposedly taken of the surgical procedure at issue; however, Lively did not establish that the recording was actually made or that defendant destroyed the tape. Therefore, the court concluded that the probative evidence Lively presented of the alleged spoliation was outweighed by the potential for unfair prejudice and confusion of the issues was great; and it affirmed the trial court's exclusion

of Lively's spoliation evidence. *Id.* at 642; *cf. State Dept. of Highways & Public Transp. v. Gonzalez*, 82 S.W.3d 322 (Tex. 2002)(where Gonzalez produced no evidence showing that missing logbook would have contained any information relevant to the disputed issue, the jury could not presume that the missing logbook contained unfavorable evidence; therefore, spoliation instruction should not have been given).

C. Jury Charge Instruction on Presumption

A jury instruction on spoliation is another means of dealing with spoliation within the trial court's discretion. *See, e.g., Trevino*, 969 S.W.2d at 960 (Baker, J., concurring)(when a trial court determines that a party improperly destroyed evidence, it may submit a spoliation presumption instruction to the jury); *Middleton*, 982 S.W.2d at 470 (instruction shifts the burden of proof and includes a statement that the spoliating party has either negligently or intentionally destroyed evidence and therefore the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported); *Watson v. Brazos Electric Power Co-op, Inc.*, 918 S.W.2d 639, 643 (Tex. App.--Waco 1996, writ denied)(error not to submit spoliation instruction where spoliation established).

Under TRCP 277, a trial court has broad discretion in instructing juries; that discretion is likewise broad where allegations of spoliation exist. *Trevino*, 969 S.W.2d at 953; *Lively*, 51 S.W.3d at 642-43; *Offshore Pipelines*, 984 S.W.2d at 667. When a trial court determines that a party improperly destroyed evidence, it may submit a spoliation presumption instruction. *Trevino*, 969 S.W.2d at 960 (Baker, J., concurring); *Watson*, 918 S.W.2d at 643 (error not to submit spoliation instruction where spoliation established).

1. Two Types of Presumptions

The use of a spoliation instruction has been limited to two circumstances: (1) the deliberate destruction of relevant evidence; and (2) the failure of a party to produce relevant evidence or to explain its non-production. *Johnson*, 106 S.W.3d at 721; *Gilmore v. SCI Texas Funeral Services, Inc.*, ___ S.W.3d ___, 2007 WL 2325811, at *9 -10 (Tex. App.--Waco Aug. 15, 2007, pet. filed); *Anderson v. Taylor Publ'g Co.*, 13 S.W.3d 56, 61 (Tex. App.--Dallas 2000, pet. denied); *Middleton*, 982 S.W.2d at 470-71.

a. Intentional Destruction of Evidence

Depending on the severity of the prejudice resulting from the particular evidence destroyed, one of two types of presumptions may arise. *See Trevino*, 969 S.W.2d at 960 (Baker, J., concurring); *Felix v. Gonzalez*, 87 S.W.3d 574, 580 (Tex. App.--San Antonio 2002, pet. denied); *Middleton*, 982 S.W.2d at 470. The more severe one is the presumption, which is used when the nonspoliating party cannot prove its prima facie case

without the destroyed evidence. That instruction shifts the burden of proof and includes a statement that the spoliating party has either negligently or intentionally destroyed evidence and therefore the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. The instruction should also include a statement that the spoliating party bears the burden to disprove the presumed fact or issue. This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome. *Trevino*, 969 S.W.2d at 960-61 (Baker, J., concurring). This presumption is only applicable when there is deliberate destruction of evidence. *Wal-Mart*, 982 S.W.2d at 470.

A party who has deliberately destroyed evidence is presumed to have done so because the evidence would have been unfavorable to the destroying party. *See, e.g., Lively*, 51 S.W.3d at 643; *Ordonez v. M.W. McCurdy & Co., Inc.*, 984 S.W.2d 264, 273 (Tex. App.--Houston [1st Dist.] 1998, no pet.); *Williford Energy Co. v. Submersible Cable Servs., Inc.*, 895 S.W.2d 379, 389-90 (Tex. App.--Amarillo 1994, no writ); *San Antonio Press, Inc. v. Custom Bilt Machinery*, 852 S.W.2d 64, 65 (Tex. App.--San Antonio 1993, no writ); *H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex. Civ. App.--Waco 1975, writ dismissed).

The spoliation presumption arises because of a suspicion that the spoliating party is concealing evidence that is unfavorable to it. If the circumstances surrounding the destruction of evidence is such that this suspicion is dispelled, the logical basis for the presumption is removed, and the presumption is rebutted. Thus, while the intentional, deliberate destruction of evidence by a party creates a presumption that the evidence would have been unfavorable to the destroying party, *Ordonez*, 984 S.W.2d at 273, that presumption can be rebutted by showing that the evidence in question was not destroyed with fraudulent intent or purpose. *Id.* at 273.

In *H.E. Butt Grocery Co. v. Bruner*, the plaintiff slipped and fell on an onion stalk. 530 S.W.2d at 342. The court of appeals held that because HEB did not explain why the onion stalk was “gotten rid of,” such raised an unrebutted presumption that the evidence was not favorable to the defendant. Such a presumption when unrebutted can establish a fact in issue -- *i.e.*, that the stalk would have shown that it was sufficiently stepped on and mashed so as to lead to the conclusion that it had lain on the floor for a sufficient period of time that defendant should have discovered it and removed it. *Id.* at 344. Subsequent interpretations of *Bruner* indicate that the destruction of evidence must be done in a bad faith attempt to preclude the opposing party from using that evidence at trial. *See, e.g., Williford Energy*, 895 S.W.2d at 390; *Brewer*, 862 S.W.2d at 160; *Vick v. Texas Employment Commission*, 514 F.2d 734, 737 (5th Cir. 1975) (applying Texas law and holding that “[t]he adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant. . . . [T]he circumstances of the act must

manifest bad faith.”); *see also Newton v. General Manager of Scurlock’s Supermarket*, 546 S.W.2d 76, 79 (Tex.Civ.App.--Corpus Christi 1976, no writ) (employees were not attempting to intentionally destroy evidence or “cover up” the apparent nature of the plaintiff’s fall, but were merely attempting to clean the floor). The San Antonio Court of Appeals has been stringent with regard to allowing a spoliation instruction, requiring a showing that the evidence was destroyed with fraudulent intent or purpose and not within the standard operating procedures of the business. *See Crescendo Investments, Inc. v. Brice*, 61 S.W.3d 465, 479 (Tex. App.--San Antonio 2001, pet. denied); *Aguirre v. South Texas Blood & Tissue Center*, 2 S.W.3d 454, 457-58 (Tex. App.--San Antonio 1999, pet. denied).

b. Party Controlling Evidence Cannot Explain Its Non-Production

Under the second circumstance, the presumption arises because the party controlling the missing evidence cannot explain its failure to produce it. *Watson*, 918 S.W.2d at 643. “Failure to produce evidence within a party’s control raises the presumption that if produced it would operate against him, and every intendment will be in favor of the opposite party.” *Brewer*, 862 S.W.2d at 159. That presumption is effected in the form of a jury instruction. *Tucker v. Terminix International Co.*, 975 S.W.2d 797, 799 (Tex. App.--Corpus Christi 1998, pet. denied).

This presumption does not apply where evidence is merely lost or done away with in the ordinary course of business. *Williford Energy*, 895 S.W.2d at 390; *Brewer*, 862 S.W.2d at 160. Courts will not infer spoliation or destruction of evidence, intentional or negligent, merely because it is missing. *Brewer*, 862 S.W.2d at 160; *Ordonez*, 984 S.W.2d at 274 (holding not abuse of discretion to refuse spoliation instruction where no evidence that log books were destroyed for the purpose of concealing them from plaintiff, but rather were destroyed in normal and routine course of business); *Newton*, 546 S.W.2d at 79 (Tex.Civ.App.--Corpus Christi 1976, no writ)(no presumption because chicken blood wiped from floor in regular course of business was for safety of shoppers and there was no evidence of intent to destroy evidence). Furthermore, the presumption does not come into play unless and until the opposing party introduces evidence harmful to the party in control of the missing evidence. *Brewer*, 862 S.W.2d at 159; *see also Tucker*, 975 S.W.2d at 799; *Watson*, 918 S.W.2d at 643.

This second type of presumption is less severe. It is a rebuttable presumption. *Trevino*, 969 S.W.2d at 960 (Baker, J., concurring); *see also Felix*, 87 S.W.3d at 580. The presumption itself has probative value and may be sufficient to support the nonspoliating party’s assertions. A party’s silence in this circumstance strengthens the probative force of the affirmative proof and itself has a certain probative force. *Conditt v. Morato*, No. 02-06-214-CV, 2007 WL 2693968, at *3 (Tex. App.--Fort Worth Sept. 13, 2007, no pet. h.)(mem. op.); *see also Flournoy v. Wilz*, 201 S.W.3d 833, 837 (Tex. App.--Waco 2006)(a jury may draw adverse inferences against parties who refuse to testify in

response to probative evidence offered against them), *rev'd on other grounds*, 228 S.W.3d 674 (Tex. 2007). However, it does not relieve the nonspoliating party of the burden to prove each element of its case. *Trevino*, 969 S.W.2d at 960-61 (Baker, J., concurring); *Fulgham v. FFE Transp. Servs., Inc.*, No. 05-01-01040-CV, 2005 WL 1621425, at *3 (Tex. App.--Dallas July 12, 2005, pet. denied). This second presumption is implicated only when the party controlling relevant evidence does not produce it and does not offer testimony explaining its non-production to rebut his opponent's harmful evidence. *Wal-Mart*, 982 S.W.2d at 470. If the non-producing party testifies as to the substance or contents of the missing evidence, the opposing party is not entitled to the presumption. *Brewer*, 862 S.W.2d at 159.

Some jurisdictions make a distinction between intentional and negligent spoliation to argue that only intentional spoliation should support the submission of a jury instruction. *See Battocchi v. Washington Hospital Center*, 581 A.2d 759, 765-66 (D.C. Cir. 1990)(distinguishing deliberate destruction of evidence from "simple failure to preserve" evidence; must give instruction if absence of evidence is due to gross indifference or to reckless disregard for the relevance of the evidence to a possible claim). One basis for that argument in Texas is *Vick v. Texas Employment Commission*, which states that "[t]he adverse inference to be drawn from the destruction of records is predicated on bad conduct of the defendant. . . . The circumstances of the act must manifest bad faith." 514 F.2d 734, 737 (5th Cir. 1975)(applying Texas law). However, Baker's concurrence in *Trevino*, 969 S.W.2d at 957 dismisses that distinction -- stating whether negligent or intentional, the spoliator should be held accountable.

It is worth noting that the San Antonio Court of Appeals in *Wal-Mart v. Middleton*, while distinguishing between *Brewer* and *Watson*, makes a passing reference to the *Watson* court's holding that the trial court erred in failing to give a spoliation instruction -- finding that *Watson* is probably correct because the destruction was intentional, as contrasted with *Brewer* where it was not. In addition, in *Brewer*, the defendants came forward with evidence which existed contemporaneously with the missing evidence, making that evidence more trustworthy than that in *Watson*.

2. Sample Spoliation Presumption Instructions

a. Instructions Approved by an Appellate Court

The following instructions have been approved by an appellate court:

You are instructed that if there is evidence that is pertinent to the issues in this cause, which was in the exclusive possession and control of a party and which cannot be produced, and its disappearance or non-production has not been satisfactorily explained, then you may consider that such evidence

contained information adverse to the position taken by the party who was in the possession.

Texas Elec. Co-op., 171 S.W.3d at 208

You are instructed that, when a party has possession of a piece of evidence at a time he knows or should have known it will be evidence in a controversy, and thereafter he disposes of it, alters it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it. If you find by a preponderance of the evidence that Cresthaven Nursing Residence had possession of original, unaltered nurses notes pertaining to Wanda Granger at a time it knew or should have known they would be evidence in this controversy, then there is a presumption that the original, unaltered nurses notes pertaining to Wanda Granger, if produced, would be unfavorable to Cresthaven Nursing Residence. This presumption may be rebutted by Cresthaven Nursing Residence with the evidence of a reasonable explanation for the non-production of the evidence.

Cresthaven Nursing Residence, 134 S.W.3d at 225..

b. Instructions Given, But No Appellate Examination of Substance of Instruction

The dissenting justice to the *Brewer* majority opinion suggested the following instruction:

You are instructed that if documents which are pertinent to the issues in this cause and which were in the exclusive possession and control of a party and which cannot be produced, and their disappearance has not been satisfactorily explained, then you will consider that such documents contained information adverse to the position taken by the party who was in possession.

862 S.W.2d at 162 (Ashworth, J., dissenting).

The instruction requested in *Ordonez v. M.W. McCurdy & Co., Inc.*, was as follows:

You are instructed that if there is evidence that is pertinent to the issues in this cause, which was in the exclusive possession and control of a party and

which cannot be produced, and its disappearance or non-production has not been satisfactorily explained, then you may consider that such evidence contained information adverse to the position taken by the party who was in possession.

984 S.W.2d at 273.

The instruction given in *Offshore Pipelines, Inc. v. Schooley*, is the second type of spoliation instruction:

If a party fails to produce evidence which is under its control and reasonably available to it and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.

984 S.W.2d at 666-67.

c. **Instructions Erroneously Given Because No Evidence of Intentional Destruction of Evidence**

In *Tucker v. Terminix International Co.*, 975 S.W.2d 797, 800 (Tex. App.--Corpus Christi 1998, pet. denied), the following instruction was held to be erroneously given because there was no evidence that plaintiff had intentionally destroyed evidence:

Terminix is entitled to show that the opposing party has destroyed soil samples that could bear on a crucial issue in this case. Because the destruction of evidence raises a presumption that the evidence would have been unfavorable to Ms. Tucker, I instruct you that it is presumed that had Terminix been allowed access to the soil samples before they were destroyed, then the ultimate test results would have been unfavorable to Ms. Tucker and favorable to Terminix. Further, the court instructs you that the plaintiff's test results are presumed to be unreliable.

In *Dunn v. Bank-Tec South*, 134 S.W.3d 315, 326 (Tex. App.--Amarillo 2003, no pet.), the plaintiffs requested the following spoliation instruction, which the court of appeals held was rightfully refused because there was no showing that the destruction of the video tape was intentional:

You are instructed that intentional spoliation or destruction of evidence by City National Bank . . . and relevant to this case raises a presumption that the evidence would have been unfavorable to City National Bank. . . .

In *Albertson's, Inc. v. Arriaga*, the court gave the following instruction:

You are instructed that, when a party has possession of a piece of evidence at a time he or she knows or should have known it will be evidence in a controversy, and thereafter disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it.

No. 04-03-00697-CV, 2004 WL 2045389, at *2 (Tex. App.--San Antonio Sept. 15, 2004, no pet.)(mem. op.).

In *Wal-Mart Stores, Inc. v. Middleton*, this instruction was given (though subsequently reversed because spoliation presumption was rebutted):

You are instructed that w[h]ere evidence, such as photographs of the accident scene, was peculiarly within the control of Wal-Mart and Wal-Mart fails to produce that evidence, you must presume that the missing evidence, if offered, would have been unfavorable to Wal-Mart. You are further instructed that such presumption may be rebutted by Wal-Mart.

982 S.W.2d at 469.

d. Instructions Disapproved

In *Roberts v. Whitfill*, although the disposition of the appeal did not turn on whether the instruction was proper, the court nevertheless addressed the substance of the instruction to guide the trial court on remand. 191 S.W.3d 348, 360 (Tex. App.--Waco 2006, no pet.). The following instruction was given, which counsel strongly emphasized in closing argument:

You are instructed that Dan Roberts has intentionally destroyed QuickBooks data. You are further instructed that you should presume that the QuickBooks data destroyed was unfavorable to Dan Roberts concerning the damages suffered by Whitfill. You are further instructed that you should presume that the QuickBooks data destroyed was unfavorable to Dan Roberts concerning whether he breached a fiduciary duty owed to Whitfill. You are further instructed that you should presume that the QuickBooks data destroyed was unfavorable to Dan Roberts concerning whether he contracted to unreasonably restrain trade or commerce. You are further instructed that Dan Roberts bears the burden to disprove these presumptions.

Id. at 360. The court was critical of the instruction as excessive in its “comprehensive severity” and pointed to the better instructions approved in *Texas Electric Co-operative v. Dillard* and *Cresthaven Nursing Residence v. Freeman*. *Id.* at 361-62.

3. Suggested Jury Instruction

I generally prefer using the following more general instruction to avoid any argument of a comment on the weight of the evidence:

You are instructed that the intentional or negligent spoliation or destruction of evidence relevant to this case by *Sally Spoliator* raises a presumption that the evidence would be unfavorable to *Sally Spoliator*.

This instruction is derived from the following cases: *Dunn v. Bank-Tec South*, 134 S.W.3d at 326; *Lively v. Blackwell*, 51 S.W.3d at 642; *Ordonez*, 984 S.W.2d at 272-73 & n. 10; *Offshore Pipelines*, 984 S.W.2d at 666-67; *Middleton*, 982 S.W.2d at 469; *Brewer*, 862 S.W.2d at 159-60.

4. Appellate Review of Trial Court’s Giving or Refusing to Give Jury Instruction on Spoliation

In *Trevino*, Justice Baker stated that the trial judge should evaluate three factors in determining whether a spoliation presumption instruction should be given: (1) whether there existed a duty to preserve the evidence, (2) whether the alleged spoliator breached that duty, either negligently or intentionally, and (3) whether spoliation prejudiced the nonspoliator. 969 S.W.2d at 954-55. Appellate courts have applied those factors in reviewing the trial court’s decision on whether to give a spoliation instruction. *Lively*, 51 S.W.3d at 643 n.4; *Whiteside v. Watson*, 12 S.W.3d 614, 621-22 (Tex. App.--Eastland 2000, pet. denied); *Offshore Pipelines, Inc.*, 984 S.W.2d at 666.

III.

ARGUMENTS TO DEFEND AGAINST A SPOLIATION ALLEGATION

A. There Was No Duty to Preserve the Evidence

See the discussion at pages 1-2 of this paper.

Central to the duty to preserve is that the alleged spoliator have possession and control of the missing evidence. If he does not, there is no duty to preserve. *See Walker*, 203 S.W.3d at 477 (utility pole at all times relevant to case was in the possession and control of another party, who had disposed of the pole during the ordinary course of business; therefore, trial court did not abuse its discretion by denying an instruction on the spoliation presumption).

B. There Is a Reasonable Explanation for the Absence of the Evidence

In *Albertson's, Inc. v. Arriaga*, the trial court gave a spoliation instruction because Albertson's did not produce a store aisle surveillance tape. 2004 WL 2045389, at *2. (See Appendix) Such was reversible error because: (1) there was no showing that Albertson's had a duty to preserve the video tape; and (2) it gave a reasonable explanation for the failure to produce the tape. All Albertson's stores in San Antonio closed in April 2002 and it didn't know what had happened to the tape -- despite its policy to retain evidence of a shoplifting incident until it had a disposition of the criminal trial. After that, it would reuse the tape. The court of appeals first held that Albertson's did not have a duty to preserve the tape. *Id.* at *3. Second, it found that Albertson's provided a reasonable explanation of its absence and provided testimony describing what the videotape depicted. Therefore, submission of a spoliation instruction was harmful error necessitating a new trial. *Id.* at *4.

If you give a reasonable explanation for the absence of the evidence, appellate courts will refuse to indulge in the assumptions of intentional destruction offered by the opposing party. The Austin Court of Appeals has specifically refused to indulge in the speculative and lengthy chain of inferences and assumptions it would take to arrive at a conclusion of intentional or negligent destruction in the face of no circumstances or evidence that the evidence was destroyed. That the evidence is simply missing is not the equivalent of "destruction"; rather, the burden is on the party alleging spoliation to show destruction by the opposing party. *Bryan v. Zenith Insurance Co.*, No. 03-00-00563-CV, 2001 WL 617925, at *3 (Tex.App.--Austin June 7, 2001, no pet.)(not designated for publication); see also *Lively*, 51 S.W.3d at 642.

C. Evidence Was Destroyed in Normal Course of Business

One of the strongest and most reasonable explanations for the absence of evidence is that it was destroyed or depleted during the normal course of business. In *Wal-Mart Stores, Inc. v. Johnson*, the reindeer decoration that fell and injured plaintiff had all been sold in the normal course of business. 106 S.W.3d at 722. Therefore, the Court held that Wal-Mart had no duty to preserve the reindeer because it had no notice they would be relevant to a future claim. Consequently, the trial court abused its discretion when it gave a spoliation instruction. *Id.* at 723.

This "normal course of business" reason is particularly prevalent with regard to video surveillance tapes in a retail store where they are routinely taped over after a certain period of time. (See the Appendix for a summary of spoliation cases involving videotapes.) In *Doe v. Mobile Video Tapes, Inc.*, the Corpus Christi Court of Appeals held that videotapes recorded over in the normal course of business and before notice of claim provide no basis for a spoliation presumption to exclude evidence. 43 S.W.3d 40,

56 (Tex. App.--Corpus Christi 2001, no pet.); *see also Brumfield*, 63 S.W.3d at 919-20 (Exxon had policy to tape over surveillance tapes after 30 days; thus, there was a reasonable explanation for the missing video, and the trial court did not abuse its discretion in refusing to give a spoliation instruction). However, note that destruction in the ordinary course of business or pursuant to a corporate policy will not rebut the presumption when you have been put on notice of the claim before the “normal course of business” destruction would have taken place. *Adobe Land Corp.*, 2007 WL 2012804, at *6.

D. Make Clear to the Trial Court How Harmful and Unnecessary Spoliation Instruction Is

Also, in arguing against a spoliation instruction, make clear to the trial court how harmful an unnecessary spoliation instruction is. In *Wal-Mart Stores, Inc. v. Johnson*, the Texas Supreme Court explained that an unnecessary spoliation instruction is particularly likely to cause harm because its very purpose is to “nudge” or “tilt” the jury. 106 S.W.3d at 721-24; *see also Arriaga*, 2004 WL 2045389, at *4. Therefore, the likelihood of harm from the erroneous instruction is substantial, especially when the case is closely contested. *Johnson*, 106 S.W.3d at 724; *see also Felix*, 87 S.W.3d at 581 (reversing because improper spoliation instruction focused jury’s attention on an unwarranted presumption that the recorded statement would have contained information unfavorable to position taken by Felix).

As the Austin Court of Appeals has described it,

Allegations that a party destroyed evidence can have a negative and highly prejudicial affect on that party in the course of the trial. . . . However, when the only basis for the accusation [of spoliation] is speculation, and where a reasonable explanation can be given for the missing evidence, **the accusation of spoliation can severely tarnish the accused party’s credibility in court.** [citations omitted] In such circumstances, it is proper to exclude evidence of alleged spoliation so as not to unfairly prejudice a party to the suit.

Bryan, 2001 WL 617925, at *4 (emphasis added), citing *Lively*, 51 S.W.3d at 642 and *Middleton*, 982 S.W.2d at 471. As the Tyler Court of Appeals also recognized:

In the context of a trial, there are few, if any, more inflammatory accusations than that one party destroyed evidence. Where, as here, the only basis for the accusation consists of speculation and conjecture and a reasonable explanation for the missing evidence exists, such an accusation can unfairly taint the jurors’ perception of the alleged spoliator as one who

is dishonest and deceitful. In such a situation, it is legitimate and proper to exclude evidence of alleged spoliation.

Lively, 51 S.W.3d at 642 (emphasis added).

IV. MISCELLANEOUS SPOILIATION ISSUES

A. Use of Spoliation Allegation in a Summary Judgment Proceeding

As I updated my spoliation research for this paper, I became aware of spoliation allegations being utilized in summary judgment proceedings -- a use I had not previously noted. The argument is that the movant is not entitled to summary judgment because he has destroyed evidence that would raise a material fact issue, thus defeating a summary judgment motion. *See Caldwell v. Carrollton Air Conditioning, Inc.*, No. 07-05-0241-CV, 2007 WL 2390425, at *4 (Tex. App.--Amarillo Aug. 22, 2007, no pet. h.). If the court has granted a no-evidence summary judgment motion where a spoliation allegation has been raised, the appellate court will presume that the trial court considered and rejected the non-movant's request for a spoliation presumption. *Adobe Land Corp.*, 2007 WL 2012804, at *3 (reversing granting of no-evidence summary judgment where party entitled to a spoliation presumption).

However, the raising of a spoliation allegation slightly modifies the standard of review. *Id.*; *Sowell v. The Kroger Co.*, ___ S.W.3d ___, 2006 WL 1493249, at *1 (Tex. App.--Houston [1st Dist.] June 1, 2006, no pet.); *Aguirre*, 2 S.W.3d at 457. First, the court reviews the trial court's implied rejection of the request for a spoliation presumption for an abuse of discretion. *Adobe Land Corp.*, 2007 WL 2012804, at *3; *see also Johnson*, 106 S.W.3d at 723. Second, if it finds no abuse of discretion, the court proceeds under the no-evidence standard of review to determine whether, without the presumption, more than a scintilla of evidence exists precluding summary judgment. *Adobe Land Corp.*, 2007 WL 2012804, at *3; *Aguirre*, 2 S.W.3d at 457; *see also Caldwell*, 2007 WL 2390425, at *4 (if the spoliation allegation does not meet the legal requisites for such a presumption, then it will not bar a summary judgment). Note that the Beaumont Court of Appeals has held that where there was no showing that samples of fire debris had been destroyed in bad faith, a spoliation argument did not raise a genuine issue of material fact. *Trahan v. Fire Ins. Exch.*, 179 S.W.3d 669, 675 (Tex. App.--Beaumont 2005, no pet.).

In addition, the Fort Worth Court of Appeals has noted that a defendant seeking summary judgment is not required to seek a no-evidence summary judgment on a spoliation allegation because spoliation is not an independent cause of action; rather, it is an evidentiary matter. *Adobe Land Corp.*, 2007 WL 2012804, at *3; *see also Rangel v. Lapin*, 177 S.W.3d 17, 25 (Tex. App.--Houston [1st Dist.] 2005, pet. denied).

B. Potential Waiver Issues

1. Be Precise When Objecting to a Spoliation Instruction Or You May Waive the Objection

A recent case out of the Fort Worth Court of Appeals reminds us forcefully that we need to be precise when objecting to tendered jury instructions, including spoliation instructions, or we risk waiving our objection. *Conditt v. Morato*, No. 02-06-214-CV, 2007 WL 2693968, at *2 (Tex. App.--Fort Worth Sept. 13, 2007, no pet. h.)(mem. op.). Conditt had objected that there was no evidence of spoliation. The court of appeals held that this objection did nothing to apprise the trial court of her desire for a less stringent sanction, like exclusion of the evidence, and did not make the trial court aware of a complaint that a spoliation instruction was an excessive sanction in the circumstances. Therefore, Conditt did not preserve that argument. *Id.* at *2. In addition, Conditt gave no explanation for why she had photographs of plaintiff's vehicle, but none of her own, and why she could not produce the originals of the photographs; nor did she testify as to the substance of the photos. For those reasons, the court held that the spoliation jury instruction was proper. *Id.* at *4.

The moral of this story is: (1) object to the instruction because (a) there was no duty to preserve the evidence, and (b) there was no intentional destruction; (2) offer a reasonable explanation for why the evidence is missing or was not produced; (3) if possible, offer evidence of what the missing evidence would have shown; and (4) in the alternative, make clear to the trial court that if it is going to sanction you for the missing evidence, a jury instruction is too excessive and offer a less severe alternative, like exclusion of certain evidence.

On the flip side of the coin, one may waive its spoliation complaint by failing to get a ruling on it. Where a party moved to obtain relief for spoliation pre-trial, but never got a ruling on the motion, he waived his complaint. *Adkison v. Adkison*, No. 12-06-00077-CV, 2007 WL 259550, at *3 (Tex. App.--Tyler Jan. 31, 2007, no pet.)(mem. op.).

2. Be Careful to Submit the Proper Presumption

As discussed at pages 8-11 of this paper, there are two presumptions upon which instructions may be given -- rebuttable or irrebutable. The irrebutable presumption will shift the burden of proof to the spoliator and is only appropriate for intentional destruction of evidence essential to a party's case; the rebuttable presumption will not. If you submit an irrebutable presumption instruction when you're not entitled to that type of presumption, you will have waived your right to the rebuttable instruction. *Cardoza v.*

Reliant Energy HL&P, No. 01-03-01126-CV, 2005 WL 1189649, at *4 (Tex. App.--Houston [1st Dist.] May 20, 2005)(mem. op.)

3. Possible Waiver of Spoliation Instruction by Not Getting Ruling on Motion to Compel Production of the Evidence

The Waco Court of Appeals in a recent case has raised the issue of whether failing to get a ruling on a motion to compel production of the evidence allegedly spoliated will waive the right to exclusion of evidence or an instruction based on spoliation. *Roberts*, 191 S.W.3d at 361-62 & n. 3. The court cited to *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993), which held that “the failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct.” *Id.* at n. 3.

However, note that the Tyler Court of Appeals and another Waco opinion take a different position, both having stated that there does not have to be an allegation of discovery abuse in order to obtain a spoliation jury instruction. *Gilmore*, 2007 WL 2325811, at *9 -10; *Tex. Elec. Co-op*, 171 S.W.3d at 208-09.

C. Spoliation in the Context of Electronic Discovery

The scope of this paper does not include spoliation issues that arise from electronic discovery. Thus far, Texas appellate courts have not reached those issues; they are mainly being developed in the federal courts. However, I did want to point you to the following resources if you’re faced with that issue:

- David Chaumette & Michael Terry, *The World of E-Discovery or How I Learned to Stop Worrying and Love the New Rules*, 44 HOUS. LAW. 30, 32-33 (2006) (discussing duty to preserve electronic evidence)
- Daniel B. Garrie, Matthew J. Armstrong & Bill Burdett, *Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 REV. LITIG. 115, 130 (Winter 2006) (discussing federal cases regarding spoliation in electronic data context)
- Neal H. Lewis, *New Rules for Electronic Discovery, So Now What?: Daubert’s Impact on Determining What Is Not Reasonably Accessible*, 10 COMPUTER L. REV. & TECH. J. 239, 254-55 (Summer 2006) (discussing the modifications to FRCP 37(f) that will remove the possibility for sanctions due to spoliation where good faith, routine business operation of electronically stored information results in the destruction of electronic evidence; examining holding in *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004))

- Sharon D. Nelson & Jon W. Simek, *Spoliation of Electronic Evidence: This Way Be Dragons*, 68 TEX. B.J. 478 (2005) (discussing the *Zubulake* case and its progeny)
- Howard L. Speight & C. Kelly, *Electronic Discovery: Not Your Father's Discovery*, 37 ST. MARY'S L.J. 119, 125-29 (2005) (discussing preserving electronic information to avoid spoliation allegations)

D. Attorney Retention of Client Files

There is a provision in the Rules of Professional Conduct regarding the length of retention of client files. Rule 1.14(a) provides:

Other client property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

TEX. R. PROF. CONDUCT 1.14(a). There are no Texas cases construing this rule or addressing retention of client files that I could locate.

However, I think the safer retention policy for a lawyer is to keep client files 5 years after the case has terminated by settlement or final judgment -- in other words, all appeals have been exhausted or time for such has expired. This is so because of the limitations period in which an attorney can be sued -- which can be up to four years for breach of fiduciary duty. Because your representation in a case sometimes terminates before the case itself terminates, Rule 1.14(a) doesn't completely cover the potential of a spoliation argument if you destroy files before the limitations period has run. But Rule 1.14(a) does give you a legal basis for selecting 5 years as your retention period.

The following are some file-specific recommendations from a recent *Texas Bar Journal* article:

- **Multi-state firms:** Retain records for the longest interval prescribed by any state in which it practices.
- **Criminal matters:** Retain as long as the client is incarcerated or the case is on appeal. In California and New Jersey, retain as long as the client is alive.
- **Minors:** Retain until four years following attainment of majority.
- **Adverse possession:** At least 25 years after the possession commences.
- **Estate planning files including wills:** Until four years after the client's death.
- **Probate files:** Until the estate is settled and all audit periods have expired (e.g. three years and nine months for estates without closing letters).

- ***Signed original documents:*** Until they are out of date and no longer of consequence.
- ***Income tax returns:*** Six years from the later of the due date or the date actually filed and longer if there are carry-over losses or other items.
- ***Estate and gift tax returns:*** Indefinitely.
- ***Trusts:*** Until final distribution and final account plus applicable statute of limitations.

James E. Brill, *Closing Your Law Practice*, 70 TEX. B.J. 170, 171 (2007). The article also notes that the most comprehensive source for retention policies is Lee R. Nemchek, *Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools*, 93 LAW LIBRARY J. 7 (2001).

APPENDIX

SPOILIATION CASES INVOLVING VIDEOTAPES

<p><i>Garcia v. Sellers Bros., Inc.</i> No. 14-05-00954-CV, 2006 WL 3360473 (Tex.App.--Houston [14th Dist.] Nov. 21, 2006, no pet.)(mem. op.)</p>	<p>While in a retail food store owned by Sellers, Garcia slipped on a large puddle of a liquid cleaner and injured her shoulder. (*1) Garcia propounded a request for production seeking a copy of the “video surveillance taken by cameras 2 and 8 from 12:30:00 am to 1:38:00 pm on the date of the incident.” Sellers responded: “There is none. The tape was taken out at 12:38.” Garcia argued this was evidence that Sellers either negligently or intentionally removed the videotape within seconds of her fall and only a “nebulous” excuse for the missing videotape. The court of appeals disagrees, stating that it is unclear whether the request was for videotapes that ran for that specific period only or whether she sought videotapes that included images recorded within that time frame; therefore, court can’t determine whether response inadequate. Also not clear whether Garcia sought the tape that was taken out. Thus, the substance of Garcia’s spoliation claim is unclear because her primary complaint seems to be that Sellers removed the tape and quit taping, not that it destroyed a videotape. Moreover, the response doesn’t state “a.m.” or “p.m.” so don’t know that tape removed after Garcia’s fall. In sum, Garcia failed to satisfy her burden to demonstrate she was entitled to a spoliation presumption on the basis of the videotape. Therefore, trial court did not abuse its discretion. (*4)</p>
<p><i>Albertson’s, Inc. v. Arriaga</i> No. 04-03-00697-CV, 2004 WL 2045389 (Tex. App.--San Antonio Sept. 15, 2004, no pet.)(mem. op.)</p>	<p>Arriaga was detained by store security for acting as a lookout for a friend who was shoplifting and concealing merchandise in his clothing. (*1) Arriaga sued Albertson’s for false imprisonment and argued that the store videotape would corroborate his version of events that he went his own way and only met up with his friend at the checkout counter. Because Albertson’s did not produce the tape, the trial court gave a spoliation instruction. Albertson’s argued on appeal that the trial court erred because: (1) Plaintiff failed to show it had a duty to preserve the videotape; and (2) it gave a reasonable explanation of the absence. (*2) All Albertson’s stores in San Antonio closed in April 2002 and it didn’t know what had happened to the tape -- despite its policy to retain evidence of a shoplifting incident until it had a disposition of the criminal trial. At that point, it would reuse the tape. The court of appeals</p>

	<p>first held that Albertson's did not have a duty to preserve the tape. (*3) Second, it found that Albertson's provided a reasonable explanation of its absence and provided testimony describing what the videotape depicted. Therefore, submission of instruction was harmful error necessitating a new trial. (*4)</p>
<p><i>Dunn v. Bank-Tec South,</i> 134 S.W.3d 315 (Tex.App.--Amarillo 2003, no pet.)</p>	<p>Dunn sued bank and manufacturer of mobile teller unit at drive-in banking facility for negligence, fraud, breach of warranty, and violation of DTPA because unit closed on his arm when he was trying to make a deposit. Judgment was entered for Dunn. (p.321) On appeal, Dunn argued that the trial court erred in refusing to give a spoliation instruction to the jury because the post-accident surveillance tape of Dunn was not provided to him. First, the court of appeals noted that Dunn had not requested such in discovery. (p.329) Second, the court stated that there was no evidence illustrating that the videos were lost or destroyed. (p.326) With regard to the video made of Dunn's entanglement in the teller machine, the film was actually a series of still shots of various images over certain period of time. A copy of those still photos was given to Dunn and introduced into evidence. Although Dunn claims that the video was lost or destroyed, they offered no proof of that fact. Instead, the evidence was simply that its location at the time of trial was unknown. Thus, there was no basis upon which to conclude that the evidence was intentionally destroyed and no basis for a jury instruction. (p.326-27)</p>
<p><i>Stephens v. Dolcefino,</i> 126 S.W.3d 120 (Tex.App.--Houston [1st Dist.] 2003), pet. denied, 181 S.W.3d 741 (Tex. 2005)(Justices Hecht and Wainwright dissenting from the denial of the petition; nothing re spoliation)</p>	<p>A television reporter secretly recorded on a pager four Houston city officials conversing during a break at a CLE seminar. The recording was broadcast a month later; it was copied from the "pager" but did not include any sound that might have been recorded. The original pager recording was recycled or reused; and whether it contained any portion of the conversation cannot be determined. Several of the officials sued the TV station for defamation and invasion of privacy, plus violation of Anti-Wiretapping Act. (p.124-25) A summary judgment was granted in favor of Defendants. On appeal, Plaintiff argued that a prior judge's order found intentional spoliation, which would bar a summary judgment. The court of appeals disagreed that the order found intentional spoliation. Rather, it refused to strike pleadings on allegation that KTRK deliberately taped over the surveillance tapes. The order did note that Plaintiff had met the legal threshold to present evidence to the jury of this conduct, but declined to decide whether a jury instruction on spoliation was warranted. Therefore, this order was not</p>

	sufficient to bar the defendant's summary judgment on limitations grounds. (p.132)
Texas Dept. of Public Safety v. Story , 115 S.W.3d 588 (Tex.App.--Waco 2003, no pet.)	Officers arrested Story for DWI, and his license was ultimately suspended by the ALJ. (p.590) Story filed an administrative appeal with the county court at law. The State Office of Administrative Hearings filed an incomplete record because it had lost a videotape prepared by the arresting agency and offered as evidence in the administrative hearing. (p.590-91) DPS found a copy of it, but Story would not stipulate to its accuracy. The trial court granted Story's request to reverse the administrative decision and restore his license because of the lost evidence. (p.591) The court of appeals held that an administrative decision could not be reversed and rendered merely because of a missing exhibit. However, the court did note that had the DPS actively participated in the loss or destruction of the exhibit, a rendition might be warranted, citing <i>Trevino</i> . (p.596)
Brumfield v. Exxon Corp. , 63 S.W.3d 912 (Tex.App.--Houston [14th Dist.] 2002, pet. denied)	Plaintiff sustained injuries when the gas he was pumping sprayed in his eyes and the Exxon employees inside the store refused to allow him to use their telephone to call for assistance. (p.915) During trial, there was testimony that the station had a surveillance camera inside the store and that it would have recorded some evidence relating to Plaintiff's claim as to whether the employees tried to help him. The trial court refused his request for a spoliation instruction. (p.919) The court of appeals held that there was no evidence that Exxon intentionally destroyed the videotape. To the contrary, videotapes were routinely taped over after 30 days. The Exxon claims adjuster further testified that when he learned of Plaintiff's claim, he believed it only concerned the splash-back incident, which would not have been covered by the camera. This constituted a reasonable explanation for the missing video; therefore, the trial court did not abuse its discretion. (p.920)
Doe v. Mobile Video Tapes, Inc. , 43 S.W.3d 40, 56 (Tex.App.--Corpus Christi 2001, no pet.)	Female high school students sued TV station for invasion of privacy and defamation because it broadcast portions of clandestine videotapes made in the school changing area for the purpose of apprehending someone who was going through students' belongings and stealing. The videotapes had been found in a dumpster and were turned over to KRGV. Based on summary judgments and a jury trial, the trial court entered judgment for the station. (p.46-47) On appeal, Plaintiffs argued that because the actual broadcast tapes were destroyed, the trial court should have excluded the scripts and portions of the

	<p>broadcasts offered into evidence by the station. (p.54) However, the evidence at trial established that it was the regular business practice of KRGV to tape an entire broadcast, keep the tape for 7 days, and then reuse the tape for subsequent broadcasts. The court of appeals concluded that videotapes recorded over in the normal course of business and before notice of a claim provided no basis for exclusion of evidence based on alleged spoliation. There was no evidence of intentional or negligent destruction; but rather the videotapes were destroyed in the ordinary course of business. (p.55-56)</p>
<p><i>Bryan v. Zenith Insurance Co.</i>, No. 03-00-00573-CV, 2001 WL 617925 (Tex.App.--Austin June 7, 2001, no pet.)(not designated for publication)</p>	<p>Bryan worked as a cable locator for Colcom. He would mark with paint or chalk the location of the lines that might be damaged by construction. As part of his job, he was required to record on video those markings. Bryan marked one site; and while driving to his next inspection site, he died of a heart attack. A co-employee collected the equipment, including the camera assigned to Bryan and delivered them to the Colcom's general manager. A few days after the death, an employee saw 2 other employees viewing the videotape of Bryan's last inspection, which included "very heavy breathing." A year later the Bryans learned of the tape and requested a copy of it when they filed for comp benefits. Colcom responded they would provide the tape only upon subpoena -- which the Bryans did after they filed suit. Colcom copied the tape and gave them the copy. The Bryans claim that it was edited or was the incorrect tape because it did not include the heavy breathing described by the Colcom employee. (*1) They argued at trial that Colcom had destroyed the tape. The trial court rendered judgment that Bryan's heart attack was not compensable under the Labor Code. On appeal, the Bryans argue that the exclusion of the employee's testimony re the tape and evidence of spoliation was harmful error. (*2) The court of appeals disagreed, stating that there was no actual proof that Colcom had destroyed or edited the tape. It declined to indulge in a chain of assumptions to reach that point. (*3) In addition, Zenith had provided a reasonable explanation for employees' mistaken belief that a Dec. 5th tape existed. The tape taken from the truck was shown to be that of work done on prior days. Here the only basis for an accusation of spoliation is speculation; therefore it was proper to exclude evidence of the spoliation so as not to unfairly prejudice a party to the suit and tarnish his credibility in court. Thus, the trial court did not abuse its discretion. (*4)</p>

<p><i>Lively v. Blackwell</i>, 51 S.W.3d 637 (Tex.App.--Tyler 2001, pet. denied)</p>	<p>Plaintiff sued doctor alleging negligence in performance of a laparoscopy procedure. During the procedure, a video camera projected internal images of the procedure on a TV monitor in the operating room. The camera also had recording capabilities. The doctor made the decision whether to make the recording; and the doctor kept the videotape in his office. However, when he produced the videotape in discovery, it was blank. The hospital did not have a policy regarding preservation of the tapes. Plaintiff alleged that the doctor had improperly destroyed the videotape. The doctor pointed out that just because there's an image on the TV monitor does not mean that the device is recording. (p.638-39) The trial court excluded any evidence of spoliation because nothing demonstrated destruction; and the court refused to give a jury instruction on the presumption. (p.640) The court of appeals agreed that plaintiff had not proved that the procedure was actually recorded onto the videotape or that the doctor destroyed the videotape. Thus, it would be speculation to assume spoliation -- plus a reasonable explanation was provided. Therefore, the trial court did not err in excluding evidence of spoliation or refusing to give the jury instruction. (p.641-43)</p>
<p><i>Grant v. Stop-N-Go Market of Texas, Inc.</i>, 994 S.W.2d 867 (Tex.App.--Houston [1st Dist.] 1999, no pet.)</p>	<p>Customer sued convenience store for false imprisonment and defamation when it detained him on an accusation of stealing. The trial court granted a summary judgment. A monitor for the surveillance camera was in the back room where a store employee had observed Grant picking up what appeared to him to be a pack of cigarettes. The videotape was not produced. The police report states it returned the videotape to the store; the store said it sent it to the Risk Management corporate office; but in response to a discovery request on the tape, the store answered "none." During oral argument, the store said the tape was lost. Grant argued that the summary judgment was barred by spoliation of the videotape. The court noted that although it need not reach this issue because it reversed the summary judgment on other legal grounds, Grant may be entitled to a jury instruction on a spoliation presumption. (p.870-71 & n. 1)</p>