

CIVIL DISCOVERY AND SPOILIATION IN TEXAS

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In the wake of nationwide corporate accounting scandals and Congress' response through the Sarbanes-Oxley Act, issues surrounding document retention and destruction have become a lightning rod for the attention of both federal investigators and civil litigants alike.

While document destruction issues have arisen in products liability and personal injury cases for some time, they are now arising in other types of litigation, including intellectual property litigation, business tort and contract litigation, and securities litigation. Destruction of evidence affects not only evidentiary aspects of civil cases, but it can also subject participants to severe sanctions from the court. While beyond the scope of this article, in extreme cases, it may also lead to criminal sanctions. This paper will provide some background regarding document retention policies before discussing the consequences of improper document destruction in civil cases.

I. DOCUMENT RETENTION

Once a litigant has received a discovery request, it is too late to purge the company's files. Creating and enforcing a document retention policy prior to the litigation is, therefore, essential to allowing the company to maintain only what it must retain for business and regulatory reasons. One need look no further than Arthur Andersen's conviction in June 2002 for obstruction of justice to see the crucial nature of a well-designed - and consistently implemented - document retention policy. In October 2001, shortly after Enron had received the results of its internal investigation regarding accounting practices, Andersen's in-house counsel, Nancy Temple, sent the following internal e-mail to Michael Odom, who then forwarded it to David Duncan, requesting "More Help":

It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.¹

On its face, this e-mail is relatively innocuous, and if it had been sent a week after a new document retention policy had been put in place, it would have been a perfectly acceptable reminder of the importance of the document retention policy. Coming as it did, however, on the heels of the discovery of one of the largest corporate accounting scandals in history, it turned out to be neither a “helpful” nor a “useful” reminder. In fact, this e-mail was one of the first steps in a chain of events which led to David Duncan’s guilty plea, the criminal conviction of Arthur Andersen, and the eventual destruction of the esteemed accounting firm itself.²

Simply put, a document retention policy must be enforced consistently, especially if it is to stand up to post-Enron levels of scrutiny from state and federal investigators and civil litigants. It must also be enforced *prior to* the company learning of any investigations or litigation.

¹ E-mail from Nancy Temple to Michael Odom of October 12, 2001 *available at* <http://www.mailutilities.com/news/archive/105/1721.html>.

² The Supreme Court’s reversal of Arthur Andersen’s criminal conviction in May 2005 does not render the lessons learned from Andersen’s criminal conviction any less important. The Court’s opinion hinged on the specific language in the jury charge and the intent requirements of the criminal statute at issue, 18 U.S.C. § 1512. Also the Court only granted Andersen a new trial, not an acquittal. *Arthur Andersen, LLP v. United States*, 125 S. Ct. 2129 (2005). Furthermore, the government is not likely to rely on 18 U.S.C. § 1512 much now that it has the broader obstruction provision found in 18 U.S.C. § 1519 which became law as part of the Sarbanes-Oxley Act of 2002. On a positive note, the Supreme Court did state that “document retention policies which are created in part to keep certain information from getting into the hands of others...are common in business. ... It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.” *Id.* at 2135.

A. Basic Concepts Behind the Document Retention Policy

The purpose of document retention is not to destroy damaging documents, but rather to promote a reasonable business purpose such as cost reduction or enhanced efficiency.³ Without such legitimate purposes, the policy, no matter how consistently it is applied, may not provide any protection. In fact, without a legitimate purpose, it may actually be harmful. For example, one court sanctioned an individual doctor who had destroyed appointment calendars as part of a routinely implemented document destruction policy.⁴ The doctor, who routinely testified as an expert had a document retention policy by which he destroyed appointment calendars regularly every three months and at the end of the year. On cross examination, he admitted that part of the reason for this policy was to “prevent plaintiffs and plaintiffs’ attorneys from establishing his financial interest and defense bias in personal injury litigation.”⁵ Although it is unclear how Texas courts might approach this fact situation, the case serves to illustrate the importance of creating a document management program to promote legitimate business interests of the company, not to destroy documents needed for litigation.

The specifics of a retention policy will vary greatly among different industries. For example, some industries are subject to federal and state regulations that require certain types of records to be kept for certain periods of time. In addition, companies that have various offices in different states will need to ensure that they are compliant with the differing regulations of those

³ *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988) (developing a three part test to determine if destruction of records pursuant to a routine document retention procedure is proper: (1) Is the retention policy reasonable in light of the relevant documents; (2) Frequency and magnitude of complaints and lawsuits; (3) Was the document retention policy implemented in bad faith).

⁴ See *Ohio ex rel. Corn v. Russo*, 740 N.E.2d 265, 267-68 (Ohio 2001).

⁵ *Id.*

states. In any event, there are several broad elements of a document retention policy that are essential regardless of the regulatory environment in which the company operates.

While the details of creating a document retention policy are beyond the scope of this article, the following elements should be common to almost any document retention policy:

- Define the types of documents covered, including electronic data.
- Set the retention period for each document type in compliance with regulatory requirements and applicable statutes of limitations.
- Design procedures that will require documents to be retained once litigation or a government investigation is foreseeable.
- Establish a central registry and depository for retained files, and/or information detailing the locations of such files.
- Develop procedures for document storage and disposition.
- Implement guidelines for implementation and enforcement of policy.
- Establish audit procedures.
- Review the policy periodically to ensure it is consistent with any changes in the law.

B. After Receipt of the Discovery Request

Obviously, a well established and consistently implemented document retention policy will help the company and its lawyers respond to requests for production and document subpoenas as smoothly and efficiently as possible. Once a discovery request or subpoena is received, it is important to communicate with all employees immediately and to impress upon

them the importance of ensuring that no relevant documents or data are destroyed or deleted.

This litigation hold can be a company's first and best line of defense against a spoliation claim.

Once an investigation is under way or litigation is reasonably foreseeable, even routine document destruction under a consistently implemented policy may subject an individual or a company to civil and criminal charges.⁶ In *Stevenson*, a wrongful death case, the plaintiff sought sanctions based on the railroad company's destruction of voice dispatch tapes that would have contained descriptions of the accident as communicated between the train crew and a dispatcher.⁷ The tapes were destroyed pursuant to a routine retention policy which called for the tapes to be recorded over after 90 days. The court concluded that the 90-day retention period for tapes was patently unreasonable in circumstances involving death or bodily injury.⁸ One key factor affecting the court's decision, however, was the fact that Union Pacific had preserved tapes in certain circumstances, presumably when the information was favorable for the company.⁹ Therefore, strict adherence to the policy in this case was unreasonable, and amounted to bad faith.¹⁰

As the *Stevenson* case illustrates, modern data storage and archiving systems routinely overwrite old data, and destroy company records. While this process is critical to the efficient operation of company computer networks that must handle seemingly infinite amounts of data on a daily basis, compliance with a documented electronic records retention policy may become even more important under proposed changes to the Federal Rules of Civil Procedure currently

⁶ See *Stevenson v. Union Pac. R.R.*, 204 F.R.D. 425, 429-30 (E.D. Ark. 2001).

⁷ *Id.*

⁸ *Id.* at 431.

⁹ *Id.*

¹⁰ *Id.*

being considered. The Committee on Rules of Practice and Procedure of the United States Judicial Conference is currently considering a number of changes to the Federal Rules of Civil Procedure regarding electronic discovery. The proposed change to Federal Rule 37 might help companies avoid sanctions based upon negligent destruction of potential evidence in the course of carrying out routine electronic record keeping procedures. As currently proposed, the amendment to Rule 37(f) would read as follows:

(f) Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:

- (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
- (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.¹¹

Under the proposed change, “the court may not impose sanctions under these rules on a party when such information is lost because of the routine operation of its electronic information system if the party took reasonable steps to preserve discoverable information.”¹² The Committee makes clear, however, that “[d]ifferent considerations would apply, if a system were deliberately designed to destroy litigation related material.”¹³

¹¹ Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee*, Aug. 3, 2004 pp. 31-37 available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf> (hereinafter “Civil Rules Advisory Committee Report”). In seeking comments to the proposed amendments, the Committee noted that it “is continuing to examine the degree of culpability that will preclude eligibility for a safe harbor from sanctions in this narrow area, where electronically stored information is lost or destroyed as a result of the routine operation of a party’s computer system.” *Id.* at 32. As a result, the Committee provided an example of alternative text for the amendment to rule 37(f) as follows:

(f) Electronically stored information. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party’s electronic information system unless: (1) the party ***intentionally or recklessly failed*** to preserve the information; or (2) the party violated an order issued in the action requiring preservation of the information. *Id.* at 33 (emphasis added).

¹² Civil Rules Advisory Committee Report, p. 33.

¹³ *Id.* at 34.

It does not appear, therefore, that the proposed changes would have impacted the court's conclusion in *Stevenson*. In that case, the court specifically found that the defendants' attempts to preserve information were patently unreasonable, and that the defendants had acted in bad faith in destroying the tapes. This would be sufficient to foreclose the protection of the safe harbor as outlined in the proposed amendment to Rule 37. In any event, the proposed amendments to the rules have not been finalized, and are not currently scheduled to take effect until December 2006, and only if approved by the Judicial Conference and the Congress.

Of course, failing to ensure compliance with a document retention policy created to preserve documents for litigation can have disastrous consequences as well. Philip Morris was fined \$2.75 million for the actions of eleven top executives who routinely destroyed emails in direct contravention of a court order and the company's internal document retention policies. The executives destroyed e-mails for over two years before the government became aware of the destruction, and Philip Morris was fined \$250,000 for each of the eleven executives who failed to comply with the company's "print and retain" e-mail policy.¹⁴ In addition, the court ordered that Philip Morris and its parent company, Altria Group, were both "precluded from calling as fact or expert witnesses at trial any individual who has failed to comply with Philip Morris' own internal document retention program."¹⁵

To avoid charges of bad faith, the wording of a notice to employees to retain documents can be critical, because if there is ever any allegation of improper destruction of evidence ("spoliation"), the letter to employees will be crucial evidence to demonstrate that all appropriate steps were taken to prevent destruction of data. The key in such a document is to ensure that it

¹⁴ *United States v. Philip Morris*, 327 F.Supp.2d 21, 26 n.1 (D.D.C. 2004).

¹⁵ *Id.*

clearly explains what documents need to be retained, making it clear to employees that all documents relevant to the litigation must be preserved.¹⁶ Appendices A-C provide some examples of document retention memoranda that might be helpful in crafting such a notice.

II. SPOILIATION OF EVIDENCE

A. What is Spoliation?

1. Definition

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or reasonably foreseeable litigation.¹⁷ The primary reasons courts control the destruction of evidence include:

- promoting accuracy in fact-finding;
- securing compliance with discovery rules;
- restoring the prejudiced party to the same position with respect to its ability to prove its case that it would have held if there had been no spoliation;
- serving as retribution against wrongdoers; and
- managing cases on a crowded docket.¹⁸

¹⁶ Indeed, one federal court has recently stated that counsel must speak directly with the key players in the litigation, as well as the client's information technology personnel in order to identify all possible sources of relevant information. Once a litigation hold has been ordered, counsel must notify all relevant employees directly and must regularly reiterate and monitor compliance with the order. In addition, counsel must arrange for segregation and safeguarding of any electronic archival materials that the party has a duty to preserve. If, however, "a party acts contrary to counsel's instructions or to a court's order, it acts at its own peril." *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 439 (S.D.N.Y. 2004).

¹⁷ *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999).

¹⁸ *See Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 105-06 (D. Colo. 1996).

2. Examples in Business Cases

As the amount of electronic evidence continues to increase dramatically, business and technology cases are beginning to involve increasing claims of destruction of that evidence. While spoliation certainly applies to paper documents, it also applies to electronic data. The computer has increased dramatically the number of documents potentially relevant to a lawsuit. Meanwhile, various aspects of corporate computing systems make it even harder to eliminate all copies of documents than was the case prior to the rise of electronic commerce. Storing individual user's files both on their own hard drives and on a central server, the use of back-up tapes, and the ease with which e-mail is sent to multiple users all combine to make it extremely difficult to truly "destroy" a document. The following discussion is intended to point out some areas where spoliation issues may arise in business cases.

a. E-Mail

Employees' communications may be relevant in any modern business case. Employees who use e-mail may not know that their mail might be discoverable in a lawsuit and typically use e-mail in a very casual, informal manner. Many employees may not even consider e-mail to be written or documentary evidence. E-mail is easily forwarded and/or downloaded to computers outside of the internal network. Companies should be advised to learn the details about how their electronic mail is saved and stored after it has been read and "trashed" by its employees, including the electronic mail that might have been downloaded to the employees' home

computers and laptops. Once the e-mail is outside the network, deletion from the network will not eliminate these remote copies.¹⁹

In a case regarding tortious interference with prospective business relations, a former employee of the prospective third party testified in a deposition that he received an e-mail message from an employee of the defendant. The content of the message constituted tortious interference with the prospective business relationship between plaintiff and the third party. Plaintiff filed discovery requests directing defendant to produce all electronic mail messages authored by defendant that related to plaintiff. In an effort to avoid producing the tortious message, defendant deleted the message from all mailboxes and denied writing such a message. Plaintiff moved to compel the backup tapes of defendant's electronic mail and recovered the "smoking e-mail" before it was overwritten. Alternatively, plaintiff could have moved to compel the former employee's laptop computer, since she routinely downloaded her e-mail.²⁰

On the other hand, even if the e-mails had been deleted, courts may not attach a spoliation presumption if the deletion of e-mail occurs as part of a regular practice. In *Crescendo Investments, Inc. v. Brice*, the San Antonio Court of Appeals held that a plaintiff was not entitled to a spoliation instruction.²¹ The defendant had deleted e-mails containing summaries of business activities for businesses that were being sold to the plaintiff.²² The

¹⁹ In fact, e-mail security is now a quickly growing industry. Some companies are promoting a "disappearing e-mail" solutions for business clients. Such e-mails are encrypted and assigned a unique key that resides on a company's server. When the e-mail is downloaded, the software retrieves the key and encrypts the e-mail. After a period of time determined by the user, the key is automatically deleted and the messages become unreadable. See Paul Desmond, *Time to Get Tough About E-Mail Security*, Datamation, May 12, 2003, available at <http://itmanagement.earthweb.com/columns/secugud/article.php/2205041>.

²⁰ Philbin, Phillip B., *Spoliation of Evidence and Retention of Evidence in a High Tech World*, p. 2 (paper presented at the 2001 Judicial Section Annual Conference) (Sept. 2001) (on file with author).

²¹ 61 S.W.3d 465, 479 (Tex. App.—San Antonio 1999, pet. denied).

²² *Id.*

defendant deleted the e-mails the night before the sale, and the plaintiff wanted to introduce the e-mails at trial.²³ The court denied plaintiff's request for a spoliation instruction because the defendant executed an affidavit stating that he normally erased e-mails after reading them.²⁴ The affidavit provided adequate evidence that the e-mails were not destroyed with fraudulent intent, and therefore the lower court did not abuse its discretion in refusing to issue a spoliation instruction.²⁵ It is unclear, however, to what extent the court's analysis might be influenced by the substance of the deleted e-mails.²⁶ If the e-mail were especially damaging, a court might be less likely to overlook the destruction, even if part of a regular practice. Although the e-mails were "deleted," they probably still remained on the computer hard drive. The court could have also ordered the defendant to conduct further efforts to retrieve them from the hard drive.

b. Computer Databases

From research and development to sales and marketing, a company's databases contain valuable information relevant to many issues in business cases. When a document is "deleted," often all that has happened is the pointer to where the data is stored on the hard drive has been erased. With modern recovery methods, data can frequently be restored even though the

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ For example, in *United States v. Philip Morris*, the court refused to issue an adverse inference instruction because such a far-reaching sanction was "simply inappropriate." Before denying the requested relief, the court noted that "[b]ecause we do not know what has been destroyed, it is impossible to accurately assess what harm has been done to the Government and what prejudice it has suffered." 327 F. Supp. 2d 21, 25 (D.D.C. 2004). Perhaps if it had been possible to detail more accurately the information that had been destroyed, the court may have been more likely to issue an adverse inference instruction.

company thought it had been deleted.²⁷ This type of recovery opens a whole new field of discovery – obtaining access to the opponent’s hard drives and/or mainframe computers.

In a patent infringement case, the alleged infringer electronically documented the development history of the allegedly infringing product. Plaintiff filed discovery requests demanding computer databases and other electronically stored material. Defendant’s lawyers objected to the discovery and requested extensions of time to respond. As part of its normal operating policy, defendant’s computer backup system had a rolling retention policy, meaning that its tapes were routinely re-used every month. While the discovery requests were pending, defendant’s document destruction policy caused the entire development history to be deleted.²⁸

A company’s backup tapes may once have been considered a “grey area” in which a company reasonably may not have anticipated the need to preserve tapes.²⁹ In *Zubulake*, the court was careful to point out that “litigants are now on notice, at least in this Court, that backup tapes that can be identified as storing information created by or for ‘key players’ must be preserved.”³⁰ It is increasingly unlikely therefore that companies and their counsel will be able

²⁷ The growth of computer forensics as a formal discipline will greatly expand the universe of data that can be recovered even after it has been “deleted.” Not only are formal educational programs in computer forensics beginning to emerge, but “experience in the in the field over the past decade has spawned several qualified and well-established experts.” MICHELE C.S. LANGE & KRISTIN M. NIMSGER, *ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW* 9, 82-83 (2004). These experts are adept at a number of forensic tasks including, searching for deleted data, recreating time critical events, and breaking passwords and encryption, in addition to providing expert testimony on these issues. *Id.*

²⁸ Philbin, *supra* note 21, at 1.

²⁹ *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (finding defendant merely negligent, not grossly negligent or reckless, in its destruction of computer backup tapes because “whether a company’s duty to preserve extends to backup tapes has been a grey area”).

³⁰ *Id.* at 220 n. 47.

to plead ignorance when faced with accusations of failure to preserve relevant computer backup tapes.³¹

c. Accounting/Financial Records

Many companies use computers in managing their accounting and financial records. These records are often highly relevant in the assessment of damages. Further, the company may have prepared forecasts, estimates, or other models that utilize databases to drive the spreadsheets. All of this evidence can be very useful in establishing damages, costs, and other financial facts.

d. Word Processing

Almost every major company utilizes a word processing program to create documents in electronic form. Copies of those documents are stored on floppy disks, CD ROMS, and hard drives. Archival copies are made to back up the entire system. Copies are also attached to e-mails and sent inside and outside the company. Keeping track of every copy is virtually impossible.

Many companies also have implemented specialized programs for scanning and managing documents. These programs are complicated by employees having remote access to the document management programs, resulting in documents existing in a number of different drafts and versions.

³¹ Indeed, the Eastern District of Texas recently cited *Zubulake* with approval stating that a “party and its counsel should ensure that (1) all sources of relevant information are discovered, (2) relevant information is retained on a continuing basis, and (3) relevant non-privileged material is produced to the opposing party.” *Tantivy Communications, Inc. v. Lucent Tech’s, Inc.*, No. Civ. A 2:04-CV-79 (TJW), 2005 WL 2860976 at *2 (E.D. Tex. Nov. 1, 2005).

These issues associated with word processing programs are of particular concern when dealing with expert witnesses in litigation. An expert witness typically generates several working drafts before arriving at a final written product. At least one court has held that ordering experts to destroy drafts of reports is sanctionable.³² In *W.R. Grace*, a hair products manufacturer instructed his testifying expert to dispose of drafts of his final report.³³ Primarily suspicious of the defendant's encouraging the expert to destroy the drafts in order "not...to confuse things," the court inferred that the draft reports would have been damagingly inconsistent with the expert's final report.³⁴ Ultimately, the court: (1) ordered defendant to reconstruct the draft reports from the expert's computer, or, if that was not possible, allowed plaintiff to depose the expert further; (2) ordered defendant to pay plaintiff's expenses in bringing the motion; (3) reserved ruling on more severe sanctions until it had been determined whether the draft reports could be reconstructed.³⁵

Moreover, in *Amster v. River Capital International Group, LLC*, the court held that an attorney was obligated to produce drafts of the expert's report on which the attorney had made edits and revisions.³⁶ The attorney was permitted to redact handwritten comments and revisions that had not been shared with the expert either orally or in writing, but was required to turn over all other comments and edits, even if they would otherwise have been protected by the attorney work-product doctrine.³⁷ In addition, the Federal District Court of Virginia has held that drafts of reports exchanged between consulting experts and testifying experts are similarly

³² *W.R. Grace & Co. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 WL 1843258, at *11, 12 (W.D.N.Y. Nov. 2, 2000).

³³ *Id.* at 2.

³⁴ *Id.* at 11.

³⁵ *Id.* at 12.

³⁶ 00-CIV-9708, 2002 U.S. Dist. LEXIS 13669 at *8-9 (S.D.N.Y. Jul. 26, 2002) (citing *W.R. Grace*).

³⁷ *Id.*

discoverable.³⁸ The court imposed sanctions on the United States for failing to turn over the draft reports that were exchanged between the consulting and testifying experts. The court noted that the government had failed to “assure that these materials were retained so that they could be disclosed, and as a result, its litigation consultant, AGE, and the testifying experts whose work AGE directed, destroyed many of the documents.”³⁹ Thus, presumably, lawyers have a duty to discuss the retention and preservation of paper and electronic documents with their expert witnesses. Furthermore, because notes and drafts are discoverable, it is important to supervise closely the process by which a testifying expert commits any analysis or conclusions to writing. The attorney should supervise this process with a focus on the potential issues associated with word processing programs, email, and the archival systems used by the expert.

e. Internet

Many companies have established websites on which they publish articles, press releases, and other corporate information. Because the documents on these websites are owned and published by the company, the implications of spoliation may extend to changes made to the company’s website, if such information was relevant to the dispute.

In a copyright infringement action, plaintiff alleged that defendant copied and used one of its copyrighted cartoon characters. In its effort to assess damages, plaintiff filed discovery requests asking for copies of all documents using its reproduction of plaintiff’s character. While the discovery requests were pending, defendant’s marketing department updated its website on

³⁸ *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 284 (E.D. Va. 2001); *see also* FED. R. CIV. P. 26 (requiring disclosure of all data or other information *considered by* the witness in forming the opinions) (emphasis added); TEX. R. CIV. P. 192.3 (permitting discovery of “all documents, tangible things, reports, models or data compilations that have been *provided to, reviewed by, or prepared by or for the expert* in anticipation of a testifying expert’s testimony”) (emphasis added).

³⁹ *Trigon*, 204 F.R.D. at 284.

the Internet. In doing so, defendant erased all reproductions of plaintiff's character on its web site. The plaintiff wanted to know how many times hits were recorded on the website to establish the number of publications of the character.⁴⁰

B. Spoliation Issues in Texas Law

Evaluating whether a claim for spoliation exists, courts will generally analyze three elements:

- Whether the litigant has a duty to preserve evidence
- Whether the destruction was willful
- Whether the evidence would have supported the inference that the jury is likely to draw.⁴¹

In Texas, the trial court has discretion whether to admit evidence of spoliation, and it is therefore not solely a question of law for the court.⁴² In one case, the plaintiff, Malone, brought a medical malpractice claim when he was rendered paraplegic after receiving treatment for what was initially diagnosed as a kidney infection.⁴³ On the day after he was admitted and began receiving treatment for a kidney infection, Malone fell in his room and purportedly told the nurse he fell because he could not move his legs.⁴⁴ The nurse filled out an incident report after the fall, but it was not until a few days after the fall that doctors found out that Mr. Malone could not

⁴⁰ Philbin, *supra* note 21 at 2; *see also Piper Jaffray Cos., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 967 F. Supp. 1148, 1152 n.3 (D. Minn. 1997) ("The Court understands that Piper's website has changed in response to this litigation; the Court fully expects Piper to cause all relevant previous "editions" to be preserved for discovery.").

⁴¹ *Trevino v. Ortega*, 969 S.W.2d 950, 954-55 (Tex. 1998) (Baker, J., concurring).

⁴² *Malone v. Foster*, 977 S.W.2d 562, 564 (Tex. 1998); *Lively v. Blackwell*, 51 S.W.3d 673, 641 (Tex. App.—Tyler 2001, pet. denied).

⁴³ *Malone*, 977 S.W.2d at 563.

⁴⁴ *Id.*

move his legs.⁴⁵ After receiving this information, the doctors immediately called in a neurosurgeon.⁴⁶ The neurosurgeon determined that Mr. Malone did not have a kidney infection, but rather had a spinal epidural abscess that required immediate surgery. After the surgery, Malone was paraplegic.⁴⁷

At trial, the nurse did not recall Mr. Malone telling her that he could not move his legs, and the only written record of Mr. Malone's fall, the incident report, had been destroyed by the hospital pursuant to its incident report retention policy.⁴⁸ Malone sought to introduce testimony from a hospital employee regarding the destruction of the report. The Texas Supreme Court held that, just like any other question of admissibility of evidence, the admissibility of evidence regarding spoliation is an issue within the trial court's discretion, and refused to overturn the trial court's decision that the evidence was not admissible.⁴⁹

Similarly, the Tyler Court of Appeals held that under Rule 403 of the Texas Rules of Evidence, trial judges may exclude relevant evidence pertaining to spoliation if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.⁵⁰

1. Was There a Duty to Preserve Evidence?

A duty to preserve evidence arises “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

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 564.

⁵⁰ *Lively v. Blackwell*, 51 S.W.3d 637, 640-41 (Tex. App.—Tyler 2001, pet. denied).

control will be material and relevant to that claim.”⁵¹ In *Wal Mart*, a patron was struck on the head and neck by some merchandise that fell off a shelf. In the course of business Wal Mart employees threw away the damaged merchandise that had fallen on the plaintiff.⁵² Some time after the incident, the plaintiff developed nerve and muscle damage, purportedly as a result of the accident at the store.⁵³ At trial, Wal Mart claimed the merchandise was made out of papier mâché, only weighed several ounces, and could not have caused plaintiff’s injuries.⁵⁴ Plaintiff argued that the merchandise was in fact made of wood and weighed over ten pounds.⁵⁵ Plaintiff successfully argued for a spoliation instruction based on the fact that the merchandise had been thrown away and there was no other evidence of the particular type of merchandise that had fallen on him.⁵⁶

On appeal, the Texas Supreme Court held that the trial court had abused its discretion in submitting the spoliation instruction to the jury. Wal Mart did not have a duty to preserve the merchandise because, at the time of the accident, plaintiff had stated that he felt fine and did not give any indication that he was planning litigation over the incident.⁵⁷ According to the court, nothing about the investigation or the circumstances surrounding the accident would have put Wal Mart on notice that there was a substantial chance that plaintiff would pursue a claim.⁵⁸

⁵¹ *Wal Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003); see also *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 24 (E.D.N.Y. 1996); *ABC Home Health Servs. v. Int’l Bus. Machs. Corp.*, 158 F.R.D. 180, 182 (S.D. Ga. 1994).

⁵² *Id.* at 719.

⁵³ *Id.* at 720.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 723.

⁵⁸ *Id.*

It is important to remember, however, that Texas courts recognize that a defendant may be on notice of potential litigation before the plaintiff expressly manifests an intent to pursue legal action.⁵⁹ Texas courts employ an objective test to look at the totality of the circumstances in determining whether a reasonable person would have anticipated litigation.⁶⁰

With respect to electronically recorded information, the Civil Rules Advisory Committee is currently considering amendments to the Federal Rules of Civil Procedure that will affect a party's duty to preserve and produce evidence for purposes of spoliation. First, as discussed in section I.B., above, proposed amendments to Federal Rule 37 would provide a safe harbor from sanctions for parties that destroy electronically recorded information in the course of the "routine operation of the party's electronic information system."⁶¹ In addition, the Committee has proposed the following amendment to Federal Rule of Civil Procedure 26(b)(2):

A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify the terms and conditions for such discovery.⁶²

Although these proposed amendments have not been finalized, and are not scheduled to take effect until December 2006 at the earliest (assuming approval by the Judicial Conference and Congress), they are sure to have a marked impact on discovery of electronic information in the Federal Courts.⁶³

⁵⁹ *Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993).

⁶⁰ *Id.*

⁶¹ Civil Rules Advisory Committee Report, p. 32 (see footnote 12, *supra*, for a full citation).

⁶² *Id.* at 6.

⁶³ For a detailed overview of electronic evidence issues in Federal Court, see PAUL R. RICE, *ELECTRONIC EVIDENCE LAW AND PRACTICE* (2005).

2. Was the Destruction Willful?

Sanctions are appropriate when the destruction of documents is a result of willfulness, bad faith, or some fault of the spoliator other than involuntary compliance.⁶⁴ Destruction of evidence includes physical destruction and also such acts as alteration or removal of evidence beyond the reach of the court.⁶⁵ Spoliation does not, however, reach to the failure to *create* evidence.⁶⁶ The act is “intentional” if the spoliator undertakes the act with the purpose of destroying or altering something that the spoliator knows to be evidence or potential evidence.⁶⁷ The scope of evidence protected is that evidence that is discoverable and reasonably foreseeable to be relevant (not necessarily admissible).

In *Doe v. Mobile Video Tapes, Inc.*, a group of female high school students and their parents sued a television station for libel, invasion of privacy, and intentional infliction of emotional distress.⁶⁸ The claims arose from an incident where a male high school teacher placed an hidden video camera in the school’s female dressing room, in order to determine who was stealing from the room.⁶⁹ A local television station broadcast distorted portions of the footage whenever there were new developments in the case.⁷⁰ The students claimed that the trial court

⁶⁴ *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 54 (Tex. App.—Corpus Christi 2001, no pet.); see also *Bouzo v. Citibank, N.A.*, 96 F.3d 51, 60 (2d Cir. 1996) (affirming the allowance of an adverse inference in a suit to enforce a letter of credit); *Century ML-Cable Corp. v. Carrillo*, 43 F. Supp.2d 176, 182-83 (D.P.R. 1998) (entering default judgment against defendant for willfully destroying critical evidence in violation of court order).

⁶⁵ *McGuire v. Acufex Microsurgical, Inc.*, 175 F.R.D. 149, 154 (D. Mass. 1997); *White v. Office of the Public Defender for the State of Maryland*, 170 F.R.D. 138, 148 (D. Md. 1997).

⁶⁶ *Capital One Bank v. Rollins*, 106 S.W.3d 286, 298 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (in the context of class certification spoliation instruction would not be appropriate because plaintiff’s claim was that Capital One had *failed to record* certain information on its deposits, not that it had recorded the information and later destroyed it); see also *Brewer v. Dowling*, 862 S.W.2d 156, 158 n.2 (Tex. App.—Fort Worth 1993, writ denied).

⁶⁷ JAMIE S. GORELICK, ET AL., DESTRUCTION OF EVIDENCE § 4.17 (quoting W. KEETON, PROSSER AND KEETON ON TORTS § 8 (5th ed. 1984)).

⁶⁸ 43 S.W.3d 40, 54 (Tex. App.—Corpus Christi 2001, no pet.).

⁶⁹ *Id.* at 46.

⁷⁰ *Id.* at 46-47.

should not have allowed portions of the broadcast footage into evidence.⁷¹ The students contended that the tapes of the actual broadcasts, which would have contained references to “Naked Tapes,” “Naked Cheerleaders,” or “Naked Truth Tapes,” had been destroyed by the station, and therefore the edited portions should not have been admitted into evidence.⁷²

On appeal, the Corpus Christi Court of Appeals held that there had been no spoliation by the television station because the station’s regular business practice was to tape entire broadcasts, keep the recording for seven days, and then reuse tape for subsequent broadcasts.⁷³ While the court recognized that the station intentionally destroyed the videotapes, there was “no evidence that they intentionally disposed of the tapes so as to make them unavailable for use at trial.”⁷⁴ The station, therefore, had presented an adequate defense to an assertion of intentional or negligent spoliation.⁷⁵

Another recent case revealing the level of intent required for spoliation is *Illinois Tool Works, Inc. v. Metro Mark Products, Ltd.*⁷⁶ There, the court entered an order requiring the defendant to preserve the integrity of all its computers.⁷⁷ Six days later, when the defendant produced one of the computers for inspection, the computer failed to operate. The plaintiff testified that the computer, which he said was kept in the basement of his home, had been struck

⁷¹ *Id.* at 54.

⁷² *Id.*

⁷³ *Id.* at 56.

⁷⁴ *Id.*

⁷⁵ *Id.*; see also *Aguirre v. S. Tex. Blood & Tissue Ctr.*, 2 S.W.3d 454, 457 (Tex. App.—San Antonio 1999, pet. denied) (destruction of records in the regular course of business and without notice of their relevance to future litigation did not raise spoliation presumption). *But see Stevenson v. Union Pac. R.R.*, 204 F.R.D. 425, 429-30 (E.D. Ark. 2001) (stating that following tape retention policy in light of circumstances amounted to bad faith) (see discussion *supra* section I.B.); *Computer Assocs. Int’l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 169 (D. Colo. 1990) (refusing to excuse defendant’s destruction of historical electronic data even assuming the maintenance of only the most updated version of the requested data was a bona fide business practice).

⁷⁶ 43 F. Supp. 2d 951 (N.D. Ill. 1999).

⁷⁷ *Id.* at 955.

by an air compressor that had fallen off a shelf several years prior, and that the computer “had fallen off my desktop on at least four or five occasions.”⁷⁸ The court found the testimony lacking credibility, and stated that it was unlikely an object the size of a desktop computer would just fall off a desk, and the plaintiff had no specific explanation for how it happened. Finally, the court noted that if the computer performed as sporadically as plaintiff had asserted, he would have purchased another computer or used a different computer to keep his business records.⁷⁹ Accordingly, the court granted the plaintiff’s motion for sanctions based on spoliation.⁸⁰

3. Would the Evidence Support the Inference That the Jury Will be Asked to Draw?

Courts will not issue a spoliation jury instruction or other remedy if the allegedly destroyed evidence would not support the inference that the jury would be asked to draw. In a case seeking enforcement of a child support order, the defendant had not paid child support as ordered by the court.⁸¹ The trial court held defendant in contempt and found that he owed over \$38,000 in back child support. On appeal, the defendant claimed that the trial court erred by failing to apply a spoliation presumption to credit him with certain amounts he alleged he had already paid. He alleged that he was entitled to the spoliation presumption because his former wife, Ms. El Rady, had destroyed deposit slips which would have shown deposits of child support payments he had made.⁸² The appeals court held that there was no error, because Ms. El

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 963.

⁸¹ *In re TLK*, 90 S.W.3d 833, 835 (Tex. App.—San Antonio 2002, no pet.).

⁸² *Id.* at 836.

Rady testified that she did not keep deposit slips because they did not show anything about the source of the funds deposited.⁸³

Furthermore, courts are unwilling to sanction a party for spoliation when the information in the purportedly destroyed evidence can be obtained from another source.⁸⁴ In *Malone* (see *supra* section II.B. for a more complete factual background), the nurse who took an incident report testified that she routinely included the information from the incident reports in her daily nursing report.⁸⁵ The Texas Supreme Court held, therefore, that the trial court did not abuse its discretion in refusing to allow plaintiff to introduce testimony from a hospital administrator regarding the destruction of the incident report.⁸⁶ The nursing report was available to plaintiff, and therefore, the trial judge could have concluded that the absence of the alleged incident report was not prejudicial to the plaintiff.⁸⁷

C. Remedies Available in Texas Courts

The Texas Rules of Civil Procedure provide a list of available remedies for spoliation. A court in which an action is pending may make any orders that are “just” which includes the following:

- 1) an order disallowing any further discovery of any kind;

⁸³ *Id.* The appeals court overruled obligor’s appeal even though, presumably, a deposit slip showing a deposit for the exact amount claimed by the defendant on or near the date provided by defendant would create a relatively strong inference that the alleged payment had been made, especially if Ms. El Rady could provide no other explanation for the deposit.

⁸⁴ *Malone v. Foster*, 977 S.W.2d 562, 564 (Tex. 1998); *Taylor Foundry Co. v. Wichita Falls Grain Co.*, 51 S.W.3d 766, 774 (Tex. App.—Fort Worth 2001, no pet.).

⁸⁵ *Malone*, 977 S.W.2d at 564.

⁸⁶ *Id.*

⁸⁷ *Id.* Similarly, in *Taylor Foundry Co. v. Wichita Falls Grain Co.*, the Fort Worth Court of Appeals held that the trial court did not abuse its discretion in refusing to issue a jury charge on spoliation, because the information in the tariff reports plaintiff claimed had been destroyed was readily available from sources on the internet. 51 S.W.3d 766, 774 (Tex. App.—Fort Worth 2001, no pet.).

- 2) an order charging all or any of the expenses of discovery against the disobedient party or the attorney advising him;
- 3) an order that designated facts relating to the discovery at issue shall be taken as established for the purposes of the litigation;
- 4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence;
- 5) an order striking out pleadings, or dismissing the action with or without prejudice;
- 6) an order of contempt for failure to adhere to the court's ruling;
- 7) in lieu of or in addition to any of the foregoing, the court shall require the offending party, or his attorney, or both, to pay reasonable expenses caused by the failure to comply with the court's order or a proper discovery request, unless the court finds that the failure was substantially justified.⁸⁸

Trial courts have broad discretion in deciding whether and how to sanction a litigant for discovery abuse.⁸⁹ Sanctions serve to achieve three main goals under Texas law: (1) to secure compliance with the discovery rules; (2) to deter other litigants from similar conduct; and (3) to punish violators.⁹⁰ In determining whether sanctions are “just” under Rule 215, courts are

⁸⁸ TEX. R. CIV. P. 215.2.

⁸⁹ *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004) (“A trial court’s ruling on a motion for sanctions...should be reversed only if it was arbitrary or unreasonable.”).

⁹⁰ *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992); *In re Dynamic Health, Inc.*, 32 S.W.3d 876, 882 (Tex. App.—Texarkana 2000, no pet.).

restrained, however, by the following requirements: (1) there must be a direct relationship between the offensive conduct, the offender, and the sanction imposed; and (2) the sanction “must not be excessive.”⁹¹

1. Adverse Presumption

The doctrine of spoliation can be summed up in the Latin phrase *omnia presumuntur contra spoliatorem*, or “all presumptions are against a despoiler.”⁹² Possibly the most commonly used remedy for spoliation is an admonition from the judge ordering the jury to presume that the evidence that was not produced was unfavorable to the spoliator.⁹³ Trial courts have broad discretion in deciding whether to give a spoliation instruction to a jury.⁹⁴ The goal is to compensate the injured party and attempt to restore the evidentiary balance.

Generally, Texas courts apply two rules regarding presumptions arising from spoliation of evidence: one for intentional spoliation and one for unintentional spoliation. Intentional spoliation raises a presumption that the evidence would have been unfavorable to the spoliator.⁹⁵ The alleged spoliator may rebut this presumption by showing that there was no fraudulent intent

⁹¹ *Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004); *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 882 (Tex. 2003); *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991); *In re Dynamic Health, Inc.*, 32 S.W.3d at 882.

⁹² *Wal Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003) (citing BLACK’S LAW DICTIONARY 980 (5th ed. 1979)); *Watson v. Brazos Elec. Power Coop., Inc.*, 918 S.W.2d 639, 643 (Tex. App.—Waco 1996, writ denied).

⁹³ TEX. R. CIV. P. 215.2.

⁹⁴ *Trevino*, 959 S.W.2d at 953; *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 920 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 657 (Tex. App.—Houston [1st Dist.] 1998, no pet.); see also *In re TLK*, 90 S.W.3d 833, 836 (Tex. App.—San Antonio 2002, no pet.) (courts have wide discretion to remedy spoliation of evidence).

⁹⁵ *Felix v. Gonzalez*, 87 S.W.3d 574, 581 (Tex. App.—San Antonio 2002, pet. denied); *Brumfield*, 63 S.W.3d at 920 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (destruction of surveillance camera recording was not intentional spoliation because it was done pursuant to policy and, at the time of destruction, the claims adjuster believed the events took place outside the view of the camera); *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied).

or purpose in destroying the evidence.⁹⁶ In *Ordonez*, a car accident victim sought a spoliation presumption because the defendant truck driver had destroyed his driver's log which documented hours driven and off-duty time.⁹⁷

The court held that no instruction was warranted because it was part of the trucking company's policy to dispose of log books after six months, and therefore there was no evidence that the log books were destroyed for the purpose of concealing them from the plaintiff.⁹⁸ The court arrived at this conclusion even though plaintiff implied that he had sent a letter notifying the trucking company of the claim that would be filed within four days of the accident.⁹⁹ The court stated, however, that there was no actual testimony to establish that plaintiff had in fact sent a notice of claim letter, and defendant, when asked directly about the letter, stated only that it "was possible" that he had received such a letter.¹⁰⁰ Under these facts, the appellate court held that trial court did not abuse its discretion by failing to issue a spoliation instruction.¹⁰¹

Similar to intentional destruction, "*unintentional* spoliation, or the failure to produce evidence within a party's control raises a rebuttable presumption that the missing evidence would be unfavorable to the non-producing party."¹⁰² In the case of unintentional spoliation, however, the presumption may be rebutted slightly differently than in the case of intentional destruction. In the case of unintentional destruction, the non-producing party may rebut the

⁹⁶ *Ordonez v. M.W. McCurdy & Co., Inc.*, 984 S.W.2d 264, 273 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Felix*, 87 S.W.3d at 574; *Brumfield*, 63 S.W.3d at 920.

presumption by providing testimony or other evidence as to the substance or content of the missing evidence.¹⁰³

2. Preclusion of Evidence

A judge may also “issue an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence.”¹⁰⁴ In some cases, fact witness or expert witness testimony may even be excluded altogether.¹⁰⁵ If the party cannot prove its case without that expert’s testimony, summary judgment may be appropriate.

Similarly, a court may order that certain facts be taken as established for purposes of the litigation.¹⁰⁶ In *Spohn Hospital v. Mayer*, the Texas Supreme Court has recently reiterated, however, that “[d]iscovery sanctions that are so severe as to inhibit the presentation of the merits of a case should be reserved to address a party’s flagrant bad faith or counsel’s callous disregard for the responsibilities of discovery under the rules.”¹⁰⁷ In that case, the trial court ordered that certain crucial facts be taken as established and imposed the sanctions “because of Spohn’s late production of witness statements in response to a Request for Disclosure.”¹⁰⁸ The Texas

¹⁰³ *Felix*, 87 S.W.3d at 574 (holding that the trial court abused its discretion in issuing a spoliation instruction because the complaining party failed to satisfy the court that the alleged recorded witness statement actually existed and because the other party produced its own notes of the interviews and was cross-examined regarding the substance of the events); *see also Brumfield*, 63 S.W.3d at 920.

¹⁰⁴ TEX. R. CIV. P. 215.2(b)(4); *see also Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991).

¹⁰⁵ *See Walton v. City of Midland*, 24 S.W.3d 853, 861-62 (Tex. App.—El Paso 2001, no pet.) (affirming lower court decision to strike plaintiff’s expert testimony for failure to maintain various work papers); *see also United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 25 (D.D.C. 2004); *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Co.*, 982 F.2d 363, 368 (9th Cir. 1992).

¹⁰⁶ TEX. R. CIV. P. 215.2(b)(3).

¹⁰⁷ *Spohn Hosp.*, 104 S.W.3d at 883.

¹⁰⁸ *Id.*

Supreme Court overturned the sanctions order because the trial court had failed to comply with the *TransAmerican* two-prong test for “just” sanctions.¹⁰⁹

3. Monetary Sanctions

Under the Texas Rules, the expenses of production in response to discovery “will be borne by the responding party, and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party.”¹¹⁰ In the case of electronic discovery, however, the producing party need only produce the electronic data that is “reasonably available to the responding party in the ordinary course of business.”¹¹¹ If extraordinary steps are necessary to retrieve the information requested, and the court orders the responding party to comply with the request, “the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.”¹¹²

Notwithstanding the cost allocation provided by the Texas Rules, in the case of spoliation a court may order a party or his attorney to pay for all or any portion of the expenses of discovery.¹¹³ Courts typically resort to monetary sanctions when the spoliation causes the opposing party to incur excessive expenses to remedy the lost evidence.¹¹⁴ In addition, monetary sanctions can serve a punitive or deterrent function.¹¹⁵ Punitive sanctions recognize

¹⁰⁹ *Id.*

¹¹⁰ TEX. R. CIV. P. 196.6.

¹¹¹ TEX. R. CIV. P. 196.4. *But see Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (establishing a seven-factor test for cost-shifting under Federal Rule of Civil Procedure 26, and noting that cost-shifting for electronic discovery is only appropriate when “*inaccessible* data is sought”).

¹¹² *Id.*

¹¹³ TEX. R. CIV. P. 215.2(b)(2).

¹¹⁴ *Walton* at 861-62 (assessing \$4,715.00 in fees and costs incurred by the defense in attempting to compel production of an expert report that plaintiff knew had been destroyed).

¹¹⁵ *Williams v. Akzo Nobel Chems., Inc.*, 999 S.W.2d 836, 843-44 (Tex. App.—Tyler 1999, no pet.).

the unnecessary consumption of the Court's time and resources in regard to the issue of document destruction...informs [the spoliator] and the public of the gravity of repeated incidents of document destruction...[and in] assessment of this monetary sanction, the Court has considered the financial worth of [the spoliator] and the minimal financial impact this sanction will have on [the spoliator's] financial stability.¹¹⁶

4. Dismissal or Default

The so called "death penalty" sanction is the most severe remedy available to the court.¹¹⁷

This sanction, which involves striking a party's pleadings or granting summary or default judgment, terminates the party's litigation and usually precludes further litigation of the same issues.¹¹⁸ This sanction is rarely invoked because it is appropriate "only when the party has acted in flagrant bad faith or his counsel has callously disregarded the responsibilities implicit in the discovery rules."¹¹⁹ Only in the face of such egregious conduct may Texas courts consider sanctions which prevent the disposition of the case on the merits. Even in cases of flagrant bad faith, however, Texas courts are generally obligated to test lesser sanctions before resorting to sanctions that prevent a decision on the merits of a case.¹²⁰ Only when the lesser sanction proves inadequate to secure compliance with the rules, promote deterrence, and adequately punish the

¹¹⁶ *Nat'l Assoc. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 558-59 (N.D. Cal. 1987); see also *In re Prudential Ins. Co. Sales Practices Litig.*, 169 F.R.D. 598, 617 (D.N.J. 1997) (\$1,000,000 sanction imposed in recognition of the unnecessary consumption of the court's time and resources with regard to document destruction, and to inform the defendant and the public of repeated incidents of document destruction, and to preserve the integrity of court proceedings).

¹¹⁷ *Trevino*, 969 S.W.2d at 953.

¹¹⁸ As noted in the Texas Rules of Civil Procedure, a court may dismiss with or without prejudice. TEX. R. CIV. P. 215.2.

¹¹⁹ *Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004). Similarly, federal courts will impose default or dismissal sanctions when spoliators willfully destroy evidence that deprives victims of the opportunity to present critical evidence. See, e.g., *Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*, 133 F.R.D. 166, 168 (D. Colo. 1990); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

¹²⁰ *Hamill v. Level*, 917 S.W.2d 15, 16 n.1 (Tex. 1996); *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992).

offender is a “death penalty” sanction appropriate.¹²¹ On the other hand, 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 sanction would promote compliance with the rules.”¹²²

The Texarkana Court of Appeals has held that a death penalty sanction was appropriate in a suit between a physician and hospital owners.¹²³ The defendant hospital sought a writ of mandamus after the trial court rendered a default judgment in favor of the plaintiff, Dr Chung.¹²⁴ The trial court had found that the hospital possessed written and videotaped records of Dr. Chung’s office equipment (which Dr. Chung alleged the hospital had stolen), those records were essential to Dr. Chung’s case, and that the hospital refused to produce them despite the imposition of significant monetary sanctions.¹²⁵ The hospital offered no explanation as to why these and other records were not produced, and the trial court had imposed lesser sanctions (including a fine of \$500,000) that had failed to persuade the defendant to comply with discovery orders, so the appellate court refused to issue mandamus and let the death penalty sanctions stand.¹²⁶

Although not a Texas case, Florida courts have recently provided a striking example of the severity of sanctions that may be imposed for spoliation and discovery abuses. In *Coleman*

¹²¹ *Chrysler Corp.*, 841 S.W.2d at 849.

¹²² *Cire*, 134 S.W.3d at 841 (holding that defendant’s conduct was so egregious that the trial court properly imposed death penalty sanction without testing lesser sanctions, even though a court must consider less stringent sanctions, and “*in all but the most exceptional cases, actually test the lesser sanctions* before striking the pleadings”) (emphasis added); *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729-30 (Tex. 1993); *see also Trevino v. Ortega*, 969 S.W.2d 950, 959 (Tex. 1998) (Baker, J., concurring) (“courts can dismiss an action or render default judgment when the spoliator’s conduct was egregious, the prejudice to the nonspoliating party was great, and imposing a lesser sanction would be ineffective to cure the prejudice”).

¹²³ *In re Dynamic Health, Inc.*, 32 S.W.3d 876, 885 (Tex. App.—Texarkana 2000, no pet.).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 885-86.

(Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., the Palm Beach County Court granted Coleman’s motion for default judgment after finding that Morgan Stanley and its counsel engaged in a litany of discovery abuses in responding to Coleman’s requests for production of relevant e-mails.¹²⁷ Coleman had sued Morgan Stanley for \$900 million in damages stemming from the investment bank’s role in the 1998 sale of Coleman to Sunbeam. The Court found that Morgan Stanley, and its lead counsel had

deliberately and contumaciously violated numerous discovery orders...chose to hide information about its violations and coach witnesses to avoid any mentions of additional, undisclosed problems with its compliance with the Agreed Order. Implicit in the requirement that MS & Co. certify compliance with the Agreed Order was the requirement to disclose impediments to its ability to so certify...[t]he other discovery abuses call into doubt all of MS & Co.’s discovery responses. *The judicial system cannot function this way.*¹²⁸

The Court made minor redactions of the Plaintiff’s complaint and ordered that it be read to the jury with the instruction that “those facts are deemed established for all purposes in this action.”¹²⁹ Essentially, Morgan Stanley was precluded from defending itself at trial on most elements of liability.

5. Independent Tort

Like many other jurisdictions, Texas has declined to recognize a separate tort cause of action for spoliation.¹³⁰ The Texas Supreme Court left open the possibility, however, that there might be a tort cause of action for spoliation against a third party who is not a party to the lawsuit.¹³¹ The Texas Supreme Court has not yet addressed this issue directly, but the Dallas

¹²⁷ No. CA 03-5045 AI, 2005 WL 674885 at *9-10 (Fla. Cir. Ct. Mar. 23, 2005).

¹²⁸ *Id.* at *9.

¹²⁹ *Id.*

¹³⁰ *Trevino v. Ortega*, 969 S.W.2d 950, 951 (Tex. 1998).

¹³¹ *Id.* at 951 n.1.

Court of Appeals has already denied at least one such claim because the plaintiff failed to provide “any compelling reason for this Court to recognize a new tort of spoliation by third parties.”¹³² Therefore, although Texas does not recognize an independent tort of spoliation among parties in to a lawsuit, it is at least theoretically possible that a non-party could potentially face liability for improper destruction of evidence.

6. Criminal Penalties

In addition to federal obstruction of justice statutes, the Texas Penal Code makes tampering with physical evidence knowing an investigation or legal proceeding is pending or in progress a third degree felony.¹³³ Texas courts also recognize contempt as an appropriate sanction for spoliation.¹³⁴ The court has the express power under the Texas Rules of Civil Procedure to invoke criminal contempt sanctions for spoliation.¹³⁵ Aside from the “death penalty” sanctions of dismissal or default, criminal sanctions are probably the most severe sanctions the court can order. Texas courts however, require a direct relationship between the offensive conduct and the sanctions imposed.¹³⁶ In addition, the sanction imposed may not be more severe than necessary to achieve the goals of deterrence, punishment, and compliance with the rules.¹³⁷

¹³² *McIntyre v. Wilson*, 50 S.W.3d 674, 686 (Tex. App.—Dallas 2001, pet. denied) (citing *Trevino* for the proposition that “we are especially averse to creating a tort that would only lead to duplicative litigation, encouraging inefficient litigation of issues better handled within the context of the core cause of action”).

¹³³ Tex. Penal Code § 37.09 (West 2003).

¹³⁴ *GTE Communications Sys. Corp. v. Tanner*, 865 S.W.2d 725, 729-30 (Tex. 1993).

¹³⁵ TEX. R. CIV. P. 215.2.

¹³⁶ *Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004).

¹³⁷ *Id.*

III. CONCLUSION

Spoliation of evidence can have severe consequences for corporations involved in civil or criminal litigation. A well-planned, consistently enforced document retention policy can help minimize the potential adverse consequences of inadvertent spoliation of evidence. Although such a policy does not make a corporation immune to a charge of spoliation, preclude liability, nor prevent a jury from drawing an adverse inference, it may, nonetheless, prevent liability if the corporation destroyed the documents in accordance with the policy and the corporation was not on notice of the relevance of the documents to the claims against it. Of course, a well-planned and consistently enforced document retention policy may also reduce the volume of materials needing to be reviewed for litigation, and may also lead to better organization of relevant documents. Both effects will serve to reduce the expense of litigation.

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APPENDIX A

MEMORANDUM

To: Client
From: Law Firm, LLP
Date:
Subject: Document Retention Issues

As a defendant in a federal securities suit, one of the matters which requires your immediate attention is the retention and preservation of all potentially relevant data in the custody and control of your company – whether in hard-copy or electronic form. The safeguarding of this information is crucial for a number of reasons:

- (1) The loss or destruction of evidence during the pendency of a lawsuit can lead to serious judicial sanctions, including monetary fines and adverse jury instructions;
- (2) Documents and other data from your company's files will assist us in understanding your company's practices and will aid in the development of effective defense strategies;
- (3) Certain documents from your company's files may be useful to us in developing a motion to dismiss the complaint;
- (4) Certain documents may be useful in formulating or evaluating settlement opportunities;
- (5) Even though discovery may not commence for a number of months, once it begins, plaintiff will likely seek the production of a wide variety of documents related to the suit, extending back over a long period of time.

Because it is difficult at the early stages of litigation to predict what documents ultimately may be sought by plaintiffs or may be useful to the defense, we recommend that the broadest possible range of materials be preserved. This includes:

- All existing drafts of relevant documents, in addition to the final versions.

- Information which may otherwise be available in the public domain. Plaintiffs are entitled to ascertain what materials existed in the company's files on relevant issues, including publicly available information. Likewise, it may be useful to your defense to demonstrate that certain public information was in the company's possession.
- Calendars, date books, emails, notes, correspondence, tape recordings and phone records of any individual defendants, as well as key officers, directors and employees with direct knowledge of the issues raised in the complaint.

To assure that immediate attention is given to this issue within your company, we advise that a short memorandum be distributed, cautioning employees to retain all potential relevant files. Attached is a short form of such a memorandum, which may be adapted for your use.

Once retention of your documents is assured, we will provide you with a detailed list of the categories of documents we expect plaintiffs to seek in discovery, as well as documents which will be helpful in our preparation of your defense. We are available to assist you to whatever extent necessary in the document collection process.

If you have any questions concerning document retention and document collection at any time, please feel free to contact any of the attorneys staffed on this matter.

APPENDIX B

DATE:

TO: Distribution

FROM: CEO, ABC Co.

SUBJECT: Pending Litigation

XYZ Company of Texas has recently sued ABC Co. in Texas courts claiming that customer agreements violate the antitrust laws. This letter is to ask you to retain in your files all documents relating to customer agreements or any other agreements with retailers for the following geographic areas:

1. Texas
2. Oklahoma
3. New Mexico

These documents would include agreements, emails, correspondence, memos, or any other documents relating to agreements with retailers in these territories.

We may need to contact you in the future to collect these documents. At that time you will be asked to confirm that you received this memo and retained your files as requested.

If you have any questions, please contact me at extension 0000.

Thank you for your assistance.

APPENDIX C

CONFIDENTIAL MEMORANDUM

To: All Employees
From: _____
Date: October ____, 2003
Subject: Document Retention

As you may know, a class action lawsuit alleging violations of federal securities laws has been filed against ABC Co. by a plaintiff seeking to represent all persons who purchased ABC Co. stock during the period from April 1, 2003 through May 31, 2003. Our outside legal counsel has asked me to remind you all not to destroy, purge or give away any documents pertaining to any matters that are the subject of the suit, including any drafts, correspondence, e-mails and other information in electronic form.

The matters that are the subject of the suit include:

- (1) ABC Co.'s estimated and actual operating and capital requirements;
- (2) ABC Co.'s ability to obtain sufficient funding to meet its operating and capital requirements;
- (3) ABC Co.'s registration for 8.5 million shares of common stock;
- (4) Communications between ABC Co. and its auditors;
- (5) Whether NASDAQ would de-list ABC Co.'s stock; and
- (6) ABC Co.'s sales channel realignment that, among other things, decreased the size of its field sales organization, closed 25 sales offices and eliminated 1000 positions in its workforce.

If you have any question about the relevance of particular documents to these matters, please contact me to discuss it. If you have documents that you believe may be relevant, but that you are unable to store any longer, please let me know, and I will arrange for them to be stored in a central location.

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