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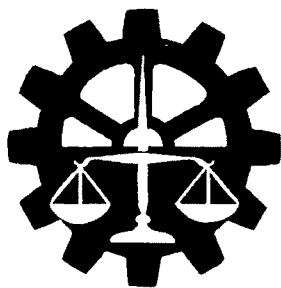
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& Peter J. Lynch*



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Spoliation of Evidence in Texas and the Corporate Records Retention Policy

John R. Walker and Peter J. Lynch

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Spoliation of Evidence in Texas and the Corporate Records Retention Policy

By John R. Walker and Peter J. Lynch*

I. INTRODUCTION

Black's Law Dictionary defines spoliation as "the destruction of evidence. It constitutes an obstruction of justice."¹ It has been defined by the courts as simply "the improper destruction of evidence relevant to a case."² The doctrine of spoliation is only implicated where physical, tangible evidence has been destroyed.³ In Texas, the doctrine of spoliation allows the court to instruct the jury that they may presume that the destroyed evidence would have been harmful to the party who destroyed it. This presumption is predicated on two elements. First, the deliberate destruction of evidence by the party controlling it⁴

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1. Black's Law Dictionary, 5th ed. at 1257 "The destruction, or the significant and meaningful alteration of a document or instrument. *Application of Bodkin*, 165 F.Supp. 25, 30 (D.C.N.Y. 1958).
2. *Kang v. Hyundai Corp.*, 992 S.W.2d 499, 502 (Tex.App.—Dallas 1999, no pet.);
3. *American Maintenance & Rentals, Inc. v. Estrada*, 896 S.W.2d 212, 213 (Tex.App.—Houston (1st Dist.) 1995) citing *Brewer v. Dowling*, 862 S.W.2d 156 (Tex.App.—Ft. Worth 1993, writ pending), *San Antonio Press v. Custom Bilt Machinery*, 852 S.W.2d 64 (Tex.App.—San Antonio 1993, no writ), *Newton v. General Manager*, 546 S.W.2d 76 (Tex.Civ.App.—Corpus Christi 1976, no writ), and *H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex.Civ.App.—Waco 1975, writ dismissed).
4. *H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex.Civ.App.—Waco 1975, writ dismissed).

and second, the lack of testimony regarding the contents of the evidence by that party.⁵

II. THE SPOILIATION DOCTRINE IN TEXAS

When a party fails to produce evidence within its control, the law presumes that, if produced, the evidence would operate against that party.⁶ This presumption serves to insure that a litigant's rights are not impaired by another party's improper destruction of relevant evidence.⁷ The spoliation presumption arises, however, only after the party that is not in control of the evidence has introduced evidence that is harmful to the party in control of the evidence.⁸

To prevent a party from benefiting from the spoliation of evidence, a court may fashion an appropriate remedy. Available remedies include a presumption that the missing evidence would be unfavorable to the party that impaired or destroyed the evidence. The presumption may be accompanied by an instruction to the jury. Traditional sanctions are also available, particularly where the presumption and instruction are ineffective to prevent the party to benefit from the spoliation. These can include criminal sanctions for obstruction of justice⁹ and destruction of evidence. Determination of the appropriate remedy generally derives from the mental state of the actor destroying or impairing the putative evidence. Determination of the appropriate remedy generally derives from the reason that the putative evidence was impaired or destroyed. In most instances, the appellant argues that the trial court committed reversible error in the submission of or refusal to submit a jury instruction on spoliation. Whether or not to submit a jury instruction is left to the trial court's discretion¹⁰ and can only be reversed if it

5. *Id.* at 343,44.

6. *H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340,343 (Tex. Civ. App. -Waco 1975, writ dismissed); *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App. - Fort Worth, 1993, writ denied); *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654 (Tex. App. -Houston[1st Dist.] 1998).

7. *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998).

8. *Watson v. Brazos Electric Power Cooperative, Inc.*, 918 S.W.2d 639, 643 (Tex. App. -Waco 1996, writ denied).

9. *U.S. v. Lundwall*, S-1 97 Cr. 211 (S.D.N.Y. June 27, 1997) (Multi-national oil company executive indicted for obstruction of justice for allegedly destroying company records to avoid producing them in a civil lawsuit).

10. *Bell*, 517 S.W.2d at 256.

probably caused the rendition of an improper verdict.¹¹ Case law suggests that the courts will not tolerate a party's attempt to, in essence, fabricate evidence through the use of the doctrine of spoliation—there must be some evidence that the contents of the destroyed evidence was directly relevant to the case.¹²

III. *TREVINO V. ORTEGA*

The Texas Supreme Court has stated: "Our jurisprudence does not permit parties to benefit from spoliation of evidence."¹³ *Trevino v. Ortega*,¹⁴ In that case, the Supreme Court was presented with the opportunity to judicially create a common-law tort for spoliation of evidence. The Court refused to find an independent cause of action for spoliation.¹⁵ Rather, any "improper conduct should properly be rectified within the context of the lawsuit".¹⁶

1. *Intentional Spoliation of Evidence*

A corporation may violate that duty, for example, by intentionally burning driving logs and vehicle inspection reports after a lawsuit has been filed against it arising from a vehicle collision.¹⁷ An expert witness' destruction of his file may provide the basis for a spoliation sanction.¹⁸ Additionally, intentional destruction of evidence may form the grounds for a criminal prosecution for obstruction of justice,¹⁹ or destruction of evidence²⁰.

11. *Ordonez v. M.W. McCurdy & Co., Inc.*, 984 S.W.2d 264, 273 (Tex.App.—Houston [1st Dist.] 1998) *citing* Tex.R.App.P. 44.1)

12. *Id.*

13. *Walton v. City of Midland*, 24 S.W.3d 853, 862 (Tex. App. —El Paso, 2000).

14. 969 S.W.2d 950, 959-60 (Tex.1998).

15. *Trevino v. Ortega*, 969 S.W.2d at 953.

16. *Trevino v. Ortega*, 969 S.W.2d at 953.

17. *Whiteside v. Watson*, 12 S.W.3d 614 (Tex.App.—Eastland 2000, reh'g overruled).

18. *Walton, supra*. The Court of Appeals stated: "Appellant's good faith was called into doubt when he failed to inform the trial court that no report would be forthcoming. The fine against Appellant and his counsel is also reasonable as it was their behavior which induced the City to believe that a report had been prepared." *Id.* at 862.

19. Tex. Crim. Code.

20. Tex. Crim. Code.

In *Whiteside v. Watson*²¹, defendant burned vehicle records, in alleged accordance with an unwritten company policy, after receiving notice of the suit. Whiteside, driving a dump truck owned by Huebner, rear-ended Watson. Every workday, Whiteside completed a Driver's Log and a Vehicle Inspection Report in keeping with trucking regulations. Whiteside noted in both the Log and the Report that there were problems with the dump truck's brakes and steering. The Log and Report were completed in duplicate with the original going to Huebner and the copy staying with Whiteside. At trial, the original Log and Report had been burned so Whiteside's copies were introduced. Huebner disavowed any knowledge of problems with the dump truck and asserted that Whiteside had forged his copies. On appeal from a judgment for Watson, Huebner argues that the spoliation instruction was improper since Whiteside testified about the Log and Report copies of both were introduced. The Appellate Court rejected this argument based on Huebner's testimony at trial and destruction of relevant evidence after receiving notice of litigation.

2. Innocent Spoliation of Evidence

Since the sanction for spoliation generally derives from the circumstances of the destruction of the evidence, Texas courts have tended not to punish the spoliator when the record either does not establish the reason for the destruction, or establishes the innocence of the destruction.

For example, in *Aguirre v. Texas Blood & Tissue Center*, the San Antonio Court of Appeals held that the Texas Blood & Tissue Center "acted in its regular course of business in destroying records at the time, without scienter or negligence on its part", there was no error in the trial courts failure to give a presumption or instruction on the spoliation claim.²² In that case, Plaintiff contended she contracted the AIDS due to receipt of tainted blood during a transfusion while giving birth and argued for the application of the spoliation presumption since the TCBC had destroyed all of its records from the relevant time period. However, the TCBC had done so according to the standard proce-

21. 12 S.W.3d 614 (Tex.App.—Eastland 2000, reh'g overruled).

22. *Aguirre v. Texas Blood & Tissue Center*, 1999 WL 511540 (Tex.App.-San Antonio 1999). The Court further found that the Defendant "had no actual notice that it would be called to defend a lawsuit arising out of the 1983 transfusions, and had no reasonable expectation at the time that it would be called to defend against them".

dures recommended by the American Association of Blood Banks.

Similarly, in a medical malpractice claim, the Amarillo Court of Appeals found the lack of evidence in the record justified the lack of a spoliation presumption.²³ Likewise, the Dallas Court found the record contained no evidence related to the destruction of termination reports in an age discrimination claim did not warrant a spoliation presumption.²⁴ However, a Houston Court of Appeals has placed the burden on the party destroying the records to provide that it “exercised reasonable diligence” to preserve the records after being apprised of potential adverse claims.²⁵

In *Ordonez v. M.W. McCurdy & Co., Inc.*,²⁶ a trucking company had an established policy to destroy the logbooks on its trucks after 6 months. A lawsuit arose as a result of a rear-end collision where appellant’s truck hit appellee’s van. Appellee requested a spoliation instruction, which the trial court refused. The Court of Appeals held that a spoliation instruction would have been improper for two reasons. First, despite claiming to have notified appellant within four days of the accident that litigation would ensue, appellee was unable to produce evidence of such notice. Second, appellee did not introduce any evidence that the logbook would have contained relevant information and, therefore, could not demonstrate “reversible error” or the probability of a different outcome had the instruction been issued.

3. No Reason for Spoliation of Evidence

In *Hight v. Dublin Veterinary Clinic, P.C.*, the plaintiffs, Marcus Hight and Punk Carter doing business as the “Hight/Carter Goat Partnership”, sued a veterinarian and his clinic for their goat that died undergoing surgery.²⁷ The spoliation claim arose from defendant’s apparent cremation of the goat following the unsuccessful surgery. The Eastland Court of Appeals held that there was no evidence in the record of the whereabouts of

23. *Clements v. Conard*, 21 S.W.3d 514, 523 (Tex. App. —Amarillo, 2000).

24. *Anderson v. Taylor Publishing Co.*, 13 S.W.3d 56, 61 (Tex. App. —Dallas, 2000).

25. *Offshore Pipelines, Inc. v. Schooley*, 984 S.W. 2d 654, 667-68 (Tex. App. —Houston, 1999).

26. 984 S.W.2d 264 (Tex.App.—Houston (1st Dist.) 1998).

27. *Hight v. Dublin Veterinary Clinic, P.C.*, 22 S.W.3d 614 (Tex. App. —Eastland, 2000). (The goat was named “Pancho”).

the goat, or the intentional destruction of the goat, and therefore, the record did not support a spoliation presumption.

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4. Non-Party Spoliation of Evidence

The doctrine of spoliation can only be used against parties to the suit.³⁰ The fact that someone not a party to the suit destroyed evidence cannot be used by one of the parties, as grounds for the presumption that the evidence destroyed by the non-party would have benefited their case.³¹ In *Scolaro v. State of Texas*, Scolaro was a judge and the target of a Quo Warranto proceeding to remove her from the bench due to lack of qualifications. In appealing the summary judgment entered against her, Scolaro argued that the trial court committed reversible error in denying her spoliation of evidence instruction based on the fact that documents she sought from the State Bar of Texas (not a party to the suit) had been destroyed in accordance with State Bar policy. The Amarillo Court of Appeals affirmed the trial court's denial of the instruction holding a party cannot use the doctrine to create an affirmative presumption that documents destroyed by a non-party would have benefited the party.

5. Amending Interrogatories as Spoliation of Evidence

Spoliation is generally not triggered by the amendment of discovery responses. When the defendant submitted answers to interrogatories that implicated a co-defendant and later amended those answers to remove the implication, the plaintiff argued that the spoliation presumption applied.³² The Court of Appeals rejected plaintiff's argument, holding that to even consider the application of the spoliation presumption, there must

28. *Clements v. Conard*, 21 S.W.3d 514, 523 (Tex. App.—Amarillo, 2000).

29. *Anderson v. Taylor Publishing Co.*, 13 S.W.3d 56, 61 (Tex. App.—Dallas, 2000).

30. *Scolaro v. State of Texas*, 1 S.W.3d 749 (Tex.App.—Amarillo 1999, no pet.).

31. *Scolaro*, *supra*.

32. *American Maintenance & Rentals, Inc. v. Estrada*, 896 S.W.2d 212 (Tex.App.—Houston (1st Dist.) 1995), *vacated pursuant to settlement*.

actually be destroyed evidence. Amending answers to interrogatories does not equate with destruction of evidence since the original answers are preserved.

6. Evidence Must Actually Be Destroyed.

For the spoliation doctrine to apply, tangible evidence must actually be destroyed. For example, when a lab to which appellant had sent soil samples for testing destroyed the samples but preserved the results of the testing, appellant was not entitled to an instruction on spoliation since there was no evidence as to what the destroyed samples would have shown plus, the sample's test results were not destroyed.³³ It wasn't until the *Scolaro* case a year later that the courts recognized that the actions of a non-party could not serve as the basis for an instruction on spoliation of evidence.

Similarly, in *Wal-Mart Stores, Inc. v. Middleton*,³⁴ Middleton slipped and fell in a Wal-Mart store. Following the accident, a Wal-Mart manager took two Polaroid pictures of a "hole" in the floor surface, which was the apparent cause of Middleton's fall. The manager attached the photos to the accident report she sent to the store headquarters. At trial, the photos could not be found so the trial court issued a jury instruction on spoliation. On appeal, the court stated that there are two parts to a spoliation presumption: first, the deliberate destruction of evidence and, second, that the party in control of the evidence does not produce it and does not testify.³⁵ Since the manager who took the photos testified as to what they depicted, it was improper to submit an instruction on spoliation.

7. No Duty to Retain Evidence.

Generally, there is no duty to retain evidence. A failure to retain evidence which one has no duty to retain does not justify an instruction on spoliation.³⁶ In *Browning*, the plaintiff slipped and fell on a clear liquid on the floor of a grocery store. An employee of the grocery store followed a trail of the liquid to a leaking bottle of floor wax in another shopper's cart but did

33. *Tucker v. Terminix Intenational Co., L.P.*, 975 S.W.2d 797 (Tex.App.—Corpus Christi 1998, review denied).

34. 982 S.W.2d 468 (Tex.App.—San Antonio 1998, review denied).

35. *Id.* citing *H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 343-44 (Tex.Civ.App.—Waco 1975, dism'd).

36. *Browning v. Minyard Food Stores, Inc.*, unpublished (Tex.App.—Dallas 1999).

not retain the bottle. The appellate court determined that, based on the evidence presented at trial, the grocery store was under no duty to retain the leaking bottle and further held that the failure to retain something which one is under no duty to retain does not rise to the level of destroying evidence.

8. *The Presumption is Not Evidence*

Even if the court determines that an instruction and presumption is proper, that instruction and presumption is not, itself, evidence. In *Kang v. Hyundai Corporation*,³⁷ Kang sued Hyundai due to a single car accident claiming defects in the steering and suspension. The wrecked car was vandalized while in Kang's possession and before Hyundai had the opportunity to inspect it. Hyundai was granted a summary judgment based, in part, on the argument that Kang had, in effect, destroyed evidence since the car was vandalized while in her possession. The Dallas Court of Appeals reversed, stating that it would not "transform a presumption or sanctionable event into a conclusively established fact for summary judgment purposes."³⁸

9. *Other Jurisdiction*

The *Trevino* court recognized that twenty other jurisdictions have considered the issue of whether or not spoliation constitutes an independent cause of action.³⁹ At that time, only six states had recognized spoliation as an independent tort: California, Alaska, Ohio, Florida, New Mexico and New Jersey. Since *Trevino*, Illinois and Kansas have recognized the tort of negligent spoliation,⁴⁰ bringing the total to eight states now recognizing spoliation as an independent tort.

Other states have proven themselves willing to assess much more severe sanctions up to dismissal of a plaintiff's case.⁴¹ In two separate Pennsylvania cases involving trucking accidents, the courts dismissed one case and granted summary judgment in the other because the plaintiffs did not preserve all

37. 992 S.W.2d 499 (Tex.App.—Dallas 1999, reh'g overruled).

38. *Id.*

39. 969 S.W.2d 950 (Tex. 1998).

40. "Spoliation of Evidence: Is One Man Trashing Another Man's Treasure." Steve E. Couch 62 Tex. B.J. 242, 247 March 1999.

41. See Nolte, "For Spoliating Parties, Court's Don't Spare the Rod," National Law Journal, p. C-7, C-9 (Sept. 8, 1997).

of the truck wreckage.⁴² For the same reasons, a case was dismissed in which an insured's house was destroyed by fire, the insurance company expert determined that a Sunbeam gas grill caused the fire but only retained the grill's fuel system allowing the remainder of the grill to be lost or destroyed.⁴³

Less severe sanctions such as the exclusion of critical testimony,⁴⁴ the imposition of monetary sanctions,⁴⁵ the entry of a default judgment,⁴⁶ and ordering that the plaintiff whose expert failed to retain gas supply piping could not argue that the piping was defective.⁴⁷

IV. RECORD RETENTION POLICIES

The initial inquiry of a spoliation claim is whether the party has a duty to preserve the evidence. As discussed above, a duty exists in Texas to preserve relevant evidence during pending litigation.⁴⁸ A duty may exist to preserve relevant evidence if a party anticipates litigation.⁴⁹ Additionally, duties may arise under various federal and state laws. Consequently, a party's record retention policy may be critical to support a claim that evidence was not intentionally or negligently destroyed.⁵⁰

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42. *Stubli v. Big D International Trucks, Inc.*, 810 Pa.2d 785 (Nev. 1991) (plaintiff's expert only retained that portion of the evidence he believed supported his theory of a product defect; the remainder was discarded), and *Schroeder v. Pennsylvania Department of Transportation*, 676 A.2d 727 (Pa. Commonwealth Court 1996)(plaintiff had storage company retain the wreckage and storage company sold some of the wreckage parts).
 43. *Allstate Insurance Co. v. Sunbeam Corp.*, 53 F.3d 804 (7th Cir. 1995)
 44. *Patton v. Newmar*, 538 N.W.2d 116 (Minn. 1995)
 45. *In re: Prudential Insurance Co. Sales Practices Litigation*, 169 F.R.D. 598 (D. N.J. 1997)
 46. *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984)
 47. *Cincinnati Insurance Co. v. Synergy Gas, Inc.*, 585 So.2d 822 (Ala. 1991)
 48. *Trevino v. Ortega*, 969 S.W.2d at 955. Tex. R. Civ. P. 215.
 49. *Watson v. Brazos Electric Power Coop., Inc.*, 918 S.W.2d 639,643 (Tex. App. —Waco 1996, writ den'd)(Court of Appeals held that trial court abused discretion in refusing to give spoliation instruction where defendant failed to preserve direct evidence after becoming aware of Plaintiff's potential claim).
 50. *Ordonez v. McCurdy*, 984 S.W. 2d 264 (Tex. App.—Houston[1st Dist.] 1998, no pet.) (discretion not abused in denying spoliation instruction where evidence showed log books were disposed of pursuant to a company policy and missing data was not shown to be harmful.).

V. RECOMMENDATIONS

Under current Texas law, compliance with a document retention policy may provide protection from claims of spoliation. As a general rule, all corporations should have a written document retention schedule. Appendix 1 contains a Sample Corporate Record Retention Schedule. However, the needs of the particular corporation should be analyzed to determine the suitability of any particular schedule or policy.⁵¹

One Texas court has recited a framework for determination if the spoliation doctrine is triggered.⁵² The initial determination is whether it is a normal business practice to destroy records.⁵³ Next, the issue is whether the documents were singled out for destruction.⁵⁴ Last, there must not be a contemplation of litigation involving the documents scheduled for destruction.⁵⁵ However, as one commentator has noted, "an obligation to suspend a routine retention program during the pendency of litigation may be tantamount to preserving such files indefinitely".⁵⁶

Today, many corporations maintain computer-assisted compilations of electronic documentation, including e-mails, voice mails, and word processing documents. This documentation has been described as "the most legally risky form of business communication".⁵⁷ Special attention should be paid to determine whether, or under what circumstances, this information should be retained.

The spoliation instruction is never the equal of the original evidence. As a commentator recently pointed out "Ironically, in certain situations, a spoliation remedy may be more effective than the evidence itself."⁵⁸ Conversely, there may be some cor-

51. See *Electronic Records Retention: Fourteen Basic Principles*, Stephens and Wallace, *Records Management Quarterly*, Volume 34, Issue 4, October 1, 2000.

52. *Scolaro* @ 755

53. *Id.*

54. *Id.*

55. *Id.*

56. *Spoliation Issues Arise in Digital Era*, *National Law Journal*, Monday, February 16, 1998, Ziegler and Stuhl.

57. Steve E. Couch, "Spoliation of Evidence: Is One Man's Trashing Another Man's Treasure," 62 *Tex. B.J.* 242, 248 (March 1999)

58. Stephens and Wallace, *Electronic Records Retention: Fourteen Basic Principles*, *Records Management Quarterly*, Volume 34, Issue 4 (October 1, 2000).

porate evidence so damaging that a spoliation instruction would never equal the impact of the original evidence.

In summary, the corporate counsel should actively assist in designing and implementing the corporate document retention policy. Special consideration should be paid to e-mail communication. Additionally, special consideration should be paid to the corporation's litigation climate and the possibility of litigation in which any corporate documents may be relevant. As a practical matter, all of these considerations should be weighed against the time and expense of retaining, indexing, storing, and ultimately retrieving any retained records.

Appendix 1: Sample Corporate Record Retention Schedule

Articles of Incorporation/Bylaws	Permanent
Audit reports of CPAs	Permanent
Canceled checks for major transactions (e.g., taxes, property purchases, large contracts, etc.)	Permanent
Capital stock and bond records	Permanent
Contracts in effect	Permanent
Copyright, patent and trademark registrations	Permanent
Corporate minute books for directors and stockholders	Permanent
Deeds, mortgages and bills of sale	Permanent
Employee personnel records (current)	Permanent
Insurance policies (existing and expired)	Permanent
Leases in effect	Permanent
Pension/profit sharing plans	Permanent
Property Records	Permanent
Tax returns	Permanent
Accounts payable ledgers & schedules	7 years
Accounts receivable ledgers & schedules	7 years
Advertising	5 years after date of publication
Bank statements	9 years
Business correspondence (general)	3 years
Canceled checks for routine transactions	7 years
Contracts (expired)	5 years
Employee payroll records (W-2, W-4, Annual Earnings Records, etc.)	7 years
Employee personnel records (after termination)	6 years
Employment applications	3 years
Leases (expired)	7 years
Payroll journal	7 years
Contract and agreement memoranda, provisions used to clarify or explain	maintain same as contract, 5 years
Accepted special bids for contract	6 years after expiration, cancellation or termination
Unaccepted special bids for contract	6 years