SPOLIATION AND DESTRUCTION OF EVIDENCE

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Chapter R

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SPOLIATION AND DESTRUCTION OF EVIDENCE

I. SCOPE OF ARTICLE


II. TORT

A. Intentional Spoliation

Spoliation was first recognized as an independent tort by California in 1984. In Smith v. Superior Court, Smith was injured when a mag wheel flew off a van and crashed into the windshield of her car. 198 Cal. Rptr. 829 (Cal. Ct. App. 1984). Abbot Ford, who later became the defendant, towed the van back to its dealership for repairs and agreed to keep certain automotive parts until Smith’s experts could inspect them for defects. Sometime later, Abbot allegedly lost, destroyed, or transferred the parts. Smith then sued Abbot Ford for “tortious interference with prospective civil action by spoliation of evidence.” Id.

The trial court refused to recognize the tort, rendering judgment for Abbot Ford. The appellate court reversed. The court reasoned both civil and criminal liability arose from spoliation of evidence, but criminal liability would not compensate the person injured by the wrongdoer. Id. at 834. The criminal statute was inapplicable because it punished willful destruction of material about to be produced in evidence; Abbot’s actions occurred before Smith filed suit.

The California court was most troubled with the uncertainty of damages. The burden of proof of reasonable accuracy, the court stated, would suffice to prove Smith’s damages. Absolute precision of proof was not a prerequisite. The court analogized to other claims which cannot be calculated with precision: wrongful death, patent infringement, libel, slander, invasion of privacy, and personal injury. Id. at 836.

Ultimately, the court compared Smith’s claim to intentional interference with a claim for prospective economic advantage. The court noted that prospective business relationships are important “probable expectancies” that are worthy of legal protection. Id. Since the plaintiff’s prospective products liability action was a valuable “probable expectancy,” the court reasoned that a cause of action existed for intentional spoliation of evidence. Id. at 837.

After the decision in Smith, Alaska, Ohio, and New Jersey recognized the tort of intentional spoliation of evidence. The Alaska case involved an altered arrest tape. After criminal charges were dropped, the plaintiff sued for false arrest and malicious prosecution. The Alaska court relied on the reasoning in Smith and held that the plaintiff’s causes of action were valuable, probable expectancies, and that the alleged destruction of the tape constituted an interference that only the tort could remedy. Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986).

The Ohio decision in Smith v. Howard Johnson Co. was a response to questions certified to the court by a federal district court sitting in that state. 615 N.E.2d 1037, 1038 (Ohio 1993). The Ohio Supreme Court provided the following concise statement of the spoliation tort:

(1) A cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of the defendant that litigation exists or is probable, (3) willful destruction of evidence by the defendant designed to disrupt the plaintiff’s case, (4) disruption of the plaintiff’s case, and (5) damages proximately caused by the defendant’s acts; (2b) such a claim should be recognized between the parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action.

Id.

While not specifically adopting the intentional tort of spoliation, the North Carolina Supreme Court in Henry v. Dean, 310 S.E. 2d 326-9 (N.C. 1984) recognized a cause of action against healthcare workers who altered a decedent’s medical records. The Court held that when “. . . a party deliberately destroys, alters or creates a false document to subvert an adverse party’s investigation of his right to seek a legal remedy and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie.” See also, Viviano v. CBS, Inc., 251 N.J. Super 113, 597 A.2d 543 (N.J. Super. Ct. 1991) cert. denied, 127 N.J. 565, 606 A.2d 375 (N.J. 1992).

In reviewing the pertinent cases and literature, C.L.E. author, Mikal Watts of Perry & Haas in Corpus Christi observes that:

Some jurisdictions have refused to recognize the intentional spoliation tort for various reasons, primarily on the basis that the spoliating party had no duty to preserve evidence. See, e.g., Moore v. U.S. Dept. of Agriculture, Forest Service, 864 F.Supp. 163 (D. Colo. 1994) (claims for intentional or negligent interference with prospective economic advantage based on alleged spoliation of evidence are not cognizable under Colorado law); Edwards v. Louisville Ladder Company, 796 F.Supp. 966 (W.D. La. 1992) (Louisiana would not recognize claim for spoliation of evidence under facts of this case); Murphy v. Target Prod., 580 N.E.2d 687 (Ind. Ct. App. 1991); Diehl v. Rocky Mountain Communications, Inc., 818 S.W.2d 183 (Tex.App.--Corpus Christi 1991, writ denied); Trump Taj Mahal v. Costruzioni Aeronautiche Giovanni, 761 F.Supp. 1143 (D.N.J. 1991); Akiona v. U.S., 938 F.2d 158 (9th Cir. 1991);


B. Negligent Spoliation

California was first to recognize the independent tort of negligent spoliation in Velasco v. Commercial Bldg. Maint. Co., 215 Cal. Rptr. 504, 506-507 (Cal. Ct. App. 1985). Not only was the tort recognized, but it appeared that the court would extend liability to third parties in appropriate circumstances. In Velasco, the plaintiffs were injured when a bottle exploded. The remains of the bottle were taken to an attorney, who left the remains on his desk in an unmarked, paper bag. The spoliation claim was made against the janitorial service that allegedly disposed of the bag while cleaning the office. The court recognized the tort of negligent interference with prospective economic advantage, but focused its reasoning on “foreseeability of harm” and the “policy of preventing future harm.” The court concluded the harm was unforeseeable to the janitors and that “no policy would be furthered by a holding that maintenance workers have a duty not to throw away what appears to be trash simply because such objects are located in an attorney’s office.” Id.; See generally, Katz & Muscaro, “Spoilage of Evidence--Crimes, Sanctions,

Florida recognized negligent spoliation as an independent tort in Bondu v. Gurvich, 473 So.2d 1307, 1309-10 (Fla. Dist. Ct. App. 1985). Plaintiff brought a medical malpractice action for her husband’s death. The plaintiff alleged negligence per se due to the hospital’s failure to provide medical records, hindering “the plaintiff’s ability to pursue certain proof which may be necessary to establish her case.” Id.

After losing the malpractice suit, Bondu filed an action alleging loss of her medical malpractice case due to the hospital’s negligent loss of the pertinent medical records. Recognizing the cause of action, “the court explained that the ‘timing’ was the difference between the two spoliation claims.” Id. at 1311; “Spoilage of Evidence,” 29 Tort & Ins. L.J. at 65. The damages in the first action were uncertain because the malpractice suit was still pending. However, since the malpractice suit was decided against the plaintiff prior to filing of the second suit, the damage caused by the defendant’s breach of duty was certain. The key to recovering damages was that the plaintiff was required to show that the defendant had a legal duty to preserve the lost or destroyed evidence. See Bondu, 473 So.2d at 1312.

The Florida District Court of Appeals subsequently stated the following elements of a cause of action for negligent destruction of evidence: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence that is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destroyed and the inability to prove the lawsuit; and (6) damages. Continental Ins. Co. v. Herman, 576 So.2d 313, 315 (Fla. App. 1991). See generally W. Prosser & W. Keeton, The Law of Torts § 30 (5th ed. 1984) (stating the traditional formula for negligence as duty, breach, causation, and damages).

There are three possible ways an injured party may argue for a court to imply the duty to preserve evidence in a negligent spoliation tort. First, parties can agree certain evidence is to be preserved. See Hazen v. Municipality of Anchorage, 718 P.2d 456, 459 (Alaska 1986); See also Smith v. Superior Court, 198 Cal. Rptr. 829, 831 (Cal. Ct. App. 1984). Second, the duty to preserve evidence may be created by a civil statute. See Bondu v. Gurvich, 473 So.2d 1307, 1313 (Fla. Dist. Ct. App. 1984). Third, where neither of the first two is present, a party may rely on a criminal statute prohibiting such conduct, establishing the required duty.

III. EVIDENTIARY INFERENCE
A. Spoliation as an Evidentiary Inference:
   The Texas Approach

In Texas, intentional, deliberate destruction of evidence by a party creates a presumption that the evidence would have been unfavorable to the destroying party. San Antonio Press, Inc. v. Custom Bilt Machinery, 852 S.W.2d 64, 67 (Tex. App.--San Antonio 1993, no writ); H.E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex. Civ. App.--Waco 1975, writ dism’d). This spoliation inference, sometimes called a negative inference, has its roots in the common law. Several jurisdictions have applied the maxim omnia praesuntur contra spoliatorum, all things are presumed against a wrongdoer, to remedy or deter destruction of evidence. Pomeroy v. Benton, 77 Mo. 64, 86 (1882); Brown v. Hamid, 856 S.W.2d 51, 56 (Mo. 1993). See, e.g., Vick v. Texas Employment Comm’n, 514 F.2d 734 (5th Cir. 1974); Fuller v. Preston State Bank, 667 S.W.2d 214, 220 (Tex. App.--Dallas 1984, writ ref’d n.r.e.). Courts may allow the fact finder to infer that the evidence would have been harmful to the spoliator’s case if the spoliator is unable to explain the disappearance of the evidence.

“Failure to produce evidence within a party’s control raises the presumption that if produced it would operate against him, and every
intendment will be in favor of the opposite party.” Brewer v. Dowling, 862 S.W.2d 156, 159 (Tex. App.--Fort Worth 1993, writ denied); H.E. Butt Grocery Co., 530 S.W.2d at 343. Evidence of the destruction of evidence is admissible at trial. See May v. Moore, 424 So.2d 596, 603 (Ala. 1982). Historically, there has been a requirement that there must be evidence that the destroying party, its agents, or employees intentionally destroyed the allegedly spoliated evidence. The courts will not infer spoliation or destruction of evidence, intentional or negligent, merely because it is missing. Brewer, 862 S.W.2d at 160.

Failure of the opposing party to rebut with evidence that had been within its control also raises a presumption that the unpresented evidence would be unfavorable to the nonproducing party. As stated by the Texas Supreme Court, where a party is in possession of evidence and does not testify, the trial judge is authorized to take the failure to testify into consideration “not only as strengthening the probative force of the testimony offered to establish the issue, but [also] as of itself clothed with some probative force.” State v. Gray, 175 S.W.2d 224, 226 (1943); Brewer, 862 S.W.2d at 159.


Even if the plaintiff is unable to show that the spoliation was intentional or wrongful, the absence of the information can be used to the same effect by an impression in the minds of the jury that the absence of the evidence is inexcusable and suspect. This evidentiary inference approach has also been utilized in other states. Carr v. St. Paul Fire Mutual Ins. Co., 384 F. Supp. 821, 831 (W.D. Ark. 1974); DeLaughter v. Lawrence County Hosp., 601 So.2d 818, 821-22 (Miss. 1992); Miller v. Montgomery County, 4 Md. App. 204, 494 A.2d 761, 768 (1975); Nationwide Check v. Forest Hills Distributors, 692 F.2d 214 (1st Cir. 1982); and Newark Stereotypers’ Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 59 (3d Cir.), cert. denied, 393 U.S. 954 (1968).

In its most recent pronouncement regarding spoliation, the Texas Supreme Court rejected the adoption of an independent tort of spoliation, but the concurring opinion by Justice Baker discusses at length the “variety of remedies available to punish spoliators, deter further spoliators, and protect nonspoliators prejudiced by evidence destruction. Trevino v. Ortega, 969 S.W.2d 950, 960 (Tex. 1998) (Baker, J. concurring). In particular, Justice Baker discusses the use of various forms of an instruction to the jury that articulates the spoliation presumptions.

. . . Texas courts have broad discretion in instructing juries. See TEX. R. CIV. P. 277; Mobil Chem. Co. v. Bell, 517 S.W.2d 245, 256 (Tex. 1975). Thus, when a party improperly destroys evidence, trial courts may submit a spoliation presumption instruction. See, e.g., Watson v. Brazos Elec. Power Coop., Inc., 918 S.W.2d 639 (Tex. App. -- Waco 1996, writ denied). Deciding whether to submit this instruction is a legal determination. As stated earlier, the trial court should first find that there was a duty to preserve evidence, the spoliating party breached that duty, and the destruction prejudiced the nonspoliating party.
Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of presumptions. See Welsh, 844 F.2d at 1239. The first and more severe presumption is a rebuttable presumption. This is primarily used when the nonspoliating party cannot prove its prima facie case without the destroyed evidence. See Welsh, 844 F.2d at 1248; Sweet, 895 P.2d at 491; Valcin, 507 So.2d at 599. The trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. See Welsh, 844 F.2d at 1247; Sweet, 895 P.2d at 491-92; Valcin, 507 S.2d at 600; Lane v. Montgomery Elevator Co., 225 Ga.App. 523, 484 S.E.2d 249, 251 (1997). This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires. See Sweet, 895 P.2d at 492 (quoting Valcin, 507 So.2d at 600-01).

In shifting the burden of proof to the spoliating party, trial courts are choosing a middle ground that neither “condones the . . . spoliation of evidence at the [nonspoliating party’s] expense nor imposes an unduly harsh and absolute liability” upon the spoliating party. Welsh, 844 F.2d at 1249. Moreover, by shifting the burden of proof, the presumption will support the nonspoliating party’s assertions and is some evidence of the particular issue or issues that the destroyed evidence might have supported. The rebuttable presumption will enable the nonspoliating party to survive summary judgment, directed verdict, judgment notwithstanding the verdict, and factual and legal sufficiency review on appeal. See Lane, 484 S.E.2d at 251.

The second type of presumption is less severe. It is merely an adverse presumption that the evidence would have been unfavorable to the spoliating party. See H.E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex. Civ. App.–Waco 1975, writ dism’d by agr.); see also, Vodusek, 71 F.3d at 155; DeLaughter, 601 So.2d at 821-22; Hirsch, 628 A.2d at 1126. The presumption itself has probative value and may be sufficient to support the nonspoliating party’s assertions. See Bruner, 530 S.W.2d at 344. However, it does not relieve the nonspoliating party of the burden to prove each element of its case. See DeLaughter, 601 So.2d at 822. Therefore, it is simply another factor used by
the factfinder in weighing the evidence.

Trevino, 969 S.W.2d at 960-61.

There is no suggested jury instruction on the spoliation inference in the Texas Pattern Jury Charge handbook series. But see, E. Deniker, et al., 3 Federal Jury Practice and Instructions, § 72.16 (4th Ed. 1987). However, some courts have made suggestions for an instruction to be included in the charge. In Ramirez v. Otis Elevator Co., Ramirez was injured when the descending gate of a freight elevator fell and struck her. 837 S.W.2d 405 (Tex. App.--Dallas 1992, writ denied). While at trial, it was discovered that twelve months of records were unavailable due to an employee deleting them from Otis’ database. In response, Ramirez moved for sanctions which were denied by the trial court.

On appeal, the court found Otis had produced documents promptly when ordered by the trial judge and that the evidence in question was inadvertently destroyed. There was not any evidence which showed the “incident was willful or made in bad faith.” Id. at 411. Although the trial court denied the motion for death penalty sanctions, the court did submit a jury instruction that Otis’ destruction of the records “raised a presumption the evidence would have been unfavorable to Otis.” Id. at 412. Ramirez was also allowed to argue to the jury that Otis destroyed the documents. Furthermore, the court assessed court costs against Otis. Id. The appellate court held that the trial court did not abuse its discretion in denying death penalty sanctions.

The Brewer court, after having addressed the issue of whether an independent tort for spoliation existed, suggested the following wording for the spoliation instruction:

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

Comparatively, the following instruction was suggested in Thomas v. St. Joseph Hosp. but was not submitted to the jury: “You are instructed that destruction of evidence relevant to a lawsuit raises a presumption that evidence would have been unfavorable to the cause of the party disposing of said evidence.” 618 S.W.2d 791, 798 (Tex.Civ.App.--Houston [1st Dist.] 1981, writ refused n.r.e.). The appeals court in Thomas held the failure to instruct the jury on the destruction of evidence was not error because it was not necessary for the jury to render a proper verdict. Id.

B. Texas Considers (and Rejects) the Spoliation Tort

Texas courts have long provided a remedy for intentional interference with an individual’s personal liberty and property rights. See, e.g., Tippett v. Hart, 497 S.W.2d 606, 610 (Tex. Civ. App.--Amarillo 1973, writ ref’d) (holding intentional invasion of contract sounds in tort). The right to sue for tort damages has also been recognized as a property right. See, e.g., Galarza v. Union Bus Lines, Inc., 38 F.R.D. 401, 404 (S. D. Tex. 1965); Garrett v. Reno Oil Co., 271 S.W.2d 764, 767 (Tex. Civ. App.--Fort Worth 1954, writ ref’d n.r.e.).

A spoliation tort would be similar to the tort for intentional interference with prospective business relations, which Texas has adopted. The tort of interference with prospective business relations protects a party’s expectation of commercial benefits. Delz v. Winfree, 16 S.W. 111, 112 (1891). The tort of spoliation of evidence protects a party’s expectation of compensation for his injuries. See Hazen v. Municipality of Anchorage, 718 P.2d 456, 464 (Alaska 1986); Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984); See also Comment, “Interference With Prospective Civil Litigation By Spoliation of Evidence: Should Texas Adopt A New Tort?,” 21 St. Mary’s L.J.
Phillip Lionberger presents an excellent discussion of the prospective tort of spoliation. The elements of the two are so similar that one may be used as a model for adopting the other.

Negligent spoliation would require the existence and breach of a duty to result in liability for loss. This duty might arise from an agreement to preserve certain evidence, civil statutes, or criminal statutes which prohibit alteration, destruction, and concealment of evidence. For example, Section 37.09 of the Texas Penal Code, which does not impose liability for destruction of evidence in prospective litigation, has been suggested as a model for the negligent spoliation tort. It states “[a] person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he (1) alters, destroys, or conceals any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding....” TEX. PENAL CODE ANN. § 37.09(a)(1) (Vernon 1989). An official proceeding is defined as any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant authorized by law to take statements under oath. TEX. PENAL CODE ANN. § 37.01(2).

Therefore, civil lawsuits are included in the definition.

Adopting a spoliation tort would have had many advantages. It would allow injured parties to be compensated, deter potential spoliators, preserve relevant evidence for parties or factfinders, address the inadequacies of the present remedies, and resolve ethical confusion for lawyers who may feel uneasy about advising clients who seek to destroy evidence.

The historical objections to the adoption of the independent tort include courts’ concerns about the absence of a duty to preserve evidence, uncertainty in determining damages, increased record keeping costs for businesses, and increased litigation costs. See Comment, “Spoliation of Evidence: A Troubling New Tort,” 37 U. Kan. L. Rev. 563 (1989). Furthermore, some courts have felt that the available remedies of the spoliation inference and sanctions are adequate to compensate for any alleged spoliation which may occur. See Comment, “Interference With Prospective Civil Litigation By Spoliation of Evidence: Should Texas Adopt A New Tort?,” 21 St. Mary’s L.J. 209, 217 (1989). This view seems to ignore those instances in which an entity, not made a party to the original suit, destroys the evidence.

The effectiveness of the spoliation inference has several criticisms. First, the weight given by courts varies. See Cecil Lorley v. General Corp., 380 F. Supp 819 (M.D. Tenn. 1974) (citing the spoliation inference to overturn the jury verdict in favor of spoliation and to order a new trial). The jury is not required to infer negligent destruction of evidence would have damaged the party’s case. See Welsh v. United States, 844 F.2d 1239 (6th Cir. 1988). Second, the inference merely creates a rebuttable presumption. Destruction of documents pursuant to routine procedures and without bad faith or destruction occurring long before litigation began may be accepted. See, e.g., Welsh; Vick v. Texas Employment Comm’n, 514 F.2d 734 (5th Cir. 1975); INA v. United States, 468 F. Supp. 695 (E.D.N.Y. 1979). Most seriously, the inference is insufficient to offset the loss of critical evidence. In cases of negligent or intentional destruction of evidence, courts are required to dismiss the suit or eliminate the spoliator’s advantage, neither of which compensates the injured party for his loss.

Considering the advantages and disadvantages of recognizing the “new” tort and in light of inadequacies of the present system, it is interesting to follow the case law in this area as it has traveled along a path that has lead to consideration and then rejection of the recognition of a new tort. The Corpus Christi Court of Appeals discussed the recognition of spoliation as an independent tort in Diehl v. Rocky Mountain Communications, 818 S.W.2d 183 (Tex. App.– Corpus Christi 1991, writ denied). Diehl fell from a ladder while at work and was injured. The ladder was subsequently stolen from RMC and Diehl sued for intentional spoliation of evidence. RMC moved for summary judgment claiming Diehl’s claim was not a cognizable cause of action and that he failed to raise a fact issue regarding intentional spoliation by RMC. The trial court granted
summary judgment for RMC and was affirmed by the appellate court. *Id.* at 184.

The appellate court ruled against Diehl because he did not have a pending or prior claim and did not show he had a viable cause of action against the ladder manufacturer. Therefore, he was not prevented from pursuing the claim because of the alleged spoliation. *Id.* The court did not reach the issue of whether a pending lawsuit against the ladder’s manufacturer would have created a spoliation tort against RMC. 

Ironically, it appears that Diehl could not sue the ladder manufacturer because he did not have the ladder and therefore could not identify the manufacturer. Furthermore, if the ladder had been present, so that the plaintiff could identify the manufacturer, Diehl’s spoliation action against RMC would have been moot. The court did not address any limitation or effect workers’ compensation laws had on Diehl’s suit against his employer RMC.

The Fort Worth Court of Appeals observed that “Texas does not recognize spoliation of evidence as an independent tort.” *Brewer v. Dowling*, 862 S.W.2d 156, 160 (Tex. App.--Fort Worth 1993, writ denied). After their son was born with brain damage, the Brewers filed suit against the doctors and hospital involved. One piece of evidence, a fetal heart monitor strip, disappeared. On appeal, the Brewers claimed the trial court “improperly refused to instruct the jury that [defendants’] destruction or loss of the fetal monitor strip created a presumption that the information on the strip would have been unfavorable” to the defendants. *Id.* at 156.

The court rationalized its decision, holding the instruction was unnecessary for a proper verdict because the presumption asserted by the Brewers never arose. The court then applied the rules, discussed earlier, which apply to presumptions that arise from the nonproduction of evidence. *Id.* at 159. The court found that no presumption arose as no evidence was presented showing the intentional or negligent destruction of the fetal monitor strip. The court simply stated that “[t]he record shows only that the strip is missing.” *Id.*

The reasoning in *Brewer* seems to be missing the point of the presumption. It is the absence of the evidence which raises the presumption that the evidence is unfavorably to the nonproducing party. Here, the court was improperly requiring some other extrinsic evidence of destruction to raise the inference that the evidence was unfavorable.


The dissent properly points out the confusion raised by the majority opinion. Justice Ashworth states that Brewer’s attorney was allowed the right to argue the presumption existed, but the right to do so was “hollow without a proper instruction from the court” so that the jury “may infer that the missing strip contained information adverse to the interests of the defendants.” *Ramirez v. Otis Elevator Co.*, 837 S.W.2d 405, 412 (Tex. App.--Dallas 1992, writ denied). *Id.*

In *H.E. Butt Grocery Co. v. Bruner*, the plaintiff slipped on an onion in defendant’s store, causing personal injuries. *530 S.W.2d* 340, 344 (Tex. Civ. App.--Waco 1975, writ dism’d). The onion stalk was last seen in the defendant’s possession and no explanation was offered for the intentional and deliberate spoliation of this
critical piece of evidence. The question arose as to whether the onion had just been stepped on by the plaintiff or by others previously. Id.

The court held that the spoliation presumption applied. Id. See McCormick and Ray, 1 Texas Evidence (Second Edition), § 103, pp. 141, 142. The failure to rebut the presumption increases the force of the evidence where it is obvious the means to rebut are readily accessible. H.E. Butt, 530 S.W.2d at 343. “Such a presumption is not evidence, but rather a rule of procedure or an ‘administrative assumption’ which ‘vanishes’ or is ‘put to flight’ when positive evidence is introduced.” Id. at 344; cf. Wal-Mart Stores, Inc. v. Gonzales, 968 S.W.2d 934 (Tex. 1998) (holding that macaroni salad on store floor covered with “a lot of dirt” and with shopping cart tracks through it did not establish that it was more likely than not that the condition had been on the floor long enough to evidence constructive notice.)

Other Texas cases which address intentional or negligent spoliation include Fuller v. Preston State Bank, 667 S.W.2d 214 (Tex. App.--Dallas 1983, writ ref’d n.r.e.) (holding destruction of relevant evidence raises presumption that evidence would have been unfavorable to the spoliator and it is error to fail to admit evidence of the destruction of records); cf. Newton v. General Manager of Scurlock’s Supermarket, 546 S.W.2d 76 (Tex. Civ. App.--Corpus Christi 1976, no writ) (stating no presumption of negligence because chicken blood wiped from floor in the regular course of business was for the safety of shoppers and there was no evidence of intent to destroy evidence).

Some jurisdictions have attempted to make a distinction between intentional and negligent spoliation to argue that only intentional spoliation should support the submission of a jury instruction. See, e.g., Battocchi v. Washington Hosp. Center, 581 A.2d 759 (D.C. Cir. 1990) (distinguishing deliberate destruction of evidence from “simple failure to preserve” evidence, holding that trial court is within its discretion as to whether or not to submit presumption instruction on adverse inference, unless it finds that the absence of the evidence is due to gross indifference to or reckless disregard for the relevance of the evidence to a possible claim). Neither H.E. Butt v. Bruner nor Fuller v. Preston State Bank require the showing of bad faith or bad intent in the destruction of evidence. Cf. Newton v. General Manager of Scurlock’s Supermarket, 546 S.W.2d 76 (Tex. Civ. App.--Corpus Christi 1976, no writ). However, one should also be aware of Vick v. Texas Employment Comm’n, which opines that “[t]he adverse inference to be drawn from the destruction of records is predicated on bad conduct of the defendant. . . . The circumstances of the act must manifest bad faith.” 514 F.2d 734, 737 (5th Cir. 1975) (applying Texas law).

For medical malpractice cases, all medical providers are under a professional duty to retain medical documents. In some instances, the duty to store and retain documents is statutory. See TEX. HEALTH & SAFETY CODE ANN. § 241.103(c) (Vernon 1992). The Hospital Licensing Law prohibits the destruction of medical records during litigation. “The hospital may not destroy medical records that relate to any matter that is involved in litigation if the hospital knows the litigation has not been finally resolved.” TEX. HEALTH & SAFETY CODE ANN. § 241.103(c).

Although Texas has not directly addressed the question of whether a private action may arise from this document retention statute, Illinois has considered such a case. In Rodgers v. St. Mary’s Hospital of Decatur, Rodgers brought suit for the wrongful death of his wife. 597 N.E.2d 616 (Ill. 1992). One of the x-rays was missing. Illinois had a statute requiring hospitals to retain x-rays for at least five years; and if the hospital had been notified in writing that the x-rays were the subject of litigation, the hospital had to keep the x-ray until the litigation had concluded, or the expiration of 12 years, whichever occurred first. Id. at 618. Rodgers argued that the statute gave rise to a private cause of action by implication. He claimed he was a person protected by the Act and could not prevail on his underlying malpractice cause of action because of the negligence of the hospital in its failure to retain the x-ray. The Illinois Supreme Court agreed and held that a violation of the x-ray statute gave rise to a statutory cause of action and that violation of the
statute was prima facie negligence. *Id.* at 619-620.

In its public policy discussion, the *Rodgers* court noted that the x-ray retention statute enumerated no administrative remedies, as alleged by the hospital. *Id.* at 619-20. However, “the threat of liability is a much more efficient method of enforcing the regulation than requiring the Public Health Department to hire inspectors to monitor the compliance of hospitals with the provisions of the Act.” *Id.*

Interestingly, the Texas statute is quite similar to its Illinois counterpart. Neither states whether a civil cause of action is permissible for a violation of the statutory provision. Instead, Texas provides a civil penalty not to exceed $1,000 for each day of violation and for each act of violation. TEX. HEALTH & SAFETY CODE ANN. § 241.055 (Vernon 1992 & Supp. 1995).

Whether or not the presumption or jury instruction can be obtained, plaintiffs should focus the jury’s attention on the negligent and unprofessional conduct of the party who is responsible for the absence of evidence. In many cases, unrelenting pressure will eventually result in the surfacing of the missing evidence. See, e.g., *Abbott Ford, Inc. v. Superior Court*, 218 Cal. Rptr. 605, 608, n.2 (Cal. Ct. App. 1985).

In 1997 two Texas Courts of Appeals split in deciding whether or not Texas would recognize an independent tort of spoliation. In *Ortega v. Trevino*, 938 S.W. 2d 219 (Tex.App.--Corpus Christi 1997, writ granted), the Plaintiff’s daughter was allegedly injured at birth and the family argued that their separate, medical malpractice suit was hindered by the destruction of crucial medical records. The Corpus Christi Court of Appeals held that the trial Court’s ruling on special exceptions was overly broad in dismissing the Plaintiff’s petition as there exists a sufficient basis under Texas law for recognizing the tort. The Court observed that the spoliation inference does not deter wrongdoers or compensate victims, is limited to parties in litigation only, and tends to reward those that destroy evidence.

Nevertheless, another Texas Court of Appeals granted partial summary judgment in a context involving alleged hospital negligence and an allegedly destroyed incident report. The Dallas Court of Appeals noted that “the Texas Supreme Court has never recognized an independent cause of action for intentional spoliation of evidence. Absent controlling Supreme Court precedent we decline to expand the law to recognize such a cause of action.” *Malone v. Foster*, S.W.2d1997 W.L. 19634 (Tex. App.--Dallas, 1997, writ granted).

The Texas Supreme Court consolidated the two cases for oral argument. The conflict in the holdings, the inadequacy of the current law in addressing a need that should be addressed by the law, and the trend among other jurisdictions to recognize the tort might have resulted in a concise statement by the Texas Supreme Court recognizing a well-defined tort of spoliation. The Court could have based the tort on the public policy against the destruction of evidence embodied in both the Penal Code and the Health & Safety Code. Indeed, the Court could have limited the tort to those instances in which litigation requiring the destroyed evidence was reasonably anticipated (presumably, both medical malpractice cases involved article 4590i notice letters). The Court could also have addressed the distinction between intentional and negligent spoliation raised by the facts of the two cases.

Instead, the Texas Supreme Court rejected the recognition of the tort of spoliation. *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998); *Malone v. Foster*, 41 Tex.S.Ct.J. 923 (June 5, 1998). The Court, unanimous in its holding in *Trevino v. Ortega*, observed that:

> [w]hile the law must adjust to meet society’s changing needs, we must balance the adjustment against boundless claims in an already crowded judicial system.

> We are especially adverse to creating a tort that would only lead to duplicate litigation, encouraging inefficient relitigation of issues better handled within the context of the core cause of action. We thus decline to recognize evidence spoliation as an independent tort.
C. Two-Edged Sword

The biases of this plaintiff-lawyer author advocating the recognition of a novel tort are obvious. See generally, Hane, “Full Disclosure in Combating Stonewalling and Other Discovery Abuses,” ATLA Press (1994). However, the offensive use of the spoliation doctrine is not limited to one party. Indeed recent case law from around the country demonstrates that defendants are utilizing the spoliation principles to thwart individual plaintiff’s claims, to limit expert testimony, and to sanction plaintiffs and their attorneys for the destruction of relevant evidence. See Hamel v. General Motors Corp., 1990 WL 7490 (D. Kan. 1990); Bright v. Ford Motor Co., 63 Ohio App. 266 (1991); Hirsch v. General Motors Corp., 628 A.2d 1108 (N.J. Super. 1993); Hall v. General Motors Corp., 8 F.3d 27 (9th Cir. 1993); Smith v. American Honda Co., Inc., 846 F.Supp. 1217 (M.D. Pa. 1994); Brohoe v. American Isuzu Motors, Inc., 155 F.R.D. 515 (M.D. Pa. 1994); and Cincinnati Ins. Co. v. General Motors Corp., 1994 WL 590566 (Ohio App. 1994). Mr. Watts discusses each of these cases (and others) in his excellent paper that was presented at a seminar sponsored by the Texas Trial Lawyers Association.

In that paper, Mikal Watts observes that:

[t]he concept of spoliation arose largely from plaintiffs who sought remedies when their cases were lost, or at least emasculated, because defendants destroyed evidence. Recently, however, it has become fashionable for defendants to claim spoliation. Specifically, defendants have increasingly lodged spoliation charges against plaintiffs in automobile products liability case. In many cases, defendants bring experts who testify that they simply cannot give their opinions because plaintiffs’ destructive testing has made it impossible to do so. See, e.g., Shimanovsky v. General Motors Corp., 1994 WL 652689, No. 1-92-4386, Slip Op. At 13-14 (Ill. App. 1994 n.w.h.).

Reported cases and anecdotal information indicate that General Motors, in particular, has stepped up its efforts to escape liability by claims that the plaintiffs have tampered with evidence. Indeed, the defense bar had been writing articles on how to torpedo a plaintiff’s case

It is important to note that a claim of spoliation is only appropriate by a defendant where the plaintiff or his agent(s) actually had control over the evidence. *See, e.g.*, Cole v. Metro-North Commuter R.R. Co., 1994 WL 728636 (Conn. Super. 1994, n.w.h.) (summary judgment denied because plaintiff never had control or possession of the evidence -- the hearing element -- and did not destroy evidence); Applegate v. Seaborn, 477 N.E.2d 74 (Ill. App. 1985) (sanction reversed where there was no showing that plaintiff had control over the truck differential at issue).

Where a plaintiff did have control over the evidence, and harm came to the product, the sanctions he suffers could be severe. *See, e.g.*, Fire Ins. Exchange v. Zenith Radio Corp., 747 P. 2d 911 (Nev. 1987) (excluding expert’s testimony as a sanction, stating that the “plaintiff was on notice of potential litigation prior to the destruction of the television set and . . . had the power to preserve the remains of the television set.”); Graves v. Daley, 526 N.E.2d 679 (Ill. App. 1988) (affirming sanctions for destruction of defective furnace over which plaintiff had complete control).

Many defendants are seeking spoliation sanctions against plaintiffs where evidence has been lost, altered or destructively tested. *See*, Johnson & Freeman, “*How to Destroy the Plaintiff’s Case Where the Plaintiff Has Destroyed the Evidence: A Primer for Succeeding on Summary Judgment Motions Based on Spoliation of Evidence,*” IDC Quarterly, Vol. 4, No. 3I (1994).

In at least one reported case, a defendant sought severe sanctions where the evidence was merely disassembled and reassembled, and videotaped. *See, e.g.*, Donahoe v. American Isuzu Motors, Inc., 155 F.R.D. 515 (M.D. Pa. 1994 n.w.h.) (the plaintiff’s engineering expert took a seatbelt mechanism apart after the collision, looking for defects). . . .

It has been said that “[a]s a matter of sound public policy, an expert should not be permitted intentionally or negligently to destroy . . . evidence [that a product is defective] and then substitute his or her own description of it. *American Family Ins. Co. v. Village Pontiac-GMC, Inc.*, 585 N.E. 2d 1115, 1118 (Ill. App. 1992).

Where product liability evidence has been intentionally or negligently “spoiled” or destroyed by the plaintiff or his expert, before the defense had an opportunity to examine the evidence, courts have imposed the remedy of exclusion of all or portions of an expert’s testimony. *Headley v. Chrysler*

The test for whether expert evidence should be excluded in whole or in part, appears to be the degree of prejudice to the defendant’s case. See, e.g., Headley v. Chrysler Motor Corp., 141 F.R.D. 32; Hirsch v. General Motors Corp., 628 A.2d 108; Argueta v. Baltimore & Ohio Chicago Terminal R.R. Co., 585 N.E. 2d 363 (Ill. App.) appeal denied, 591 N.E.2d 20 (1991) (plaintiff’s expert’s metallurgist) report excluded where trial court determined that fractured spindle pin was not available to other parties prior to trial, and they were prejudiced); cf. Bright v. Ford Motor Co., 63 Ohio App. 3d 256 (1991) (the key factor to be considered in determining whether expert testimony is to be excluded is whether a reasonable possibility exists that the destroyed evidence would have been favorable to the defendant).

judgment is an inappropriate remedy for spoliation of evidence).


IV. SANCTIONS
There are several possible sanctioning tools the Texas courts may currently use in battling spoliation. Depending on the circumstances (and who the spoliator is), sanctions may include discovery, criminal, and ethical sanctions.

A. Abuse of Discovery
The court may issue orders sanctioning the offending party if that party “fails to comply with proper discovery requests or to obey an order to provide or permit discovery.” TEX. R. CIV. P. 215(2)(b). Discovery sanctions may include one or more of the following: dismissal of the lawsuit; entry of a default judgment; and exclusion of evidence, including test results, reports of examinations, and expert testimony based on the spoliated object or document. Katz & Muscaro, “Spoilage of Evidence--Crimes, Sanctions, Inferences, and Torts,” 29 Tort & Ins. L.J. 51, 54 (1993). The choice of sanctions is “largely a matter for the trial court’s discretion. Willful violations may justify severe sanctions.” San Antonio Press, Inc. v. Custom Bilt Machinery, 852 S.W.2d 64, 67 (Tex. App.--San Antonio 1993, no writ). See Plorin v. Bedrock Found & House Leveling Co., 755 S.W.2d 490, 490-92 (Tex. App.--Dallas 1988, writ denied).

The court may also levy less severe sanctions. These may include disallowing discovery by the offending party, assessing discovery or court costs against the disobedient party or the party’s attorney, striking part of the party’s pleadings, and holding the party in contempt.

Before the court imposes sanctions, it must meet the prerequisites set forth in Transamerican Natural Gas v. Powell, 811 S.W.2d 913, 917 (Tex. 1991). The Texas Supreme Court set forth two standards to measure whether an imposed sanction was appropriate. First, there must be a direct relationship between the offensive conduct and the sanction imposed. It must be directed against the abuse and toward remedying the prejudice the abuse causes; and be visited upon the offender, either the party, the party’s attorney, or both. Secondly, it must not be excessive. Id. The sanction may vary with the degree of offensive conduct.

In Abcon Paving, Inc. v. Crissup, the county court struck the paving company’s pleadings as a discovery sanction. On appeal, the court found the trial court did not consider less stringent sanctions before striking the pleadings. Consequently, the extreme sanction imposed failed to meet the second standard in Transamerican. Abcon Paving, Inc. v. Crissup, 820 S.W.2d 951, 955 (Tex. App. 1991, no writ).

However, Rule 166b(2)(b) of the Texas Rules of Civil Procedure provides that a “person is not required to produce a document or tangible thing unless it is within the person’s possession, custody, or control.” This means sanctions are not effective against a non-party. Furthermore, it appears that a party may avoid sanctions by destroying the evidence before a party makes a discovery request. See Barker v. Bledsoe, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979); Comment, “Interference With Prospective Civil Litigation By Spoliation of Evidence: Should Texas Adopt A New Tort?,” 21 St. Mary’s L.J. 209, 228 (1989). Discovery sanctions, therefore, are a deterrent only in limited circumstances. If the judge orders a sanction less severe than a default judgment, the non-offending party may not have an appropriate remedy.

The concurrence to the Court’s recent opinion rejecting the adoption of the spoliation tort discusses at length the sanctions available to the trial court in those instances in which it is
alleged that a party to the litigation has destroyed or altered evidence without the agreement of all parties. Justice Baker in *Trevino v. Ortega*, 969 S.W.2d 950, 959 (Tex. 1998) (concurring) writes that:

Once a court finds that evidence has been improperly spoliated and that the nonspoliating party was prejudiced by the spoliation, the court should decide what sanction to apply. Trial courts have broad discretion in choosing the appropriate sanction. See *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). There are a wide variety available. See Scott S. Katz & Anne Marie Muscaro, *Spoilage of Evidence — Crimes, Sanctions, Inferences, and Torts*, 29 TORT & INS. L.J. 51 (1993); Kelly P. Cambre, Comment, *Spoilation of Evidence: Proposed Remedies for the Destruction of Evidence in Louisiana Civil Litigation*, 39 LOY. L. REV. 601 (1993). Among other courts that have considered this issue, the primary sanctions are dismissal or default judgment against the spoliator and exclusion of evidence or testimony.

Because of the varying degrees of sanctions available and because each case presents a unique set of circumstances, courts should apply sanctions on a case by case basis. See *Schmid*, 13 F.2d at 81; *Welsh*, 844 F.2d at 1247. Important factors for the trial court to weigh include the degree of the spoliator’s culpability and the prejudice the nonspoliator suffers. See, e.g., *Schmid*, 13 F.3d at 79; *Welsh*, 844 F.2d at 1246; see also *San Antonio Press, Inc. v. Custom Bilt Mach.*, 852 S.W.2d 64, 67 (Tex. App. – San Antonio 1993, no writ). As with any other type of sanction, the trial court’s sanction must be directed against the wrongdoer and properly tailored to remedy the prejudice. See *TransAmerican*, 811 S.W.2d at 917.

The most severe sanction for evidence spoliation is to dismiss the action or render a default judgment. See *TransAmerican*, 811 S.W.2d at 917-18; *Ramirez v. Otis Elevator Co.*, 837 S.W.2d 504, 410-11 (Tex. App. – Dallas 1992, writ denied). In considering this sanction, courts must be sensitive to certain constitutional due process considerations and avoid depriving a party of the right to have its case heard on the merits. See *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209-10, 78 S.Ct. 1087, 2L.Ed.2d 1255 (1958); *TransAmerican*, 811 S.W.2d at 917-18. However, courts have found that a dismissal or default judgment is justified when a party destroys evidence with the intent to subvert discovery. See *Computer Assocs. Int’l, Inc.*, 133 F.R.D. at 169; *Wm. T. Thompson Co.*, 593 F.Supp. at 1456. Thus, courts can dismiss an action or render a 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. See *TransAmerican*, 811 S.W.2d at 917-18; *Ramirez*, 837 S.W.2d at 504.
Another effective sanction is excluding evidence or testimony. Courts generally use this sanction when the spoliating party is attempting to admit testimony or evidence adduced from the destroyed evidence. See, e.g., Sacramona, 106 F.3d at 444; Dillon, 986 F.2d at 263; Unigard Sec. Ins. Co., 982 F.2d at 363; Fire Ins. Exch., 747 P.2d at 911; Chapman, 469 S.E.2d at 783; Hamann, 539 N.W.2d 753. In these situations, the nonspoliating party is at a double disadvantage. Not only is the nonspoliating party precluded from using the evidence, but evidence adduced from the destroyed evidence is being used against that party. Understandably, it will be extremely difficult for the nonspoliating party to defend against the spoliating party’s allegations without being able to inspect the evidence. Thus, in some instances, it is proper for courts to exclude the spoliating party’s evidence.

Trevino, 969 S.W.2d 950, 959-960.

B. Criminal

TEX. PENAL CODE ANN. § 37.09(a)(1) provides that a person who “alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in [an] investigation or official proceeding” is guilty of a class A misdemeanor. TEX. PENAL CODE ANN. § 37.09(a)(1) (Vernon 1989). The person is also required by the section to have knowledge of a pending or on-going investigation, or other official proceeding. Most cases in Texas discussing this statute involve criminal investigations. See Cuadra v. State, 715 S.W.2d 723 (Tex. App.--Houston [14th Dist.] 1986, no writ); Dillard v. State, 640 S.W.2d 85 (Tex. App.--Fort Worth 1982, no writ).

Even if this section was utilized to address the destruction of evidence in a civil suit, the statute would only have a deterrent effect (as opposed to a compensatory approach). See Smith v. Superior Court, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984); Comment, “Interference With Prospective Civil Litigation By Spoliation of Evidence: Should Texas Adopt A New Tort?,” 21 St. Mary’s L.J. 209, 226 (1989). Although deterrence is important as a policy matter, a penalty does not compensate a plaintiff who will be unable to prove his cause of action due to the defendant’s destruction of the evidence. Violation of the statute carries a fine of not more than $3,000, or a prison term not more than one year, or both. TEX. PENAL CODE ANN. § 37.09(c) (Vernon 1989).

Before waiving a copy of the statute at opposing counsel, a prudent attorney should remember that threatening the opposing party with a criminal sanction in order to gain advantage in a civil case, may constitute an ethical violation.

C. Ethical

A lawyer is prohibited from concealing, destroying, altering, or falsifying evidence which may be relevant to a pending or foreseeable proceeding. See Texas Code of Professional Responsibility § 3.04(a) & (b); see also DR 3.04, comment 2, TEX. GOV’T CODE ANN. tit. 2, subtit. G-app, art. X, § 9 (Vernon Supp. 1992). This includes material which a competent attorney would believe has potential or actual evidentiary value. The attorney is not required to have actual knowledge. As long as he anticipates a proceeding and acted unlawfully, he may be
sanctioned. Similarly, other professionals including engineers should adhere to published ethical guidelines with regard to evidence to be used in litigation. See Designation E860-82 “Standard Practice for Examining and Testing Items That Are or May Become Involved in Products Liability Litigation,” ASTM Standards on Technical Aspects of Products Liability Litigation (2d Ed. 1988).

Lawyers also have an ethical duty not to suppress evidence and must reveal a client’s intentional destruction of evidence when the client knows that an investigation or an official proceeding is pending or in progress. Texas Code of Professional Responsibility § 7.102(a)(3) & §7.109(a).

Ethical sanctions, however, are criticized as ineffective since courts are not uniform in levying sanctions. Sanctions may include disbarment, suspension, fine, simple reprimand, or no sanction at all. See, e.g., In re Williams, 23 N.W.2d 4,5-6 (disbarred); In re Nixon, 385 N.Y.2d 305, 307 (N.Y. App. Div. 1976) (President Nixon disbarred); Florida Bar v. Simons, 391 So.2d 684, 686 (Fla. 1980) (suspended); Barker v. Bledsoe, 85 F.R.D. 545, 549 (W.D. Okla. 1979) (fined); In re Bear, 578 S.W.2d 928 (Mo. 1979) (reprimand); Telectron v. Ohio, 116 F.R.D 107, 136-37 (S.D. Fla. 1987) (no sanction).

Another criticism of ethical sanctions is the ambiguity of the language used in the rules. It is unclear what the requirements are for the “competent lawyer” standard. The lack of explanatory remarks in the comments fail to provide courts and attorneys with any guidance. Furthermore, there is the question of whether “actual” or “reasonable” should be the standard for “anticipation of a dispute.” We must speculate why the writers did not use the word, “reasonable” or “reasonable belief,” which are defined in the rules. Finally, since the rules have a knowledge requirement, a lawyer who innocently or inadvertently destroys evidence which may be relevant, is not implicated by the disciplinary rules.