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CHAPTER 18
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SPOLIATION AND LEGAL MALPRACTICE

I. INTRODUCTION

This paper examines the extent to which the body of law that has developed around spoliation of evidence in Texas state and federal courts may, in addition to regulating spoliation, serve as a basis for legal malpractice claims against lawyers. More than one commentator has suggested that a lawyer’s failure to adequately or correctly advise a client about its duty to preserve evidence during or in anticipation of litigation may expose counsel to a malpractice claim.

Prohibitions against spoliation of evidence date to the 1800’s in Texas. Similarly, the ability of clients to sue lawyers for legal malpractice is a longstanding component of Texas law. While some gray areas remain when one digs into the minutiae of legal malpractice claims, the contours of such claims such as the legal elements and “case within a case” methodology are well-established in Texas law and beyond dispute. The law governing the spoliation of evidence, particularly with respect to electronically stored information, continues to evolve; however, even in that field the contemporary case law offers lawyers and litigants substantial guidance.

The purpose of this analysis is not to duplicate the numerous excellent CLE papers and commentaries that discuss the law of spoliation but instead to address what appear to be risks for lawyers arising from such law. The often discussed 2004 federal case of Zubulake v. UBS Warburg, for example, sets the gold standard for the responsibilities of counsel in connection with the preservation and production of electronic data. The thought that all litigation counsel in all cases may need to adhere to the dictates of Zubulake or risk professional liability is unnerving, to say the least. Whether Zubulake literally or practically sets the standard of care for Texas lawyers advising clients about the duty to preserve evidence is a fair question. Assuming that the body of law concerning spoliation defines the standard of care, are there nonetheless limits on legal malpractice claims associated with spoliation of evidence?

II. TEXAS LAW CONCERNING LEGAL MALPRACTICE CLAIMS

In Texas, a legal malpractice action is based upon negligence and requires proof of four elements: (1) a legal duty, (2) a breach of that duty, (3) that the breach proximately caused the plaintiff’s damages, and (4) that the plaintiff sustained damages. Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development and Research Corp., 299 S.W.3d 106, 112 (Tex. 2009). If a legal malpractice case arises from prior litigation, a plaintiff must prove that, “but for” the attorney’s breach of his duty, the plaintiff would have prevailed in the underlying case. Duerr v. Brown, 262 S.W.3d 63, 76–77 (Tex. App.—Houston [14th Dist.] 2008, no pet.). This “but for” causation aspect of the plaintiff’s burden is referred to as the “case-within-a-case” or “suit within a suit” requirement. Id. at 77.

“In representing a client, an attorney is required to exercise reasonable and ordinary care and diligence in the use and application of the attorney’s skill and knowledge to the client’s cause.” WILLIAM DORSANEO, TEXAS LITIGATION GUIDE, Ch. 322 – Professional Malpractice, § 322.02[1][a][i] (2009). The standard is an objective exercise of professional judgment, not the subjective belief that one’s acts are in good faith. Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989). If an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Id.; Beck v. Law Offices of Edwin J. Terry, Jr., P.C., 284 S.W.3d 416, 426 (Tex. App.—Austin 2009, no pet.). The most common bases for attorney malpractice liability include giving erroneous opinions or advice, failing to give advice when legally obligated to do so, and failing to use ordinary care in litigation. DORSANEO, supra, at § 322.02[1][b][i].


III. TEXAS LAW CONCERNING SPOLIATION

Under Texas law, spoliation is an evidentiary concept that allows “the factfinder to deduce[] guilt from the destruction of presumably incriminating evidence.” Trevino v. Ortega, 969 S.W.2d 950, 952 (Tex. 1998).

Before any failure to produce material evidence may be viewed as discovery abuse, the opposing party must establish that the non-producing party had a duty to preserve the evidence in question. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003); MRT, Inc. v. Vounckx, 299 S.W.3d 500, 510 (Tex. App.—Dallas 2009, no pet.). “Such a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim.” Id. at 722.

Texas does not recognize a separate and distinct cause of action for spoliation. Trevino, 969 S.W.2d at 952. Instead, punishment for spoliation takes the form of sanctions imposed in the case in which spoliation occurs. Trial courts have broad discretion to fashion an appropriate remedy on a case-by-case basis to restore the parties to a rough approximation of their positions as if all evidence had been available. Id. at 953. Justice Baker has suggested that, in making that determination, courts consider the following: (1) whether there was a duty to preserve evidence, (2) whether the alleged spoliator negligently or intentionally spoliated evidence, and (3) whether the spoliation prejudiced the opponent’s ability to present its case. Id. at 954-55 (Baker, J., concurring). With regard to the second prong, “[p]arties need not take extraordinary measures to preserve evidence; however, a party should exercise reasonable care in preserving evidence.” Id. at 954-55 (Baker, J., concurring); Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 226 (Tex. App. – Amarillo 2003, no pet.).

A major unanswered question in Texas spoliation law is whether a party can be sanctioned for negligent spoliation of evidence, or whether the law allows punishment only for intentional spoliation. In his concurring opinion in Trevino, Justice Baker argued that:

Because parties have a duty to reasonably preserve evidence, it is only logical that they should be held accountable for either negligent or intentional spoliation. While allowing a court to hold a party accountable for negligent as well as intentional spoliation may appear inconsistent with the punitive purpose of remedying spoliation, it is clearly consistent with the evidentiary rationale supporting it because the remedies ameliorate the prejudicial effects resulting from the unavailability of evidence. In essence, it places the burden of the prejudicial effects upon the culpable spoliating party rather than the innocent nonspooliating party.

Trevino, 969 S.W.2d at 957 (Baker, J., concurring) (citation omitted).

A common remedy for spoliation is an instruction informing the jury that it must presume that the missing evidence would have been unfavorable to the party at fault. Wal-Mart, 106 S.W.3d at 721. Generally, the use of a spoliation instruction is limited to two circumstances: (1) the deliberate destruction of relevant evidence and (2) the failure of a party to produce relevant evidence or to explain its non-production. Id.

Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of instructions. The first and more severe presumption is a rebuttable presumption that shifts the burden of proof. Trevino, 969 S.W.2d at 960 (Baker, J., concurring). This is primarily used when the nonspooliating party cannot prove its prima facie case without the destroyed evidence. Id. The trial court instructs 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. Id. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. Id. 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 innocent party’s expense nor imposes an unduly harsh and absolute liability upon
the spoliating party. Id. 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.

The second type of instruction is less severe. Id. It is merely an adverse presumption that the evidence would have been unfavorable to the spoliating party. Id. The presumption itself has probative value and may be sufficient to support the nonspoliating party's assertions. Id. at 960-61. However, it does not relieve the nonspoliating party of the burden to prove each element of its case. Id. at 961. Therefore, it is simply another factor used by the factfinder in weighing the evidence. Id. The following is an example of this second type of spoliation instruction used in a recent case involving the destruction of videotapes:

You, the jury, are instructed that Wackenhut Corrections Corporation and Warden David Forest destroyed, lost, or failed to produce to this Court material evidence that by law should have been produced as evidence for your deliberations. You are further instructed that you may, but are not required to, presume this material evidence is unfavorable to Wackenhut Corrections Corporation and Warden David Forest.

Wackenhut Corrections Corp. v. de la Rosa, 305 S.W.3d 594, 608 n. 13 (Tex. App.—Corpus Christi 2009, no pet.).

Sanctions more severe than a spoliation instruction may be justified in exceptional cases. In Cire v. Cummings, 134 S.W.3d 835, 836 (Tex. 2004), the Texas Supreme Court held that the trial court did not abuse its discretion by imposing “death penalty” sanctions – the striking of plaintiff’s pleadings and dismissal of her case. Despite being ordered three times by the trial court to produce evidence, the plaintiff deliberately destroyed 70 to 100 audio tapes containing secretly recorded conversations with the defendant. Id. at 836–37. The trial court had carefully considered the possibility of less severe sanctions, including a spoliation instruction and determined that they would be insufficient to promote compliance with the discovery rules. Id. at 842–43.

Giving an improper spoliation instruction is reversible error if its submission probably caused the rendition of an improper judgment. Wal-Mart, 106 S.W.3d at 723. Because the purpose of a spoliation instruction is to nudge or tilt the jury, an unnecessary spoliation instruction is particularly likely to cause harm in a closely contested case. Id. at 724.

IV. FEDERAL LAW CONCERNING SPOLIATION
A. Zubulake

The Zubulake series of decisions arose out of claims by Laura Zubulake against several UBS entities for gender discrimination and illegal retaliation. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311 (S.D.N.Y. 2003). Zubulake contended that key evidence was located in various emails exchanged among UBS employees that, by the time of the litigation, existed only on backup tapes and other archived media. Id. at 311-12. In her fourth opinion in the case, District Judge Shira Scheindlin held that:

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company’s policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.


Judge Scheindlin’s fifth opinion in the case, issued in 2004, addressed counsel’s obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information. See Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422, 424 (S.D.N.Y. 2004) (Zubulake V). She identified the following duties on the part of counsel:

- a duty to issue a litigation hold at the outset of litigation or whenever litigation is reasonably anticipated to ensure the preservation of evidence,
- a duty to periodically re-issue the litigation hold so that new employees are aware of it and so that it is fresh in the minds of all employees,
- a duty to take affirmative steps to monitor compliance with the litigation hold such as identifying all sources of potentially relevant information,
- a duty to become fully familiar with the
client’s document retention policies, as well as the client’s data retention architecture, by speaking with information technology personnel,

- a duty to communicate with the “key players” in the litigation to understand how they stored information and advise them of their obligation to preserve evidence,
- a duty, once the party and counsel have identified all of the sources of potentially relevant information, to retain that information and to instruct all employees to produce information responsive to the opposing party’s requests, and
- as may be necessary, a duty to take possession of or otherwise safeguard all potentially relevant backup tapes.

See id. at 431-34.

Judge Scheindlin found that UBS’s in-house counsel had issued a litigation hold initially and repeated that instruction several times over the course of the litigation and that UBS’s counsel repeatedly advised UBS of its discovery obligations; nevertheless, the court faulted counsel for several failings. See id. at 434. She determined that counsel failed to communicate the litigation hold to all key players, failed to properly oversee UBS’s compliance with the litigation hold, failed to adequately communicate with key players about how they stored data, failed to make sure that relevant data was retained, failed to protect relevant backup tapes, and failed to produce some documents that UBS had provided to counsel. See id. at 434-36. Based on these findings and others, Judge Scheindlin ordered that the jury be given an adverse-inference instruction with respect to certain emails that had been deleted and ordered UBS to pay the costs of any depositions or re-depositions required by the deficient production. See id. at 437.

B. Texas Federal Courts

Professor Dorsaneo has described Zubulake as “the benchmark for many e-discovery disputes involving evidence preservation and sanctions, and, in particular, the role of counsel.”5 While federal courts in Texas certainly consider Zubulake in situations involving the spoliation of electronic information, it is nonetheless clear that Zubulake’s laundry list of counsel responsibilities is not (at least, not yet) the law in Texas federal courts.

The Fifth Circuit Court of Appeals has not cited or adopted Zubulake as the standard by which to judge counsel’s responsibilities in connection with the preservation or spoliation of electronic evidence. Only nine published Texas federal district court opinions have cited and applied Zubulake since 2004. Eight have cited Zubulake with respect to the shifting of discovery costs and/or for the proposition that a duty to preserve evidence exists.6 Only one Texas federal district court opinion has cited Zubulake for the proposition that counsel have duties with respect to the identification and preservation of evidence. In Tantivy Communications, Inc. v. Lucent Technologies, Inc.,7 the court wrote:

Lucent and its counsel are well aware that a party in litigation must suspend its routine document retention/destruction policy and establish a “litigation hold” to ensure the preservation of relevant documents. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D. N.Y. 2003). The 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. Id.

Fifth Circuit decisions establish the foregoing principles with regard to the spoliation of evidence:

- federal law rather than state law governs spoliation of evidence in federal cases, including cases based solely on diversity jurisdiction, Condrey v. Suntrust Bank of Ga., 431 F.3d 191, 203 (5th Cir. 2005);


● a severe sanction for spoliation, including an adverse-inference instruction, requires a showing of bad faith; mere negligence is not enough, King v. Ill. Cent. R.R., 337 F.3d 550, 556 (5th Cir. 2003); Condrey, 431 F.3d at 203; Vick v. Tex. Employment Comm’n, 514 F.2d 734, 737 (5th Cir. 1975);

● the mere fact that documents are destroyed after the initiation of litigation is not enough to automatically draw an inference of bad faith, Russell v. Univ. of Texas at Permian Basin, 234 Fed. Appx. 195, 208 (5th Cir. 2007);

● if a party destroys documents as part of routine file maintenance, and that party is not aware that the discarded evidence might be relevant to a claim, there is no bad faith, King, 337 F.3d at 556;

● a spoliation instruction entitles the jury to draw an inference that a party who intentionally destroys important documents did so because the contents of those documents were unfavorable to that party, Vick, 514 F.2d at 737; and

● a district court’s refusal to give a requested jury instruction is reviewed under an abuse of discretion standard, United States v. Cain, 440 F.3d 672, 674 (5th Cir. 2006).

V. A HYPOTHETICAL SPOLIATION-BASED MALPRACTICE CLAIM

The bodies of law that govern spoliation of evidence and legal malpractice can intersect in a variety of contexts. For example, the reported decisions include legal malpractice lawsuits within which a party destroys evidence. See, e.g., Cire v. Cummings, 134 S.W.3d 835 (Tex. 2004) (“death penalty” sanction for spoliation proper where legal malpractice plaintiff was found to have deliberately destroyed 70 to 100 audio tapes); Williams v. Russ, 167 Cal. App. 4th 1215, 84 Cal. Rptr. 3d 813 (Cal. App. – 2d Dist. 2008, rev. denied) (legal malpractice complaint dismissed as a discovery sanction based on plaintiff’s failure to safeguard and preserve case files). That situation is not the focus of the analysis here.

There are also cases in which a lawyer is sued for malpractice for failing to safeguard evidence under his control that was material to the outcome of a prior case. A California case, Galanek v. Wismar, 68 Cal. App. 4th 1417, 81 Cal. Rptr. 2d 236 (Cal. Ct. App. – 4th Dist. 1999, rev. denied), provides an example. In Galanek, a court of appeals upheld a client’s right to pursue a legal malpractice claim against a lawyer based on his negligent spoliation of evidence. Galanek, the client, was severely injured when, while seated in her Acura Integra she was struck from behind by another vehicle. Wismar, her lawyer, soon recognized that in addition to having claims against the other driver Galanek could assert a “seating system failure” claim against Honda for strict products liability based on a defect in the Acura that caused the driver’s seat to collapse upon impact.

It was well known among experienced products liability attorneys that the defective vehicle needs to be preserved for a plaintiff to succeed in seating system failure cases and the lawyer learned of this prior to suing Honda. The Acura had been sold at auction to a third party but was located in a local storage facility and available for possession by the lawyer. However, the lawyer never took possession of the vehicle and learned later that it had been destroyed. Summary judgment was entered in favor of Honda in the underlying case because the Acura was no longer in existence. The court in the underlying case ruled that, absent the vehicle, the client could not meet her burden to prove causation.

The client’s malpractice complaint alleged that her attorney’s failure to take reasonable steps to prevent the destruction of the Acura caused her to lose a meritorious products liability case against Honda. The court of appeals ruled that (1) as the attorney, Wismar was primarily responsible during the course of the litigation for the preservation of evidence, and (2) Wismar’s negligence in failing to preserve the car is what made it impossible for Galanek to prove causation.

The focus in this paper is on legal malpractice claims premised on the lawyer’s failure to advise or failure to fully and correctly advise the client about its duty to preserve evidence. California cases again provide an example. In a case pending in California state court, a former client (Jerrold Fine) asserted a legal malpractice counterclaim against his former attorney (Morris Getzels) alleging that the lawyer should have but failed to advise the client of its duty not to destroy evidence during the clean-up of a site previously occupied by an oil company.8 Arguably, such legal malpractice cases are just a variant of cases in which a client is injured in underlying litigation as a result of its lawyer’s mishandling of discovery. See, e.g., Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 181 (Tex. 1995) (malpractice case based on lawyer’s failure to timely respond to discovery in underlying case, which led court in underlying case to

strike client’s pleadings and enter default judgment against client).

One can imagine the following hypothetical case: In 2010, years after Wal-Mart v. Johnson, Trevino v. Ortega and Zubulake v issued, the ACME Corporation is sued and retains Attorney Smith to defend it. Smith instructs ACME to assemble all documents relevant to the dispute. However, Smith makes no effort to inform ACME of the duty not to destroy evidence. Smith does not advise ACME to issue a “litigation hold,” does not familiarize himself with ACME’s document retention policies or document management system, does not undertake an independent effort to identify all sources of potentially relevant information, and does not take possession of any potentially relevant backup tapes. In the ensuing months, evidence that is material and relevant to plaintiff’s claim is destroyed through ACME’s routine document destruction processes.

Upon discovery that the evidence was destroyed, plaintiff moves to sanction ACME for spoliation. The court finds that Smith failed to adequately advise ACME about its duty to preserve evidence and that, in whole or in part as a result of Smith’s failings, ACME negligently destroyed evidence highly material to plaintiff’s claim. After considering lesser sanctions, the court determines that “death penalty” sanctions are warranted due to the importance of the evidence to plaintiff’s case. The court strikes ACME’s answer and enters judgment against it in the amount of $250,000. Based on the advice of new counsel, ACME decides not to appeal but instead to sue Attorney Smith for legal malpractice.

In the malpractice case, ACME presents an expert witness who opines that:

- the applicable standard of care requires lawyers to immediately advise litigation clients of the duty to preserve evidence, to instruct clients to issue a “litigation hold,” to periodically instruct clients to re-issue the litigation hold, to fully familiarize themselves with the client’s document retention policies and information technology architecture, to interview information technology personnel, to communicate with the “key players,” to identify all sources of potentially relevant information, and to take possession of any potentially relevant backup tapes;
- Attorney Smith breached the standard of care by failing to take the foregoing steps;
- had Smith properly advised ACME of the duty to preserve evidence and otherwise satisfied the standard of care, the evidence at issue would not have been destroyed by ACME; and
- the court’s entry of judgment against ACME in the underlying case was proximately caused by Smith’s negligent conduct.

VI. WHAT IS THE STANDARD OF CARE FOR ADVISING CLIENTS ABOUT THE DUTY TO PRESERVE EVIDENCE?

The foregoing hypothetical is extreme in the sense that Attorney Smith did nothing to satisfy the standard of care with respect to advising ACME about the duty to preserve evidence. Whatever that standard of care may be, Smith’s conduct fell below it. The hypothetical also is purposely vague about whether the underlying case was in state court (and therefore subject to state spoliation standards) or in federal court (and subject to federal spoliation standards). In fact, Texas lawyers are subject to one standard of care in connection with the duty to preserve evidence in Texas state courts and a different standard of care in Texas federal courts. This portion of the paper examines the issue of the standard of care for advising clients about the duty to preserve evidence.

A. The Standard of Care in Texas State Courts

As noted in Section II above, the conduct of a reasonably prudent attorney in the same or similar circumstances sets the standard of care. What would a reasonably prudent Texas attorney familiar with the body of spoliation law do when retained by a client who has been sued in state court?

First, the lawyer will have determined under Wal-Mart that there is a duty to preserve evidence that is material and relevant to the dispute. A reasonably prudent attorney would immediately advise the client of the duty. Depending on the circumstances, it could constitute professional negligence for a lawyer not to inform the client of the duty.9

Second, it is clear under Trevino that the lawyer should inform the client that the client (as opposed to counsel) is required to take reasonable measures to safeguard relevant, material evidence but has no obligation to take extraordinary measures.

Third, a reasonably prudent attorney would also tell the client that the deliberate destruction of evidence can lead the court to impose a range of sanctions, including the use of a spoliation instruction and the striking of pleadings.

9 Situations in which a client seeks advice about an incident that has happened but in which no lawsuit has been filed may or may not involve a duty to preserve evidence. In such situations, the lawyer has a duty to advise the client to preserve evidence only if a reasonable person would anticipate litigation to arise from the incident.
It does not appear that Texas jurisprudence, in its current state, requires lawyers to do anything more with regard to advising clients about the duty to preserve evidence. Presently, there is no authority for holding Texas lawyers in state court cases to Zubulake’s list of counsel responsibilities. The decision of a federal district judge on a matter of state law is not binding on a state court. Moreover, only two reported Texas cases have cited Zubulake. See MRT, Inc. v. Vounckx, 299 S.W.3d 500 (Tex. 2009); In re Honza, 242 S.W.3d 578 (Tex. App.—Waco 2008, pet. denied). In In re Honza the Waco Court of Appeals’ reference to Zubulake was limited to the proposition that electronic data stored on computer hard drives is subject to discovery. See In re Honza 242 S.W.3d, at 581. In Vounckx the Dallas Court of Appeals distinguished Zubulake on its facts. Thus, as of August 2009, no Texas state court had incorporated into Texas law the laundry list of counsel’s responsibilities stated in Zubulake.

B. The Standard of Care in Texas Federal Courts

Although legal malpractice is a state law claim, the Fifth Circuit’s decision in Condrey that federal law, not state law, governs spoliation of evidence in federal court means that the standard of care for lawyers handling federal cases is different from the standard applicable to lawyers handling cases in Texas state court. Put differently, if a former client files a malpractice case based on attorney negligence that occurred in an underlying federal lawsuit, the standard of care will be based on what a reasonably prudent federal court practitioner would have done under the same or similar circumstances, not on what a reasonably prudent state court practitioner would have done.

That being said, does Zubulake define the standard of care in Texas federal courts? A strong argument can be made that, based on the reported decisions, Zubulake does not set the standard of care for federal court practitioners in Texas in advising their clients about the duty to preserve evidence. As noted in Section IV B. above, despite the passage of several years, the Fifth Circuit has not adopted Zubulake and only one federal district judge in Texas has cited Zubulake for the proposition that counsel have duties with respect to the identification and preservation of evidence. If this view is correct, then a reasonably prudent attorney involved in a federal case in Texas would be expected to advise the client that:

- the client has a duty to preserve evidence in its possession, custody or control that is relevant and material to the dispute,
- bad faith spoliation of evidence may result in severe sanctions, including the use of a spoliation instruction,
- the destruction of documents not known by the client to be relevant as part of routine file maintenance does not amount to bad faith, and
- it is unsettled whether negligent spoliation of evidence is sanctionable.

Under this minimalist approach, there does not appear to be any duty on the part of the lawyer to instruct clients to issue a “litigation hold,” to periodically instruct clients to re-issue the litigation hold, to fully familiarize themselves with the client’s document retention policies and information technology architecture, to interview information technology personnel, to communicate with the “key players,” to identify all sources of potentially relevant information or to take possession of any potentially relevant backup tapes.

The concern for lawyers in federal cases in Texas is that they may be held to a Zubulake-like standard of care higher than the minimal standard derived from Fifth Circuit and Texas district court decisions. It is not difficult to imagine an expert opining in a malpractice case that a reasonably prudent lawyer would do more than the minimum required by case law – i.e., a reasonably prudent lawyer would undertake most or all of the measures delineated by Judge Scheindlin in Zubulake.

There are a number of reasons for this concern. First, although the reported decisions do not show that federal judges in Texas hold lawyers to the Zubulake standards, in the author’s experience a number of those judges view Zubulake as a “benchmark” for the role of counsel in many e-discovery disputes involving evidence preservation and sanctions, there may be a perception among members of the bar that Zubulake governs attorney conduct in federal cases in Texas. Third, Federal Rule of Civil Procedure 26(f)(3)(C) requires counsel, in connection with the Zubulake conference, to prepare a discovery plan that provides for the disclosure and discovery of electronically stored information. It is hard to see how counsel can properly satisfy his or her Rule 26(f) duty to the court without performing some of the tasks delineated in Zubulake, such as issuing a litigation hold, identifying sources of potentially relevant information, and becoming familiar with the client’s document retention policies and document management system. Finally, while some of the Zubulake responsibilities (such as the duty to become
familiar with a client’s data retention architecture) may be daunting, others (such as issuing a “litigation hold”) ought to be performed because they are relatively easy for any lawyer to perform in any case. Examples of evidence preservation letters to be sent to clients and opponents that track Zubulake principles of management, production and preservation of electronic evidence are readily available. See, e.g., WILLIAM DORSANEO, TEXAS LITIGATION GUIDE, § 99.103 (2009); American Bar Association, Preservation of Evidence Letters Toolkit (2008).

VII. LIMITS TO LEGAL MALPRACTICE ASSOCIATED WITH SPOILATION

In the event lawyers are held to a heightened standard of care in connection with the preservation of evidence, there are a number of limits on legal malpractice claims associated with spoliation.

Causation and collectibility. As noted in Section II above, to prevail on a legal malpractice claim a plaintiff must establish causation and damage in addition to breach of the applicable standard of care. If a client is sanctioned in an underlying case for spoliation of evidence, it will have to prove in the subsequent legal malpractice action that the lawyer’s breach of the duty to advise the client about the duty to preserve evidence proximately caused the client to be sanctioned. Plus, the client must prove that the sanction, in turn, caused it to lose the underlying case, which it would have won but for the discovery sanction. Except in cases like the hypothetical situation discussed in Section V (where Attorney Smith made no effort to inform his client about the duty to preserve evidence and where the court expressly imposed “death penalty” sanctions based at least in part on counsel’s failings), the link between bad legal advice and quantifiable injury to a client may be difficult to prove.

“Collectibility of judgment” is an essential element of a legal malpractice claim arising out of prior litigation. Cosgrove v. Grimes, 774 S.W.2d 662, 666 (Tex. 1989). In cases where the malpractice plaintiff was seeking monetary relief in the underlying case, plaintiff has the burden to show the amount that would have been collectible had it recovered a judgment. Oliva v. Macias, No. 04-03-00165-CV 2003 Tex. App. LEXIS 9423, *5 (Tex. App.—San Antonio Nov. 5, 2003, no pet.); Ballesteros v. Jones, 985 S.W.2d 485, 489 (Tex. App.—San Antonio 1998, pet. denied). Even if a former client establishes negligence on the part of his lawyer, the client suffers no damage absent proof that he would have collected the judgment from the opponent in the underlying case. Williams v. Briscoe, 137 S.W.3d 120, 124 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Under this authority, even if “death penalty” sanctions are imposed on a client for spoliation of evidence and the sanctions are tied directly to a lawyer’s negligence, the former client still would have to prove the extent to which a favorable judgment in the underlying case would have been collectible from the defendant therein.

Public policy. There may be certain acts of spoliation by clients which could not, as a matter of policy, support a legal malpractice claim based on the lawyer’s failure to advise the client about the duty to preserve evidence. It is well-established in Texas law that public policy will not permit a party to obtain relief in a civil action when the action is based on illegal acts. See Gulf, Colorado & Santa Fe Ry. Co. v. Johnson, 9 S.W. 602, 603 (Tex. 1888) (“It may be assumed, as undisputed doctrine, that no action will lie to recover a claim for damages, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon an illegal act to which he is a party.”); see also Saks v. Sawtelle, Goode, Davidson & Troilo, P.C., 880 S.W.2d 466, 469 (Tex. App.—San Antonio 1994, writ denied) (bank fraud); Dover v. Baker, Brown, Sharman & Parker, 859 S.W.2d 441 (Tex. App.—Houston [1st Dist.] 1993, no writ) (tax-and-bank fraud). A client’s destruction of evidence may be illegal for reasons independent of litigation requirements. Under the foregoing authority, such destruction could not be the basis for a legal malpractice claim, even if the lawyer neglected to advise the client about the duty to preserve evidence for use in civil litigation.

While not illegal, there appear to be other acts of spoliation of evidence by a client that would not support claims of legal malpractice. Assuming that a lawyer completely neglects to advise the client that it has a duty to preserve relevant, material evidence (just as Attorney Smith did in the foregoing hypothetical), a client found by a court to have unilaterally destroyed material evidence deliberately and in bad faith would appear to have no real prospect for recovery against the lawyer. In Cire v. Cummings, for example, the plaintiff burned numerous audiotapes that were key evidence and, as a result, the court granted judgment against plaintiff. Even if Cummings’ lawyers never told her that she had a duty to preserve the audiotapes, her ability to assert a legal malpractice claim against those lawyers seems to be limited as a practical matter.

Practical limitations. Not every case is like the one in which Judge Scheindlin formulated her guidelines for counsel responsibilities in connection with the identification and preservation of electronically stored information. In Zubulake, plaintiff’s damages totaled $13 million, the volume of emails to be searched was significant (an estimated 200 emails per employee per day), and the defendants’ document management system and data storage
protocols were extensive and complex. See 217 F.R.D. at 311 n.9 & 313-15. Smaller cases simply may not justify the attorney’s fees and other costs incumbent in counsel monitoring compliance with a litigation hold, becoming familiar with a client’s data retention architecture, interviewing information technology personnel or taking possession of all potentially relevant backup tapes. The demands of the case and limited resources of the client may make it impractical or unfair to hold lawyers responsible for doing more with regard to the identification and preservation of evidence than the minimum required by Texas and Fifth Circuit spoliation law.

VIII. CONCLUSION

The body of law regulating the spoliation of evidence in Texas state and federal courts clearly imposes professional obligations on Texas lawyers, the breach of which may lead to claims of malpractice. At the present time, those obligations are more limited than the counsel responsibilities delineated in Zubulake, where the court held that counsel have a duty not only to advise clients about the duty to preserve evidence but also to undertake affirmative measures to identify and safeguard such evidence. Nonetheless, some courts and commentators in Texas view Zubulake as setting the standard or “benchmark” for counsel behavior in connection with preventing the spoliation of evidence. This reality makes it possible that lawyers will be held to more than a minimal standard of care. And it certainly goes without saying that, putting aside the legal standards established by the cases, rules of professional ethics, common sense and our obligations as officers of the court may require lawyers to go above and beyond the call of duty in certain situations to affirmatively prevent the destruction of evidence or to disclose its occurrence.