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## Interference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort.

Philip A. Lionberger

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## COMMENT

### Interference With Prospective Civil Litigation By Spoliation of Evidence: Should Texas Adopt A New Tort?

Philip A. Lionberger

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#### I. INTRODUCTION

Spoliation of evidence is a serious legal problem.<sup>1</sup> If it occurs, litigants

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1. See *Barker v. Bledsoe*, 85 F.R.D. 545, 548 (W.D. Okla. 1979)(destruction of evidence prevents fair trial); *Smith v. Superior Court*, 198 Cal. Rptr. 829, 835 (Cal. Ct. App. 1984)(intentional spoliation of evidence obstructs justice); see also Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 191 (1985)(intentional spoliation of

will have difficulty proving a cause of action or a defense.<sup>2</sup> Evidence destruction may also cause increased litigation costs and cause the trial court to make factfinding errors.<sup>3</sup> Currently, the courts utilize various methods of dealing with evidence destruction which include: (1) criminal sanctions,<sup>4</sup> (2) civil discovery sanctions,<sup>5</sup> (3) the spoliation inference,<sup>6</sup> and (4) the spoliation

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evidence is problematic). Spoliation is a word with "evil connotations" that is synonymous with "pillaging, plundering, and robbing." See *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 109 F.2d 299, 302 (5th Cir. 1940) (discussing spoliation of trust funds); see also *In re Bodkins*, 165 F. Supp. 25, 30 (E.D.N.Y. 1958) (spoliation is destruction or significant and meaningful alteration of document); *Miller v. Montgomery County*, 494 A.2d 761, 767 (Md. Ct. Spec. App. 1985) (spoliation is destruction, mutilation, or alteration of evidence by one involved in litigation); Maguire & Vincent, *Admissions Implied From Spoliation or Related Conduct*, 45 YALE L.J. 226, 227 (1935) (spoliation refers to actions that impede or pervert judicial process).

2. Cedillo & Lopez, *Document Destruction in Business Litigation From a Practitioner's Point-of-View: The Ethical Rules vs. Practical Realities*, 20 ST. MARY'S L.J. 637, 638 (1989)(lawyers who destroy evidence impede administration of justice); Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1187 (1983)(document destruction creates problem of building case or defense for litigants).

3. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1187 (1983).

4. See, e.g., *Spector v. State*, 746 S.W.2d 945, 946 (Tex. App.—Austin 1988, no writ)(reversed conviction for destruction of evidence); *Cuadra v. State*, 715 S.W.2d 723, 725 (Tex. App.—Houston [14th Dist.] 1986, no writ)(conviction for destruction of evidence did not violate due process clause); *Dillard v. State*, 640 S.W.2d 85, 86 (Tex. App.—Fort Worth 1982, no writ)(evidence insufficient to support conviction for tampering with evidence). See generally Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1108 (1987)(discusses use of criminal proceedings to control destruction of evidence).

5. See, e.g., *Wm. T. Thompson Co. v. General Nutrition Corp.*, 104 F.R.D. 119, 122 (C.D. Cal. 1985)(discovery sanctions appropriate when litigant destroys evidence); *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979*, 90 F.R.D. 613, 618 (N.D. Ill. 1981)(litigant sanctioned when he lost or destroyed records on advice of counsel); *Alliance to End Repression v. Rochford*, 75 F.R.D. 438, 440 (N.D. Ill. 1976)(defendant sanctioned for destroying documents); see also Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1094-1100 (1987)(discovery sanctions applicable to destruction of evidence); Comment, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 979 (1985)(discovery sanctions available pursuant to Federal Rule of Civil Procedure 37).

6. See, e.g., *Moore v. General Motors Corp.*, 558 S.W.2d 720, 735 (Mo. Ct. App. 1977)(spoliation of evidence gives rise to unfavorable inference against litigant); *Larsen v. Romero*, 255 A.2d 387, 391 (Md. 1969)(factfinder may draw unfavorable inference against litigant who destroys relevant evidence); *H. E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 343 (Tex. App.—Waco 1975, writ dismissed)(factfinder may infer litigant destroyed documents because evidence unfavorable in his case); see also Maguire & Vincent, *Admissions Implied From Spoliation or Related Conduct*, 45 YALE L.J. 226, 226-259 (1935)(discusses spoliation inference); Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*,

tort.<sup>7</sup>

In 1984, a California court of appeals created the tort of “intentional spoliation of evidence.”<sup>8</sup> Alaska followed suit by also recognizing the new tort.<sup>9</sup> Furthermore, California and Florida have created a cause of action for the negligent spoliation of evidence.<sup>10</sup> Other jurisdictions, however, have declined to follow California’s lead.<sup>11</sup> This comment explores the present state

36 EMORY L.J. 1085, 1087-94 (1987)(spoliation inference used to control destruction of evidence).

7. See, e.g., *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986)(tort of intentional spoliation of evidence); *Smith v. Superior Court*, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984)(tort of intentional spoliation of evidence); *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984)(tort of negligent spoliation of evidence); see also Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1100-06 (1987)(spoliation tort used to control destruction of evidence).

8. See *Smith*, 198 Cal. Rptr. at 837 (plaintiff’s interests in prospective civil litigation entitled to legal protection against intentional spoliation of evidence by defendant).

9. See *Hazen*, 718 P.2d at 463 (court recognized tort of intentional interference with prospective civil action by spoliation of evidence). Although the parties neither briefed nor argued the issue, the Alaska Supreme Court decided to recognize a common law action for the intentional spoliation of evidence. See *id.* at 463 n.9.

10. See *Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504, 506 (Cal. Ct. App. 1985)(holding negligent destruction of evidence needed for prospective civil litigation gives rise to valid cause of action); *Bondu v. Gurvich*, 473 So. 2d 307, 1312-13 (Fla. Dist. Ct. App. 1984)(plaintiff’s complaint stated cause of action for negligent spoliation of evidence). In order for a plaintiff to state a cause of action for negligent spoliation of evidence, a duty to preserve evidence must exist. See *Williams v. State of California*, 192 Cal. Rptr. 233, 239 (Cal. Ct. App. 1985)(plaintiff failed to state cause of action for negligent spoliation of evidence by failing to show duty to preserve evidence existed); *Bondu*, 473 So. 2d at 1312 (cause of action against hospital for breach of duty to maintain medical records that prevented plaintiff from presenting expert witnesses in medical negligence suit); see also Note, *Torts—Arizona Should Adopt The Tort of Intentional Spoliation of Evidence—La Raia v. Superior Court*, 150 Ariz. 118, 722 P.2d 286 (1986), 19 ARIZ. ST. L.J. 371, 379 (1987)(element of duty in conventional negligence also required in cause of action for negligent spoliation of evidence).

11. See, e.g., *La Raia v. Superior Court*, 722 P.2d 286, 289 (Arizona 1986)(court refused to recognize tort of intentional spoliation of evidence because of existence of alternative remedy); *Fox v. Cohen*, 406 N.E.2d 178, 183 (Ill. Ct. App. 1980)(action against hospital for breach of duty to maintain patient’s medical records premature because plaintiff’s medical malpractice claim still pending); *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1181-82 (Kan. 1987)(action for intentional spoliation of evidence would not lie absent duty on appellee’s part to preserve evidence); *Miller v. Montgomery County*, 494 A.2d 761, 767-68 (Md. Ct. Spec. App. 1985)(holding no separate cause of action against party to underlying lawsuit for spoliation of evidence). Some courts have refused to extend liability to spoliators who were not parties to the underlying litigation. Compare *Velasco v. Commercial Maintenance Co.*, 215 Cal. Rptr. 504, 506 (Cal. Ct. App. 1985)(plaintiff had cause of action against maintenance company whose janitor threw away evidence important to plaintiff’s product liability action) with *Koplin*, 734 P.2d at 1179 (no duty to preserve evidence so plaintiff may bring future legal action against third party). On the other hand, one court has said that there is no separate cause of action for spoliation of evidence against a party to the underlying litigation. *Miller*, 494 A.2d at 768; see also Abney, *Spoliation and Future Civil Actions: Slowing the Rush to a*

of the law involving the tort of spoliation of evidence and proposes that the Texas courts adopt the tort in both its intentional and negligent form.

## II. CREATION OF A NEW TORT

### A. *Intentional Spoliation of Evidence*

California blazed the trail in the area of evidence spoliation by becoming the first jurisdiction to recognize the tort of intentional spoliation of evidence.<sup>12</sup> In *Smith v. Superior Court*,<sup>13</sup> Phyllis Smith sustained injuries when a "mag wheel" flew off a van and crashed into her car's windshield.<sup>14</sup> Immediately after the accident, Abbott Ford, the party that later became the defendant, towed the van back to its dealership for repairs.<sup>15</sup> When contacted by Smith's attorney, Abbott Ford agreed to keep certain automotive parts until Smith's experts could inspect them for defects.<sup>16</sup> Sometime after the

*Novel Tort*, The National Law Journal, Feb. 2, 1987, at 38, col. 2 (no reason for new tort when spoliator also litigant to future civil action). *But see Smith*, 198 Cal. Rptr. at 837 (plaintiff had cause of action for intentional spoliation against party in underlying litigation); *Hazen*, 718 P.2d at 464 (cause of action for intentional spoliation of evidence against police officers in underlying false arrest and malicious prosecution actions).

12. *Spano v. McAvoy*, 589 F. Supp. 423, 427 n.2 (N.D.N.Y. 1984); *Hazen*, 718 P.2d at 463; *Koplin*, 734 P.2d at 1181; *see also* Note, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 962 (1984)(no court before *Smith* recognized spoliation of evidence as separate tort); Comment, *Spoliation: Civil Liability For Destruction of Evidence*, 20 U. RICH. L. REV. 191, 194 (1985)(California court of appeals first court to recognize tort for intentional spoliation of evidence). Prior to *Smith v. Superior Court*, the Supreme Court of California hinted that in appropriate circumstances it would recognize a cause of action for negligent spoliation of evidence. *See Williams v. State of California*, 192 Cal. Rptr. 233, 239 (Cal. Ct. App. 1985)(court would not say civil action for spoliation of evidence could never be maintained); *see also Smith*, 198 Cal. Rptr. at 833 (Supreme Court in *Williams* apparently recognized tort for spoliation of evidence); *Velasco*, 215 Cal. Rptr. at 505 (language in *Williams* indicated California Supreme Court recognized tort for negligent spoliation of evidence); Comment, *Spoliation of Evidence—Recognition for a New Tort*, 15 WESTERN ST. U. L. REV. 359, 361 (1987)(court in *Williams* impliedly held that it would have acknowledged tort of negligent spoliation had plaintiff satisfied duty element).

13. 198 Cal. Rptr. 829 (Cal. Ct. App. 1984).

14. *Id.* at 831. Fragments of glass from the shattered windshield struck Ms. Smith in the face. *Id.* As a result, she suffered permanent blindness in both of her eyes, and her sense of smell was impaired. *Id.*

15. *Id.* Abbott Ford was the dealer who customized the van with the mag wheels. *Id.*

16. *Id.* at 831-32. The agreement was necessary so that Smith's experts might find the defect which caused the van's wheel assembly to fail. *Id.* An agreement such as the one in *Smith* is viewed by some courts as being a condition precedent to an action for intentional spoliation of evidence. *See Reid v. State Farm Mut. Auto. Ins. Co.*, 218 Cal. Rptr. 913, 926 n.9 (Cal. Ct. App. 1985)(holding *Smith* inapposite because plaintiff made no claim nor presented any evidence of promise to preserve evidence); *see also Koplin v. Rosel Well Perforators, Inc.* 734 P.2d 1177, 1179-82 (Kan. 1987)(absent some relationship arising by agreement, statute, or special circumstance, no duty exists to preserve evidence). *But see Solum &*

consummation of the agreement, Abbott Ford allegedly destroyed, lost, or transferred the parts.<sup>17</sup> Thereafter, Smith sued Abbott Ford for "Tortious Interference with Prospective Civil Action By Spoliation of Evidence."<sup>18</sup> The trial court, however, refused to recognize the tort, rendered judgment for Abbott Ford, and Smith appealed.<sup>19</sup>

The California appellate court first addressed Abbott Ford's argument that a California penal statute which punishes spoliators preempted Smith's lawsuit for intentional spoliation of evidence.<sup>20</sup> The court reasoned that both civil and criminal liability arose from spoliation of evidence,<sup>21</sup> but criminal liability would not compensate the person injured by the wrongdoer.<sup>22</sup> Additionally, the court stated that the criminal statute probably would not

Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1102 (1987)(Smith does not require agreement by custodian to preserve potentially relevant evidence); see also Comment, *Spoliation: Civil Liability For Destruction of Evidence*, 20 U. RICH. L. REV. 191, 201 (1985)(duty to preserve evidence may not be necessary in actions for intentional spoliation of evidence).

17. *Smith v. Superior Court*, 198 Cal. Rptr. 829, 831 (Cal. Ct. App. 1984). Smith alleged that Abbott Ford intentionally lost, destroyed, or otherwise disposed of the mag wheel which they had promised to preserve for her. *Id.* at 832.

18. *Id.* at 831. Ms. Smith also asserted causes of action for breach of contract, promissory estoppel, and negligence, all related to the loss of evidence. *Id.* Smith further alleged that the damage she suffered was the opportunity to obtain compensation for her personal injuries. *Id.* at 832.

19. *Id.* The trial court dismissed Ms. Smith's cause of action for intentional spoliation of evidence on the grounds that such a tort did not exist. *Id.*

20. See *id.* at 833. Abbott Ford argued that California's criminal "obstruction of justice" statute barred Smith from bringing a civil cause of action. *Id.* They based their argument on a California court of appeals decision which held that only the state could prosecute under the "obstruction of justice statute" and that no civil cause of action was available to the party harmed. *Id.* The court, however, rejected the argument that spoliation of evidence is a wrong only against the public. See *id.* at 834-35. Furthermore, the court found that the policy arguments for not extending civil liability to violators of the "obstruction of justice statute" were inapposite to the instant case. *Id.* at 834. The court stated that the present case was distinguishable from *Agnew v. Parks* wherein the plaintiff sought to use the "obstruction of justice" statute to essentially relitigate matters already adjudicated in an earlier trial. *Id.* at 833-34; see also *Agnew v. Parks*, 343 P.2d 118, 125 (Cal. Ct. App. 1959)(court held new cause of action would essentially relitigate matters already adjudicated). The court remarked that Smith's case was vastly different procedurally from the *Agnew* case. *Smith*, 198 Cal. Rptr. at 833-34. The court noted that if Ms. Smith were to bring her cause of action after the trial, she would be collaterally estopped like the plaintiffs in *Agnew*. *Id.* at 834.

21. *Smith v. Superior Court*, 198 Cal. Rptr. 829, 834 (Cal. Ct. App. 1984). The court stated that many torts in California have analogues in the penal code. *Id.* The court cited wrongful death, battery, and conversion as examples of torts which have analogues in criminal law. *Id.*

22. *Id.* The court noted that the purpose of criminal trials is to vindicate the interests of the general public and to punish the wrongdoer or eliminate him from society. *Id.* As far as compensation, the court reasoned that a criminal prosecution would only leave the wrongdoer's victim "empty-handed." *Id.*

deter evidence destruction because violation of its provisions was only a misdemeanor.<sup>23</sup>

The court then focused on what it called the "most troubling aspect" of the case, the certainty of damages.<sup>24</sup> The court stated that the burden of proof of reasonable accuracy would suffice to prove plaintiff's damages, and absolute precision of proof was not a prerequisite.<sup>25</sup> Smith satisfied this burden because the amount of damages was plead with reasonable accuracy.<sup>26</sup>

Finally, the court analogized intentional spoliation to the common law tort of intentional interference with prospective business advantage.<sup>27</sup> The court noted that prospective business relationships are important "probable expectancies" that are worthy of legal protection.<sup>28</sup> Because Smith's prospective products liability action was a valuable "probable expectancy," the court reasoned a cause of action existed for intentional spoliation of evidence.<sup>29</sup>

After the *Smith* decision, Alaska adopted the tort of intentional spoliation of evidence.<sup>30</sup> The Alaska Supreme Court recognized the spoliation tort in a

23. *Id.* at 835. The court stated, "If crucial evidence could be intentionally destroyed by a party to a civil action who thereby stands to gain substantially monetarily by such destruction, the effect would be of minimal deterrence." *Id.*

24. *Id.*; see also Goodrich, *Gone Today, Here Tomorrow*, 4 CAL. LAW. 15, 15 (June 1984)(quantifying damages for spoliation of evidence speculative). The court was concerned about the possibility that Smith could prove her case by other means and recover damages. *Smith*, 198 Cal. Rptr. at 835. The court stated that not only did Ms. Smith have to show she suffered a legally recognizable injury, but she also had to prove the amount of her damages. *Id.*

25. *Id.* The court recognized that some claims could not be calculated with precision. *Id.* at 836. The court pointed to wrongful death, patent infringement, libel, slander, invasion of privacy, and personal injury cases as examples of interests that the law protects, regardless of the uncertainty of the damages. *Id.*

26. *Smith v. Superior Court*, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984). The court concluded that public policy dictated that Smith's interests in prospective civil litigation were entitled to protection despite any uncertainty regarding damages. *Id.*

27. *Id.* at 836.

28. *Id.* The court stated that the relevant consideration in intentional interference with prospective business advantage was the *expectations* of the parties. *Id.*

29. *Id.* at 837. The prospective advantage in the instant case was not Smith's *opportunity to win* her product liability suit; it was the *opportunity to prove* her lawsuit. See *id.* Thus, a plaintiff who states a cause of action for spoliation of evidence need not prove, but for the destruction of evidence, he would have prevailed in his lawsuit. See *id.* Rather, the plaintiff's burden is to show that the defendant's interference cost him an opportunity to prove his lawsuit. See *id.* Furthermore, spoliation claims need not be limited to plaintiffs; a defendant could also state a cause of action for spoliation of evidence. See Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1102 n.83 (1987)(*Smith* should not be limited to plaintiff's suits); Bosco, *Liability for Spoliation of Evidence*, 28 TRIAL LAW. GUIDE 85, 101 (1984)(destruction of evidence by one defendant can harm codefendants).

30. *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986).

case involving an altered arrest tape.<sup>31</sup> The defendant's alteration of the tape, the court reasoned, constituted an unreasonable interference with the plaintiff's prospective causes of action for false arrest and malicious prosecution.<sup>32</sup>

### B. *Negligent Spoliation of Evidence*

In addition to the intentional tort adopted by California and Alaska, Florida recognizes the tort of negligent spoliation of evidence.<sup>33</sup> A Florida district court of appeals adopted the tort, but indicated that to recover damages for spoliation of evidence based on negligent conduct, a plaintiff must show that a legal duty<sup>34</sup> existed to preserve the lost or destroyed evidence.<sup>35</sup> Be-

31. *Id.* at 456. The plaintiff, Penny Hazen, was charged with prostitution after she allegedly offered sex to an undercover vice officer who taped the conversation on a hidden recorder. *Id.* at 458. The case against Hazen was eventually dismissed, and she sued the Municipality of Anchorage and four police officers for false arrest, malicious prosecution, and civil rights violations. *Id.* at 458-59. During discovery, Hazen's attorneys learned that the arrest tape had been altered. *Id.* at 459. Furthermore, after listening to the tape of the dismissal hearing at the criminal trial, Hazen and her attorneys heard a whispered comment immediately following the prosecutor's statement that he would preserve the arrest tape. *Id.* A male voice, which was inaudible in the open courtroom, whispered, "[W]ait 'till you hear what is on the tape now." *Id.* Subsequently, Hazen amended her complaint to include a claim for alteration of the arrest tape. *Id.* At trial, the court dismissed Hazen's false arrest and malicious prosecution claims, and the jury returned a general verdict against Hazen on her tape alteration claim. *Id.* at 459-60.

32. *Id.* at 464. Because the prospective false arrest and malicious prosecution actions were "valuable probable expectancies," the court reasoned that a lawsuit was available for interference with these expectancies. *Id.*

33. *See Bondu v. Gurvich*, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984)(court recognized negligent spoliation of evidence as new tort). California has also adopted a tort for negligent spoliation of evidence. *See Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504, 506 (Cal. Ct. App. 1985)(cause of action exists for negligent spoliation of evidence). In *Bondu*, the plaintiff's husband died on the operating table during the administration of anesthesia. *See Bondu*, 473 So. 2d at 1309. In two counts of a multi-count complaint, the plaintiff alleged that the hospital negligently, or in the alternative, intentionally "lost and/or destroyed" her husband's anesthesiology records, thus causing her to lose a medical negligence suit. *Id.* Early in the trial, the court dismissed both counts with prejudice because they failed to state a cause of action. *Id.* at 1310. Plaintiff later learned through discovery proceedings that anesthesiology records had in fact been made but were now missing. *Id.* Plaintiff moved for a rehearing and leave to amend her complaint, but she was unsuccessful. *Id.* Contemporaneously with this motion, the plaintiff also filed a separate action against the hospital alleging that the hospital negligently lost her husband's records causing her to lose a medical negligence lawsuit because she could not provide expert witnesses. *Id.* The hospital asserted the defense of res judicata and moved for a judgment on the pleadings. *Id.* at 1310. The trial court dismissed on res judicata grounds, and the plaintiff appealed. *Id.*

34. *See, e.g., Earp v. Nobmann*, 175 Cal. Rptr. 767, 778 (Cal. Ct. App. 1981)(concept of duty protects plaintiff's interests against defendant's conduct); *Bartell v. Palos Verdes Peninsula School Dist.*, 147 Cal. Rptr. 989, 901 (Cal. Ct. App. 1978)(duty is policy consideration



cause the plaintiff proved the defendant breached a statutory duty to maintain medical records, the court found that the plaintiff's cause of action for negligent spoliation of evidence was a valid claim.<sup>36</sup>

### III. TREATMENT IN OTHER JURISDICTIONS

Other jurisdictions have not followed California, Florida, and Alaska in recognizing a right to relief in tort for spoliation of evidence.<sup>37</sup> Some jurisdictions have discussed this developing area of the law and have listed various reasons for refusing to adopt the spoliation tort.<sup>38</sup> Among these reasons

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that protects plaintiff against specific harm); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)(risk reasonably perceived defines duty to be obeyed); *see also* *Buckland, The Duty to Take Care*, 51 LAW Q. REV. 637, 638 (1935)(no negligence without legal duty to take care); *Winfield, Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 43 (1934)(duty requires defendant to act with reasonable care).

35. *Bondu*, 473 So. 2d at 1312. The plaintiff was able to show that the hospital owed her a duty because a state regulation and statute required the hospital to make and maintain medical records and furnish them to patients. *Id.* at 1312-13. *Contra Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504, 506-07 (Cal. Ct. App. 1985). In *Velasco*, a bag of glass fragments on an attorney's desk was allegedly disposed of by a janitor. *Id.* at 505. The fragments were the remains of a bottle which had exploded injuring the plaintiff and his son. *Id.* The fragments were to be used by the plaintiffs as evidence in a future products liability action. *Id.* at 505-06. The bag containing the evidence was not marked so as to put the janitor on notice regarding the bag's contents. *Id.* at 505. The court found that a reasonably prudent janitor necessarily would not foresee that an unmarked bag on an attorney's desk containing a broken bottle would be valuable evidence. *Id.* at 506-07. The court concluded that the defendant was not liable for negligent spoliation of evidence because no duty of care was breached by the defendant. *Id.* at 507.

36. *Bondu*, 473 So. 2d at 1313.

37. *Compare* *Smith v. Superior Court*, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984)(court created tort for intentional spoliation of evidence) *and* *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986)(court adopted tort of intentional spoliation of evidence) *and* *Bondu*, 473 So. 2d at 1312-13 (court adopted tort of negligent spoliation of evidence) *with* *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986)(court refused to adopt tort of spoliation of evidence) *and* *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1183 (Kan. 1987)(court did not recognize common-law action for intentional spoliation of evidence) *and* *Miller v. Montgomery County*, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985)(court refused to adopt tort of spoliation of evidence).

38. *See, e.g.,* *Langager v. Lake Havasu Community Hosp.*, 799 F.2d 1354, 1356 (9th Cir. 1986)(statute of limitations barred cause of action for intentional spoliation of evidence); *Parker v. Thyssen Mining Constr., Inc.*, 428 So. 2d 615, 617-18 (Ala. 1983)(defendant had no duty to preserve evidence that plaintiff needed for third party action against manufacturer of mortar mix); *La Raia v. Superior Court*, 722 P.2d 286, 289 (Arizona 1986)(court refused to adopt tort of spoliation of evidence because alternative remedy existed); *Fox v. Cohen*, 406 N.E.2d 178, 179 (Ill. Ct. App. 1980)(plaintiff's lawsuit against hospital for spoliation of evidence was dismissed as being premature because underlying malpractice action was still pending); *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1181-82 (Kan. 1987)(plaintiff lost lawsuit because defendant had no duty to preserve evidence); *Coley v. Arnot Ogden Memorial Hosp.*, 485 N.Y.S.2d 876, 878 (N.Y. App. Div. 1985)(defendant not liable for discarding lad-

are: (1) the absence of a duty to preserve evidence,<sup>39</sup> (2) the adequacy of present remedies,<sup>40</sup> and (3) the difficulty of setting the amount of damages.<sup>41</sup>

Of the above-stated reasons, the absence of a duty to preserve evidence is the primary ground on which courts have refused to adopt the spoliation tort.<sup>42</sup> For example, the Kansas Supreme Court has stated that a spoliator is

der needed by plaintiff for evidence); *Miller v. Montgomery County*, 494 A.2d 761, 767-68 (Md. Ct. Spec. App. 1985)(spoliation inference appropriate remedy for destruction of evidence, not spoliation tort); *see also* Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 207 (1985)(remarkably few courts have recognized tort of spoliation of evidence); Comment, *Spoliation of Evidence—Recognition for a New Tort*, 15 WESTERN ST. U. L. REV. 359, 368 (1987)(recognition of new tort for spoliation of evidence has not created much litigation in California or elsewhere). *But see* *Pirocchi v. Liberty Mut. Ins. Co.*, 365 F. Supp. 277, 280-82 (E.D. Penn. 1973)(plaintiff had cause of action against workman's compensation carrier that destroyed plaintiff's third party claim by negligent spoliation of evidence).

39. *See, e.g.*, *Spano v. McAvoy*, 589 F. Supp. 423, 427 n.2 (N.D.N.Y. 1984)(agreement to preserve evidence necessary element of spoliation tort); *Pirocchi v. Liberty Mut. Ins. Co.*, 365 F. Supp. 277, 281 (E.D. Penn. 1973)(defendant may have assumed duty to preserve evidence); *Parker v. Thyssen Mining Constr., Inc.*, 428 So. 2d 615, 618 (Ala. 1983)(no duty to obtain evidence for plaintiff's action against third party); *Reid v. State Farm Mut. Auto. Ins. Co.*, 218 Cal. Rptr. 913, 926 (Cal. Ct. App. 1985)(tort for spoliation not available because defendant never promised to preserve evidence); *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984)(hospital owed plaintiff duty to preserve medical records); *Fox v. Cohen*, 406 N.E.2d 178, 182 (Ill. App. Ct. 1980)(hospital breached duty to maintain patient's medical records); *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1179 (Kan. 1987)(no duty to preserve evidence absent special relationship or agreement between parties to lawsuit); *Coley v. Arnot Ogden Memorial Hosp.*, 485 N.Y.S.2d 876, 878 (N.Y. App. Div. 1985)(no duty owed to plaintiff by defendant to safekeep evidence); *see also* Galante, *A New Tort: The Spoiling of Evidence*, *The National Law Journal*, Feb. 20, 1984, at 10, col. 3 (spoliation tort requires duty based on agreement to retain evidence); Goodrich, *Gone Today, Here Tomorrow*, 4 CAL. LAW. 15, 15 (June 1984)(plaintiff must show agreement with defendant or third party to preserve evidence).

40. *See* *Miller v. Montgomery County*, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985)(no need for spoliation tort because spoliation inference appropriate remedy); *see also* Abney, *Spoliation and Future Civil Actions: Slowing the Rush to a Novel Tort*, *The National Law Journal*, Feb. 2, 1987, at 38, col. 1 (adequate remedies already exist if spoliator is party to underlying lawsuit). *But see* *Smith v. Superior Court*, 198 Cal. Rptr. 829, 834 (Cal. Ct. App. 1984)(criminal penalties for spoliation of evidence are inadequate remedy).

41. *See* Abney, *Spoliation and Future Civil Actions: Slowing the Rush to a Novel Tort*, *The National Law Journal*, Feb. 2, 1987, at 38, col. 2 (damages for spoliation of evidence based upon speculation); Goodrich, *Gone Today, Here Tomorrow*, 4 CAL. LAW. 15, 15 (June 1984)(determination of damages for spoliation of evidence based upon speculation).

42. *See* *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1179 (Kan. 1987)(absent agreement or special circumstances, there is no duty to preserve evidence for other litigant); *accord* *Parker v. Thyssen Mining Constr., Inc.* 428 So. 2d 615, 617-18 (Ala. 1983)(defendant had no duty to preserve evidence for plaintiff); *Coley v. Arnot Ogden Memorial Hosp.*, 485 N.Y.S.2d 876, 878 (N.Y. App. Div. 1985)(defendant did not owe plaintiff duty to preserve evidence). *But see generally* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1102 (1987)(duty to preserve evidence not necessary for intentional spoliation of evidence).

under no obligation to preserve evidence for a plaintiff who might take legal action against another party.<sup>43</sup> Furthermore, the Kansas court distinguished *Smith v. Superior Court* on the ground that the spoliator in *Smith* was not a defendant in the underlying lawsuit.<sup>44</sup>

The second reason why jurisdictions have refused to adopt the tort of spoliation of evidence is the availability of legal alternatives for controlling the destruction of evidence.<sup>45</sup> In Maryland, a court of appeals refused to adopt a separate tort for either intentional or negligent spoliation of evidence.<sup>46</sup> The court noted that because the alleged spoliator was a defendant in the underlying litigation, the proper remedy was to allow the jury to infer that the altered evidence was unfavorable to the defendant's case.<sup>47</sup> Similarly, an Arizona court refused to adopt a tort for spoliation of evidence because adequate remedies already existed under conventional tort law.<sup>48</sup> In the suit before the Arizona court, the plaintiff had a cause of action against the spoli-

43. *Koplin*, 734 P.2d at 1179 (Kan. 1987). The plaintiff in *Koplin* was injured on-the-job by an allegedly defective piece of equipment called a "T-clamp." *Id.* at 1178. The plaintiff sued the manufacturers of the T-clamp under products liability and warranty theories. *Id.* Additionally, the plaintiff sued his employer, Rosel Well Industries, Inc., claiming that Rosel's agent intentionally destroyed the T-clamp to prevent him from using it as evidence in potential litigation. *Id.*

44. *Id.* at 1181-82.

45. See *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986)(existing tort law provides remedy for spoliation evidence); *Miller v. Montgomery County*, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985)(existence of adequate remedies for spoliation of evidence given as reason for not adopting tort of spoliation). See generally Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1086-1137 (1987)(alternatives to spoliation tort exist for controlling destruction of evidence).

46. See *Miller v. Montgomery Co.*, 494 A.2d 761, 768 (Md. Ct. Spec. App. 1985)(no basis or need to recognize tort of spoliation of evidence). In *Miller*, a traffic light at a controlled intersection failed and caused an automobile accident. *Id.* at 763-66. A faulty component in the traffic control device was the source of the failure. *Id.* The plaintiff alleged that Montgomery County was negligent in its maintenance of its traffic light. *Id.* at 763. At trial the plaintiff's expert opined that the county altered the component it gave to him for inspection. *Id.* at 767. The plaintiff then filed an amended declaration alleging a cause of action for "Fraudulent Destruction of Evidence." *Id.*

47. *Id.* at 768.

48. *La Raia v. Superior Court*, 722 P.2d 286, 289 (Ariz. 1986). In *La Raia*, the plaintiff sustained serious physical and mental injuries as a result of her landlord allowing a janitor to spray the inside of her apartment with an outdoor pesticide. *La Raia*, 722 P.2d at 287-88. The janitor was neither licensed nor trained to do such work. *Id.* at 288. Subsequently, the plaintiff sued her landlord for negligence. *Id.* During the trial it was revealed that the apartment manager had lied to the plaintiff about what pesticide was used in her apartment. *Id.* Furthermore, the manager had the janitor dispose of the outdoor pesticide used on the plaintiff's apartment. *Id.* Upon learning this, the plaintiff sought leave to amend her complaint to include a claim for intentional spoliation of evidence. *Id.* at 288. The trial judge denied the plaintiff's motion to amend, and she appealed. *Id.* at 288-89.

ator for the physical injuries he allegedly caused her.<sup>49</sup> Thus, the court reasoned there was no need to adopt a new tort for spoliation of evidence.<sup>50</sup>

The third reason courts refrain from adopting the spoliation tort is the difficulty in determining the amount of damages proximately caused by the spoliation of evidence.<sup>51</sup> Two commentators have echoed this concern by stating that mere speculation is the basis of damage awards for spoliation of evidence.<sup>52</sup> From this perspective, the spoliation tort is problematic, for the law tries to avoid speculation when determining damage awards.<sup>53</sup>

#### IV. SPOILIATION OF EVIDENCE IN TEXAS

In civil litigation, the courts invoke various methods to prevent the destruction of evidence in the form of the spoliation inference,<sup>54</sup> discovery sanctions,<sup>55</sup> and the spoliation tort.<sup>56</sup> Furthermore, legislatures have en-

49. *Id.* at 289.

50. *Id.*

51. *Smith v. Superior Court*, 198 Cal. Rptr. 829, 835 (Cal. Ct. App. 1984).

52. Abney, *Spoliation and Future Civil Actions: Slowing the Rush to a Novel Tort*, *The National Law Journal*, Feb. 2, 1987, at 38, col. 2; Goodrich, *Gone Today, Here Tomorrow*, 4 CAL. LAW. 15, 15 (June 1984). *Contra Solum & Marzen, Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1103-04 (1987).

53. *Roth v. Law*, 579 S.W.2d 949, 956 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); *see also Matador Drilling co. v. Post*, 662 F.2d 1190, 1196 (5th Cir. 1981)(damage verdict may not be based on speculation); *Natco, Inc. v. Williams Bros. Eng'g Co.*, 489 F.2d 639, 640 (5th Cir. 1974)(proof of lost profits may not be based on surmise or conjecture). On the other hand, absolute certainty about the amount of damages is not a requirement. *E.g.*, *Downtown Realty, Inc. v. 509 Tremont Bldg., Inc.*, 748 S.W.2d 309, 313 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Berry Contracting, Inc. v. Coastal States Petrochemical Co.*, 635 S.W.2d 759, 761 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); *Birge v. Toppers Menswear, Inc.*, 473 S.W.2d 79, 85 (Tex. Civ. App.—Dallas 1971 writ ref'd n.r.e.). The plaintiff only must prove by a reasonable certainty the amount of his damages. *E.g.*, *Helfman Motors, Inc. v. Stockman*, 616 S.W.2d 394, 398-99 (Tex. Civ. App.—Ft. Worth 1981, writ ref'd n.r.e.); *Young v. De Guerin*, 591 S.W.2d 296, 300 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *Grace v. Starrett*, 411 S.W.2d 774, 778 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.).

54. *See, e.g.*, *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1111 (8th Cir. 1988)(failure to produce records needed for litigation gives rise to inference that evidence was unfavorable to party that destroyed records); *State v. Langlet*, 283 N.W.2d 330, 334 (Iowa 1979)(presumption evidence unfavorable to one who destroys evidence); *Jagamin v. Simonds Abrasive Co.*, 211 N.W.2d 810, 821 (Wis. 1973)(if plaintiff proves defendant intentionally destroyed evidence, spoliation inference available). *See generally* J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 278, 291 (1904)(spoliation of evidence indicates spoliator is conscious of his guilt and weak case).

55. *See* TEX. R. CIV. P. 215(2)(b)(sanctions proper when party fails to comply with discovery requests or orders to provide or permit discovery).

56. *See, e.g.*, *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986)(plaintiff had claim for intentional spoliation of arrest tape); *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984)(plaintiff permitted to proceed in tort against hospital

acted penal statutes to punish persons who conceal, alter, or destroy physical evidence.<sup>57</sup> In Texas, the first two methods currently are available to combat spoliation of evidence.<sup>58</sup> However, because independent action for the spoliation is a better means for achieving the desired goals of compensating injured parties and deterring future destruction of evidence, Texas should adopt this new tort.<sup>59</sup>

#### A. *Intentional Spoliation of Evidence*

##### 1. Is Interference With Prospective Civil Litigation a Legally Protected Interest?<sup>60</sup>

In Texas the courts provide a remedy for any intentional interference with an individual's personal liberty or property rights in the form of an actionable tort.<sup>61</sup> Texas also recognizes that the right to sue for damages in tort is a

which negligently lost or destroyed medical records); *Smith v. Superior Court*, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984)(plaintiff had claim in tort against dealer who allegedly destroyed mag wheel).

57. See, e.g., CAL. PENAL CODE § 135 (Deering 1985)(misdemeanor to destroy evidence); FLA. STAT. ANN. § 918.13(1)(a) (West 1985)(tampering with or fabricating physical evidence punishable as third degree felony); ILL. ANN. STAT. ch. 38, § 31-4(a) (Smith-Hurd 1977)(destruction of physical evidence Class 4 felony); N.J. STAT. ANN. § 2C:28-6(1) (West 1982)(crime of fourth degree to alter, destroy, conceal, or remove physical evidence); N.Y. PENAL LAW § 215.40(2) (McKinney 1988)(suppression of physical evidence by destruction class E felony). In Texas section 37.09 of the Penal Code may be used to punish persons who intentionally destroy, alter, or conceal physical evidence needed for an investigation or official proceeding. § 37.09(a)(1) (Vernon 1989).

58. See *H. E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex. App.—Waco 1974, writ dismissed)(intentional spoliation of evidence raises presumption that evidence is unfavorable to spoliator's case); *Southern Pac. Co. v. Evans*, 590 S.W.2d 515, 519 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ refused n.r.e.)(sanctions imposed because destruction of evidence and failure to answer interrogatories obstructed discovery process), *cert. denied*, 449 U.S. 994 (1980).

59. See *Smith v. Superior Court*, 198 Cal. Rptr. 829, 834-35 (Cal. Ct. App. 1984)(criminal law cannot compensate injured individual nor can it deter future spoliation); see also *Solum & Marzen, Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1103-04 (1987)(*Smith* implicitly recognized victims of spoliation deserve compensation).

60. See *Cedillo & Lopez, Document Destruction in Business Litigation From a Practitioner's Point-of-View: The Ethical Rules vs. Practical Realities*, 20 ST. MARY'S L.J. 637, 652-53 (1989)(analyzes whether spoliation of evidence is recognizable tort in Texas).

61. See, e.g., *Tippett v. Hart*, 497 S.W.2d 606, 610 (Tex. Civ. App.—Amarillo 1973, writ refused)(intentional invasion of contract sounds in tort); *Snow v. Milner*, 364 S.W.2d 726, 729 (Tex. Civ. App.—Houston [14th Dist.] 1963, writ refused n.r.e.)(petition failed to allege cause of action relating to personal injury or injury to property); *Cooper v. Steen*, 318 S.W.2d 750, 757 (Tex. Civ. App.—Dallas 1958, no writ)(plaintiff established prima facie case of tortious interference with right to dispose of property).

property right.<sup>62</sup> Therefore, the law should allow the victim of intentional spoliation of evidence to maintain an action in tort because spoliation of evidence interferes with an individual's right to sue for damages.<sup>63</sup>

## 2. Similarity to Intentional Interference With Prospective Economic Advantage

Jurisdictions recognizing the spoliation tort have noted that it is in many respects similar to the tort of intentional interference with prospective economic advantage, in terms of both the interests it protects and its requirements.<sup>64</sup> Texas, like these jurisdictions, has long-recognized the tort of intentional interference with prospective business relationship.<sup>65</sup> The tort of intentional interference with prospective economic advantage protects a per-

62. *See, e.g., Galarza v. Union Bus Lines, Inc.*, 38 F.R.D. 401, 404 (S.D. Tex. 1965)(Texas treats recovery for personal injuries as property right), *aff'd*, 369 F.2d 402 (5th Cir. 1966); *Redfern v. Collins*, 113 F. Supp. 892, 895 (E.D. Tex. 1953)(Texas recognizes right to sue for damages in tort is chose in action and property); *Garrett v. Reno Oil Co.*, 271 S.W.2d 764, 767 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.)(right to recover damages for personal injury is property right); *accord Button v. Drake*, 195 S.W.2d 66, 69 (Ky. Ct. App. 1946)(chose in action are personal property).

63. *Cedillo & Lopez, Document Destruction in Business Litigation From a Practitioner's Point of View: The Ethical Rules Versus Practical Realities*, 20 ST. MARY'S L.J. 637, 652-53 (1989).

64. *See Smith v. Superior Court*, 198 Cal. Rptr. 829, 836-37 (Cal. Ct. App. 1984)(intentional spoliation of evidence similar to intentional interference with prospective business advantage); *see also Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463-64 (Alaska 1986)(quoting *Smith*, 198 Cal. Rptr. at 836-37); Note, *Torts—Arizona Should Adopt the Tort of Intentional Spoliation of Evidence—La Raia v. Superior Court*, 150 Ariz. 118, 722 P.2d 286 (1986), 19 ARIZ. ST. L.J. 371, 391 (1987)(elements necessary for tort of intentional spoliation of evidence present in *Smith*); Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 200 (1985)(elements of tort for intentional spoliation of evidence analogous to elements of tort for intentional interference with prospective economic advantage).

65. *See Delz v. Winfree*, 80 Tex. 400, 405, 16 S.W. 111, 112 (1891)(right to be free from malicious and wanton interference with business); *see also Champion v. Wright*, 740 S.W.2d 848, 853 (Tex. App.—San Antonio 1987, no writ)(Texas recognizes tortious interference with contractual and prospective business relations); *Light v. Transp. Ins. Co.*, 469 S.W.2d 433, 439 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.)(Texas recognizes cause of action for tortious interference with advantageous business relationships). Tortious interference with prospective economic advantage is the right to be free from malicious interference when conducting negotiations which have a reasonable probability of producing a contract. *Martin v. Phillips Petroleum Co.*, 455 S.W.2d 429, 435 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ); *see also Cooper v. Steen*, 318 S.W.2d 750, 757 (Tex. Civ. App.—Dallas 1958, no writ). The tort of intentional interference with prospective economic advantage is also known as intentional interference with prospective business relations. *Champion*, 740 S.W.2d at 853 n.2. *See generally* Comment, *Interference with a Prospective Business Relationship: An Old Tort for the New Marketplace*, 35 BAYLOR L. REV. 123, 123 (1983)(Texas courts base tort for interference with prospective business relationship on notion of fair play).

son's expectation of commercial benefits.<sup>66</sup> The tort of intentional spoliation of evidence protects a person's expectation of compensation for his injuries.<sup>67</sup> The elements of intentional interference with prospective economic advantage are:

- (1) An economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff;
- (2) knowledge by the defendant of the existence of the relationship;
- (3) intentional acts on the part of the defendant designed to disrupt the relationship; and
- (5) damages proximately caused by the acts of the defendant.<sup>68</sup>

The elements of intentional spoliation of evidence are: "(1) [the] existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) destruction of evidence; (4) intent . . . ; (5) a causal relationship between the act of destruction and the inability to prove the lawsuit; and (6) damage."<sup>69</sup> Thus, Texas could use intentional interference with prospective eco-

66. *Delz*, 80 Tex. at 405, 16 S.W. at 112; *accord* *Zimmerman v. Bank of Am. Nat'l Trust & Sav. Ass'n.*, 12 Cal. Rptr. 319, 320 (Cal. Ct. App. 1961)(party who suffers loss of advantageous relationships or contract should recover damages from malicious interloper). *See generally* Broida & Handler, *Tortious Interference with Contract and Prospective Advantage in Illinois*, 32 DEPAUL L. REV. 325, 327 (1983)(interference torts protect expectation of benefits from commercial relations with others); Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract doctrine*, 49 U. CHI. L. REV. 61, 62 (1982)(tort law applied to protect business relationship).

67. *See Hazen v. Municipality of Anchorage*, 718 P.2d 456, 464 (Alaska 1986)(expectation of false arrest and malicious prosecution actions entitled to legal protection); *see also* *Smith v. Superior Court*, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984)(expectation of future products liability action entitled to legal protection).

68. *Smith v. Superior Court*, 198 Cal. Rptr. 829, 836 (Cal. Ct. App. 1984); *Asia Inv. Co. v. Borowski*, 184 Cal. Rptr. 317, 323 (Cal. Ct. App. 1982); *see also* *Champion v. Wright*, 740 S.W.2d 848, 853 (Tex. App.—San Antonio 1987, no writ) (lists elements of tortious interference with contract); *Griffin v. Rowden*, 702 S.W.2d 692, 693 (Tex. App.—Dallas 1985, writ ref'd) (lists elements of interference with contract or business relationship). *See generally* Note, *Torts—Arizona Should Adopt the Tort of Intentional Spoliation of Evidence—La Raia v. Superior Court*, 150 Ariz. 118, 722 P.2d 286 (1986), 19 ARIZ. ST. L.J. 371, 375-76 (1987) (compares elements of intentional interference with prospective economic advantage to elements of intentional spoliation of evidence).

69. Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 200 (1985); Note *Torts—Arizona Should Adopt the Tort of Intentional Spoliation of Evidence—La Raia v. Superior Court*, 150 Ariz. 118, 722 P.2d 286 (1986), 19 ARIZ. ST. L.J. 371, 375-76 (1987) (lists elements of intentional spoliation of evidence); *see also* *Smith*, 198 Cal. Rptr. at 836 (elements of tort for intentional spoliation of evidence analogous to elements of tort for intentional spoliation of evidence). It is important to note that Texas does not require the element of knowledge to establish a prima facie case of intentional interference with business relations, as do other jurisdictions. *Compare* *Smith*, 198 Cal. Rptr. at 836 (knowledge of existing economic relationship required for tort of intentional interference with prospective business advantage) *with* *Champion*, 740 S.W.2d at 853 (knowledge of existing contract not

nomic advantage as a model for adopting the tort of intentional spoliation of evidence because the torts are similar.<sup>70</sup>

### B. *Negligent Spoliation of Evidence*

Negligent spoliation of evidence is similar to its intentional counterpart except that a legally recognizable duty to protect evidence must exist before courts will impose liability for its loss or destruction.<sup>71</sup> The parties may

required to claim intentional interference with contract). Therefore, if Texas were to adopt a tort for the intentional spoliation of evidence, the defendant might not be required to have had knowledge of the plaintiff's potential lawsuit. *Cf. Griffin v. Rowden*, 702 S.W.2d 692, 693 (Tex. App.—Dallas 1985, writ ref'd)(knowledge of existing contract not required for intentional interference with contractual relations).

70. Compare *Martin v. Phillips Petroleum Co.*, 455 S.W.2d 429, 435 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ)(future contractual relationship is probable expectancy) with *Smith v. Superior Court*, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984)(prospective civil action in products liability case is probable expectancy). According to Prosser and Keeton, "[A] large part of what is most valuable in modern life depends upon 'probable expectancies,' as social and industrial life becomes more complex the courts must do more to discover, define and protect them from undue interference." W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 130 (5th ed. 1984). In the past, courts defined "probable expectancy" as the right of every person to earn a living or to pursue a trade or business free from the undue interference of others. *Jersey City Printing Co. v. Cassidy*, 53 A. 230, 233 (N.J. Ch. 1902); see also *L.D. Willcutt & Sons v. Bricklayers' Benevolent & Protective Union No. 3*, 85 N.E. 897, 900 (Mass. 1908)(citing and adopting definition in *Cassidy*, 53 A. at 233). This definition has expanded to include choses in action. See *Smith*, 198 Cal. Rptr. at 837 (prospective civil action is probable expectancy).

71. See *Velasco v. Commercial Bldg. Maintenance Co.*, 215 Cal. Rptr. 504, 507 (Cal. Ct. App. 1985)(janitor not liable for discarding evidence because no duty owed to plaintiff); see also *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984)(hospital liable to plaintiff for negligent spoliation of evidence because duty to furnish plaintiff with medical records breached). The elements necessary to state a cause of action for negligent interference with prospective civil litigation by spoliation of evidence are the same as those for a typical negligence action: duty, breach, causation, and damages. See *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984)(hospital's breach of duty proximately caused plaintiff's damages); see also *Fox v. Cohen*, 406 N.E.2d 178, 179 (Ill. App. Ct. 1980)(plaintiff must plead defendant breached duty to plaintiff which proximately caused plaintiff's injuries). See generally W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 30 (5th ed. 1984)(traditional formula for negligence is duty, breach, causation and damage). It is unclear whether a duty based on an agreement to preserve evidence might also be required in an action for intentional spoliation of evidence. See *Spano v. McAvoy*, 589 F. Supp. 423, 427 n.2 (N.D.N.Y. 1984)(*Smith* decision predicated on wrongdoer's agreement to hold evidence for plaintiff); see also *Reid v. State Farm Mut. Auto. Ins. Co.*, 218 Cal. Rptr. 913, 926 (Cal. Ct. App. 1985)(*Smith* inapposite because State Farm never promised to preserve automobile). Compare *Goodrich, Gone Today, Here Tomorrow*, 4 CAL. LAW. 15, 15 (June 1984)(narrow reading of *Smith* requires plaintiff to show agreement to preserve evidence existed between her and defendant, or third party) and Galante, *A New Tort: The Spoliation of Evidence*, 6 The National Law Journal, Feb. 20, 1984, at 10, col. 3 (new tort requires duty based on promise to retain evidence) with *Solum & Marzen, Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085,



agree to preserve certain evidence,<sup>72</sup> or a civil statute may create the duty to preserve evidence.<sup>73</sup> Where no agreement is present,<sup>74</sup> or no civil statute expressly creates a duty to preserve evidence,<sup>75</sup> a person could rely on a criminal statute that prohibits tampering with or fabrication of physical evidence to establish the required duty.<sup>76</sup> As a result, an injured party has three possible sources from which a court could imply the duty to preserve evidence in a negligent spoliation tort.

In Texas, section 37.09 of the Penal Code states that if a person knows an official proceeding or investigation is pending or in progress, and the person intentionally tampers with or fabricates evidence, he will be subject to crimi-

1102 (1987)(*Smith* does not require agreement by custodian to preserve potentially relevant evidence) and Comment, *Spoliation: Civil Liability For Destruction of Evidence*, 20 U. RICH. L. REV. 191, 201 (1985)(duty to preserve evidence may not be necessary in actions for intentional spoliation of evidence). See generally *Cedillo & Lopez, Document Destruction in Business Litigation From a Practitioner's Point-of-View: The Ethical Rules Versus Practical Realities*, 20 ST. MARY'S L.J. 637, 653 (1989)(Texas may not require duty element for intentional spoliation of evidence).

72. See *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 459 (Alaska 1986)(municipal prosecutor agreed to preserve arrest tape for plaintiff); see also *Smith v. Superior Court*, 198 Cal. Rptr. 829, 831 (Cal. Ct. App. 1984)(defendant agreed to maintain automotive parts crucial to plaintiff's future lawsuit).

73. See *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984)(duty to maintain and furnish medical records to plaintiff found in statute); see also *Fox v. Cohen*, 406 N.E.2d 178, 182 (Ill. App. Ct. 1980)(hospital owed patients duty based on health regulations). A court may use a legislative enactment or administrative regulation to establish the standard of conduct of a reasonably prudent person in three situations: (1) when a statute or regulation contains an express provision that its violation shall result in tort liability; (2) when a statute or regulation does not contain a provision expressly providing for tort liability, but the court recognizes that the legislative body intended that violation of the statute or regulation should result in tort liability; or (3) when the statute or regulation neither expressly nor impliedly provides that its violation shall result in liability, but the court adopts the requirements of the statute or regulation as setting the standard of conduct. RESTATEMENT (SECOND) OF TORTS § 285 comments b & c, § 286 comment c (1965).

74. Compare *Fox*, 406 N.E.2d at 182 (duty based upon health regulation) and *Bondu*, 473 So. 2d at 1313 (duty based upon statute) with *Hazen*, 718 P.2d at 459 (defendant agreed to preserve arrest tape) and *Smith*, 198 Cal. Rptr. t 831 (defendant agreed to preserve automotive parts).

75. Cf. *Norton v. Wilbur Waggoner Equip. Rental*, 394 N.E.2d 403, 405 (Ill. 1979)(statute provided persons in charge of erecting buildings liable for injuries to workers); *Grayson Fraternal Order of Eagles, Aerie No. 3738 v. Claywell*, 736 S.W.2d 328, 334 (Ky. 1987)(person injured by violation of statute's provisions could recover damages from violator of statute); *Hyde v. Maison Hortense, Inc.*, 229 N.Y.S. 666, 668 (N.Y. Sup. Ct. 1928)(defendant negligent because it violated labor law).

76. Cf. *Cort v. Ash*, 422 U.S. 66, 78 (1975)(private cause of action may be based upon criminal statute); *Bartholomew County Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353, 356 (Ind. Ct. App. 1988)(beer wholesaler had civil cause of action against competitor based upon violation of criminal statute banning price discrimination).

nal prosecution.<sup>77</sup> This statute, however, does not expressly create civil liability for destroying evidence needed for prospective litigation.<sup>78</sup> Nonetheless, a court could imply a duty to preserve evidence for civil litigation from the statute and establish the rule that violations of the statute are negligence per se.<sup>79</sup> Therefore, Texas Penal Code section 37.09 could provide the basis for creating the duty to preserve evidence required by the negligent spoliation tort.

## V. ALTERNATIVE REMEDIES

### A. Criminal Sanctions

Criminal sanctions are one alternative to a tort for spoliation of evidence.<sup>80</sup> These sanctions in the form of obstruction of justice or tampering

77. § 37.09(a)(1) (Vernon 1989).

78. See TEX. PENAL CODE ANN. § 37.09(c) (Vernon 1989)(statute provides for criminal liability only).

79. Cf. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 314 (Tex. 1987)(liquor licensee negligent per se for selling alcoholic beverage to intoxicated person in violation of Texas statute); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex. 1985)(defendants' violation of ordinance intended to deter crime constituted negligence per se); *Missouri Pacific R.R. Co. v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977)(plaintiff's violation of statute constituted contributory negligence per se); *Parrott v. Garcia*, 436 S.W.2d 897, 900 (Tex. 1969)(violation of statute prohibiting drag racing constituted contributory negligence per se); *Lang v. Henderson*, 147 Tex. 353, 357, 215 S.W.2d 585, 587 (1948)(act done contrary to statutory duty is negligent per se). See generally Comment, *Negligence Per Se and Excuse For a Statutory Violation in Texas*, 5 ST. MARY'S L.J. 552, 552 (1973)(Texas follows majority of jurisdictions in recognizing negligence per se). In order for a plaintiff to establish negligence per se, he must show that he belongs to the class of persons the statute was designed to protect. *American Statesman*, 552 S.W.2d at 103; see also *Parrott*, 436 S.W.2d at 899 (negligence per se depends on whether statute designed to protect plaintiff from particular injuries sustained); RESTATEMENT (SECOND) OF TORTS § 286(a)-(d) (1965)(court may adopt standard of conduct based on legislative enactment if statute intended to protect person whose interest was invaded). A finding that the defendant was negligent per se, however, does not mean the defendant will be liable; the plaintiff must establish that the defendant's violation of the statute was the proximate cause of his injuries. See, e.g., *El Chico*, 732 S.W.2d at 313 (to prove negligence per se plaintiff must show injuries proximately caused by defendant's violation of statute); *Nixon*, 690 S.W.2d at 549 (negligence per se does not end court's inquiry into proximate causation); *American Statesman*, 552 S.W.2d at 103 (negligence per se establishes possible liability not liability). See generally Ratliff, *Negligence Per Se in Texas: An Analysis of Statutory Excuse and Related Doctrines With Proposed Special Issues and Instructions*, 41 TEX. L. REV. 104, 107 (1962)(special issues submitted regarding negligence per se are inquiries about conduct constituting breach and proximate cause).

80. See *Smith v. Superior Court*, 198 Cal. Rptr. 829, 834 (Cal. Ct. App. 1984)(same offense can result in both criminal and civil liability); see also Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1087 (1987)(criminal prosecution theoretically possible for spoliation of evidence needed for civil litigation); Note, *Torts—Arizona Should Adopt the Tort of Intentional Spoliation of Evidence—*

statutes, which are present in most states, including Texas, penalize persons who destroy evidence.<sup>81</sup> In Texas, section 37.09(a)(1) of the Penal Code 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.<sup>82</sup> Section 37.09 also requires the person have knowledge of a pending or on-going investigation, or other official proceeding.<sup>83</sup> Texas cases addressing the question of penalties for the destruction of evidence involve criminal investigations.<sup>84</sup> Even if a person could be prosecuted under section 37.09 for evidence destruction in a civil case, the criminal statute simply performs a deterrence function.<sup>85</sup> Deterrence is an important policy consideration, but the imposition of penalties does not compensate a plaintiff who is unable to prove his cause of action because the defendant destroyed the evidence.<sup>86</sup> Furthermore, violation of the statute is only a class A misdemeanor carrying a fine of not more than \$2,000, or a prison term not more than one year, or both fine and imprisonment.<sup>87</sup> Potential defendants may decide that the pecuniary gains realizable from the destruction of damaging evidence outweighs any penalties imposed under section 37.09.<sup>88</sup> Thus,

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La Raia v. Superior Court, 150 Ariz. 118, 722 P.2d 286 (1986), 19 ARIZ. ST. L.J. 371, 385 (1987)(criminal law may penalize spoliator).

81. See, e.g., ALA. CODE § 13A-10-129 (1982)(destruction of evidence when legal proceeding about to take place violates statute); COLO. REV. STAT. § 18-8-610 (1986)(class 5 felony to destroy evidence); TEX. PENAL CODE ANN. § 37.09(c) (Vernon 1989)(destruction of evidence class A misdemeanor).

82. § 37.09(a)(1) (Vernon 1989).

83. TEX. PENAL CODE ANN. § 37.09(a).

84. See Spector v. State, 746 S.W.2d 945, 945 (Tex. App.—Austin 1988, no writ)(possession of marihuana); Cuadra v. State, 715 S.W.2d 723, 724 (Tex. App.—Houston [14th Dist.] 1986, no writ)(reckless conduct); Dillard v. State, 640 S.W.2d 85, 85 (Tex. App.—Fort Worth 1982, no writ)(theft).

85. See Smith v. Superior Court, 198 Cal. Rptr. 829, 835 (Cal. Ct. App. 1984)(misdemeanor penalties for destruction of evidence have minimal deterrent effect); see also Comment, *Spoilation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 198 (1985)(tort for spoliator for evidence creates deterrent in addition to criminal penalties). See generally Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1106 (1987)(threat of criminal prosecution for evidence destruction more theoretical than real).

86. See Smith, 198 Cal. Rptr. at 834 (criminal penalties for destruction of evidence do not compensate injured party for damage suffered); see also Note, *Torts—Arizona Should Adopt the Tort of Spoliation of Evidence—La Raia v. Superior Court*, 150 Ariz. 118, 722 P.2d 286 (1986), 19 ARIZ. ST. L.J. 371, 390 (1987)(criminal penalties leave victim uncompensated). But cf. La Raia v. Superior Court, 722 P.2d 286, 289 (Ariz. 1986)(tort for spoliator of evidence unnecessary because plaintiff compensated under existing tort law).

87. TEX. PENAL CODE ANN. § 12.21(1)-(3) (Vernon 1974).

88. See Smith, 198 Cal. Rptr. at 835 (misdemeanor penalties minimal deterrent when spoliator stands to profit by intentionally destroying evidence); see also Comment, *Spoilation:*

Texas Penal Code, section 37.09 only provides minimal deterrence and does not adequately protect a party from the potential destruction of valuable evidence.

### B. *Discovery Sanctions*

When a litigant destroys evidence after the discovery process has begun, discovery sanctions are available to remedy the loss of evidence.<sup>89</sup> In Texas, if a party “fails to comply with proper discovery requests or to obey an order to provide or permit discovery,”<sup>90</sup> the court may issue orders sanctioning the offending party.<sup>91</sup> One sanction available to the court is entry of a default judgment against the offending party.<sup>92</sup> With respect to the spoliation of evidence, a default judgment is the most effective discovery sanction because

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*Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 198 (1985)(criminal penalties for destruction of evidence gives spoliator opportunity to economically benefit by destroying evidence); Comment, *Spoliation of Evidence-Recognition for a New Tort*, 15 WESTERN ST. U. L. REV. 359, 368 (1987)(new tort deters spoliators who think criminal penalties are minor).

89. See *In re “Agent Orange” Prod. Liab. Litig.*, 506 F. Supp. 750, 751 (E.D.N.Y. 1980)(obligation to preserve documents requested in motion to produce); see also *United States v. International Bus. Machs.*, 66 F.R.D. 189, 194 (S.D.N.Y. 1974)(no sanctions for destroying documents before entrance of protective order); Oesterle, *A Private Litigant’s Remedies for an Opponent’s Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1222 (1983)(sanctions only applicable when party destroys documents in face of court order to produce or preserve documents). But see *Struthers Patent Corp. v. Nestle Co.*, 558 F. Supp. 747, 765-66 (D.N.J. 1981)(defendant sanctioned even though destruction of documents occurred before issuance of protective order).

90. TEX. R. CIV. P. 215(2)(b).

91. See, e.g., *Jarrett v. Warhola*, 695 S.W.2d 8, 9-10 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.)(trial court has power to use sanctions to secure compliance with discovery rules and penalize abusers of discovery process); *City of Houston v. Arney*, 680 S.W.2d 867, 870 (Tex. App.—Houston [1st Dist.] 1984, no writ)(trial judge authorized to impose sanctions for discovery abuse); *Southern Pac. Transp. Co. v. Evans*, 590 S.W.2d 515, 519 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref’d n.r.e.)(concluded trial court could strike defendant’s answer as sanction for obstructing discovery process), cert. denied, 449 U.S. 994 (1980); see also TEX. R. CIV. P. 215 (2)(b)(1)-(6)(discovery sanctions).

92. See, e.g., *Greater Houston Transp. Co. v. Wilson*, 725 S.W.2d 427, 431 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.)(no abuse of discretion to enter default judgment for failure to appear at depositions); *Woodruff v. Cook*, 721 S.W.2d 865, 868-69 (Tex. App.—Dallas 1986, writ ref’d n.r.e.)(default judgment entered for abuse of discovery process). Other sanctions include disallowing further discovery, charging discovery expenses and court costs to the disobedient party, barring designated claims or defenses, striking pleadings, staying the proceedings, dismissal, and contempt of court orders. See, e.g., *First State Bank, Bishop v. Chappell & Handy, P.C.*, 729 S.W.2d 917, 921 (Tex. App.—Corpus Christi 1987, no writ)(pleadings struck); *Gonzales v. Conoco, Inc.*, 722 S.W.2d 247, 249 (Tex. App.—San Antonio 1986, no writ)(dismissal); *Lindley v. Flores*, 672 S.W.2d 612, 614 (Tex. App.—Corpus Christi 1984, no writ)(costs); *Harrell v. Fashing*, 562 S.W.2d 544, 545 (Tex. Civ. App.—El Paso 1978, no writ)(stay of proceedings); see also TEX. R. CIV. P. 215(2)(b)(1)-(6).

the non-offending party wins the lawsuit.<sup>93</sup> However, a person can avoid sanctions by destroying evidence before a party makes a discovery request.<sup>94</sup> Therefore, discovery sanctions act as an effective deterrent only in a limited range of circumstances, and even then, if the sanction is less than a default judgment, the non-offending party may be left without an adequate remedy.

### C. *Spoilation Inference*

Several courts have applied the legal maxim *omnia praesumuntur contra spoliatorem*, or "[a]ll things are presumed against a despoiler or wrongdoer,"<sup>95</sup> to remedy or deter the destruction of evidence.<sup>96</sup> If the spoliator fails to explain the disappearance of the evidence, courts may allow the jury to infer that the evidence would have been harmful to the spoliator's case.<sup>97</sup>

93. See *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 486 (S.D. Fla. 1984)(default judgment only means of compensating plaintiff whose right to have case decided on merits has been eliminated by defendant's destruction of documents); see also Comment, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 979 (1985)(default judgment compensates plaintiff because he wins lawsuit); Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 207 (1985)(default judgment compensates plaintiff).

94. See *Barker v. Bledsoe*, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979)(sanctions appropriate after suit is initiated); see also *DePuy, Inc. v. Eckes*, 427 So. 2d 306, 307 (Fla. Dist. Ct. App. 1983)(sanctions usually imposed after formal suit has begun); Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 207 (1985)(spoliator can escape sanctions by destroying evidence prior to initiation of discovery proceedings). *But see Alliance to End Repression v. Rochford*, 75 F.R.D. 438, 440 (N.D. Ill. 1976)(defendant sanctioned despite fact that documents were destroyed before lawsuit). If a party destroys evidence before a discovery request is made, he will be unable to comply with subsequent requests; therefore, he cannot be punished for failure to comply. Comment, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 979 (1985).

95. BLACK'S LAW DICTIONARY 980 (5th ed. 1979).

96. See, e.g., *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1974)(adverse inference may be drawn from destruction of records); *Bird Provision Co. v. Owens Country Sausage, Inc.*, 379 F. Supp. 744, 751 (N.D. Tex. 1974)(spoliation inference available when party withholds documentary evidence); *Fuller v. Preston State Bank*, 667 S.W.2d 214, 220 (Tex. App.—Dallas 1984, writ ref'd n.r.e.)(intentional destruction of evidence raises presumption that evidence would have been unfavorable to spoliator); accord *Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha*, 102 F.2d 450, 453 (2d Cir. 1939)(when party destroys evidence it is natural to conclude he is hiding something and is conscious of his guilt); *Telectron, Inc., v. Overhead Door Corp.*, 116 F.R.D. 107, 133 (S.D. Fla. 1987)(destruction of evidence raises strong inference evidence unfavorable to spoliator's case); *Prudential Ins. Co. v. Lawnsdail*, 15 N.W.2d 880, 883 (Iowa 1944)(destruction of evidence raises inference tending to corroborate other side's evidence).

97. See *H. E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 343 (Tex. Civ. App.—Waco 1975, writ dismissed)(force of inference increased when spoliator fails to rebut it); *Fain v. Beaver*, 478 S.W.2d 816, 820 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.)(failure to testify raises strong presumption against defendant and strengthens probative force of plaintiff's evidence). Most jurisdictions hold that mere negligence is an insufficient basis for drawing the spoliation

A person, however, may choose to destroy evidence and take his chances that destruction cannot be proved or that a jury will not infer that the evidence was unfavorable to his case.<sup>98</sup> Thus, the spoliation inference, or sometimes termed a presumption, is also an inadequate remedy because it does not provide a certain penalty for the spoliation of evidence.<sup>99</sup>

## VI. POLICY CONSIDERATIONS

When considering adoption of a spoliation tort, courts consider two important policies underlying the tort of spoliation of evidence: compensation of injured parties and deterrence of spoliators.<sup>100</sup> Other considerations include the inadequacy and unpredictable application of alternative remedies,<sup>101</sup> promotion of the administration of justice by ensuring that all relevant evidence is available to finders of fact,<sup>102</sup> and the alleviation of ethi-

inference; there must be an intentional act of destruction. *See, e.g.,* Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 96 (3rd Cir. 1983)(evidence accidentally destroyed does not give rise to adverse inference); INA Aviation Corp. v. United States, 468 F. Supp. 695, 700 (E.D.N.Y.)(unfavorable inference arises against despoiler of evidence only if destruction intentional), *aff'd without opinion*, 610 F.2d 806 (2d Cir. 1979); McCleery v. McCleery, 75 So. 316, 317 (Ala. 1917)(purposeful destruction of evidence gives rise to rebuttable presumption against spoliation); Jagmin v. Simonds Abrasive Co., 211 N.W.2d 810, 821 (Wis. 1973)(destruction of evidence must be deliberate and not simply negligent). *Compare* Vick v. Texas Employment Comm'n, 514 F.2d 734, 737 (5th Cir. 1975)(destruction must be intentional act) *with* Newton v. General Manager of Scurlock's Supermarket, 546 S.W.2d 76, 78-79 (Tex. Civ. App.—Corpus Christi 1976, no writ)(no presumption because defendant's employee did not intentionally destroy evidence). *See generally* Fedders & Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME L. REV. 5, 54 (1980)(adverse inference applicable only when destructive act intentional); Maguire & Vincent, *Admissions Implied From Spoliation or Related Conduct*, 45 YALE L.J. 226, 235 (1935)(spoliation must be deliberate or intentional).

98. Note, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 980 (1985).

99. *See* Barker v. Bledsoe, 85 F.R.D. 545, 548 (W.D. Okla. 1979)(inference not sufficient to deter spoliation); *see also* Note, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 980 (1985)(inference does not effectively deter destruction of evidence); Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 207 (1985)(inference inadequate remedy).

100. *See* *Smith v. Superior Court*, 198 Cal. Rptr. 829, 834-36 (Cal. Ct. App. 1984)(tort for intentional spoliation of evidence compensates injured party and deters future spoliators); *see also* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1103-04 (1987)(*Smith* based on policies of compensation of victims and deterrence); Comment, *Spoliation of Evidence—Recognition for a New Tort*, 15 WESTERN ST. U. L. REV. 359, 368 (1987)(*Smith* important because tort deters future spoliators).

101. *See* *Smith*, 198 Cal. Rptr. at 834 (criminal penalties fail to compensate victims of spoliation of evidence).

102. *See* Barker v. Bledsoe, 85 F.R.D. 545, 548 (W.D. Okla. 1979)(destruction of evidence prevents fair trial); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-27

cal confusion for lawyers or other professionals.<sup>103</sup>

The primary purpose of tort law is to compensate parties harmed by wrongdoers.<sup>104</sup> Where the wrong involves destruction of evidence, the harm is that a party to litigation loses a real or perceived opportunity to prove a cause of action or establish a defense.<sup>105</sup> At a minimum, sound public policy argues that the law should provide compensation to a party who in fact is harmed by tortious spoliation.

In addition to compensating injured litigants, judicial recognition of the tort of spoliation of evidence would deter future acts of spoliation,<sup>106</sup> by the same defendant or by others. An award of damages forewarns future spoliators of the prospect of civil liability.<sup>107</sup>

Another reason for adopting an independent action in tort for spoliation of evidence is the inadequacy of alternative remedies.<sup>108</sup> Currently, spolia-

(1987)(suppression of evidence interferes with administration of justice); Ethics Op. Wisc. E-82-14, Law. Man. on Prof. Conduct (ABA/BNA) at 801:9107 (Apr. 1983)(destruction of document with possible evidentiary value interferes with administration of justice); *cf.* *Youst v. Longo*, 729 P.2d 728, 735 (Cal. 1987)(*Smith* based on policy of preserving integrity of civil litigation).

103. Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 RICH. L. REV. 191, 198 (1985); *see also* Comment, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665, 1680 (1979)(lawyers may feel uneasy about advising clients to destroy evidence).

104. *See Forster v. R. J. Reynolds Tobacco Co.*, 423 N.W.2d 691, 694 (Minn. Ct. App. 1988)(individuals wrongfully harmed should receive compensation for their injuries); *see also Merten v. Nathan*, 321 N.W.2d 173, 177 (Wis. 1982)(law of torts compensates individuals for injuries resulting from unreasonable conduct of others).

105. *See Smith v. Superior Court*, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984)(plaintiffs suffered "some" damage in preparing their case against defendants); *see also Hazen v. Municipality of Anchorage*, 718 P.2d 456, 464 (Alaska 1986)(interference with plaintiff's prospective lawsuits deserved remedy); *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984)(plaintiff had cause of action against hospital for failure to provide medical record after she lost medical negligence lawsuit).

106. *See Smith*, 198 Cal. Rptr. at 836 (deterrence is important policy consideration); *see also Note, Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 983 (1985)(tort for spoliation of evidence warns potential spoliators destruction of evidence will not be tolerated); Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 198 (1985)(tort liability is additional deterrent against spoliation).

107. *See Smith*, 198 Cal. Rptr. at 836 (tort for spoliation of evidence is deterrent); *see also* Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 198 (1985)(tort deters others from destroying evidence); Comment, *Spoliation of Evidence—Recognition for a New Tort*, 15 WESTERN ST. U. L. REV. 359, 368 (1987)(tort for spoliation of evidence deters future spoliators).

108. *See Smith v. Superior Court*, 198 Cal. Rptr. 829, 834 (Cal. Ct. App. 1984)(criminal law fails to compensate persons injured by wrongful destruction of evidence by another). Furthermore, *Smith* was predicated on the belief that criminal penalties for the spoliation of evidence were insufficient to deter wrongdoers who might gain a pecuniary benefit by destroying evidence. *See id.* at 835.

tors may escape criminal or civil sanctions by destroying evidence before the institution of legal proceedings.<sup>109</sup> A spoliation tort, however, can close these loopholes by holding a spoliator liable for destruction of evidence even in instances where legal proceedings have not yet begun.<sup>110</sup>

Destruction of evidence prevents fair and proper adjudication of the rights of litigants and thereby interferes with the administration of justice.<sup>111</sup> In so doing, the destruction of evidence undermines the basic purpose of a trial, namely the determination of the truth.<sup>112</sup> By deterring spoliators, the tort promotes the administration of justice by enabling litigants to present to the factfinder a more complete view of the evidence needed to determine the truth of the parties' allegations.<sup>113</sup>

Finally, the recognition of a separate tort action for spoliation of evidence would lessen the ethical confusion faced by lawyers whose clients seek advice with respect to destruction of potential evidence.<sup>114</sup> Lawyers have an ethical duty not to suppress evidence<sup>115</sup> and must reveal a client's intentional de-

109. See Oesterle, *A Private Litigants Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1219-20 (1983)(federal and state obstruction of justice statutes contain "loopholes" whereby parties can "beat the buzzer" by destroying evidence before plaintiff files his complaint).

110. Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 198 (1985).

111. See *Palomar Mortgage Co. v. Lister*, 27 Cal. Rptr. 863, 865 (Cal. Ct. App. 1963)(purpose of trial is fair and proper adjudication of litigants' rights); see also *Butin v. Rothman*, 312 P.2d 783, 786 (Colo. 1957)(justice served by affording parties opportunity to be heard); *Hansen v. St. Paul City Ry. Co.*, 43 N.W.2d 260, 264 (Minn. 1950)(object of trial is securing "fair and impartial administration of justice" between litigants); Note, *Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence*, 69 MINN. L. REV. 961, 972 (1985)(new tort promotes administration of justice); Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 208 (1985)(spoliation undermines fair administration of justice). See generally *Cedillo & Lopez, Document Destruction in Business Litigation From a Practitioner's Point-of-View: The Ethical Views vs. Practical Realities*, 20 ST. MARY'S L.J. 637, 638 (1989)(advising clients to destroy evidence prior to discovery request or court order in pending litigation impedes administration of justice).

112. See, e.g., *Tehen v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966)(purpose of trial is discovery of truth); *Grismore v. Consol. Products*, 5 N.W.2d 646, 656 (Iowa 1942)(purpose of trial is ascertainment of truth); *Redman v. Western & Southern Life Ins. Co.*, 187 S.W.2d 842, 849 (Mo. Ct. App. 1945)(purpose of trial is to ascertain truth about matters in evidence before court); *Morse Boulger Destructor Co. v. Arnoni*, 101 A.2d 705, 709 (Pa. 1954)(object of trial to ascertain truth of facts in issue).

113. See *In re Selser*, 105 A.2d 395, 401 (N.J. 1954)(full disclosure at trial leads to truth); *Duling v. Bluefield Sanitarium, Inc.*, 142 S.E.2d 754, 766 (W. Va. 1965)(truth determined by presenting all relevant testimony).

114. See Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 198 (1985)(recognition of intentional spoliation reduces ethical confusion lawyers might experience when advising clients about destroying evidence).

115. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XII, § 8 (Code of Professional Responsibility) DR 7-102 (A)(3) (1988) [hereinafter TEXAS



struction of evidence when the client knows that an investigation or an official proceeding is pending or in progress.<sup>116</sup> Although section 37.09 of the Texas Penal Code does not prohibit persons from destroying evidence when an official proceeding is not pending or in progress,<sup>117</sup> ethical confusion might arise if a client seeks the advice when future litigation is foreseeable, but not underway.<sup>118</sup> Adoption of the spoliation tort would help reduce this confusion because lawyers would advise their clients of the legal ramifications for the destruction of evidence when a potential lawsuit is foreseeable.

## VII. CONCLUSION

To date, Texas has not followed the lead of other jurisdictions in adopting a tort for spoliation of evidence. Because the destruction of evidence interferes with a party's ability to obtain redress, Texas should adopt a tort for spoliation of evidence to protect an injured party's right to compensation from the wrongdoer. Texas courts could rely on the tort of intentional interference with prospective economic advantage to formulate the basis for a tort for intentional spoliation of evidence. Texas Penal Code section 37.09 could provide the duty to preserve evidence necessary for the negligent form of the spoliation tort. Texas' adoption of a tort for spoliation of evidence would be beneficial to society because recognizing the tort is consistent with the public policy of compensating persons injured by the tortious conduct of others and deterring future acts of wrongdoing. At present, Texas law does not provide an adequate remedy for destruction and loss of evidence. The absence of such a remedy interferes with the administration of justice and creates ethical confusion for lawyers required to provide legal advice with respect to evidence destruction.

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CODE OF PROFESSIONAL RESPONSIBILITY]. The Texas Code of Professional Responsibility also states that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1988).

116. TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(A) (1988); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1987)(neither lawyer nor his client shall suppress evidence where there is legal obligation to reveal).

117. TEX. PENAL CODE ANN. § 37.09(a)(1) (Vernon 1989).

118. *Compare* TEX. PENAL CODE ANN. § 37.09(a)(1) (person must know investigation is pending or proceeding) *with* DEL. CODE ANN. tit. 11, § 1269(2) (1987)(person commits offense if he tampers with evidence believing it will be used in prospective official proceeding). In some jurisdictions, lawyers who intentionally destroy evidence that may be required for a trial may be subject to discipline. *See* *Lady v. State Bar*, 170 P.2d 460, 464 (Cal. 1946)(lawyer disciplined for destroying document that might have been material to case); *see also In re Williams*, 23 N.W.2d 4, 9 (Minn. 1946)(wilful destruction of evidence that may be required for trial subjects lawyer to discipline). *See generally* C. WOLFRAM, MODERN LEGAL ETHICS, § 12.3.5 (1986)(many states' laws cover destruction of evidence when legal proceedings are reasonably foreseeable).