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Texas's Spoliation Presumption.

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TEXAS'S SPOLIATION "PRESUMPTION"

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I. INTRODUCTION

In *Brewer v. Dowling*,[1] the plaintiffs submitted twenty variations of a single jury instruction to the trial court, alleging that the defendants' destruction of relevant evidence mandated a presumption that the evidence was unfavorable to the defendants' case.[2] The Brewers, who sued a doctor and hospital for brain damage caused to their infant, alleged that the defendants were responsible for the destruction of a fetal monitor strip.[3] The strip contained an electronically produced record that might have shown signs of fetal distress and supported the Brewers' medical

1. Brewer v. Dowling, 862 S.W.2d 156 (Tex. App.—Fort Worth 1993, writ denied).
2. *Id.* at 158 n.1.
3. *Id.* at 157.

malpractice claim.[4] The trial court refused to submit any of the twenty spoliation instructions to the jury and rendered a take-nothing judgment in favor of the defendants.[5] The Texas Second Court of Appeals affirmed the judgment, holding that the circumstances surrounding the loss of the fetal monitor strip did not give rise to a presumption of unfavorable evidence.[6]

Although the facts of *Brewer* transpired almost thirty years ago,[7] practitioners and litigants continue to share many of the *Brewer* plaintiffs' frustrations including: the inability to access relevant evidence possibly destroyed by an opposing party;[8] the lack of sufficiently clear judicial guidance on spoliation issues;[9] and the absence of a model spoliation instruction approved by Texas courts. The explosion of digital evidence and electronically stored information (ESI) over the past two decades has likely contributed to these frustrations.[10] Accusations of spoliation can

4. *Id.* at 157–58 (recounting the actions of hospital personnel during the time the fetal monitoring strip was allegedly misplaced).

5. *Id.*

6. *Id.* at 159–60 ("We will not infer spoliation or destruction of the strip—intentional or otherwise—from the mere fact that it is missing.").

7. *See id.* at 157–58 (stating the underlying facts of the case). The strip later disappeared, and appellants contended in their point of error that the court refused to instruct jurors that a "rebuttable presumption [exists in] that the information on the strip would have been unfavorable to appellees." *Id.* at 158.

8. *See id.* at 158 (considering whether the "missing evidence was critical to a determination of appellees' negligence"); *see also* Kronisch v. United States, 150 F.3d 112, 127 (2d Cir. 1998) ("[I]n the absence of the destroyed evidence, we can only venture guesses with varying degrees of confidence as to what that missing evidence may have revealed.").

9. Sheldon M. Finkelstein et al., *Spoliation, or Please Don't Leave the Cake Out in the Rain*, 32 LITIG., Winter 2006, at 28, 28 (discussing the "'unavoidably imperfect' body of spoliation law").

10. *See* Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 214 (S.D.N.Y. 2003) (recognizing the increased difficulties in the area of spoliation due to the rise in the use of electronic information); Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 696–98 (2009) (explaining that electronic evidence is challenging because it "is more voluminous and easier to duplicate, is more difficult to delete, constantly changes formats, contains hidden metadata, can be dependent on a particular computer system, and is dispersed across different file formats and storage devices"); *see also* THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (Jonathan Redgrave et al. eds., 2005), *available at* https://thesedonaconference.org/download-pub/99 (click on "I agree to these terms" box; then click the "Download" button) (estimating that in 2005, more than 90% of all information was created electronically); Bennett B. Borden et al., *Four Years Later: How*

stem from the sheer complexity and lack of understanding of electronic systems and storage as well as retrieval of ESI.[11] When neither judges nor lawyers understand how to locate, preserve, or access ESI, the environment is ripe for allegations of spoliation.[12] The rapid transformation of litigation, particularly in the discovery stage, necessitates the clarification of Texas's spoliation law[13] and clearer jury instructions on spoliation.[14]

Facially, courts in Texas have been somewhat consistent in their

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the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and are Revitalizing the Civil Justice System, 17 RICH. J.L. & TECH. 10, ¶ 3 (2011) ("The immense volume of potentially relevant evidence has driven the cost of finding, reviewing, and producing that information to unprecedented heights, threatening the very purposes of our civil justice system."); Damian Vargas, Note, *Electronic Discovery: 2006 Amendments to the Federal Rules of Civil Procedure*, 34 RUTGERS COMPUTER & TECH. L.J. 396, 398 (2008) (mentioning a 2006 survey that noted "a company of 100,000 employees may store an average of 1.5 billion emails annually").

11. *See* GEORGE L. PAUL & BRUCE H. NEARON, THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 7 (2006) (pointing out increasing problems related to information technology in law practice); *cf.* Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, ¶ 21 (2006) (explaining that information might be readily available and considered "accessible," but noting that the cost and burden of retrieving the information makes it "not reasonably accessible"). There are noticeable differences in using electronic information. Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 RICH. J.L. & TECH. 7, ¶ 27 (2008) (describing certain types of storage media requiring forensic retrieval); Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, ¶ 21 (2006) (documenting accessibility, custodianship, and preservation issues faced by litigants, judges, and attorneys using electronic evidence).

12. *See* Lucia Cucu, Note, *The Requirement for Metadata Production Under* Williams v. Sprint/United Management Co.*: An Unnecessary Burden for Litigants Engaged in Electronic Discovery*, 93 CORNELL L. REV. 221, 230 (2007) ("[A]ttorneys might not even be aware that certain types of metadata exist."); *cf.* Lee H. Rosenthal & James C. Francis IV, Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1, 15 (2007) (documenting that at least one federal judge "encourage[s] counsel to come with the IT person to the meet-and-confer" because lawyers are not experts and miscommunicate information/technology issues).

13. *See* A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2006 (2011) (proposing amendments to the Federal Rules of Civil Procedure); *see also* George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10 ¶ 23 (2007) (exploring the problems associated with the change from a paper-based society to one reliant on ESI, and proposing solutions to such challenges).

14. *See* Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 683 (2009) (addressing the different standards used by the courts to show spoliation).

definition of the term "spoliation," but have differed in their application of the spoliation presumption and its consequences.[15] Texas has long recognized that the destruction or suppression of written documents or objects raises a presumption that the destroyed or suppressed evidence was unfavorable to the person who destroyed or suppressed it.[16] However, over the past four decades, several courts have described spoliation in narrower terms, indicating that spoliation includes only the intentional destruction of evidence.[17] Other courts have described spoliation

15. *See* Ham v. Equity Residential Prop. Mgmt. Servs., Corp., 315 S.W.3d 627, 631 (Tex. App.—Dallas 2010, pet. denied) ("Spoliation is the deliberate destruction of, failure to produce, or failure to explain the [nonproduction] of relevant evidence, which, if proved, may give rise to a presumption that the missing evidence would be unfavorable to the spoliator." (citing Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003))); Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 101 (Tex. App.—Corpus Christi 2008) ("Spoliation is the improper destruction of evidence, proof of which may give rise to a presumption that the missing evidence would be unfavorable to the spoliator."), *rev'd on other grounds*, 298 S.W.3d 631 (Tex. 2009); Walker v. Thomasson Lumber Co., 203 S.W.3d 470, 477 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (indicating that the party wishing to receive the presumption must establish a "duty to preserve the evidence in question" (citing *Johnson*, 106 S.W.3d at 722)); Capital One Bank v. Rollins, 106 S.W.3d 286, 298 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (defining spoliation as the destruction of evidence); Brumfield v. Exxon Corp., 63 S.W.3d 912, 919 n.3 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) ("Spoliation is the improper destruction of evidence." (citing Whiteside v. Watson, 12 S.W.3d 614, 621 (Tex. App.—Eastland 2000, pet. denied, judgm't vacated w.r.m.))); Lively v. Blackwell, 51 S.W.3d 637, 640 (Tex. App.—Tyler 2001, pet. denied) (stating that spoliation is a question of law); *Whiteside*, 12 S.W.3d at 621 ("When a party fails to produce evidence within its control, the law presumes that, if produced, the evidence would operate against that party."); Brewer v. Dowling, 862 S.W.2d 156, 158 n.2 (Tex. App.—Fort Worth 1993, writ denied) ("Spoliation is defined as: '[t]he destruction of evidence.... The destruction, or the significant and meaningful alteration of a document or instrument.'" (quoting BLACK'S LAW DICTIONARY 1257 (5th ed. 1979))). The Texas Supreme Court defined spoliation as "the wrongful act of withholding or destroying the means of furnishing direct testimony." Tynan v. Paschal, 27 Tex. 286, 298 (1863).

16. *Johnson*, 106 S.W.3d at 721; *see* 1 McCormick & Ray, *Texas Evidence* § 103, at 141 (2d ed. 1956) (discussing the presumption that arises from the destruction or nonproduction of evidence). This Article relies on McCormick & Ray's treatise, among other sources, because it explains Texas's evidentiary concepts prior to the development of modern spoliation law and was relied on by the courts of appeals in developing Texas spoliation law. *See, e.g.*, H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 343–44 (Tex. Civ. App.—Waco 1975, writ dism'd) ("A kindred rule to the foregoing, applicable to the case at bar, is that the intentional spoliation or destruction of evidence relevant to a case raises a presumption that the evidence would have been unfavorable to the cause of the spoliator." (citing 1 McCormick & Ray, *Texas Evidence* § 103, at 141–42 (2d ed. 1956))).

17. *See, e.g.*, *Ham*, 315 S.W.3d at 631 (defining spoliation as deliberate destruction, or a deliberate failure, to produce relevant evidence); Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied) ("Generally, two rules apply to presumptions that arise from the nonproduction of evidence. One rule is that the

in terms of two distinct rules under which a trial court may submit a spoliation instruction: One circumstance involves the deliberate destruction of evidence, and the other involves the nonproduction of evidence.[18] To further complicate matters, the terminology commonly used to define spoliation principles (e.g., "spoliation," "intentional," "inference," and "presumption") is ambiguous at best.[19]

This Article examines spoliation issues in the civil context and focuses on the jury instruction commonly imposed as a spoliation remedy. Before proceeding, it is important to define what is meant by "spoliation." As used in this Article, spoliation is the wrongful withholding or destruction of relevant evidence that raises a true presumption that the missing evidence was unfavorable to that party.[20] "Spoliation law" is that body of law

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deliberate spoliation of evidence relevant to a case raises a presumption that the evidence would have been unfavorable to the cause of the spoliator."); Williford Energy Co. v. Submergible Cable Servs., 895 S.W.2d 379, 390 (Tex. App.—Amarillo 1994, no writ) ("This rule, however, applies when evidence has been intentionally destroyed, not merely lost.").

18. *See Johnson*, 106 S.W.3d at 721 (describing the two circumstances where spoliation instructions are generally used); *Middleton*, 982 S.W.2d at 470 ("Generally, two rules apply to presumptions that arise from the nonproduction of evidence."); *see also Brumfield*, 63 S.W.3d at 920 (acknowledging the two general rules).

19. *See Ham*, 315 S.W.3d at 631 (providing one definition of spoliation); ROBERT R. MERHIGE, JR. ET AL., CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURT: OUTLINE OF SPOLIATION OF EVIDENCE ISSUES 533, 535–37 (1999) (distinguishing bad faith, willfulness, intent, negligence, and accidental destruction of evidence); 2 MCCORMICK ON EVIDENCE 495 (Kenneth S. Brown ed., 6th ed. 2006) (footnote and citations omitted) ("One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'").

20. Combining elements of the various definitions for spoliation used by Texas courts, this Article formulated this definition to include all relevant components for the act of spoliation. *See Ham*, 315 S.W.3d at 631 ("Spoliation is the deliberate destruction of, failure to produce, or failure to explain the [nonproduction] of relevant evidence, which, if proved, may give rise to a presumption that the missing evidence would be unfavorable to the spoliator." (citing *Johnson*, 106 S.W.3d at 721)); *Walker*, 203 S.W.3d at 477 ("Spoliation is the improper destruction of evidence, proof of which may give rise to a presumption that the missing evidence would be unfavorable to the spoliator." (citing *Brumfield*, 63 S.W.3d at 919 n.3, 920)); *Rollins*, 106 S.W.3d at 298 ("[S]poliation is defined as: [t]he *destruction* of evidence, not the failure to *create* evidence." (citing *Brewer*, 862 S.W.2d at 158 n.2)); *Brewer*, 862 S.W.2d at 158 n.2 ("Spoliation is defined as: '[t]he destruction of evidence. . . . The destruction, or the significant and meaningful alteration of a document or instrument.'" (quoting BLACK'S LAW DICTIONARY 1257 (5th ed. 1979))). Texas courts have construed criminal defendants' requests for spoliation presumptions in the context of due process violations for the state's wrongful withholding or destruction of evidence. White v. State, 125 S.W.3d 41, 43–44 (Tex. App.—Houston

that addresses the spoliation presumption or resulting jury instruction. Although older cases narrowly define spoliation in terms of intentional destruction of evidence, modern spoliation cases have broadly described spoliation by including the nonproduction of evidence, the subject of many discovery disputes.[21] Consequently, remediation of spoliation involves a discussion of the discovery rules and case law.[22]

In Texas, accusations of spoliation ordinarily arise in the context of discovery abuse and are resolved accordingly.[23] The value of Texas spoliation law is to provide trial courts with additional mechanisms to remedy the unavailability of relevant evidence caused by one of the parties.[24] Thus, in addition to awarding

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[14th Dist.] 2003, pet. ref'd) (citing California v. Trombetta, 467 U.S. 479, 489 (1984)). Consequently, Texas courts have been less receptive to recognizing additional remedies for spoliation in criminal cases. *See, e.g.*, Fonseca v. State, No. 04-03-00398-CR, 2004 WL 2533305, at *3 (Tex. App.—San Antonio Nov. 10, 2004, pet. denied) (mem. op., not designated for publication) (declining to apply spoliation law in a criminal case); Herrin v. State, No. 06-97-00134-CR, 1998 Tex. App. LEXIS 7158, at *6 (Tex. App.—Texarkana 1998, no pet.) (not designated for publication) ("The trial court correctly refused to include the requested instruction in its charge to the jury. . . . [T]he requested instruction would have constituted an impermissible comment on the evidence"). *But see, e.g.*, Pachecano v. State, 881 S.W.2d 537, 543 (Tex. App.—Fort Worth 1994, no writ) (assuming that a spoliation presumption would apply in the case (citing Saldana v. State, 783 S.W.2d 22, 23 (Tex. App.—Austin 1990, no writ); Cuesta v. State, 763 S.W.2d 547, 555 (Tex. App.—Amarillo 1988, no writ))).

21. *Compare Ham*, 315 S.W.3d at 631 (including destruction, failure to produce, and failure to explain nonproduction of evidence in the definition of "spoliation"), *with Bruner*, 530 S.W.2d at 344 (referring to "spoliation" as "[t]he deliberate destruction of evidence").

22. *See, e.g.*, Philip A. Lionberger, Comment, *Inference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 ST. MARY'S L.J. 209, 219 n.55 (1989) (referring to the discovery sanctions found in the Texas Rules of Civil Procedure as a basis for sanctioning nonproduction of evidence).

23. *See* A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2005 (2011) (suggesting introducing the topic of spoliation during the discovery process and addressing the duty to preserve evidence); Philip A. Lionberger, Comment, *Inference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 ST. MARY'S L.J. 209, 227 (1989) (explaining Texas's use of discovery sanctions, such as a default judgment, to punish spoliators). *But see* Steven R. Selsberg & Maelissa Brauer Lipman, *"My Dog Ate It": Spoliation of Evidence and the Texas Supreme Court's* Ortega *Decision*, 62 TEX. B.J. 1014, 1018 (1999) (specifying four instances when sanctions fail to provide a sufficient remedy for pretrial spoliation of evidence).

24. *See* Philip A. Lionberger, Comment, *Inference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 ST. MARY'S L.J. 209, 219 (1989) (listing methods of addressing spoliation in civil litigation including "the spoliation inference, discovery sanctions, and the spoliation tort").

sanctions, Texas courts may remedy discovery abuse through the application of the spoliation presumption or the submission of a spoliation instruction to the jury.[25]

Due to the lack of recent scholarly discussion or analysis on Texas spoliation law,[26] this Article was written to tackle some of the more complex, unresolved issues in the case law and seeks to make recommendations for the submission of spoliation instructions to juries. The purpose of this Article is to provide guidance to litigators who may encounter spoliation issues, and offer assistance to trial courts that are considering how to remedy spoliation. Part II presents the problems faced by parties, courts, and attorneys when evidence is withheld or destroyed. Part III offers a classification scheme for understanding the responses to spoliation. The major developments in spoliation law in Texas are discussed in Part IV. Part V then analyzes the current status of Texas spoliation law by identifying and resolving conflicting descriptions and applications of spoliation principles. This analysis provides a helpful background for understanding the discussions in Part VI, which identifies inconsistencies in spoliation instructions

25. *See, e.g.*, Trevino v. Ortega, 969 S.W.2d 950, 960 (Tex. 1998) (Baker, J., concurring) ("[W]hen a party improperly destroys evidence, trial courts may submit a spoliation presumption instruction." (citing Watson v. Brazos Elec. Power Corp., 918 S.W.2d 639 (Tex. App.—Waco 1996, writ denied))).

26. Only a few books and articles have addressed Texas law specifically in their discussions of spoliation law. *See* MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 232–36 (Daniel F. Gourash ed., 2d ed. 2006) (describing independent causes of action, civil and evidentiary sanctions, and criminal statutes relating to spoliation); Linda Addison, *Reindeer Keep Falling on My Head: Establishing the Foundation for a Spoliation Instruction*, 67 TEX. B.J. 468, 468–69 (2004) (analyzing the Texas Supreme Court's decision regarding a spoliation instruction in *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003), where a Wal-Mart customer was injured after a decorative reindeer fell from a shelf and struck him); Steve E. Couch, *Spoliation of Evidence: Is One Man's Trashing Another Man's Treasure?*, 62 TEX. B.J. 242, 243–44 (1999) (outlining approved sanctions for spoliation, and describing Texas's approach to the area of spoliation as comprised of two rules—failure to produce evidence and intentional destruction of evidence); Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY'S L.J. 351, 355 (1995) (recommending that Texas adopt a tort for evidence spoliation); Steven R. Selsberg & Maelissa Brauer Lipman, *"My Dog Ate It": Spoliation of Evidence and the Texas Supreme Court's* Ortega *Decision*, 62 TEX. B.J. 1014, 1015 (1999) (arguing that Texas should recognize a tort against third-party spoliators); Philip A. Lionberger, Comment, *Interference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 ST. MARY'S L.J. 209, 220 (1989) (advocating that Texas should recognize a tort for the intentional and negligent spoliation of evidence).

and makes recommendations for the crafting and submitting of spoliation instructions. Part VII briefly concludes the Article.

II. PROBLEMS CAUSED BY SPOLIATION

The spoliation of evidence is an increasing problem for litigants in Texas courts.[27] One of the most cited studies[28] on spoliation reported that "one-half of litigators believe that unfair and inadequate disclosure of material information prior to trial [is] a regular or frequent problem . . . [and] 69% of surveyed antitrust attorneys [have] encountered unethical practices, including, most commonly, destruction of evidence."[29] Spoliation creates concerns for nearly every participant in a case[30] and "is a serious problem that can have a devastating effect on the administration of justice."[31] From the client's and lawyer's perspectives, evidence

27. *See Trevino*, 969 S.W.2d at 952 ("Evidence spoliation is not a new concept. For years courts have struggled with the problem . . . ."). The courts' struggles are likely due, at least in part, to the increased use of ESI and the adoption of document retention policies and ESI management systems, which have been implemented to combat the routine destruction of electronic and paper documents. *See* Lloyd S. van Oostenrijk, Comment, *Paper or Plastic?: Electronic Discovery and Spoliation in the Digital Age*, 42 HOUS. L. REV. 1163, 1184–86 (2005) (explaining the idea behind document retention policies, and identifying differences between paper and electronic files).

28. *See* MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION x (Daniel F. Gourash ed., 2d ed. 2006) (citing Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 806 (1991)); *see also* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1552 n.76 (1997) (containing an estimation by Nesson that the "destruction of evidence occurs in a large percentage of civil cases"); Drew D. Dropkin, Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1805 n.15 (2002) (mentioning Nesson's assertion that judges are critical to crafting spoliation remedies); James T. Killelea, Note, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045, 1045 n.5 (2005) (referencing the Nesson study's findings regarding attorney incentive to alter evidence before trial).

29. Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 806 (1991) (alteration in original) (citations and internal quotation marks omitted); Drew D. Dropkin, Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1806 (2002).

30. *See Trevino*, 969 S.W.2d at 954 (Baker, J., concurring) (explaining how a court's actions regarding spoliation affect both the spoliating and the nonspoliating parties); Donald H. Flanary, Jr. & Bruce M. Flowers, *Spoliation of Evidence: Let's Have a Rule in Response*, 60 DEF. COUNS. J. 553, 553 (1993) ("Spoliation of evidence is a serious problem for practitioners and clients.").

31. *Trevino*, 969 S.W.2d at 954.

that an opposing party has spoliated may prevent amicable settlement, because suspicions of foul play only increase antagonism between the parties.[32] Because spoliation results in the unavailability of evidence, it places parties in a less apt position to accurately assess the strengths and weaknesses of their cases.[33] The spoliation of some evidence could merely "tip[] the balance in a lawsuit,"[34] but in other cases, "the loss or destruction of evidence may seriously impair a party's ability to present its case."[35]

Spoliation also creates problems for trial judges and juries in their attempts to resolve legal and factual disputes. The wrongful destruction or withholding of evidence is commonly raised as grounds for discovery sanctions. Therefore, accusations of spoliation can prolong the discovery process and the overall life of the lawsuit by creating additional disputes between parties.[36] Spoliation can also make it more difficult for a trial court to dispose of motions for summary judgment or determine whether a party is otherwise entitled to judgment as a matter of law.[37] If the case goes to trial, the unavailability of the spoliated evidence adversely impacts the fact-finding process because some relevant

32. *See* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) ("The courts must protect the integrity of the judicial process because, '[a]s soon as the process falters . . . the people are then justified in abandoning support for the system.'" (quoting United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993))).

33. *See* James T. Killelea, Note, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045, 1046 (2005) ("[D]estruction of evidence violates the spirit of liberal discovery, offends notions of fair play, and generally undermines the efficacy of the adversarial system.").

34. *Trevino*, 969 S.W.2d at 953.

35. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003).

36. The disputes in Texas are limited to discovery, but in *Trevino*, the court refused to recognize a cause of action for spoliation. *Trevino*, 969 S.W.2d at 953. A few other jurisdictions recognize a separate cause of action for the intentional and negligent spoliation of evidence. *See generally* MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 125 (Daniel F. Gourash ed., 2d ed. 2006) (conducting a fifty-state survey to determine which states recognize causes of action for evidence spoliation). Trial judges are called upon to hold hearings to determine whether a party is responsible for spoliation and whether to impose a spoliation sanction. *See Trevino*, 969 S.W.2d at 954 (suggesting implicitly that parties raise spoliation disputes to the trial court and request a hearing on the matter).

37. *See* Aguirre v. S. Tex. Blood & Tissue Ctr., 2 S.W.3d 454, 457 (Tex. App.—San Antonio 1999, pet. denied) (noting the necessity to modify the standard of review when spoliation is raised in response to a motion for summary judgment).

evidence is unavailable for the fact finder's consideration.[38] Spoliation can thereby undermine the truth-seeking function of the judicial system and the adjudicatory process.[39] Judge Shira Scheindlin, in her series of well-regarded opinions in *Zubulake v. UBS Warburg L.L.C.*,[40] described this problem: "Documents create a paper reality we call proof. The absence of such documentary proof may stymie the search for the truth."[41] "[B]ecause no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition."[42]

Technological advances magnify the problems associated with spoliation.[43] In the age of information, evidence is increasingly stored electronically.[44] Examples of ESI "includ[e] e-mail, word-processed documents, spreadsheets, and [I]nternet records."[45] ESI differs from traditional tangible evidence in

38. *Cf.* MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 57 (Daniel F. Gourash ed., 2d ed. 2006) ("The destruction of evidence inhibits a court's ability to hear evidence and accurately determine the facts.").

39. *See* Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1167 (1987) ("Thus, through the spoliation doctrine, the law of evidence permits the fact finder to draw an adverse inference from the fact of destruction.").

40. Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 430–31 (S.D.N.Y. 2004); Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 222 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 281 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake II*), 230 F.R.D. 290, 291–92 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

41. *Zubulake IV*, 220 F.R.D. at 214 (internal quotation marks omitted) (quoting MASON COOLEY, CITY APHORISMS, SIXTH SELECTION (1989)); *see* United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993) (emphasizing the invaluable role that good faith and honesty play in the adversarial process).

42. *Shaffer*, 11 F.3d at 457.

43. *Zubulake IV*, 220 F.R.D. at 214; *see* Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 696–700 (2009) (discussing "[t]he impact of the [d]igital [r]evoltuon on [e]videntary [p]rocedures").

44. Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 696–97 (2009) ("In the twenty-first century, spoliation disputes more and more involve electronically-stored information (ESI).").

45. Carole S. Gailor, *In-Depth Examination of the Law Regarding Spoliation in State and Federal Courts*, 23 J. AM. ACAD. MATRIMONIAL LAWS. 71, 77 (2010).

several ways.[46] "[E]lectronic evidence is more voluminous and easier to duplicate, is more difficult to delete, constantly changes formats, contains hidden metadata, can be dependent on a particular computer system, and is dispersed across different file formats and storage devices."[47] Most importantly, most ESI is virtually inaccessible.[48] These differences can raise challenges for many lawyers who are less familiar and comfortable with maintaining and reviewing electronic data.[49] Because the problems caused by spoliation are frequently complex, especially in light of the digitalization of evidence, courts have recognized a variety of ways to respond to spoliation.

III. RESPONDING TO SPOLIATION

A. *Classifying the Responses to Spoliation*

A proper understanding of the nature of judicial responses to spoliation is helpful to understand Texas spoliation cases, yet the responses to spoliation have not been expressly delineated. Therefore, in making analyses and recommendations, this Article seeks to explore the implied classification of responses to spoliation in general.

Spoliation can be addressed either within the suit in which the spoliation arises or outside of the suit.[50] If spoliation is not

46. Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 697–98 (2009).

47. *Id.*

48. *See* Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (*Coleman I*), No. 502003CA005045XXOCAI, 2005 WL 679071, at *5–6 (Fla. Cir. Ct. Mar. 1, 2005) (demonstrating the accessibility problem). In this case, Morgan Stanley repeatedly failed to locate all the requested documents or to access them in a timely fashion. *Id.* The judge ultimately issued two opinions, and the jury awarded Coleman $850,000 in punitive damages. *See* Daniel B. Garrie & Yoav M. Griver, *Digital Issues in Mergers & Acquisitions, E-Discovery, & Information Technology Systems*, 19 WIDENER L. REV. 25, 36 (2009) (emphasizing the punitive damages award as well as a jury award of $604.3 million in actual damages). *See generally* Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. (*Coleman II*), No. CA 03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005) (issuing the second scathing opinion in this line of cases).

49. *See* Gregory P. Joseph, *Spoliation: Truth or Consequences*, GREGORY P. JOSEPH L. OFF. LLC (2007), http://www.josephnyc.com/articles/viewarticle.php?45 ("The lasting legal legacy of the current era of electronic discovery likely will lie in the area of spoliation and sanctions. Lawyers know how to review, shepherd, and maintain paper. Electronic data are another matter.").

50. *See* TEX. R. CIV. P. 215.2 (providing a list of options that a trial judge may use

addressed within the suit in which the spoliation occurs, then there are several collateral proceedings available. Although rejected by Texas, a few jurisdictions recognize a tort for the intentional or negligent destruction of evidence.[51] The three primary examples of collateral proceedings in Texas include criminal prosecutions,[52] disciplinary proceedings,[53] and contempt proceedings.[54] Criminal prosecution and contempt proceedings are designed to address the bad-faith conduct of a party or its attorney.[55] An attorney who violates the Texas Disciplinary Rules of Professional Conduct with respect to withholding or destroying evidence is subject to

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when an attorney fails to comply with discovery requests); Smith v. Superior Court, 151 Cal. App. 3d 491, 496 (Ct. App. 1984) (creating a new tort for the intentional spoliation of evidence), *overruled by* Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 521 & n.4 (Cal. 1998). *Cedars-Sinai* overruled *Smith* to the extent that a tort remedy is available where "the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action." *Cedars-Sinai*, 954 P.2d at 521 & n.4.

51. *See* Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420, 424 & n.9 (Mass. 2007) (listing jurisdictions that have recognized a spoliation tort, including Alaska, Florida, Montana, New Mexico, and Ohio).

52. *See* TEX. PENAL CODE ANN. § 7.09 (West Supp. 2011) (noting that tampering with physical evidence, with knowledge of a pending investigation, is a third-degree felony). However, using this method has limited effects. "Even if the victim of spoliation can convince a district attorney to prosecute a spoliation case, which is unlikely because section 37.09 has rarely, if ever, been applied in a civil case, a conviction only punishes the spoliator. It does not compensate the victim." Steven R. Selsberg & Maelissa Brauer Lipman, *"My Dog Ate It": Spoliation of Evidence and the Texas Supreme Court's* Ortega *Decision*, 62 TEX. B.J. 1014, 1018 (1999) (footnote omitted).

53. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04 (prohibiting an attorney from destroying or assisting in destruction of evidence pertaining to a case), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005); *see also* Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 172 (Tex. 1993) (acknowledging that trial attorneys who engage in improper trial conduct are subject to disciplinary action under Rule 3.04).

54. *See* TEX. R. CIV. P. 215.2 (outlining the express power to invoke criminal contempt sanctions for spoliation); GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729–30 (Tex. 1993) (concluding that the lower court erred by not allowing sanctions such as fines and contempt to further promote compliance with discovery).

55. *See* Chrysler Corp. v. Blackmon, 841 S.W.2d 844, 849 (Tex. 1992) (outlining the legitimate purposes of discovery sanctions and noting the three main goals are: "(1) to secure compliance with discovery rules; (2) to deter other litigants from similar misconduct; and (3) to punish violators"); *see also* Cire v. Cummings, 134 S.W.3d 835, 839 (Tex. 2004) (explaining that sanctions are often used to encourage "compliance with discovery and deter those who might be tempted to abuse discovery in the absence of a deterrent"). Although the trial court has the authority to impose sanctions, those sanctions should not be "more severe than necessary to satisfy its legitimate purpose." *Cire*, 134 S.W.3d at 839.

disciplinary proceedings even in the absence of bad faith.[56] Furthermore, collateral proceedings are primarily punitive and afford little to no compensation to the nonspoliating party.[57]

If spoliation is addressed within the lawsuit in which it arises, then the trial court may impose discovery sanctions or grant spoliation remedies.[58] As a practical matter, spoliation most often arises as a discovery issue, and the Texas Rules of Civil Procedure bestow upon Texas trial courts the discretion to respond.[59] Accordingly, trial courts may impose a discovery sanction under Rule 215.2 to address spoliation arising as discovery abuse.[60] In addition to the enumerated discovery sanctions of Rule 215.2, the trial court may consider spoliation remedies as a response to discovery abuse.[61] A spoliation remedy is a remedy associated

56. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04 cmt. 3 (warning that resorting to disciplinary measures should be limited to habitual abuse of the discovery process, while also clarifying that disciplinary procedures should not function as tactical ploys to prolong litigation). Furthermore, acting in good conscience will not always shield an attorney from being subject to disciplinary sanctions. *See id.* (noting that a lawyer is subject to "discipline only for habitual abuses of procedural or evidentiary rules, including those relating to the discovery process"). "A lawyer in good conscience should not engage in even a single intentional violation of those rules, however, and a lawyer may be subject to judicial sanctions for doing so." *Id.*

57. *See* Walton v. City of Midland, 24 S.W.3d 853, 861–62 (Tex. App.—El Paso 2001, no pet.) (illustrating that courts generally resort to monetary sanctions when spoliation causes the opposing party to incur expenses in an effort to remedy the situation). In *Walton*, the defense incurred costs to obtain an expert report—one that the plaintiff knew had been previously destroyed. *Id.* Thus, the court awarded the defense $4,715.10 to compensate for fees incurred while attempting to retrieve a destroyed report. *Id.* at 861; *cf.* MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 236 (Daniel F. Gourash ed., 2d ed. 2006) (reiterating that the Texas Penal Code fails to "provide relief to spoliation victims").

58. *See* Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003) (emphasizing the broad power of a trial court judge who "should have discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available"); *see also* Vela v. Wagner & Brown, Ltd., 203 S.W.3d 37, 58 (Tex. App.—San Antonio 2006, no pet.) (referring to Texas Rule of Civil Procedure 215.3 for sanctions within a judge's discretion).

59. *E.g.*, TEX. R. CIV. P. 215.2 (enumerating sanctions for failure to comply with an order or discovery request); *accord* Am. Flood Research, Inc. v. Jones, 192 S.W.3d 581, 584 (Tex. 2006) ("[T]he trial court may impose sanctions against the party *or the attorney advising the party* when the party fails to comply with an order to permit discovery.").

60. *See* TEX. R. CIV. P. 215.2 (bestowing the court with power to sanction a party for discovery violations).

61. *See In re* TLK, 90 S.W.3d 833, 836 (Tex. App.—San Antonio 2002, no pet.) (granting courts wide "discretion to remedy spoliation of evidence"). Trial courts may use other remedies as well. MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION

with application of the spoliation presumption.[62] The two most commonly requested spoliation remedies are the application of the spoliation presumption in the summary judgment context and the spoliation instruction.[63]

B. *Choosing an Appropriate Response*

Once a trial court determines that spoliation has occurred and the nonspoliating party has been prejudiced as a result thereof, the court then considers remedying the spoliation or sanctioning the spoliating party.[64] Understanding the rationales underlying the imposition of spoliation remedies aids courts in determining what remedy or sanction is appropriate. Courts, including those in Texas, and commentators generally agree that there are several basic rationales that justify spoliation remedies: punishment, deterrence, and compensation or remediation.[65]

OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 234 (Daniel F. Gourash ed., 2d ed. 2006). For example, if a spoliator's conduct was egregious, then the court has the ability to dismiss an action. *Id.* The court may also allow expert testimony to discuss the destroyed evidence. *Id.*

62. *See* TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913, 918 (Tex. 1991) ("Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit.").

63. While many cases and scholarly discussions concern the authority of a court to impose sanctions, the breadth of the Texas Rules of Civil Procedure gives trial courts broad discretion to impose discovery sanctions and to submit instructions to juries. Moreover, the spoliation presumption, as the Article discusses in Part IV, is a creature of the common law, and is applied in no-evidence legal sufficiency reviews. Thus, the authority of Texas courts to apply spoliation remedies has not been contested.

64. MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 234 (Daniel F. Gourash ed., 2d ed. 2006) (clarifying that spoliation of evidence does not automatically result in sanctions). After the court determines whether there was a breach of legal duty to preserve evidence, "it must determine whether the destruction of evidence has injured the [nonspoliating] party. When a spoliator has negligently destroyed evidence, it may show no prejudice resulted to the [nonspoliating] party. After these determinations, the court may consider an appropriate remedy." *Id.* (footnote omitted); *see* Donald H. Flanary, Jr. & Bruce M. Flowers, *Spoliation of Evidence: Let's Have a Rule in Response*, 60 DEF. COUNS. J. 553, 553 (1993) (pointing out there is no unified method for confronting spoliation issues on the state or federal level, and jurisdictions have various methods of redress).

65. *See* Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 554 (6th Cir. 2010) (noting the punitive and fairness functions of spoliation remedies); *see also* Booker v. Mass. Dep't of Pub. Health, 612 F.3d 34, 46 (1st Cir. 2010) ("The inference is also based on prophylactic and punitive rationales: it serves to deter litigants from destroying relevant evidence prior to trial and to penalize a party whose misconduct creates the risk of an erroneous

The fundamental policy underlying Texas's current spoliation law is remediation; trial courts should have broad discretion in remedying the prejudice caused by the unavailability of relevant evidence.[66] While punitive considerations have secondary importance, the primary goal is compensating the innocent party. The Texas Supreme Court's decision in *Trevino v. Ortega*[67] signified a prioritization of the goals of Texas's spoliation law. In *Trevino*, the court refused to recognize a tort for negligent or intentional spoliation.[68] The court reasoned that the damages for such a tort would be too speculative, and the refusal to recognize a tort was consistent with its "refus[al] to recognize a separate cause of action for perjury or embracery."[69] The court's last rationale focused on the sufficient remedies available in the context of the underlying lawsuit that can compensate an innocent party who,

judgment."); Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) ("[T]he applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." (internal quotation marks omitted) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999))); Trevino v. Ortega, 969 S.W.2d 950, 961 (Tex. 1998) (Baker, J., concurring) (characterizing the purposes of the spoliation doctrine as punishment, deterrence, and protection); Clements v. Conard, 21 S.W.3d 514, 523 (Tex. App.—Amarillo 2000, pet. denied) ("[The doctrine's] intent is to prevent the subversion of the discovery process and the fair administration of justice by destroying evidence before a claim is actually filed."); Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 688–89 (2009) (acknowledging a court's authority to sanction unintentional spoliation as a way of providing restitution to the nonspoliating party). The compensation rationale is also related to the concerns of accuracy in the fact-finding and truth-seeking process. *See* Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1167 (1987) ("A rule designed to restore accuracy, rather than attempting to deter evidence destruction generally, would seek to correct the distortion of the fact-finding process. . . .").

66. *See* Williams v. Akzo Nobel Chems., Inc. 999 S.W.2d 836, 843 (Tex. App.—Tyler 1999, no pet.) (emphasizing the inherent power of a trial court "to sanction to the extent necessary to deter, alleviate, and counteract bad[-]faith abuse of the judicial process"); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04 cmt. 1 (explaining that the goals of the disciplinary rules are advanced "by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like").

67. Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998).

68. *See id.* at 953 ("[W]e disagree that the creation of an independent tort is warranted.").

69. *Id.* at n.4 (defining "embracery as '[t]he crime of attempting to influence a jury corruptly to one side or the other.'" (quoting BLACK'S LAW DICTIONARY 522 (6th ed. 1990) (internal quotation marks omitted)).

through no fault of their own, has lost access to relevant evidence.[70] The court noted:

> We share Ortega's concern that, when spoliation occurs, there must be adequate measures to ensure that it does not improperly impair a litigant's rights, but we disagree that the creation of an independent tort is warranted. It is simpler, more practical, and more logical to rectify any improper conduct within the context of the lawsuit in which it is relevant. Indeed, evolving remedies, sanctions and procedures for evidence spoliation are available under Texas jurisprudence.... As with any discovery abuse or evidentiary issue, there is no one remedy that is appropriate for every incidence of spoliation; the trial court must respond appropriately based upon the particular facts of each individual case.[71]

In *Trevino*, the court foreclosed the only primarily compensatory collateral proceeding.[72] The remaining three collateral proceedings are primarily punitive and can have little compensatory value for the innocent party.[73] Thus, the primary concern for the imposition of a discovery sanction or spoliation remedy in the underlying suit is the ability of the trial court to respond appropriately to compensate the non-spoliator.[74] Because the purpose of spoliation law should shape its form and inform its application, the recommendations in this Article are based on how to better accomplish this primary goal.

IV. THE HISTORICAL DEVELOPMENT OF TEXAS'S SPOLIATION LAW

The evolution of Texas's spoliation law is unique when compared with other jurisdictions.[75] First, courts have recognized

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70. *Id.*

71. *Id.*

72. *See* Drew D. Dropkin, Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1811 n.50 (2002) ("[C]riminal prosecutions fail to satisfy the judicial objective of remediation because they do not reinstate adversarial balance in the primary civil suit, and second, criminal prosecutions do not provide sufficient deterrence because they are almost never feasible in light of the scarcity of prosecutorial resources.").

73. *Trevino*, 969 S.W.2d at 953.

74. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003) ("A trial judge should have discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available.").

75. *See* MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL

two rules that apply to the application of the spoliation presumption.[76] These two rules have been incorporated with some success into an alternative analytical framework for considering whether to apply a spoliation presumption.[77] Second, courts have submitted widely varying and inconsistent spoliation instructions to juries, yet have provided little to no analysis of how a proper spoliation instruction should be framed.[78] To understand how and why Texas's spoliation law has diverged from spoliation law in other jurisdictions, it is necessary to review significant developments in the case law.

Precedent from the Texas Supreme Court on spoliation has been sparse. One of the earliest, if not the earliest, cases in which the Texas Supreme Court recognized a spoliation rule was *Cheatham v. Riddle*.[79] The court adopted the principle that "[e]verything is to be presumed *in odium spoliatoris*" (i.e., all things are presumed against a wrongdoer) when it permitted a party to introduce secondary evidence of the contents of a bill of sale that the opposing party took out of the country.[80] By the late 1800s, the court recognized spoliation as a circumstance that a jury could consider in weighing the evidence and rendering a verdict.[81] The court did not focus on spoliation again until the end of the twentieth century.[82]

LITIGATION 38–39 (David A. Bell ed., 2nd ed. 2006) (describing Texas's "two general rules applying to presumptions" as an "alternative approach" to applying the adverse inference).

76. *Id.* The two rules can be summarized as (1) the intentional destruction of relevant evidence raises a presumption that the destroyed evidence would have been harmful to the spoliator; and (2) failure to produce evidence under a party's control raises the presumption that if produced, the evidence would operate against him. H. E. Butt Grocery v. Bruner, 530 S.W.2d 340, 343 (Tex. Civ. App.—Waco 1975, writ dism'd).

77. The analytical framework is derived from *Trevino v. Ortega*, 969 S.W.2d 950, 954 (Tex. 1998) (Baker, J., concurring). MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 38–39 (David A. Bell ed., 2nd ed. 2006).

78. *Id.*

79. Cheatham v. Riddle, 8 Tex. 162 (1852).

80. *Id.* at 167 (citing McReynolds v. McCord, 6 Watts 288, 290 (Pa. 1837)).

81. Curtis & Co. Mfg. v. Douglass, 79 Tex. 167, 15 S.W. 154, 155 (1890) ("[The evidence] was not preserved, so that . . . [it] might be exhibited. That this was not done was a circumstance to be considered by the jury."); Underwood v. Coolgrove, 59 Tex. 164, 170 (1883) ("It is possible, too, that the jury, had the issue been submitted to them, might have found that the appellant had, upon a view of the whole case, failed to sustain his plea of limitation.").

82. It was only until the end of the century when the Texas Supreme Court again

Consequently, much of the development of spoliation law in Texas occurred in the courts of appeals.[83] In *H. E. Butt Grocery Co. v. Bruner*,[84] which is considered a seminal case in Texas spoliation law,[85] the Tenth Court of Appeals outlined what has become the most widely accepted articulation of Texas's spoliation presumption: "[T]he intentional spoliation or destruction of evidence relevant to a case raises a presumption that the evidence would have been unfavorable to the cause of the spoliator."[86] The *Bruner* court also discussed a related rule: "Failure to produce evidence within a party's control raises the presumption that if produced it would operate against him, and every intendment will be in favor of the opposite party."[87] The court held that evidence proving the defendant threw out an onion stalk, which caused the plaintiff to slip and fall, gave rise to a spoliation presumption under the first rule.[88] The Tenth Court of Appeals then concluded that the spoliation presumption operated to strengthen the inferences drawn from the plaintiff's other circumstantial evidence and constituted legally sufficient evidence to support the judgment.[89] As discussed later, the use of the term "presumption"

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began discussing spoliation. *E.g.*, *Trevino*, 969 S.W.2d at 951 (declining to recognize a cause of action for spoliation of evidence); *accord* Malone v. Foster, 977 S.W.2d 562, 563 (Tex. 1998) (considering and rejecting "an independent cause of action for intentional or negligent spoliation of evidence by parties to litigation").

83. *See* 1 McCormick & Ray, *Texas Evidence* § 103, at 141–42 (2d ed. 1956) (citing cases applying a presumption based on the destruction or suppression of writings, written instruments, and physical evidence).

84. H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340 (Tex. Civ. App.—Waco 1975, writ dism'd).

85. Steve E. Couch, *Spoliation of Evidence: Is One Man's Trashing Another Man's Treasure*, 62 TEX. B.J. 242, 244 (1999) ("The seminal case under the intentional destruction of evidence rule is *H. E. Butt Grocery Co. v. Bruner*.").

86. *Bruner*, 530 S.W.2d at 343–44 (citing 1 McCormick & Ray, *Texas Evidence* § 103, at 141–42 (2d ed. 1956)).

87. *Id.* at 343.

88. *Id.* at 343–44 (holding that the intentional destruction of relevant evidence raises a presumption the evidence would be unfavorable to the spoliator).

89. Justice Hall disagreed with the majority's application of the spoliation presumption. *Id.* at 347–48 (Hall, J., dissenting). He believed that the spoliation presumption did not add probative force to the inferences from the plaintiff's other circumstantial evidence because such a presumption did not arise until after the plaintiff made out her prima facie case. *Id.* Justice Hall's dissent raised one issue that courts throughout the country have struggled to answer (and that this Article attempts to resolve in Part V): What effect does the spoliation presumption have in supporting a judgment? *Id.*

and the attribution of probative force of the presumption would create confusion in subsequent cases.[90]

Following *Bruner*, the courts of appeals began applying the two rules in analyzing the appropriateness of a trial court's grant or denial of spoliation remedies.[91] For example, in *Brewer v. Dowling*, the Second Court of Appeals relied on *Bruner* in stating that these "[t]wo general rules apply to presumptions that arise from the nonproduction of evidence."[92] *Brewer*, however, was one the first cases to apply the two rules when analyzing the propriety of granting a jury instruction.[93] Thus, the two rules discussed in *Bruner* became one framework for courts of appeals' analyses of whether a trial court abused its discretion in granting or denying a spoliation instruction.[94]

Attempting to bring additional clarity to Texas spoliation law, Justice Baker delivered a concurring opinion in *Trevino v. Ortega*.[95] Justice Baker's concurrence addressed the concern that in light of the majority's refusal to recognize a spoliation tort, there would be insufficient remedies available to compensate nonspoliating parties when relevant evidence had been deliberately destroyed.[96] In addition to discussing the available spoliation remedies, Justice Baker outlined an analytical framework for disposing of spoliation issues for all spoliation remedies, including spoliation instructions.[97]

Because Justice Baker's framework has been explicitly adopted in total by almost all of the courts of appeals,[98] and implicitly

90. *See infra* Part V.C.1. Most federal cases use the adverse inference instead of the presumption when describing the result of spoliation. Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH. TELECOMM. & TECH. L. REV. 1, 57 (2011).

91. Brewer v. Dowling, 862 S.W.2d 156 (Tex. App.—Fort Worth 1993, no writ).

92. *Id.* at 159.

93. *Id.* at 160 (mentioning the two rules and noting that only one other Texas court had considered the issue).

94. *Id.* (basing its analysis on the rules proposed by the court in *Bruner*).

95. Trevino v. Ortega, 969 S.W.2d 950, 954 (Tex. 1998) (Baker, J., concurring) ("Evidence spoliation is a serious problem that can have a devastating effect on the administration of justice. Accordingly, I believe it appropriate to review what remedies are available to Texas trial courts to protect nonspoliating litigants and when the remedies should be applied.").

96. *Id.* (listing the remedies for spoliation of evidence, including punishing the spoliator for destruction, in order to deter future spoliators).

97. *Id.* at 356–57.

98. *See* Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *5

adopted in part by the Texas Supreme Court,[99] it must be discussed at length. The first inquiry in Justice Baker's analytical framework asks whether a party has the duty to preserve evidence.[100] The duty to preserve evidence in one's possession arises when a person has notice of actual or reasonably foreseeable litigation.[101] In determining whether litigation is reasonably foreseeable, Justice Baker recommended adopting the test from *National Tank v. Brotherton*[102] to determine reasonably foreseeable litigation in the investigative privilege context.[103] The duty inquiry questions whether the allegedly spoliated evidence was likely to be relevant.[104] The duty, Justice Baker suggested, is "to preserve what [the party] knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be

(Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.) ("The trial court enjoys discretion to fashion an appropriate remedy for negligent spoliation."); Clark v. Randalls Food, 317 S.W.3d 351, 356 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (describing the standard for breach as one of reasonableness that places the risk of loss on the party in possession of the evidence, and holding that Randalls Food failed to exercise reasonable care); Buckeye Ret. Co. v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.) (following Justice Baker's framework); McMillin v. State Farm Lloyds, 180 S.W.3d 183, 199 (Tex. App.—Austin 2005, pet. denied) ("A spoliation instruction tells the jury that, if a party has control over a piece of evidence and fails to retain or produce it, the jury should presume that the evidence would have been unfavorable to the party who controlled the evidence."); Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 667–68 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("If the trial court, after hearing such testimony, determines that the accused party had a duty to preserve evidence, which it breached either negligently or intentionally, and that the loss of the evidence will prejudice the other party, the court then, in the exercise of its discretion, must decide whether the submission of a spoliation instruction is a proper remedy.").

99. *See* Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003) (adopting what was essentially Justice Baker's concept of duty).

100. *Trevino*, 969 S.W.2d at 955 ("Upon a spoliation complaint, the threshold question should be whether the alleged spoliator was under any obligation to preserve evidence. A party may have a statutory, regulatory, or ethical duty to preserve evidence.").

101. *Id.* (discussing various jurisdictions upholding a common law duty to preserve evidence relevant to potential or actual litigation).

102. Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993).

103. *Trevino*, 969 S.W.2d at 956 ("[T]o determine when a party reasonably anticipates or foresees litigation, trial courts must look at the totality of the circumstances and decide whether a reasonable person in the party's position would have anticipated litigation and whether the party actually did anticipate litigation." (citing *Brotherton*, 851 S.W.2d at 204)).

104. *Id.* at 957 ("[T]he focus is on whether a party is on notice that a particular piece of evidence is relevant.").

requested during discovery, [or] is the subject of a pending discovery sanction."[105]

The second inquiry looks to whether the party in possession of allegedly spoliated evidence destroyed the evidence or rendered relevant evidence unavailable.[106] According to Justice Baker, a party breaches the duty to preserve relevant evidence if it fails to exercise reasonable care in preserving that evidence.[107] Justice Baker considered a party's culpability—fault, recklessness, or fraudulent intent—relevant to the issue of breach.[108] He contended that spoliation remedies should be available for either negligent or intentional destruction of evidence.[109]

The third component of Justice Baker's analytical framework considers prejudice toward the nonspoliating party.[110] In determining the severity of prejudice, Justice Baker recommended that courts consider the destroyed evidence's degree of relevance and the availability of cumulative evidence.[111] The important considerations in determining prejudice include whether other cumulative evidence exists to take the place of the spoliated evidence and "whether the destroyed evidence supports key issues in the case."[112] If other competent evidence exists to prove the

105. *Id.* at 956 (alteration in original) (quoting Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)) (internal quotation marks omitted).

106. *Id.* at 957 ("[C]ourts have held parties accountable for either intentional or negligent spoliation.").

107. *Id.* ("Parties need not take extraordinary measures to preserve evidence; however, a party should exercise reasonable care in preserving evidence.").

108. *Id.* (citing to various examples of cases allowing sanctions for spoliation).

109. *Id.* ("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.").

110. *Id.* at 957–58 ("One of the key reasons for allowing remedies for spoliation is that the spoliation has prejudiced the nonspoliating party.").

111. *Id.* at 958 ("Most importantly, courts should consider the destroyed evidence's relevancy.... The more relevant the destroyed evidence, the more harm the nonspoliating party will suffer from its destruction.").

112. *Id.* at 958 (citing Battocchi v. Wash. Hosp. Ctr., 581 A.2d 759, 767 (D.C. Ct. App. 1990)); *accord* Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994) ("We believe the key considerations in determining whether such a sanction is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future."). *See generally* Dillon v. Nissan Motor Co., 986 F.2d 263, 267 (8th Cir. 1993) (announcing that before sanctioning an attorney for destruction of evidence, there must be

same facts that the spoliated evidence would prove, the prejudice to the nonspoliating party is minimal.[113]

Despite the opportunity to do so, the Texas Supreme Court has yet to expressly adopt Justice Baker's framework. Five years after *Trevino v. Ortega*, the court decided *Wal-Mart Stores, Inc. v. Johnson*,[114] where it held that a trial court abused its discretion in granting a spoliation instruction.[115] Because it is the most recent supreme court examination of the propriety of granting a spoliation instruction, a thorough review of the case is required.

Johnson was injured while shopping at Wal-Mart when a decorative reindeer fell from a shelf onto his head.[116] Although Johnson told a Wal-Mart employee that he was not hurt, the employee conducted an investigation in which she took notes, photos, and a statement from Johnson.[117] Johnson then sued. During discovery, Johnson requested that Wal-Mart produce the reindeer that fell on his head, but Wal-Mart had previously discarded it.[118] At trial, the parties offered conflicting testimony of the size and weight of the reindeer. The trial court granted Johnson's request for a spoliation instruction, and after Johnson prevailed at trial, Wal-Mart appealed.[119]

The supreme court began its analysis by describing the variety of ways in which evidence may be made unavailable for trial, and the problems this unavailability poses for the litigants.[120] It recognized that trial courts have broad discretion to craft an appropriate remedy "to restore the parties to a rough approximation of their positions if all [the] evidence [was] available."[121] The court noted that the spoliation instruction is a common remedy for the destruction of evidence and that the

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a finding that the destroyed evidence prejudiced the other party).

113. *Trevino*, 969 S.W.2d at 958 ("Obviously, the more evidence there is and the less important the issue involved is, the less prejudice the nonspoliating party will suffer.").

114. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718 (Tex. 2003).

115. *Id.* at 719.

116. *Id.* at 720.

117. *Id.*

118. *Id.*

119. *Id.* at 720–21.

120. *Id.* at 721.

121. *Id.* The court focused on the remedial or compensatory goal of a spoliation instruction. *Id.* at 724. "Because the instruction itself is given to compensate for the absence of evidence that a party had a duty to preserve, its very purpose is to 'nudge' or 'tilt' the jury." *Id.*

Texas courts of appeals have generally permitted such an instruction under two circumstances: "[(1)] the deliberate destruction of relevant evidence and [(2)] the failure of a party to produce relevant evidence or to explain its nonproduction."[122] Apparently, the trial court submitted the instruction based on the second circumstance.[123] The supreme court, however, dismissed the parties' arguments regarding its application and disposed of the case based on Wal-Mart's lack of a duty to preserve the reindeer.[124]

Like Justice Baker's concurrence in *Trevino*, the *Johnson* court explained that the initial inquiry for any complaint of discovery abuse is the issue of duty.[125] "[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."[126] The supreme court held that "nothing about the investigation or the circumstances surrounding the accident would have put Wal-Mart on notice that there was a substantial chance that the Johnsons would pursue a claim."[127] Because the supreme court held that Wal-Mart did not have the duty to preserve the reindeer, it concluded that the trial court abused its discretion in submitting the spoliation instruction.[128]

The supreme court in *Johnson* neither expressly endorsed Justice Baker's concurring opinion, nor cited it as relevant authority. However, the court appeared to endorse a portion of Justice Baker's analytical framework[129] when it offered an

122. *Id.* at 721. This is the Texas Supreme Court's articulation of the two "rules" under Texas common law from which the spoliation presumption can arise. *See* Brewer v. Dowling, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied) (recognizing that the use of the spoliation instruction is appropriate when evidence has been deliberately destroyed because it was unfavorable to the party's cause); *see also* Watson v. Brazos Elec. Power Coop., Inc., 918 S.W.2d 639, 643 (Tex. App.—Waco 1996, writ denied) (stating that the second situation arises because the party controlling said evidence cannot explain its nonproduction).

123. *Johnson*, 106 S.W.3d at 722.

124. *Id.*

125. *Id.* at 721.

126. *Id.* at 722.

127. *Id.*

128. *Id.* at 723.

129. *See* Trevino v. Ortega, 969 S.W.2d 950, 954–55 (Tex. 1998) (Baker, J., concurring) (framing the issue as necessitating a consideration of "(1) whether there was a duty to preserve evidence; (2) whether the alleged spoliator either negligently or

explanation of duty that mirrored Justice Baker's. The court described the duty as the obligation to preserve evidence "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."[130]

It is equally important to note what the *Johnson* court did not decide. The court did not reach the issue of whether a breach of duty requires a culpable mental state, negligence, or intentional nonproduction or destruction of evidence.[131] Furthermore, the court did not decide whether a showing of prejudice is required to impose a spoliation remedy, who has the burden to prove prejudice, or how to show prejudice when evidence is destroyed.[132] Finally, it did not approve or disapprove of the wording of the instruction, despite finding the court erred in submitting the instruction.[133]

After *Johnson*, Texas trial and appellate courts still have relatively little guidance regarding when to submit a spoliation instruction and how to craft a correct spoliation instruction.[134] It is therefore unsurprising that the courts of appeals have differed in their analyses of spoliation issues.[135] Many courts of appeals have relied heavily on Justice Baker's concurrence.[136] Others have continued to rely on the two rules relating to the adverse presumption raised by the nonproduction of evidence.[137] This Article analyzes the current state of Texas law in Part V.

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intentionally spoliated evidence; and (3) whether the spoliation prejudiced the non-spoliator's ability to present its case or defense").

130. *Johnson*, 106 S.W.3d at 722.

131. *Id.* ("[W]e need not decide whether a spoliation instruction is justified when evidence is unintentionally lost or destroyed, or if it is, what standard is proper. Rather we begin and end our analysis here with the issue of duty . . . .").

132. *Id.*

133. *Id.* at 723.

134. *Id.* at 721; *Trevino*, 969 S.W.2d at 954 (determining when a spoliation presumption instruction is appropriate).

135. *Trevino*, 969 S.W.2d at 954 (analyzing the spoliation at issue under both *Trevino* and *Brookshire Bros.*).

136. *Id.* (relying on *Trevino* when confronted with a spoliation issue).

137. *See, e.g.*, Brewer v. Dowling, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied) (relying on the rules relating to the adverse presumption associated with the nonproduction of evidence).

V. THE CURRENT STATE OF TEXAS'S SPOLIATION LAW

Due to the lack of certainty in the analytical framework for addressing spoliation issues, it is necessary to analyze the current status of Texas law. In discussing Texas spoliation law, reviewing inconsistencies in the law helps clarify the current state of Texas spoliation law by answering the following three questions: First, what is the spoliation presumption? Second, when does the spoliation presumption arise? Finally, how is the spoliation presumption applied and reviewed?

The distinction between a presumption and inference is important in analyzing spoliation issues. Although often used interchangeably,[138] the terms have different meanings. Texas courts treat presumptions as procedural rules that require the jury to assume a fact if unrebutted.[139] However, if evidence is presented that rebuts the presumed fact, the presumption disappears, but the evidence giving rise to the presumption remains and may still be considered by the fact finder.[140] An inference is a conclusion the jury may draw and may be considered by the jury in weighing the evidence.[141] A rebutted presumption vanishes and cannot support a judgment, but a reasonable inference may legally support a judgment.[142] The distinction is important for purposes of submitting a spoliation instruction to the

138. Strain v. Martin, 183 S.W.2d 246, 247 (Tex. Civ. App.—Eastland 1944, no writ) ("The words *presumption* and *inference* are often used interchangeably as meaning the same thing."); *see* Ann Lents, Comment, *Presumptions in Texas: A Study in Irrational Jury Control*, 52 TEX. L. REV. 1329, 1331–34 (1974) (commenting on the mischaracterization of inferences as presumptions).

139. Sudduth v. Commonwealth Cnty. Mut. Ins. Co., 454 S.W.2d 196, 198 (Tex. 1970) ("A true presumption is simply a rule of law requiring the jury to reach a particular conclusion in the absence of evidence to the contrary. The presumption does disappear, therefore, when evidence to the contrary is introduced, but the facts upon which the presumption is based remain in evidence and will support any inferences that may properly be drawn therefrom." (citation omitted)).

140. Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993) (noting that the effect of a presumption is to shift the burden of production, and once that burden is discharged the presumption disappears, but "the facts upon which the presumption was based remain in evidence and will support any inferences that may be reasonably drawn from them"); Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 360 (Tex. 1971) (holding a presumption of course and scope rebutted and no other evidence to support the driver was in the course and scope of employment at the time of the accident).

141. *Sudduth*, 454 S.W.2d at 198; *see Robertson*, 468 S.W.2d 354, 358 (discussing the application of a presumption within the context of a car accident).

142. *Strain*, 183 S.W.2d at 247.

jury. The general Texas rule is that trial courts do not instruct juries on presumptions, but they may instruct juries on inferences.[143] Finally, a presumption mandates that a certain fact is established and shifts the burden of production to another party to rebut the presumed fact.[144] Conversely, an inference does not shift the burden of production; it merely permits a fact finder to draw reasonable conclusions from other evidence. This Article turns first to the murky issue of the true identity of the spoliation presumption; is it a true presumption or merely an inference?

A. *What Is the Spoliation Presumption?*

"It seems safe to say that no member of the family of legal terms has been more variously defined or loosely used than the term 'presumption.'"[145] The classification scheme provided by Professors Charles T. McCormick and Roy R. Ray in their treatise on Texas evidence is helpful in understanding presumptions and Texas spoliation cases.[146] At its most basic, "a presumption is a rule which requires the assumption of the existence of one fact from the existence of another fact."[147] It differs from an inference, which is a logical conclusion that can be drawn from a set of circumstances, but the conclusion does not necessarily follow.[148]

McCormick and Ray distinguish presumptions from assumptions, often labeled "conclusive presumptions."[149] Assumptions are substantive rules of law (e.g., all persons are presumed to know the law) rather than rules of evidence or procedure.[150] "True presumptions," McCormick and Ray explain, differ from conclusive presumptions in that the former may be rebutted by the production of evidence that would permit a jury to

143. Tex. A&M Univ. v. Chambers, 31 S.W.3d 780, 783–84 (Tex. App.—Austin 2000, pet. denied) ("A presumption 'may not properly be the subject of an instruction to the jury.'" (quoting Armstrong v. W. Tex. Rig Co. 339 S.W.2d 69, 74 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.))).

144. *Sudduth*, 454 S.W.2d at 198.

145. 1 McCormick & Ray, *Texas Evidence* § 103, at 56 (2d ed. 1956).

146. *Id.*

147. *Id.* at 57.

148. *Id.* at 57–59.

149. *Id.*

150. *Id.* at 60 ("For example, the seal was regarded as conclusive evidence of consideration. A child born in lawful wedlock was conclusively presumed to be legitimate." (footnotes omitted)).

find the opposite of the presumed fact.[151] In other words, a true presumption shifts the burden of production to the party against whom the fact is presumed.[152] Once the party meets that burden, the presumption vanishes, and the burden of production again resides with the proponent.[153]

An example of how a presumption operates is illustrated by the presumption of delivery of a letter that arises from evidence of mailing.[154] The evidence of mailing shifts the burden of production to the other side to offer evidence of non-delivery to rebut the presumed fact of delivery. If no rebuttal evidence is offered, delivery becomes an established fact of the case. If rebuttal evidence of non-delivery is offered, however, the presumption vanishes. The trier of fact is permitted to weigh the evidence surrounding mailing and delivery and draw any reasonable inferences.[155] While the evidence surrounding mailing may often raise an inference of delivery,[156] sometimes the evidence from which the presumption arises is insufficient to support an inference of the presumed fact.[157]

Presumptions are based on a variety of policies including procedural convenience at trial, evidentiary access, social policy,

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151. *Id.* at 61.

152. *Id.* at 60.

153. *Id.* at 61. This is consistent with Professor J.B. Thayer's bubble-bursting conception of presumptions that federal courts use. *Id.*; *see* FED. R. EVID. 301, advisory committee's note (House Report No. 93–650) (stating the purpose of the amendment to the rule was "to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact"); *see also* Pennzoil Co. v. Fed. Energy Regulatory Comm'n, 789 F.2d 1128, 1136–37 (5th Cir. 1997) (applying the bubble-bursting concept); United States v. Hare, 873 F.2d 796, 798 (5th Cir. 1986) ("However, that presumption is not a mere 'bursting bubble' that totally disappears from the judge's consideration after the defendant comes forward with evidence.").

154. Sudduth v. Commonwealth Cnty. Mut. Ins. Co., 454 S.W.2d 196, 198 (Tex. 1970).

155. *Id. But see* Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 358 (Tex. 1971) (discussing a situation in which a reasonable inference cannot be drawn).

156. *See Sudduth*, 454 S.W.2d at 198 (presuming mail was sent when affirmative proof was attached).

157. *Robertson*, 468 S.W.2d at 358 (stating that once a presumption vanished, remaining evidence was insufficient to support inference of course and scope of employment).

and probability of the existence of a fact.[158] Some commentators have suggested that not only the burden of production but the burden of persuasion should shift depending on the underlying policy.[159] Texas courts, however, treat all presumptions the same—they never shift the burden of persuasion.[160] "[A] presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts."[161]

Texas courts generally have treated the spoliation presumption as a true presumption.[162] The underlying facts of the spoliation give rise to the presumed fact[163] that the unavailable evidence would have been unfavorable to the spoliator.[164] This Article uses the word "unfavorable" in the discussion of the presumed fact generically; the unfavorable nature of the missing evidence is often tied to a specific issue or fact depending on the circumstances. For example, in some cases, the unavailable evidence may establish notice, in others negligence.[165] If a party establishes that an opponent spoliated evidence, then the burden of production shifts to the spoliator to produce evidence from which the jury could find that the spoliated evidence was not unfavorable to the

158. Ann Lents, Comment, *Presumptions in Texas: A Study in Irrational Jury Control*, 52 TEX. L. REV. 1329, 1343 (1974).

159. Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 910 (1931); J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 185 (1947) ("[P]resumptions are created for different reasons and might logically enough be tough or tender according to the nature and force of those reasons.")

160. 1 McCormick & Ray, *Texas Evidence* § 103, at 61 (2d ed. 1956).

161. Brewer v. Dowling, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied); Combined Am. Ins. Co. v. Blanton, 163 Tex. 225, 353 S.W.2d 847, 849 (1962) (quoting BURR W. JONES, JONES ON EVIDENCE § 32 (2d ed. 1926)).

162. *See, e.g.*, *Saenz*, 873 S.W.2d at 359 (stating the effect of presumptions generally is to shift the burden of producing evidence to the party the presumption works against).

163. *See* Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003) (noting the trial court gave a spoliation instruction based on Wal-Mart's perceived misconduct).

164. *See, e.g.*, *id.* (recognizing that it is presumed that the evidence was destroyed because it would have been unfavorable (citing *Brewer*, 862 S.W.2d at 159)).

165. Clark v. Randalls Food, 317 S.W.3d 351, 356–58 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (missing video would purport to show notice of liquid on floor); Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 228 (Tex. App.—Amarillo 2003, no pet.) (demonstrating lost records would show fraudulent nursing notes).

nonspoliating party.[166] For example, during trial in *Brewer v. Dowling* (the fetal monitor strip case discussed in Part I), other documentary evidence was admitted, and hospital personnel testified to what the contents of the fetal monitor strip would have revealed.[167] The Second Court of Appeals affirmed the trial court's denial of the plaintiff's request for a spoliation instruction, holding that evidence was presented that rebutted the alleged unfavorable contents of the missing monitor strip.[168] Similarly, in *Wal-Mart Stores v. Middleton*,[169] the Fourth Court of Appeals affirmed a trial court's denial of a request for a spoliation instruction because Wal-Mart employees testified as to what the allegedly spoliated photographs would have shown and rebutted the presumption that the photographs would be unfavorable.[170]

In *Watson v. Brazos Electrical Power Cooperative, Inc.*,[171] a cross-arm of one of Brazos's electrical poles "gave way," allowing a power line to dangle onto Watson's property, which started a fire, and ultimately ravaged 300 acres of Watson's ranchland.[172] Watson alleged that Brazos was negligent in failing to conduct reasonable inspections of its poles because the cross-arm had been compromised due to several woodpecker holes.[173] At trial, Brazos failed to produce the cross-arm, but an employee testified that he saw no holes in the cross-arm.[174] Watson requested a spoliation instruction, which the trial court denied.[175] The Tenth Court of Appeals reversed, holding that Brazos's testimonial

166. *See Brewer*, 862 S.W.2d at 159 (stating that no presumption that the evidence lost was unfavorable arose because the testimony introduced related what the lost evidence would have shown).

167. *Id.*

168. *Brewer*, 862 S.W.2d at 160. The court reviewed both bases for the common law spoliation presumption: failure to produce evidence within a party's control and deliberate destruction of evidence. *Id.* Not only did it hold that there was evidence to rebut the presumption that the missing evidence would be unfavorable, but it also held that the facts of the case did not give rise to the presumption because there was no evidence that the appellees intentionally or accidentally destroyed the fetal monitor strip. *Id.*

169. Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468 (Tex. App.—San Antonio 1998, pet. denied).

170. *Id.* at 470.

171. Watson v. Brazos Elec. Power Coop., Inc., 918 S.W.2d 639 (Tex. App.—Waco 1996, no writ).

172. *Id.* at 642.

173. *Id.* at 641.

174. *Id.* at 643.

175. *Id.* at 642–43.

evidence that there were no holes in the cross-arm, was "not the type of rebuttal evidence that precludes the application of the spoliation presumption."[176] The court reasoned that the employee's testimony lacked sufficient trustworthiness, unlike the hospital charts and notations in *Brewer* that were made contemporaneously with the allegedly destroyed evidence.[177]

The *Middleton* court was probably correct in noting that the "*Watson* court may have been overreaching in its attempt to distinguish *Brewer*."[178] The type of evidence—testimonial, documentary, or physical—ordinarily is not relevant to determining whether a party against whom the presumption applies has met its burden of production.[179] Although testimonial evidence stating that allegedly spoliated evidence was not unfavorable to the testifying party is quite self-serving and oftentimes predictably unreliable, a party's testimony may be the only evidence the party has to rebut the unfavorable presumption and is sufficient to rebut the spoliation presumption.[180]

The preceding analysis demonstrates that the spoliation presumption is indeed rebuttable,[181] and vanishes if the spoliator presents evidence from which a jury could find that the spoliated evidence was not harmful to the spoliator.[182] However, the fact

176. *Id.* at 643.

177. *Id.* at 642.

178. Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 471 (Tex. App.—San Antonio 1998, pet. denied).

179. *Cf.* Brewer v. Dowling, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied) ("[T]he failure of the opposing party to rebut the harmful evidence within its control *raises a presumption* that the unpresented evidence would also be unfavorable to the nonproducing party." (citing H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dism'd))).

180. Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 358 (Tex. 1971) (holding evidence to rebut the presumption of course and scope of employment need not meet the highest standard); 1 McCormick & Ray, *Texas Evidence* § 103, at 60 (2d ed. 1956). *See generally* Ann Lents, Comment, *Presumptions In Texas: A Study In Irrational Jury Control*, 52 TEX. L. REV. 1329 (1974) (examining the state of presumptions in Texas).

181. *See, e.g.*, *Brewer*, 862 S.W.2d at 159 (allowing the presumption to be rebutted by the production of evidence of what the nonproduced evidence would have shown).

182. More recent cases have continued to describe the spoliation presumption as a true presumption, but have not applied it as such. *See* Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *7–8 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.) (describing the presumption as vanishing when a party introduces evidence of the contents of the spoliated evidence); Felix v. Gonzalez, 87 S.W.3d 574, 580–81 (Tex. App.—San Antonio 2002, pet. denied) ("Because there was no evidence of intentional spoliation and because Felix testified as to the circumstances of the accident, the trial

the spoliation presumption is rebutted and vanishes merely removes the burden of production from the spoliator. Without the benefit of a presumption, the non-spoliator must rely on the circumstances surrounding the spoliation to create a reasonable inference the evidence is harmful to the spoliator or present some additional evidence that the unavailable evidence is harmful to the spoliator.[183] Curiously, several Texas cases have held that the spoliation presumption may be rebutted not only by proof that the unavailable evidence would not be unfavorable to the spoliator (the presumed fact), but also by the spoliator demonstrating that the evidence was not destroyed or made unavailable with "fraudulent intent or purpose."[184] These cases conflict with the prior cases discussing the operation of the presumption as shifting only the burden of production with regard to the presumed fact (that the spoliated evidence was unfavorable to the spoliator), rather than the underlying facts of spoliation.[185] Although lack of fraudulent intent or purpose does not rebut the presumption, it

court abused its discretion in submitting a spoliation instruction to the jury.").

183. *See Robertson*, 468 S.W.2d at 359 (holding that once rebuttal evidence was introduced, the presumption vanished and the party with the burden of persuasion must produce evidence to support its claims); Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 228 (Tex. App.—Amarillo 2003, no pet.) (noting the conflicting testimony concerning the nursing records, but nevertheless affirming the trial court's discretion to submit a spoliation instruction). Although the *Brewer* and *Middleton* courts concluded that the non-spoliator was not entitled to a jury instruction because the spoliation presumption had been rebutted, a different trial court, in its discretion, could have concluded that the nonspoliating parties in those cases should receive a jury instruction because the evidence of spoliation gave rise to an inference that the spoliated evidence would have been harmful to the spoliating parties. *See* San Antonio Press, Inc. v. Custom Bilt Mach., 852 S.W.2d 64, 67 (Tex. App.—San Antonio 1993, no writ) (indicating that choice of sanctions is a matter for the trial court's discretion, and an appellate court will not disturb the trial court's resolution of conflicting testimony in a sanctions dispute).

184. *E.g.*, Ordonez v. M.W. McCurdy & Co., 984 S.W.2d 264, 273 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("[T]he alleged spoliator may rebut the presumption by showing that the evidence in question was not destroyed with fraudulent intent or purpose." (citing H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dism'd))); *see also* Buckeye Ret. Co., v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.) ("The presumption may be rebutted by a showing that the evidence in question was not destroyed with a fraudulent purpose or intent.").

185. *Compare Ordonez*, 984 S.W.2d at 273 (allowing the presumption to be rebutted if the alleged spoliator shows the evidence was not destroyed fraudulently (citing *Bruner*, 530 S.W.2d at 344)), *with Brewer*, 862 S.W.2d at 159 (allowing the presumption to be rebutted if the alleged spoliator demonstrates the evidence would not have been harmful to the alleged spoliator).

may be important in determining the sanction or remedy available for spoliation. Likewise, the cases discussing "fraudulent intent or purpose" as a mode of rebuttal seem to conflict with Justice Baker's suggestion that even negligent spoliation may support a spoliation presumption.[186] Although Justice Baker states that a spoliator can defend against an assertion of negligent or intentional destruction by providing other explanations for the destruction, it is clear that he believes a spoliation presumption may arise from spoliation caused by negligence as well as spoliation conceived with fraudulent intent or purpose.[187]

Moreover, the fraudulent intent or purpose consideration originated in the context of an application of the best-evidence rule in Chief Justice Hall's dissent in *Massie v. Hutcheson*.[188] Chief Justice Hall discussed a presumption that may be drawn from this destruction.[189] This presumption, contained within the best-evidence rule,[190] states that if a party voluntarily destroys evidence, then it is presumed that the party did so with fraudulent intent or purpose. Importing the best-evidence rule presumption of fraudulent intent or purpose into the spoliation context contributes to the lack of clarity in spoliation law. The best-evidence rule presumption would be helpful in the spoliation context only to the extent that the fact finder is attempting to ascertain the facts underlying the alleged spoliation of evidence (i.e., whether a party destroyed the evidence in bad faith). However, the spoliation presumption assumes that if a party

186. Trevino v. Ortega, 969 S.W.2d 950, 957 (Tex. 1998) (Baker, J., concurring) (determining that a spoliation presumption may arise from both negligent and intentional spoliation based on prejudice); *see Buckeye Ret.*, 239 S.W.3d at 401 (discussing lack of fraudulent intent and purpose as rebuttal to the spoliation presumption, and relying on Justice Baker's framework in analyzing the case).

187. *Trevino*, 969 S.W.2d at 957; *Buckeye Ret.*, 239 S.W.3d at 401.

188. Massie v. Hutcheson, 296 S.W. 939 (Tex. Civ. App.—Amarillo 1927, writ ref'd). *Compare id.* at 945 (Hall, C.J., dissenting) (arguing that secondary evidence was admissible only if the deed had been lost or destroyed, and, if the evidence showed that the deed had been intentionally destroyed, the proponent of the secondary evidence was required to present evidence "to rebut all inferences of a fraudulent intent or purpose arising from the act of destroying the instrument under the circumstances"), *with* TEX. R. EVID. 1004 (articulating that "[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible" if the enumerated provisions are met).

189. *Massie*, 296 S.W. at 945.

190. *See* TEX. R. EVID. 1004 (providing scenarios where "other evidence" is permitted in place of the original evidence).

destroys evidence in bad faith (or with fraudulent intent or purpose), then it is presumed that the evidence would have been unfavorable to that party.

Rather than view "lack of fraudulent intent or purpose" as a rebuttal to the spoliation presumption, a more appropriate analysis would be to examine the spoliator's intent in the initial evaluation of the underlying spoliation facts (such as whether the spoliator withheld or destroyed the evidence in bad faith). Applying Justice Baker's framework, the intent of the spoliating party is an important factor in determining breach and prejudice. "Generally, when a party has destroyed evidence intentionally or in bad faith, the evidence was relevant and harmful to the spoliating party's case."[191] According to Baker, absent contrary evidence, the court could find the spoliated evidence relevant just based on the bad-faith destruction of the evidence.[192] Of course the intent of the spoliator must also be taken into consideration when crafting a remedy for the spoliation.[193] This Article examines the culpability of the spoliator in more detail as jury instructions are discussed in Part VI.

Based on a review of Texas case law, it appears the spoliation presumption is easier to define than to apply. Under Texas law, spoliation gives rise to a presumption that the spoliated evidence would have been unfavorable to the spoliator.[194] The spoliation presumption is properly classified as a true presumption that shifts the burden of production to the spoliator to present evidence that the spoliated evidence was not unfavorable to it.[195] Some courts have stated that the spoliation presumption may be rebutted by evidence that the spoliator did not destroy the evidence with fraudulent intent or purpose.[196] The logical implication of this proposition is that spoliation gives rise to the presumed fact that a

191. *Trevino*, 969 S.W.2d at 958.

192. *Id.*

193. *See* Cire v. Cummings, 134 S.W.3d 835, 839 (Tex. 2004) (determining that a death-penalty sanction, rather than spoliation instruction, was supported by the egregious nature of the spoliation).

194. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003).

195. *See* Brewer v. Dowling, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied) (noting that the spoliating party testified that the missing evidence was not unfavorable).

196. Buckeye Ret. Co., v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.).

party destroyed evidence with fraudulent intent or purpose. This reasoning is flawed because it mischaracterizes the nature of the presumed fact of spoliation as courts have always described it—that the evidence is unfavorable to the spoliator.[197] As noted earlier, although evidence of lack of fraudulent intent or purpose may be relevant to establishing prejudice and the sanctions available to remedy spoliation, it does not serve to rebut the spoliation presumption.[198] With this conflict in Texas case law resolved, it is appropriate to outline the current law with regard to the circumstances under which this presumption arises.

B. *Under What Circumstances Does the Spoliation Presumption Arise?*

The discussion in Part IV notes the two distinct analytical frameworks for addressing spoliation issues. The first analytical framework addresses the two rules giving rise to the spoliation presumption. The second is Justice Baker's framework analyzing duty, breach, and prejudice.[199] Can these two analytical frameworks be coherently synthesized to answer what makes out a prima facie case of spoliation? This Article takes the position that, with some reservations, Justice Baker's analytical framework provides an accurate structure for analyzing spoliation issues and, to a great extent, incorporates the two-rule approach that preceded Justice Baker's concurrence in *Trevino*.[200] Although the framework appears relatively simple, the attempt of some appellate courts to synthesize the two rules with Justice Baker's framework has resulted in some confusing descriptions of spoliation law, particularly as it relates to culpability. Justice Baker's framework assists the trial court in making its initial

197. H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dism'd).

198. Fraudulent intent or purpose may be an important factor to consider in determining prejudice under Justice Baker's framework. Trevino v. Ortega, 969 S.W.2d 950, 958–60 (Tex. 1998) (Baker, J., concurring).

199. *Id.* at 955–58.

200. *See Bruner*, 530 S.W.2d at 344 (establishing the two rules which state that the "failure of a party to testify or produce evidence creates a presumption unfavorable to such party which of itself has probative force" and "that the intentional spoliation or destruction of evidence relevant to a case raises a presumption that the evidence would have been unfavorable to the cause of the spoliator").

finding of spoliation.[201] After it makes its initial finding, culpability becomes an important consideration for the trial court in determining sanctions.[202] Confusion arises from applying the same culpability standard to both the initial finding of spoliation and the ultimate sanction awarded.

Under Justice Baker's framework, there are three components required to make a prima facie case of evidence spoliation: duty, breach, and prejudice.[203] It is only appropriate to begin, as did the supreme court in *Johnson*, with an examination of duty.

1. Duty

The duty component concerns the obligation to preserve relevant evidence in a party's possession arising after the party receives notice of a likely claim.[204] In general, a party must preserve evidence that it knows or reasonably should know is relevant to the action, is likely to be requested in discovery, or is the subject of a discovery order.[205] In addition there are also several statutes, regulations, and rules that require the preservation of documents for certain periods of time.[206] The duty component, discussed at length in *Wal-Mart Stores, Inc. v. Johnson*, is generally the most contested spoliation element, and the courts of appeals have been relatively consistent, after *Johnson*, in applying the duty rules therein.[207] Because the

201. *Trevino*, 969 S.W.2d at 955–58.

202. *See* Cire v. Cummings, 134 S.W.3d 835, 842 (Tex. 2004) (providing analysis of when death-penalty sanctions are appropriate).

203. *Trevino*, 969 S.W.2d at 955–58.

204. This test is similar to the test used in federal courts. *See, e.g.*, Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.").

205. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003); Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 357 (Tex. App.—Fort Worth 2007, pet. denied).

206. *Trevino*, 969 S.W.2d at 955 (citing statutes that create duties to maintain records).

207. *Johnson*, 106 S.W.3d at 722. It is appropriate to refer the reader to the cases applying *Johnson*'s duty principles. *See* H.E. Butt Grocery Co. v. Advance Stores Co., No. 10-10-00004-CV, 2010 WL 3036654, at *8 (Tex. App.—Waco Aug. 4, 2010, no pet.) (mem. op.) ("[O]nce [the party] was put on notice that the claim was pending, they made no efforts to preserve any potentially relevant evidence, and therefore, they breached their duty to preserve the evidence."); SDN, Ltd. v. JV Rd., L.P., No. 03-08-00230-CV, 2010 WL 1170230, at *7 (Tex. App.—Austin Mar. 24, 2010, no pet.) (mem. op.) (articulating there was no duty because the non-spoliator provided no evidence that any relevant evidence was destroyed); Clark v. Randalls Food, 317 S.W.3d 351, 356–58 (Tex. App.—Houston [1st

supreme court has not yet addressed the elements of breach and prejudice, this Article next considers for each whether the element is required and, if so, the components of each element.

2. Breach

Breach is relatively straightforward. The supreme court's holding in *Wal-Mart Stores v. Johnson* logically implicates that breach is necessary to prove spoliation.[208] Establishing that an opposing party had the duty to preserve certain evidence will not alone be sufficient to show spoliation. Thus, the alleged spoliator must also have breached that duty.[209] Moreover, *Johnson* simplified the two rules giving rise to the spoliation presumption by recasting parts of the two spoliation presumption rules (e.g., the relevance requirement) as elements of the duty inquiry.[210] The

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Dist.] 2010, no pet.) (holding Randalls breached its duty to preserve evidence when it knew of an impending claim and was aware that the evidence was relevant to the claim); *Adobe Land*, 236 S.W.3d at 358 ("This filing effectively served to provide Griffin with notice of the claims asserted in the petition and to trigger Griffin's duty to preserve all evidence that it knew or reasonably should have known could be potentially relevant to those claims."); Walker v. Thomasson Lumber Co., 203 S.W.3d 470, 477 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (noting the requirement of possession of evidence); Martinez v. Abbott Labs., 146 S.W.3d 260, 270 (Tex. App.—Fort Worth 2004, pet. denied) (declaring the burden to prove duty is on the movant); Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 226 (Tex. App.—Amarillo 2003, no pet.) ("A party may have a statutory, regulatory, or ethical duty to preserve evidence." (citing *Trevino*, 969 S.W.2d at 955)); Felix v. Gonzalez, 87 S.W.3d 574, 581 (Tex. App.—San Antonio 2002, pet. denied) ("In this case, there is no evidence that [the allegedly destroyed] recorded statement was ever taken."); Clements v. Conard, 21 S.W.3d 514, 523 (Tex. App.—Amarillo 2000, pet. denied) (referring to the possible duty to preserve evidence (citing *Trevino*, 969 S.W.2d at 955)); Aguirre v. S. Tex. Blood & Tissue Ctr., 2 S.W.3d 454, 457–58 (Tex. App.—San Antonio 1999, pet. denied) (finding South Texas Blood and Tissue Center had no duty to preserve evidence because it had no actual notice or reasonable expectation that it would be called to defend a lawsuit); Scolaro v. State, 1 S.W.3d 749, 755 (Tex. App.—Amarillo 1999, no pet.) (asserting that at the time of destruction "there was no contemplation of litigation relevant to [the] records by the State Bar or the parties to this proceeding."); Ordonez v. M.W. McCurdy & Co., 984 S.W.2d 264, 273 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (indicating that the testimony did not necessarily prove there was a duty to preserve evidence).

208. *See Johnson*, 106 S.W.3d at 722 (requiring duty for a spoliation claim).

209. *E.g.*, *Adobe Land*, 236 S.W.3d at 358 (concluding Griffin had a duty and breached that duty by destroying evidence); *see Advance Stores*, 2010 WL 3036654, at *3 (determining there was a breach of duty when a party failed to preserve evidence).

210. *Johnson*, 106 S.W.3d at 722 ("Thus, as a foundation for the submission of the spoliation instruction in this case, the Johnsons had to show that Wal-Mart disposed of the reindeer after it knew, or should have known, that there was a substantial chance there would be litigation and that the reindeer would be material to it.").

breach inquiry has also been simplified because the courts of appeals have accepted that the same presumption that spoliated evidence would be harmful to the spoliator arises from both the nonproduction of evidence and the destruction of evidence.[211] Thus, breach can be established by (1) the failure to preserve relevant evidence or (2) the failure to produce relevant evidence when under a duty to do so.[212] Breach of the duty to maintain or produce evidence will most frequently arise in the context of a discovery dispute, and the issue will be framed as whether the spoliator has committed discovery abuse.[213] Although a party may have common law, statutory, and ethical duties to preserve evidence, the duty to produce the evidence may not arise if proper discovery procedures are not followed or if the evidence is never requested.[214] Prior to resolving the substantive spoliation issue, the trial court may need to determine first, whether the non-spoliator properly requested the spoliated evidence, and second, whether the alleged spoliator failed to produce the evidence. The alleged spoliator may respond by explaining its reasons for failing to produce the evidence.[215] From these facts, in addition to the evidence of duty (e.g., relevance and possession), the trial court may determine that there is enough evidence to support that the alleged spoliator has either negligently or intentionally withheld or destroyed evidence that the alleged spoliator had the duty to preserve and produce.[216]

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211. *See Adobe Land*, 236 S.W.3d at 359 (referring to the burden of proof on the spoliating party).

212. *Johnson*, 106 S.W.3d at 722; *Adobe Land*, 236 S.W.3d at 359.

213. *Johnson*, 106 S.W.3d at 722 (noting that duty is the initial inquiry for any complaint of discovery abuse); *Adobe Land*, 236 S.W.3d at 357 (characterizing the failure to produce evidence as discovery abuse). *But see* Gilmore v. SCI Funeral Servs., 234 S.W.3d 251, 262–63 (Tex. App.—Waco 2007, pet. denied) (holding spoliation instruction appropriate in some instances without finding discovery abuse).

214. Kawasaki Motors Corp. v. Thompson, 872 S.W.2d 221, 224 (Tex. 1994) (stating a duty to supplement experts' interrogatories did not arise in the absence of a proper discovery request); Pace v. Jordan, 999 S.W.2d 615, 622 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (holding the party waived its right to discovery when it failed to obtain a ruling on opposing party's objections and failed to file a motion to compel).

215. In addition to challenging the discovery request, the spoliator could offer reasons for the spoliation such as destruction in the ordinary course of business prior to a duty to preserve arising. *See* Brumfield v. Exxon Corp., 63 S.W.3d 912, 920 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (concluding no instruction on spolication was mandated where the spoliating party testified that videotapes were routinely taped over).

216. Trevino v. Ortega, 969 S.W.2d 950, 957 (Tex. 1998) (Baker, J., concurring).

It is important for practitioners to remember that the failure to compel production of evidence known to be missing before trial will waive any request for a sanction for that conduct. A late request for a spoliation remedy at trial will be considered waived.[217] If evidence of the destruction of evidence first comes to light at trial, perhaps through unexpected witness testimony that certain relevant documents were destroyed, then the non-spoliator must still establish that the allegedly destroyed evidence was requested and not produced, or that the spoliator had some other duty to produce the missing evidence.[218]

Although the issue of breach is conceptually straightforward, Texas spoliation cases raise additional questions regarding breach. First, who has the burden to establish that the alleged spoliated evidence existed in the first place? Second, there is a question in the courts of appeals on the culpability required for a trial court to find spoliation. And third, some courts have stated that the spoliation presumption arises only after harmful evidence has been introduced against the alleged spoliator and she fails to produce evidence in response.

a. Proof of Existence

Breach is predicated on the duty to preserve and produce evidence, but in some cases the focus is on whether the allegedly spoliated evidence ever existed.[219] When the existence of the destroyed evidence is contested, the party seeking a spoliation presumption must put on some evidence that the destroyed evidence existed in the first place.[220] The question of whether

217. *See* Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 175 (Tex. 1993) ("[T]he failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct."); Roberts v. Whitfill, 191 S.W.3d 348, 361 n.3 (Tex. App.—Waco 2006, no pet.) ("The failure to pursue the motion to compel to a ruling raises the issue whether a sanction such as a spoliation instruction was warranted.").

218. Sowell v. Kroger Co., 263 S.W.3d 36, 38 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

219. *See* Felix v. Gonzalez, 87 S.W.3d 574, 581 (Tex. App.—San Antonio 2002, pet. denied) ("In this case, there is no evidence that [the allegedly destroyed] recorded statement was ever taken."); *see also* SDN, Ltd. v. JV Rd., L.P., No. 03-08-00230-CV, 2010 WL 1170230, at *7 (Tex. App.—Austin Mar. 24, 2010, no pet.) (mem. op.) (finding the party produced no evidence that any evidence was actually destroyed, therefore no duty to preserve existed).

220. *Felix*, 87 S.W.3d 574, 581 (Tex. App.—San Antonio 2002, pet. denied).

such evidence existed is resolved by the trial court.[221] The non-spoliator is not required to put on specific proof about the circumstances surrounding the destruction of evidence.[222] Once the court determines that the evidence existed and the alleged spoliator has failed to produce it, the burden of production shifts to the alleged spoliator to explain the unavailability or destruction of the evidence.[223]

b. Culpability

In his concurrence, Justice Baker identified culpability (i.e., negligence or bad faith) as an important aspect of breach.[224] Therefore, a brief discussion of culpability as a component of breach is warranted. A discussion of the culpability necessary to support the trial court's submission of a spoliation instruction will be discussed later. For purposes of proving a prima facie case of spoliation, most authority supports that at least negligence is required. At first glance there appears to be a conflict between the courts of appeals over the culpability necessary for a finding of spoliation, but the differences in the courts of appeals' opinions often depend on whether they are using Justice Baker's framework for determining spoliation or discussing the two common law rules from which a spoliation presumption may arise. Several cases

221. *Trevino*, 969 S.W.2d at 955 (noting whether a party has destroyed evidence is a preliminary question for the court to decide); San Antonio Press, Inc. v. Custom Bilt Mach., 852 S.W.2d 64, 67 (Tex. App.—San Antonio 1993, no writ).

222. The actual destruction of evidence may be readily apparent. For example, some cases involve the production of video surveillance tapes where only a portion of the tapes have been preserved. Destruction of the remainder of the videotapes is readily apparent. Other cases involve the routine destruction of evidence through document retention policies. In these cases, destruction is almost always admitted, but lack of culpability or prejudice is often argued. *See* Clark v. Randalls Food, 317 S.W.3d 351, 354–55, 360 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding that "the trial court did not abuse its discretion by finding no prejudice resulted from Randalls Food's failure to preserve the [evidence]" because it was destroyed "pursuant to Randalls's normal procedure to preserve tapes for 60 to 90 days only"); Doe v. Mobile Video Tapes, Inc., 43 S.W.3d 40, 56 (Tex. App.—Corpus Christi 2001, no pet.) (holding that "appellees adequately defended against an assertion of negligent or intentional destruction" because they destroyed the evidence "in the ordinary course of business").

223. *Trevino*, 969 S.W.2d at 955 (stating that the spoliator may defend against the assertion of spoliation by providing an explanation for the destruction or failure to produce.).

224. *Id.* at 957 ("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.").

reference Justice Baker's concurrence and note that a party should be held accountable for both negligent and intentional breach of the duty to reasonably preserve evidence.[225] In contrast, other appellate cases seem to require intentional destruction of evidence for a spoliation presumption to arise.[226] The cases that rely on lack of evidence of fraudulent intent or purpose as rebutting the spoliation presumption likewise implicitly hold that some intentionality is required for the spoliation presumption to arise.[227]

The differences regarding the culpability required to support a breach of duty are due, in part, to incorporating into Justice Baker's framework the two common law rules that give rise to the spoliation presumption. The first rule, articulated as the deliberate or intentional destruction of relevant evidence, requires some culpability greater than negligence to support a presumption of spoliation.[228] The second rule does not explicitly require such

225. H.E. Butt Grocery Co. v. Advance Stores Co., No. 10-10-00004-CV, 2010 WL 3036654, at *4 (Tex. App.—Waco Aug. 4, 2010, no pet.) (mem. op.); Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *4 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.); *Clark*, 317 S.W.3d at 358; Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 360–61 (Tex. App.—Fort Worth 2007, pet. denied).

226. *E.g.*, Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 225 (Tex. App.—Amarillo 2003, no pet.) (stating deliberate spoliation gives rise to a presumption); Brumfield v. Exxon Corp., 63 S.W.3d 912, 920 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (finding no evidence of intentional destruction of videotapes when evidence showed that tapes were routinely taped over); Lively v. Blackwell, 51 S.W.3d 637, 642–43 (Tex. App.—Tyler 2001, pet. denied) (determining that Lively was not entitled to a spoliation instruction because she had not provided evidence of intentional or negligent destruction by Blackwell); Ordonez v. M.W. McCurdy & Co., Inc., 984 S.W.2d 264, 273 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (holding that spoliation is the intentional destruction of documents); San Antonio Press, Inc. v. Custom Bilt Mach., 852 S.W.2d 64, 67 (Tex. App.—San Antonio 1993, no writ) (noting "the intentional, deliberate destruction of evidence" raises the spoliation presumption).

227. *E.g.*, *Ordonez*, 984 S.W.2d at 273 (stating that an "alleged spoliator may rebut the presumption by showing that the evidence in question was not destroyed with fraudulent intent or purpose" (citing H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dism'd))); *see also* Buckeye Ret. Co., v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.) (agreeing with *Ordonez* in that spoliation may be rebutted by demonstrating a lack of fraudulent intent or purpose).

228. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003) (describing deliberate destruction); *Brumfield*, 63 S.W.3d at 920 (illustrating intentional destruction); Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied) (giving an example of an instance where deliberate destruction did not occur); *Ordonez*, 984 S.W.2d at 273 (analyzing a situation where intentional destruction was

intentionality and merely provides that failure to produce evidence within a party's control raises the spoliation presumption.[229] Under the second rule, culpability is generally not discussed, perhaps because the failure to produce evidence implies some intentionality.[230] In the discovery context, the refusal to respond to discovery permits the imposition of sanctions.[231] Texas Rules of Civil Procedure 215.2 and 215.3 authorize a trial court, after notice and hearing, to impose a variety of sanctions for the failure of a party to comply with proper discovery requests.[232] However, Rule 215.2 does not specifically require intent or bad faith to impose sanctions.[233] Rather, if the non-spoliator presents sufficient evidence of breach (i.e., destruction of evidence or the nonproduction of requested evidence), then the court turns to an examination of the type of sanction requested and whether the sanction (1) has a direct relationship to the offensive conduct and (2) is not excessive.[234] This inquiry, particularly in the context of death-penalty sanctions, will involve the culpability of the nonproducing party.[235] Thus, the culpability of the spoliator may not be as important in determining whether a party breached a duty to produce evidence, as it will be to a trial court's consideration of *what* remedy to impose.[236] Some remedies require more culpable mental states.[237] Thus, for purposes of

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alleged); *San Antonio Press*, 852 S.W.2d at 67 (describing both intentional and deliberate destruction).

229. *See Bruner*, 530 S.W.2d at 344 (providing a list of authorities that "stand for the proposition that such failure of a party to testify or to produce evidence creates a presumption unfavorable to such party which of itself has probative force").

230. *See Brumfield*, 63 S.W.3d at 920 (noting that under the second rule, failure to produce evidence within the party's control raises a rebuttable presumption); *see also* McMillin v. State Farm Lloyds, 180 S.W.3d 183, 199 (Tex. App.—Austin 2005, pet. denied) (stating spoliation instruction is proper for deliberate destruction of evidence or failure to produce relevant evidence or to explain its nonproduction).

231. TEX. R. CIV. P. 215.2(b).

232. *Id.* R. 215.2.; *In re* Dynamic Health, Inc., 32 S.W.3d 876, 885 (Tex. App.—Texarkana 2000, orig. proceeding).

233. TEX. R. CIV. P. 215.2; *see also id.* R. 215.3.

234. *See* Cire v. Cummings, 134 S.W.3d 835, 842 (Tex. 2004) (discussing the effectiveness test).

235. *Id.* at 842.

236. Trevino v. Ortega, 969 S.W.2d 950, 959 (Tex. 1998) (Baker, J., concurring) ("Because of the varying degrees of sanctions available and because each case presents a unique set of circumstances, courts should apply sanctions on a case by case basis.").

237. *See, e.g.*, *Cire*, 134 S.W.3d at 839 (noting the bad-faith requirement for death-penalty sanctions); Spohn Hosp. v. Mayer, 104 S.W.3d 878, 882 (Tex. 2003) (per

establishing a breach of the duty to preserve evidence, a non-spoliator must initially prove duty and that the requested evidence in the alleged spoliator's possession was not produced (breach).[238] The unexplained failure to produce relevant evidence would be sufficient to at least raise an inference that the spoliator either negligently or in bad faith (i.e., fraudulent intent or purpose) failed to produce the evidence.[239] To complete Justice Baker's framework for finding spoliation, some prejudice must be shown, and the spoliator would then have the opportunity to respond.[240]

c. The Prerequisite of Harmful Evidence

Prior to the adoption of Justice Baker's framework by the courts of appeals, a curious aspect of the second rule, relating to the failure to produce, was the requirement of introduction of harmful evidence against the spoliator before a spoliation presumption could arise. The harmful evidence referenced is some evidence of the harmful nature of the missing evidence such that a failure of the spoliator to respond creates a presumption that the unpresented evidence in the spoliator's possession would also be

curiam) (applying a two-part test for determining whether a sanction is just).

238. *See* Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied) (holding Wal-Mart's failure to produce not only established a prima facie case of spoliation, but also "create[d] a rebuttable presumption unfavorable to that party"); H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 343 (Tex. Civ. App.—Waco 1975, writ dism'd) ("Failure to produce evidence within a party's control raises the presumption that if produced it would operate against him, and every intendment will be in favor of the opposite party.").

239. Cases state that the spoliation presumption may be rebutted by evidence that the evidence was not destroyed with fraudulent intent or purpose. *E.g.*, Ordonez v. M.W. McCurdy & Co., 984 S.W.2d 264, 273 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("[T]he alleged spoliator may rebut the presumption by showing that the evidence in question was not destroyed with fraudulent intent or purpose." (citing *Bruner*, 530 S.W.2d at 344)); *see also* Buckeye Ret. Co., v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.) (noting that lack of intent may overcome the presumption). Rather, it is the minimal culpable state to justify the imposition of a discovery sanction and, as we later discuss, the spoliation instruction. There is some support that it could not, consistent with due process, give rise to a presumption. *Cf.* W. & A. R.R. v. Henderson, 279 U.S. 639, 642 (1929) (requiring a logical connection between evidentiary facts and the fact to be presumed).

240. *See Trevino*, 969 S.W.2d at 957 (indicating the spoliator can defend against a charge of spoliation by providing another explanation for the destruction); *Ordonez*, 984 S.W.2d at 273 ("[T]he alleged spoliator may rebut the presumption by showing that the evidence in question was not destroyed with fraudulent intent or purpose.").

unfavorable.[241] Remnants of this element appear in more recent cases.[242] The *Brewer* court explained the rule as follows: "The . . . failure to produce evidence within a party's control raises the presumption that if produced it would operate against him, and every intendment will be in favor of the opposite party. . . . Importantly, this rule comes into play only when one party has introduced evidence harmful to its opponent."[243] However, a closer examination of the cases reveals that the requirement of introducing harmful evidence arose in the context of an entirely different presumption relating to a refusal to testify.[244]

The *Brewer* court relied heavily upon *State v. Gray*.[245] In *Gray*, the Texas Supreme Court recognized that a party's failure to rebut evidence that had been offered against the party supported a judgment against that party.[246] *Gray* concerned an action brought by the state to destroy multiple slot machines that had been criminally exhibited.[247] The trial court ordered the machines destroyed, but the court of civil appeals reversed, holding that there was insufficient evidence to support that the slot machines were illegally exhibited.[248] The supreme court reversed the court of appeals, detailing the evidence supporting the trial court's judgment.[249] Citing several courts of appeals, the supreme court also stated: "[I]n addition to that evidence, the trial judge was authorized to take into consideration the fact that Gray did not testify, not only as strengthening the probative force of the testimony offered to establish the issue, but as of itself clothed with some probative force."[250]

241. Brewer v. Dowling, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied); *Bruner*, 530 S.W.2d at 343.

242. *See* Tucker v. Terminix Int'l Co., 975 S.W.2d 797, 799 (Tex. App.—Corpus Christi 1998, pet. denied) ("The spoliation presumption against a non-producing party 'comes into play only when one party has introduced evidence harmful to its opponent.'"); *Middleton*, 982 S.W.2d at 470 (implying a need for an opposing party to introduce evidence to rebut the harmful evidence produced by the opponent).

243. *Brewer*, 862 S.W.2d at 159.

244. *Middleton*, 982 S.W.2d at 470 (recognizing that the failure to produce evidence or to testify may raise the presumption).

245. State v. Gray, 141 Tex. 604, 175 S.W.2d 224 (1943).

246. *Id.* at 226.

247. *Id.* at 225.

248. *Id.*

249. *Id.* at 225–26.

250. *Id.* at 226.

However, *Gray*'s presumption arose for different reasons and presented different policy concerns than a failure to produce requested evidence. McCormick and Ray discuss authority supporting the concept that a "presumption arises where a party fails to produce a[] [requested] object whose appearance and condition are material to the case or to explain such failure."[251] A spoliation presumption is distinct from the failure-to-testify presumption that applies where harmful evidence has been introduced against a party, and the party who has an opportunity to testify in response to the harmful evidence fails to do so.[252] Additionally, the consideration in a sufficiency analysis regarding a presumption arising from a party's refusal to testify at trial is entirely different than the consideration of whether to grant a remedy for alleged pretrial spoliation.[253] Indeed under modern robust discovery practice, the production of relevant evidence will be instigated by a discovery request. The failure to respond is sufficient to impose sanctions absent any evidence of harm to the spoliator.[254] Thus, the prerequisite of introducing evidence harmful to the spoliator's case thereby places a burden on the spoliator to testify or produce relevant evidence. To do so before spoliation may be found is simply inapplicable to a spoliation analysis under Justice Baker's framework and under modern discovery practice. It is now appropriate to turn to Baker's third element.

3. Prejudice

Prejudice, the third element of Justice Baker's framework, concerns the degree to which the alleged spoliation has hindered the non-spoliator's ability to present her claims or defenses.[255]

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251. 1 McCormick & Ray, *Texas Evidence* § 103, at 141–42 (2d ed. 1956).

252. *See* H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 343 (Tex. Civ. App.—Waco 1975, writ dism'd) ("Our [s]upreme [c]ourt states the rule this way: Where a party is in possession of evidence and does not testify, the trial court is authorized to take such failure to testify into consideration 'not only as strengthening the probative force of the testimony offered to establish the issue, but (such failure) is of itself clothed with some probative force.'" (citation omitted)).

253. *Compare* Wackenhut Corr. Corp. v. de la Rosa, 305 S.W.3d 594, 607–08 (Tex. App.—Corpus Christi 2009, no pet.) (discussing pretrial rulings on spoliation), *with Bruner*, 530 S.W.2d at 344 (analyzing the legal sufficiency presumption).

254. *See* TEX. R. CIV. P. 215.2, 215.3 (addressing sanctions related to discovery abuse).

255. Trevino v. Ortega, 969 S.W.2d 950, 957–58 (Tex. 1998) (Baker, J., concurring).

Although the Texas Supreme Court has not yet addressed whether prejudice is necessary to establish spoliation, prejudice has been an implicit part of spoliation law, even prior to Justice Baker's concurrence.[256] For example, spoliation remedies have been denied in instances where the evidence is equally available to both parties or if the non-spoliator has a true copy of the alleged spoliated evidence.[257] Additionally, because the primary concern of the Texas spoliation presumption is to remedy the harm caused by the unavailability of evidence, there is no reason to remedy a harm that does not exist. It is unclear whether the supreme court will adopt Justice Baker's framework for analyzing prejudice (i.e., how relevant the evidence is to the party's case and whether there is other evidence available on the issue that the alleged spoliated evidence would have been offered to prove).[258] However, the courts of appeals have adopted the prejudice component of Justice Baker's framework.[259]

While the courts of appeals have rather consistently applied the two prongs of Justice Baker's prejudice inquiry, (1) relevance, and

256. *See* Hickey v. J.C. Penney Co., No. 05-95-00914, 1996 WL 479568, at *5 (Tex. App.—Dallas Aug. 15, 1996, writ denied) (not designated for publication) (discussing prejudice with regard to spoliation law nearly two years before *Trevino* was decided).

257. Taylor Foundry Co. v. Wichita Falls Grain Co., 51 S.W.3d 766, 774 (Tex. App.—Fort Worth 2001, no pet.); *cf.* Whiteside v. Watson, 12 S.W.3d 614, 622 (Tex. App.—Eastland 2000, pet. denied) (suggesting that if the copies had not been altered, there would likely be no spoliation claim).

258. *See Trevino*, 969 S.W.2d at 957–58 (analyzing prejudice and stating "[a] party is entitled to a remedy only when evidence spoliation hinders its ability to present its case or defense"). There are several examples of appellate courts' applications of the prejudice standard. Petrol. Solutions, Inc. v. Head, No. 13-09-00204-CV, 2011 WL 1707001, at *38–40 (Tex. App.—Corpus Christi Apr. 29, 2011, pet. filed) (mem. op.); H.E. Butt Grocery Co., v. Advance Stores Co., No. 10-10-00004-CV, 2010 WL 3036654, *10–13 (Tex. App.—Waco Aug. 4, 2010, no pet.) (mem. op.); Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *8 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.); Clark v. Randalls Food, 317 S.W.3d 351, 359–60 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 360–61 (Tex. App.—Fort Worth 2007, pet. denied); Fulgham v. FFE Transp. Servs., Inc., No. 05-01-01040-CV, 2005 WL 1621425, at *5–7 (Tex. App.—Dallas July 12, 2005, pet. denied) (mem. op.); *Taylor Foundry*, 51 S.W.3d at 774 (considering it relevant that the allegedly destroyed evidence was equally available to both sides); *In re* Dynamic Health, Inc., 32 S.W.3d 876, 885–86 (Tex. App.—Texarkana 2000, orig. proceeding) (applying Justice Baker's framework to affirm death-penalty sanctions for a defendant who failed to produce evidence during discovery).

259. *See* Cire v. Cummings, 134 S.W.3d 835, 843 (Tex. 2004) (concluding the trial court did not abuse its discretion in striking Cummings's pleadings to remedy the prejudice caused to Cire when Cummings deliberately destroyed relevant evidence).

(2) the cumulative nature of the destroyed evidence, difficulties arise when the content of the destroyed evidence is unknown.[260] How can the non-spoliator establish relevance and whether there is other available evidence if the content is completely unknown? Should the spoliator bear the burden of negating prejudice? The Texas Supreme Court recently granted petition for review of *Brookshire Bros. v. Aldridge*,[261] a case that highlights the problem associated with establishing both the relevance of and prejudice resulting from spoliated evidence.

Brookshire Bros. involved a slip and fall in a Brookshire Brothers store. The store videotaped and produced the footage of the fall, but it did not retain footage preceding the accident that allegedly would have shown the spill and how long it remained on the floor.

The Twelfth Court of Appeals used Justice Baker's framework to analyze prejudice.[262] "Brookshire Brothers argue[d] that Aldridge failed to present sufficient evidence to the trial court that he was prejudiced by" Brookshire Brothers's failure to preserve more of the videotape in question.[263] The court of appeals held "the small portion of the video preserved was sufficient to show that the destroyed video would have been highly probative."[264] It noted the recorded area included the area of the spill, and "it showed persons passing by that area."[265] Thus, the court concluded that the deleted video probably would have contained evidence of the spill and how long it remained on the floor before the fall.[266] "Therefore, the video would have been some evidence of when a spill occurred or the length of time that the spill remained."[267] On appeal to the supreme court, Brookshire Brothers argues that the appellate court incorrectly shifted Aldridge's burden of establishing prejudice to Brookshire Brothers by requiring it to disprove prejudice from the missing

260. *Trevino*, 969 S.W.2d at 957–58; *Adobe Land*, 236 S.W.3d at 360.

261. Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.).

262. *Id.* at *7–9.

263. *Id.* at *9–10.

264. *Id.* at *7.

265. *Id.*

266. *Id.*

267. *Id.*

evidence. Thus, further guidance on the element of prejudice may be forthcoming.

The fact-specific nature of the prejudice inquiry is illustrated in *Clark v. Randalls Food*.[268] There, the appellate court affirmed a no-evidence and traditional summary judgment based on the failure of the evidence to support prejudice.[269] Clark slipped and fell on some liquid detergent at a Randalls store. In response to the fall, the surveillance video was removed and "preserved at the manager's station."[270] An employee made a copy of a six minute portion of the video that covered Clark's movements, including his fall. Clark argued the missing evidence would support the negligence of Randalls and requested a spoliation sanction to defeat the summary judgment.[271] The trial court denied the motion for sanctions and granted the summary judgments. The appellate court analyzed the element of prejudice[272] when it turned to the weight of the video and its impact on the "key issues in the case."[273] A review of the preserved video footage revealed that the floor in the area of the fall was not visible due to a counter. Thus, the camera was unable to capture any image of the liquid on the floor or when it was spilled.[274] Even if the video had captured an employee performing a walk-through one hour before the event, "that would not reveal whether the employee saw the liquid because the tape of Clark's fall does not show any visible liquid."[275] Ultimately, the court of appeals held:

268. Clark v. Randalls Food, 317 S.W.3d 351 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

269. *Id.* at 354.

270. *Id.*

271. *Id.* at 354–55.

272. *Id.* At first glance, a conclusion of lack of prejudice seems somewhat at odds with the holding that Clark established the relevance of the spoliated evidence. However, it illustrates an important point. Relevance is but one of the considerations that goes into determining prejudice. A party might destroy highly relevant documents in a case, but if the nonspoliating party can obtain copies of the documents from another source, the submission of a spoliation instruction would serve little purpose. There would be no need to infer anything about the documents if they were available for the jury to review. Other sanctions for the spoliation, including monetary fines, would be more appropriate.

273. *Id.* at 359 ("In determining whether a party was harmed by spoliated evidence, we consider 'whether the destroyed evidence supports key issues in the case.'" (quoting Trevino v. Ortega, 969 S.W.2d 950, 958 (Tex. 1998) (Baker, J., concurring))).

274. *Id.*

275. *Id.*

> Although the tape is relevant, the trial court could have reasonably determined it had limited value in the case because the tape is unclear, it does not show any liquid on the part of the floor that can be seen on the tape, and due to the angle of the camera and the height of the counter, it does not show the part of the floor where Clark fell.[276]

The court of appeals concluded that the trial court's determination was not speculation but a reasonable inference from the portion of the video that was retained.[277] "The trial court, therefore, could have reasonably determined the unavailable footage was cumulative of other competent evidence that Clark could use in the place of the destroyed evidence."[278] Thus, Clark did not overcome his burden to establish that the videotape contained evidence not available from other sources.[279]

Clark and *Brookshire Bros.* illustrate the problems associated with determining prejudice attributable to unavailable evidence.[280] The trial courts came to contrary conclusions of prejudice based on key differences in the evidence.[281] In both cases, the appellate court recognized the produced portion of the videotape as some evidence of what the missing portion of the tape would or would not reveal. But ultimately, both courts determined that the respective trial courts did not abuse their discretion because the evidence in the respective cases supported the trial judges' rulings.[282]

It is important to discuss the role of culpability in the determination of prejudice. Justice Baker noted that generally

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276. *Id.*

277. *Id.* at 360.

278. *Id.*

279. *Id.*

280. *Compare id.* at 359 (analyzing the prejudice resulting from Randalls's spoliation of evidence, and finding that no prejudice resulted because it was reasonable to conclude, after a review of the evidence, that the missing evidence was cumulative of other evidence that could be used in the place of the destroyed evidence), *with* Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *8 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.) (discussing the amount of prejudice that Brookshire Brothers's spoliation of evidence caused, and finding prejudice existed because "the small portion of the video preserved was sufficient to show that the destroyed video would have been highly probative").

281. *See Clark*, 317 S.W.3d at 359–60 (considering the prejudice to Clark resulting from Randalls's spoliation of evidence); *see also Brookshire Bros.*, 2010 WL 2982902, at *8–11 (examining prejudice resulting from spoliation of evidence).

282. *Brookshire Bros.*, 2010 WL 2982902, at *10; *Clark*, 317 S.W.3d at 360.

when a party intentionally or in bad faith destroys evidence, the evidence was relevant and harmful to the spoliating party's case.[283] "Absent evidence to the contrary, the trial court could find relevancy based solely on this fact."[284] Negligent destruction, on the other hand, would require the nonspoliating party to offer some proof about the content of the destroyed evidence.[285] Then the court could determine whether the missing evidence would have been helpful to the nonspoliating party's case or defense.[286] Under either state of culpability, the court must still consider whether the evidence is cumulative of other competent evidence and whether the missing evidence supports key issues in the case.[287]

Justice Baker's analysis recognizes there is a correlation between the culpability of the spoliator and the relevance of the destroyed evidence. The more culpable the spoliator, the more likely the destroyed evidence was relevant and prejudicial. Although Texas appellate courts have not discussed this relationship in detail, a recent 2010 federal case authored by Judge Scheindlin, the author of the notable *Zubulake*[288] opinions, reviewed this relationship.[289] Judge Scheindlin noted that where a party destroys evidence in bad faith, the bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude the evidence was unfavorable to that party.[290] Prejudice is assumed. In the case of a merely negligent spoliator, the non-spoliator would have to prove both relevance and prejudice to justify the imposition of a severe spoliation sanction.[291] Finally, she explained that no matter the culpability level, any presumption is rebuttable and the spoliating party

283. Trevino v. Ortega, 969 S.W.2d 950, 957 (Tex. 1998) (Baker, J., concurring).

284. *Id.*

285. *Id.* (noting that the spoliating party is free to attempt to show no prejudice resulted from the destruction).

286. *Id.*

287. *Id.*; Clark v. Randalls Food, 317 S.W.3d 351, 359–60 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

288. Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422 (S.D.N.Y. 2004); Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212 (S.D.N.Y. 2003).

289. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

290. *Id.* at 467.

291. *Id.*

should have the opportunity to demonstrate a lack of prejudice.[292] In a Texas federal case of the same year, Judge Rosenthal noted that prejudice and culpability range along continuums and a court's response to the loss of evidence depends on both the degree of culpability and the extent of prejudice.[293] As the cases discussed indicate, a determination of prejudice depends on the facts of the case, including the culpability of the spoliator, the nature of the destroyed evidence, and the relationship of the destroyed evidence to the case.

C. *How Is the Spoliation Presumption Applied and Reviewed?*

Once spoliation has occurred and the spoliation presumption arises, it is the non-spoliator's responsibility to request an appropriate remedy.[294] Likewise, the trial court has authority on its own motion to impose sanctions for the failure to produce evidence or discovery abuse.[295] A wide variety of sanctions are enumerated under the Texas Rules of Civil Procedure.[296] However, the two most commonly litigated spoliation remedies—the spoliation instructions and presumptions, as applied in no-evidence legal sufficiency challenges—are not enumerated discovery sanctions under the Rules of Civil Procedure but are a unique form of remediation tailored to each specific case.[297] Because the primary focus of this Article is spoliation, it is appropriate to turn to the application of the spoliation presumption to summary judgments and legal sufficiency reviews. The spoliation instruction will be addressed separately.

Many Texas courts have addressed the legal sufficiency of the spoliation presumption in two contexts: a legal sufficiency review

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292. *Id.* at 468.

293. Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).

294. *See supra* Part III (discussing a variety of remedies).

295. TEX. R. CIV. P. 215.2, 215.3; Conditt v. Morato, No. 02-06-00214-CV, 2007 WL 2693968, at *2 (Tex. App.—Fort Worth Sept. 13, 2007, pet. denied) (mem. op.) (deciding whether a spoliation instruction was proper based on an abuse of discovery).

296. *See* TEX. R. CIV. P. 215 (outlining discovery abuse and potential sanctions).

297. *See id.* (declining to list spoliation presumptions and spoliation instructions as applied in no-evidence legal sufficiency challenges as sanctions for discovery abuse). *But see* CMA-CGM (Am.) Inc. v. Empire Truck Lines Inc., 285 S.W.3d 9, 17–18 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (discussing a "spoliation instruction as a discovery sanction").

on appeal and no-evidence motions for summary judgment.[298] Because legal sufficiency challenges and no-evidence motions for summary judgment are reviewed under the same standard, the spoliation presumption must have the same legal effect in both contexts.[299]

As discussed earlier, a presumption is not evidence, but a mere procedural rule that requires the fact finder, once it finds the existence of a certain fact or group of facts, to assume the existence of the presumed fact unless and until the presumed fact is rebutted.[300] It stands in the place of evidence until rebutted and then disappears.[301] Once the presumption disappears, the evidence giving rise to the presumption may still be considered by the fact finder, and it may make all reasonable inferences from such evidence.[302] Few Texas cases discuss the technical operation of the spoliation presumption. But understanding whether the presumption has been rebutted and the reasonable inferences that can be drawn from the circumstances surrounding the spoliation is key to determining whether a spoliation presumption will assist a party in a legal sufficiency review or in overcoming a no-evidence

298. *See* Aguirre v. S. Tex. Blood & Tissue Ctr., 2 S.W.3d 454, 457 (Tex. App.—San Antonio 1999, pet. denied) (addressing spoliation in the no-evidence motion for summary judgment context); H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dism'd) (analyzing spoliation in the context of the appellate review of legal sufficiency).

299. *See Aguirre*, 2 S.W.3d at 457 (discussing the standard for no-evidence summary judgments); *see also Bruner*, 530 S.W.2d at 344 (determining the standard for legal sufficiency challenges).

300. Sudduth v. Commonwealth Cnty. Mut. Ins. Co., 454 S.W.2d 196, 198 (Tex. 1970) ("A true presumption is simply a rule of law requiring the jury to reach a particular conclusion in the absence of evidence to the contrary. The presumption does disappear, therefore, when evidence to the contrary is introduced, but the facts upon which the presumption is based remain in evidence and will support any inferences that may properly be drawn therefrom.").

301. *Id.*; Strain v. Martin, 183 S.W.2d 246, 248 (Tex. App.—Eastland 1944, no writ) (reciting that an unrebutted presumed fact may fully establish a fact in issue not as evidence but as an artificial legal equivalent); McCormick & Ray, *Texas Evidence* § 37, at 58 (1st ed. 1937).

302. Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993); Robertson Tank Lines, Inc. v. Van Cleave, 468 S.W.2d 354, 360 (Tex. 1971); *see* Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 159 S.W.2d 854, 857–58 (1942) (noting that after rebutting the presumption, the basic facts still have evidentiary effect); Jim Walter Homes, Inc. v. Valencia, 679 S.W.2d 29, 35 (Tex. App.—Corpus Christi 1984) (indicating that once the presumption has been rebutted, the underlying facts remain for consideration by the trier of fact), *aff'd as modified*, 690 S.W.2d 239 (Tex. 1985); Pete v. Stevens, 582 S.W.2d 892, 895 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (following *Greenwade*).

summary judgment. The biggest confusion surrounding this area stems from Justice Baker's concurrence and reference to two presumptions and corresponding instructions that find little basis in Texas law.[303]

1. The Effect of the Spoliation Presumption in Legal Sufficiency Analyses

As noted earlier, once the elements are met, the spoliation presumption arises that the unavailable evidence is harmful to the spoliator.[304] The burden of production shifts to the spoliator to rebut the presumed fact that the unavailable evidence is harmful.[305] With the production of rebuttal evidence, the presumption vanishes, but any inferences that may be reasonably drawn from the circumstances surrounding spoliation remain.[306] Once vanished, the presumption is not sufficient to overcome a no-evidence legal sufficiency challenge.[307] As a practical matter there are few, if any, cases where no evidence is offered to rebut the presumed fact that the destroyed or unavailable evidence is harmful to the spoliator.[308] The non-spoliator's difficulty in producing evidence of the harmful nature of the missing evidence was recognized by Justice Baker in his concurrence and by most courts that address this issue.[309] Unfortunately, a true presumption that easily vanishes offers little solace to the

303. *Compare* McCormick & Ray, *Texas Evidence* § 37, at 58 (1st ed. 1937) (discussing presumptions and concluding they are not to be considered as evidence with probative value), *with* Trevino v. Ortega, 969 S.W.2d 950, 957 (Tex. 1998) (Baker, J., concurring) (describing two presumptions: one shifts the burden of persuasion and the second has probative value but does not relieve the nonspoliating party of the burden to prove each element of its case).

304. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003).

305. *Saenz*, 873 S.W.2d at 359.

306. *Id.*

307. *E.g.*, *Greenwade*, 159 S.W.2d at 857–58 (holding that presumptions are not rules of evidence and have no probative force).

308. In *Wal-Mart Stores, Inc. v. Johnson*, Wal-Mart rebutted the harmful nature of the missing reindeer by submitting testimony that the reindeer were papier mâchè and lightweight. *Johnson*, 106 S.W.3d at 720. In *Brewer v. Dowling*, evidence was offered to dispute the alleged harmful evidence contained on the missing fetal monitor. 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied). In *Brookshire Bros. v. Aldridge*, a store manager testified that a spill would have been noticed within five minutes of the fall, and the video would not have disclosed anything harmful. No 12-08-00368-CV, 2010 WL 2982902 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.).

309. Trevino v. Ortega, 969 S.W.2d 950, 958–60 (Tex. 1998) (Baker, J., concurring); *Brookshire Bros.*, 2010 WL 2982902, at *8.

nonspoliating party. In response, Justice Baker suggested two new presumptions that could assist the non-spoliator in overcoming motions for summary judgment or directed verdict.[310] Courts of appeals have been slow to adopt these presumptions.

The weight of authority supports that the spoliation presumption, once rebutted, vanishes and is not sufficient to overcome a no-evidence legal sufficiency challenge.[311] Once the presumption vanishes, the question is whether the circumstances surrounding the spoliation will support an inference that the unavailable evidence is harmful to the spoliator, because an inference may legally support a judgment.[312] Unfortunately, much of the confusion that arises over the operation and probative force of the spoliation presumption is directly related to Justice Baker's concurrence.[313]

In his concurrence Justice Baker describes two presumptions that may support a jury instruction based on the severity of prejudice to the affected party. The first is described as a rebuttable presumption that shifts not only the burden of production but the burden of persuasion so that the jury is instructed that (1) it should presume the unavailable evidence was unfavorable to the spoliating party, and (2) the spoliating party bears the burden to disprove the presumed fact or issue.[314] This instruction is suggested when the nonspoliating party cannot prove its prima facie case without the unavailable evidence. The effect of shifting the burden of persuasion is to preclude a directed verdict or no-evidence summary judgment. Such a presumption, however, is not a true presumption and has no basis in Texas law,

310. *Trevino*, 969 S.W.2d at 960.

311. *But see* Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 360 (Tex. App.—Fort Worth 2007, pet. denied) (shifting the burden of persuasion to avoid summary judgment); Wackenhut Corr. Corp. v. de la Rosa 305 S.W.3d 594, 625–29 (Tex. App.—Corpus Christi 2009, no pet.) (considering whether the instruction given shifted the burden of proof). 312. Strain v. Martin, 183 S.W.2d 246, 247–48 (Tex. Civ. App.—Eastland 1944, no writ).

312. Strain v. Martin, 183 S.W.2d 246, 247–48 (Tex. Civ. App.—Eastland 1944, no writ).

313. *See generally Trevino*, 969 S.W.2d at 960 (discussing the two types of instructions: those that shift the burden of proof and those that allow the jury to presume the evidence would have been unfavorable to the spoliating party).

314. *Trevino*, 969 S.W.2d at 960.

particularly as it relates to spoliation.[315] Justice Baker relies on federal cases to support such a presumption, but Rule 301 of the Federal Rules of Evidence provides that presumptions only operate to shift the burden of producing evidence, not the burden of persuasion.[316] The source of this first presumption must be found in policy rather than case law, and should be viewed as a form of remediation reserved for cases involving the most severe types of prejudice.[317] Further discussion of the problems with the form of the suggested jury instruction will be discussed in Part VI.

The second presumption Justice Baker describes is an "adverse presumption" to be applied in less severe circumstances that would inform the jury that the evidence would have been unfavorable to the spoliating party.[318] This presumption "has probative value and may be sufficient to support the nonspoliating party's assertions[; however,] it does not relieve the nonspoliating party of the burden to prove each element of its case."[319] This more closely describes a true presumption. Indeed, until rebutted, a presumption may be sufficient to defeat a legal sufficiency review.[320] However, the presumption vanishes when rebutted, leaving only an adverse inference if the circumstances will support it.[321] Thus, Justice Baker's terminology may be imprecise, but if

315. There are, however, some conclusive presumptions that shift the burden of proof such as the longstanding presumption against illegitimacy. *See* McCullough v. McCullough, 69 Tex. 682, 7 S.W. 593, 593 (1888) (presuming that a woman's husband is her child's father, unless "overcome by some proof to the contrary").

316. FED. R. EVID. 301. *See generally* Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010) (discussing the submission of an adverse inference instruction as remediation for spoliation).

317. *See* Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 360 (Tex. App.—Fort Worth 2007, pet. denied) (shifting the burden of persuasion to avoid summary judgment). In *Adobe Land*, the prejudice was severe due to missing evidence crucial to the plaintiff's case. *Id.*

318. *Trevino*, 969 S.W.2d at 960.

319. *Id.*

320. *See* Sudduth v. Commonwealth Cnty. Mut. Ins. Co., 454 S.W.2d 196, 198 (Tex. 1970) ("A true presumption is simply a rule of law requiring the jury to reach a particular conclusion in the absence of evidence to the contrary. The presumption does disappear, therefore, when evidence to the contrary is introduced, but the facts upon which the presumption is based remain in evidence and will support any inferences that may properly be drawn therefrom.").

321. *Id.* In *Southland Life Ins. Co. v. Greenwade*, the Texas Supreme Court, citing several evidence treatises, confirmed that presumptions are rules of law, not evidence, and have no probative force. 138 Tex. 450, 159 S.W.2d 854, 857–58 (1942). The court noted that even if the opponent has met his burden of production and rebutted the presumed

the facts support a reasonable inference that the unavailable evidence is harmful to the spoliator, then such an inference may defeat a summary judgment challenge or provide some evidence for a legal sufficiency challenge. However, the burden remains on the non-spoliator to prove her case. *Wackenhut Corrections Corp. v. de la Rosa*[322] illustrates the confusion resulting from Justice Baker's imprecise terminology and description of the spoliation presumption. A brief discussion of the facts is necessary to understand the role spoliation played in the legal sufficiency review. *Wackenhut* involved a fight at a prison facility that resulted in the death of an inmate.[323] The deceased inmate's family brought a wrongful death suit against the private prison facility and the warden alleging the defendants negligently with malice caused the inmate's death by failing to prevent the attack by two other inmates.[324] The family claimed negligence because there was evidence that the guards failed to follow their procedures by not searching each inmate for weapons before the inmates went through a "crash gate."[325] At least one of the inmates that assaulted the victim had a homemade weapon made from a lock and a sock that was not discovered by the guards.[326] The court determined the burden was on the family to establish that Wackenhut had good reason to anticipate the danger of the assault.[327] There was evidence that there were surveillance cameras that were focused on the crash gate and the beating.[328] These cameras were always on and recorded not only the beating but events leading up to the beating.[329] The warden testified that he viewed such a video and described the fight that was contained on it but then changed his testimony and said it did not exist.[330] One officer testified that all videotapes were taken to the warden's office, and the warden maintained custody of the tapes. There was

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fact, the jury may draw reasonable inferences from the evidence that initially gave rise to the evidentiary presumption. *Id.* at 859.

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

323. *Id.* at 600.

324. *Id.*

325. *Id.* at 601.

326. *Id.* at 624.

327. *Id.*

328. *Id.* at 627

329. *Id.*

330. *Id.*

also testimony that there was a separate video made by a warden of the victim's injuries, but he saw the warden leaving the parking lot later in the day with the video.[331] The jury was given an instruction permitting them to "presume" that the material would contain evidence unfavorable to the defendants.[332]

In its review of the evidence, the *Wackenhut* court of appeals held that the spoliation presumption has probative value sufficient to overcome a no-evidence legal sufficiency challenge on appeal, but not a factual sufficiency challenge.[333] In its reasoning, the court relied primarily upon Justice Baker's concurrence in *Trevino*, which stated that the "presumption itself has probative value and may be sufficient to support the nonspoliating party's assertions."[334] The court identified the instruction given in the case as embodying the second presumption discussed by Justice Baker in his concurrence.[335] Interestingly, the court attempted to integrate Texas spoliation law by recognizing that the jury instruction supports an inference that the missing evidence would be harmful.[336] However, the court confused the operation of the spoliation presumption with the inference the jury may draw from the circumstances surrounding the spoliaton. The result that the spoliation supported the negligence verdict is correct but not for the articulated reasons.

The *Wackenhut* case provides an appropriate fact pattern to review the operation of the spoliation presumption. The evidence established there were cameras that recorded relevant evidence. There was evidence videotapes existed, but they were destroyed or not produced. Thus, there was evidence of duty and breach. Prejudice was shown in that a crucial issue of the case was whether the facility had good reason to anticipate the assault. The

331. *Id.* at 607.

332. *Id.* at 608 & n.13. The instruction provided: "You, the jury, are instructed that [defendants] destroyed, lost, or failed to produce to this [c]ourt 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 [defendants]." *Id.*

333. *Id.* at 626.

334. *Id.* (quoting Trevino v. Ortega, 969 S.W.2d 950, 960–61 (Tex. 1998) (Baker, J., concurring)).

335. *Id.*

336. *Id.* ("Because the instruction itself is given to compensate for the absence of evidence that a party had a duty to preserve, its very purpose is to 'nudge' or 'tilt' the jury." (citing Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 724 (Tex. 2003))).

evidence supported that the destruction of tapes was in bad faith and was a deliberate attempt to make the tapes unavailable. Thus, the relevance prong was established. There was no dispute the cameras videotaped the area and could have shown suspicious activities or bulging pockets where weapons were stored. There was testimony that at least one video would contain information on the injuries. At this juncture, a trial court could find spoliation to support a rebuttable presumption, based on bad-faith destruction, that the tapes would provide evidence that the facility had good reason to anticipate the assault. If no evidence was presented to rebut the presumed fact, then the presumption could support the family's negligence claim.[337] In that instance the court would instruct the jury that the destroyed tapes established that the activities of the aggressors would have given the facility good reason to anticipate the assault (the presumed fact).

Importantly, in *Wackenhut*, rebuttal evidence that the facility could not anticipate the assault was offered and at that point the presumption vanished and provided no support for the negligence finding.[338] But based on the facts surrounding the spoliation and the reasonable inferences to be drawn from the circumstances surrounding the bad-faith unavailability or destruction of the tapes, the trial court had the discretion to submit an adverse inference instruction, which in essence it did.[339] The instruction permitted the jury to infer that the tapes were destroyed because they were harmful to the facility. The jury's reasonable inference supported the negligence finding.[340] The distinction between a presumption and inference under Texas law is that the unrebutted presumption mandates the conclusion of the presumed fact. The permissive inference permits the jury to weigh the evidence and infer the presumed fact.[341] In this case the jury found in favor of the family and all reasonable inferences may support the jury verdict.

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337. *See* Sudduth v. Commonwealth Cnty. Mut. Ins. Co., 454 S.W.2d 196, 198 (Tex. 1970) (implying evidence is necessary to rebut the presumed fact).

338. *Wackenhut*, 305 S.W.3d at 608 & n.13.

339. *Id.*

340. *See* Strain v. Martin, 183 S.W.2d 246, 247 (Tex. Civ. App.—Eastland 1944, no writ) (considering whether the presumption of negligence existed against a truck driver).

341. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 724 (Tex. 2003) (acknowledging the purpose of a spoliation instruction is remediation for the failure to preserve relevant evidence).

Thus, the court of appeals' conclusion that the spoliation provided some evidence to support the negligence finding was correct, but its reliance on Justice Baker's terminology and discussion of the spoliation presumption and instruction was misplaced.[342]

Relying on Justice Baker's analysis, other courts have held that the spoliation presumption has—when combined with inferences drawn from other circumstantial evidence—aided a party in overcoming a legal sufficiency challenge.[343] These courts treat the spoliation presumption like an additive, which by itself is insufficient to achieve the desired result, but in combination with another substance can reach the desired result.[344] In the analyses of these cases, the spoliation presumption strengthens the inferences drawn from the other circumstantial evidence. Often the terminology is incorrect, but the results are correct.

2. Summary Judgment Cases

In the summary judgment context, Texas courts of appeals have articulated a standard of review that implies that the spoliation presumption has probative force. Since 1999, Texas courts have suggested that the spoliation presumption—when raised in response to a motion for summary judgment—can be sufficient to defeat a no-evidence motion for summary judgment.[345] In

342. *Wackenhut*, 305 S.W.3d at 626 (noting that the spoliation instruction does not completely relieve the nonspoliating party of its burden of proof but does "at least allow[] an inference to support the facts that the missing evidence would have established").

343. *E.g.*, Curtis & Co. Mfg. v. Douglass, 79 Tex. 167, 15 S.W. 154, 155 (1890) (illustrating the inference later described by Justice Baker); BIC Pen Corp. v. Carter, 346 S.W.3d 569, 580–81 (Tex. App.—Corpus Christi 2008) (citing Justice Baker's concurrence in *Trevino*, and finding that the jury could have used the spoliation presumption instruction as probative evidence), *rev'd on other grounds*, 346 S.W.3d 533 (Tex. 2011); Flournoy v. Wilz, 201 S.W.3d 833, 837 (Tex. App.—Waco 2006) (finding a jury may draw "adverse inferences against parties who 'refuse to testify'" and "equat[ing] this rule of law to the spoliation presumption"), *rev'd on other grounds*, 228 S.W.3d 674 (Tex. 2007).

344. *Douglass*, 15 S.W. at 155 (combining the spoliation presumption with additional evidence to find that the evidence was sufficient to sustain a verdict); *see Carter*, 346 S.W.3d at 580–81 (finding that combining testimony given and the spoliation presumption the evidence was sufficient to establish a fact in the case); *Flournoy*, 201 S.W.3d at 837 (holding the spoliation presumption "constitutes a factor when 'weighing the evidence'" (quoting Trevino v. Ortega, 969 S.W.2d 950, 961 (Tex. 1998) (Baker, J., concurring))).

345. Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 359, 361 (Tex. App.—Fort Worth 2007, pet. denied); Sowell v. Kroger Co., 263 S.W.3d 36, 38–39 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); Martinez v. Abbott Labs., 146 S.W.3d 260, 270–71 (Tex. App.—Fort Worth 2004, pet. denied); Aguirre v. S. Tex. Blood & Tissue Ctr., 2

Aguirre v. South Texas Blood & Tissue Center,[346] the court of appeals announced a modified standard of review for determining a no-evidence motion for summary judgment despite the nonmovant's request for a spoliation presumption.[347] The court stated: "Because [the nonmovant] raised the issue of entitlement to a presumption in her response to summary judgment, and the trial court nonetheless granted summary judgment, we presume that the trial court considered and rejected [the nonmovant]'s claim for a presumption since a presumption would have precluded summary judgment."[348] However, the court of appeals ultimately held that the trial court did not abuse its discretion by denying the presumption, and the court affirmed the summary judgment.[349] *Aguirre*, as well as other cases relying on *Aguirre* to affirm a grant of summary judgment over a request for an application of the spoliation presumption, generally do not rely on the spoliation presumption to overcome summary judgment.[350] Rather, the appellate court looked at the evidence surrounding the spoliation to determine whether the trial court abused its discretion in impliedly refusing to find spoliation. *Adobe Land* is one example of an appellate court reversing a trial court's summary judgment under this modified standard.[351]

As noted earlier, an unrebutted spoliation presumption may overcome a no-evidence motion for summary judgment because it operates as a determined fact.[352] It is unlikely that the harmful nature of the unavailable evidence would remain unrebutted. Just as a rebutted spoliation presumption is not evidence and has no probative value in a legal sufficiency review on appeal, a rebutted spoliation presumption is not evidence and has no probative value in the summary judgment context.[353] However, Texas case law

S.W.3d 454, 457 (Tex. App.—San Antonio 1999, pet. denied).

346. Aguirre v. S. Tex. Blood & Tissue Ctr., 2 S.W.3d 454 (Tex. App.—San Antonio 1999, pet. denied).

347. *Id.* at 457.

348. *Id.*

349. *Id.* at 458.

350. *Id.*

351. Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 356–57 (Tex. App.—Fort Worth 2007, pet. denied).

352. Sudduth v. Commonwealth Cnty. Mut. Ins. Co., 454 S.W.2d 196, 198 (Tex. 1970).

353. *See Adobe Land*, 236 S.W.3d at 356–57 (reviewing the entitlement to a spoliation presumption in the context of a no-evidence motion for summary judgment).

supports that in a legal sufficiency review on appeal after the spoliation presumption vanishes, reasonable inferences may be drawn from the circumstances surrounding the spoliation that would be sufficient in combination with other evidence to support a judgment. Federal case law supports that the same rule applies in the summary judgment context.[354]

With nothing but a spoliation presumption, once rebuttal evidence is introduced the only way for a nonmovant to overcome a no-evidence motion for summary judgment would be to shift the burden of persuasion to the summary judgment movant.[355] This is precisely the solution articulated by Justice Baker in his concurrence: "[B]y shifting the burden of proof, the presumption will support the nonspoliating party's assertions and is some evidence of the particular issue or issues that the destroyed evidence might have supported."[356] The use of this "more severe" presumption (according to Justice Baker) should be limited to situations in which the nonspoliating party cannot prove its prima facie case.[357]

There is some support in Texas case law for shifting the burden of persuasion back to the movant seeking a no-evidence summary judgment under certain severe circumstances. In *Adobe Land Corp. v. Griffin, L.L.C.*,[358] the court of appeals, relying on *Aguirre*, held that the trial court abused its discretion in denying a spoliation presumption and reversed the trial court's grant of summary judgment.[359] Adopting Justice Baker's framework for considering whether the denial of the spoliation presumption was improper, the court of appeals held the movant breached a duty to

354. *See* Kronisch v. United States, 150 F.3d 112, 128 (2d Cir. 1998) ("We do not suggest that the destruction of evidence, standing alone, is enough to allow a party who has produced no evidence—or utterly inadequate evidence—in support of a given claim to survive summary judgment on that claim. But at the margin, where the innocent party has produced some (not insubstantial) evidence in support of his claim, the intentional destruction of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the line." (citation omitted)).

355. *See Adobe Land*, 236 S.W.3d at 356–57 (explaining spoliation presumptions in the no-evidence motion for summary judgment context and holding that "[the party] was not required to seek a no-evidence summary judgment on [the other party's] spoliation allegations in order to properly obtain no-evidence summary judgment relief").

356. Trevino v. Ortega, 969 S.W.2d 950, 960 (Tex. 1998) (Baker, J., concurring).

357. *Id.*

358. Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351 (Tex. App.—Fort Worth 2007, pet. denied).

359. *Id.* at 361.

preserve relevant evidence, and the nonmovant was sufficiently harmed as to raise the spoliation presumption.[360] In a footnote, the court explained that after it held the trial court abused its discretion, the severe prejudice to the non-spoliator justified shifting the burden of persuasion to the movant.[361]

With those principles in mind, when faced with a no-evidence motion for summary judgment, the respondent should submit evidence to support each element of spoliation and seek the establishment of the presumed fact that the evidence would be harmful to the movant on the issue upon which the motion is based, and thereby defeat the motion for summary judgment.[362] Even if the evidence of the presumed fact is rebutted and the presumption vanishes, a reasonable inference supporting the presumed fact may arise from the circumstances of the spoliation combined with other evidence of the harmful nature of the destroyed evidence and be sufficient to raise a fact issue and defeat the motion.

Justice Baker recognized that the presumption that arises from spoliation is based on a policy of remediation that "levels the evidentiary playing field and compensates the [nonspoliating] party."[363] His framework of the trial court's spoliation inquiry based on duty, breach, and prejudice has been widely followed and is in accord with Texas precedent. However, Justice Baker's discussion of the operation and result of a spoliation presumption, particularly its probative value, has little basis in Texas law and has contributed to the confusion surrounding the submission and review of jury instructions.[364] The confusion stemming from a misunderstanding of the operation of the spoliation presumption is clear from the myriad of instructions being submitted by courts in

360. *Id.* at 360.

361. *Id.* at 360 n.11. However, courts have been unwilling to conclusively establish a fact for granting summary judgment. *See, e.g.*, Kang v. Hyundai Corp. (U.S.A.), 992 S.W.2d 499, 502 (Tex. App.—Dallas 1999, no pet.) ("We will not, however, transform a presumption or sanctionable event into a conclusively established fact for summary judgment purposes.").

362. *Adobe Land*, 236 S.W.3d at 360 n.11. *But see* Ham v. Equity Residential Prop. Mgmt. Servs., Corp., 315 S.W.3d 627, 635 (Tex. App.—Dallas 2010, pet. denied) (noting the spoliated evidence did not go to the necessary element to defeat summary judgment).

363. Trevino v. Ortega, 969 S.W.2d 950, 954 (Tex. 1998) (Baker, J., concurring).

364. *Id.*

Texas. This Article now turns to the issues surrounding the submission of and form of spoliation instructions.

This Article's previous discussion regarding the inability of a spoliation presumption to alone withstand a no-evidence legal sufficiency analysis, casts serious doubt on our conclusion that the spoliation presumption is a true presumption. A persuasive case can be made that, like the inference arising from the failure of a party to testify in rebuttal against harmful evidence admitted against it, the spoliation presumption was never intended to be a presumption at all.[365] This contention is supported by prior analyses of the cases that have treated the spoliation presumption as having probative force when, according to the Texas Supreme Court, presumptions have no probative force.[366]

Therefore, it is likely that the spoliation presumption was never intended to be a presumption; it was merely an inference that may be drawn from the destruction or suppression of evidence. The inference, when combined with other circumstantial evidence, can be legally sufficient to support a verdict where a presumption cannot. Courts probably used "presumption" incorrectly in describing the inference that may be drawn from spoliation. However, when Texas courts of appeals started applying the spoliation inference as a spoliation presumption, the inference became a presumption as a matter of law.[367]

VI. SPOLIATION INSTRUCTIONS

A frequently requested and employed spoliation remedy is the spoliation instruction.[368] Spoliation instructions currently take many forms, some delegate to the jury the task of determining duty to preserve and breach, and others permit the jury to

365. *See, e.g.*, Flournoy v. Wilz, 201 S.W.3d 833, 837 (Tex. App.—Waco 2006) (categorizing the failure to testify in rebuttal against harmful evidence as an "adverse inference" and not a presumption, stating that the jury "may draw whatever inference is reasonable under the circumstances" from a party's refusal to testify), *rev'd on other grounds*, 228 S.W.3d 674 (Tex. 2007).

366. *See generally* McCormick & Ray, *Texas Evidence* § 37, at 58 (1st ed. 1937) (discussing presumptions and concluding they are not to be considered as evidence with probative value).

367. Whether or not the spoliation presumption should remain a presumption is outside the scope of this Article.

368. *See* Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 721 (Tex. 2003) (noting that the roots of the spoliation instruction date back to the English common law).

"presume" the unfavorable nature of evidence.[369] Although instructions should be tailored to the facts of the specific case at hand, the wide variety of issues the jury is asked to consider in these instructions demonstrates considerable confusion over both when to give the instruction and the form it should take. Currently unexamined in Texas jurisprudence are three questions about submitting a spoliation instruction: First, who decides whether a party spoliated? Second, is bad faith necessary to submit a spoliation instruction? Third, how should a spoliation instruction be framed? The answer to the first question is straightforward—the trial judge must make the initial determination of whether spoliation occurred before submitting a spoliation instruction to the jury.[370] The answers to the second and third questions require a closer examination of policy considerations and the two rules from which the spoliation presumption arises. Because the level of culpability in the submission of a spoliation instruction has not been decided by the Texas Supreme Court,[371] this Article will briefly examine the conflicting positions in the federal circuits. This Article concludes that more than negligence is required for a trial court to submit a spoliation instruction based on Texas common law. Finally, this Article will review some of the instructions parties have requested and trial courts have submitted to suggest a form that can be adapted to a variety of case types.

A. *The Initial Determination of Spoliation*

A jury instruction must (1) assist the jury, (2) accurately state the law, and (3) find support in the pleadings and evidence.[372] Moreover, deciding whether to give a jury instruction will

369. *See, e.g., id.* ("A trial judge should have discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available."); Lively v. Blackwell, 51 S.W.3d 637, 640 (Tex. App.—Tyler 2001, pet. denied) (asking the court for a negligent or intentional destruction of evidence instruction from which the jury could infer that the evidence would have been harmful). *See generally Trevino*, 969 S.W.2d at 959–60 (discussing the various spoliation remedies). See *infra* Appendix for examples of submitted and requested instructions.

370. *Trevino*, 969 S.W.2d at 960.

371. *Johnson*, 106 S.W.3d at 722 ("We need not decide whether a spoliation instruction is justified when evidence is unintentionally lost or destroyed, or if it is, what standard is proper.").

372. Union Pac. R.R. Co. v. Williams, 85 S.W.3d 162, 166 (Tex. 2002) (citing TEX. R. CIV. P. 277, 278); Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied).

ordinarily lie in the trial court's sound discretion.[373] Justice Baker made clear in his concurrence in *Trevino v. Ortega* that it is the trial court's role to determine whether a spoliation instruction is appropriate.[374] "This is a question of law for the trial court."[375] The courts are in agreement that the trial court has broad discretion in crafting remedies for spoliation.[376] Logically, the trial court must determine spoliation before determining whether an instruction is the appropriate remedy.[377] Consequently, based on the facts of each case, the trial court determines as a preliminary issue whether spoliation occurred and then determines whether an instruction or sanction is appropriate.[378] Such a determination will often require the trial court to resolve fact issues relating to the spoliation.[379] The trial court's resolution of conflicting testimony in a discovery dispute or sanctions hearing will not be disturbed unless the trial court abused its discretion.[380] Although the courts of appeals are generally in accord with Justice Baker's view that the trial court makes the initial determination of spoliation, the instructions given by some trial courts reflect a delegation of fact-finding to the jury on some elements of spoliation.[381] The instructions given in *Wal-Mart Stores, Inc. v.*

373. *Middleton*, 982 S.W.2d at 470.

374. *Trevino*, 969 S.W.2d at 954.

375. *Id.* At least one court has taken issue with the characterization of the question as one of law. Lively v. Blackwell, 51 S.W.3d 637, 640–41 (Tex. App.—Tyler 2001, pet. denied).

376. *See, e.g.*, *Johnson*, 106 S.W.3d at 721 ("A trial judge should have discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available.").

377. *See* McMillin v. State Farm Lloyds, 180 S.W.3d 183, 200 (Tex. App.—Austin 2005, pet. denied) (discussing the ability of the trial court to resolve discovery disputes because it had the history of the litigation and the progression of the facts leading to the discovery dispute).

378. *Trevino*, 969 S.W.2d at 960 ("[T]he trial court should first find that there was a duty to preserve evidence, the spoliating party breached that duty, and the destruction prejudiced the nonspoliating party."); Cardoza v. Reliant Energy HL&P, No. 10-03-01126-CV, 2005 WL 1189649, at *2 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (mem. op.); Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 666 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

379. *Trevino*, 969 S.W.2d at 954 (citing Massie v. Hutcheson, 270 S.W. 544, 545 (Tex. Civ. App.—Amarillo 1927, writ ref'd)); San Antonio Press, Inc. v. Custom Bilt Mach., 852 S.W.2d 64, 66–67 (Tex. App.—San Antonio 1993, no writ).

380. *San Antonio Press*, 852 S.W.2d at 67.

381. *See Johnson*, 106 S.W.3d at 721 ("The instruction informed the jury that it must presume that the missing [evidence] would have harmed [the spoliator's] case if the jury concluded that [the spoliator] disposed of the [evidence] after it knew or should have

Johnson and *Cresthaven Nursing Residence v. Freeman*[382] regard the jury as the fact finder who must find duty and breach by a preponderance of the evidence prior to applying the spoliation presumption.[383] The trial court's instruction in *Brookshire Bros. v. Aldridge* contained trial court findings on some elements and sought the jury's determination of the underlying element of duty.[384] Requesting juries to make findings on the elements of spoliation either duplicates the trial court's initial fact-finding of spoliation or reflects a misguided view of the remedial nature of a spoliation instruction. This Article concurs with Justice Baker's viewpoint that the trial court should resolve the initial issue of whether spoliation occurred.[385]

B. *The Bad-Faith Requirement for Jury Instructions*

Once the trial court has determined that spoliation has occurred, the question of an appropriate remedy arises, and the answer to that question is based on a number of factors. In what types of cases may a judge submit a spoliation instruction? This Article previously looked at culpability in the context of establishing the elements of spoliation including breach and prejudice.[386] The following discussion examines the role of the spoliator's intent when considering the submission of a spoliation instruction. One can draw the conclusion that more than negligence should be required to submit an instruction that permits the jury to infer the unavailable evidence would be harmful to the spoliator.

In *Trevino*, Justice Baker determined that a spoliation instruction is available for either negligent or intentional spoliation, but recognized that other jurisdictions require bad faith.[387] The Texas Supreme Court has at least twice described

known that they would be evidence in the case."); Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 225 (Tex. App.—Amarillo 2003, no pet.) (instructing on duty and presumption).

382. Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214 (Tex. App.—Amarillo 2003, no pet.).

383. *Johnson*, 106 S.W.3d at 721; *Freeman*, 134 S.W.3d at 225.

384. Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *8 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.).

385. *Trevino*, 969 S.W.2d at 957.

386. This Article previously concluded that negligence will support a trial court's finding of spoliation. *See supra* Part V.

387. *Trevino*, 969 S.W.2d at 957.

the culpability associated with a spoliation instruction as the "deliberate" destruction of evidence. In *Johnson*, the court noted that Texas "courts of appeals have generally limited the use of the spoliation instruction to . . . the deliberate destruction of relevant evidence."[388] In *Cire v. Cummings*,[389] the court stated that "spoliation instruction[s] may be given when a party has deliberately destroyed relevant evidence."[390]

In *Johnson*, the court noted that the Texas "courts of appeals have generally limited the use of the spoliation instruction to [1] the deliberate destruction of relevant evidence and [2] the failure of a party to produce relevant evidence or to explain its [nonproduction]."[391] But the court specifically left the culpability issue open in *Johnson* when it stated: "[W]e need not decide whether a spoliation instruction is justified when evidence is unintentionally lost or destroyed, or if it is, what standard is proper."[392] Currently, in the Texas courts of appeals there is support for the submission of a spoliation instruction based on either negligent or intentional spoliation.[393] Unlike the federal circuits that are hotly split on whether something less than bad faith may support an "adverse inference" instruction,[394] Texas courts of appeals barely address the culpability issue, and if there is a conflict, they do not discuss it.[395] A review of the two rules

388. *Johnson*, 106 S.W.3d at 721.

389. Cire v. Cummings, 134 S.W.3d 835 (Tex. 2004).

390. *Id.* at 843.

391. *Johnson*, 106 S.W.3d at 721.

392. *Id.* at 722.

393. *Trevino*, 969 S.W.2d at 957.

394. *See* Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 686–87 (2009) (explaining the split among the federal circuits regarding culpability for a spoliation instruction).

395. *See* Clark v. Randalls Food, 317 S.W.3d 351, 356, 358–59 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (citing *Trevino*, 969 S.W.2d at 957; Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 359 (Tex. App.—Fort Worth 2007, pet. denied)) (describing the standard for breach as one of reasonableness, which places the risk of loss on the party in possession of the evidence, and holding that Randalls failed to exercise reasonable care); Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *7 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.) ("The trial court enjoys discretion to fashion an appropriate remedy for negligent spoliation."); Buckeye Ret. Co. v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.) (following Justice Baker's framework in *Trevino*); McMillin v. State Farm Lloyds, 180 S.W.3d 183, 198 (Tex. App.—Austin 2005, pet. denied) (conforming to *Trevino*'s analysis, and allowing sanctions for negligent spoliation of evidence); Offshore Pipelines, Inc. v. Schooley, 984

giving rise to the spoliation presumption in Texas may explain, in part, why culpability is not a focus of Texas courts of appeals opinions.

1. Texas Case Law

The two rules from which the spoliation presumption arises: (1) the deliberate destruction of relevant evidence and (2) the failure of a party to produce relevant evidence or explain its nonproduction, contain elements of culpability.[396] The first rule requires the "deliberate" destruction of evidence. The second rule does not specify any culpable intent, although intent may be implied. When reviewing cases involving the destruction of relevant evidence, courts of appeals turn to the first rule and recite the requirement of deliberate destruction to support a spoliation presumption.[397] When reviewing cases involving the failure to produce evidence attributable to something other than destruction, the courts may recite both rules but focus on the second.[398] Because there is no express culpability identified in the second rule, the distinction between whether the spoliator intentionally or negligently spoliated is not discussed.[399]

S.W.2d 654, 667–68 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("If the trial court, after hearing such testimony, determines that the accused party had a duty to preserve evidence, which it breached either negligently or intentionally and that the loss of the evidence will prejudice the other party, the court then . . . must decide whether the submission of a spoliation instruction is a proper remedy.").

396. *Johnson*, 106 S.W.3d at 721.

397. Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 225 (Tex. App.—Amarillo 2003, no pet.) (stating deliberate spoliation gives rise to a presumption); Brumfield v. Exxon Corp., 63 S.W.3d 912, 920 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (holding no evidence of intentional destruction of videotapes when evidence showed that tapes were routinely taped over); Clements v. Conard, 21 S.W.3d 514, 523 (Tex. App.—Amarillo 2000, pet. denied) ("The doctrine of spoliation refers to the improper intentional destruction of evidence relevant to a case."); Williford Energy Co. v. Submergible Cable Servs., 895 S.W.2d 379, 389 (Tex. App.—Amarillo 1994, no writ) ("There is no evidence in the record that Submergible intentionally disposed of the experimental bands so as to make them unavailable for discovery."); San Antonio Press, Inc. v. Custom Bilt Mach., 852 S.W.2d 64, 67 (Tex. App.—San Antonio 1993, no writ) (noting "the intentional, deliberate destruction of evidence" raises the spoliation presumption).

398. Clark v. Randalls Food, 317 S.W.3d 351, 356, 358–59 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (citing *Trevino*, 969 S.W.2d at 957; *Adobe Land*, 236 S.W.3d 351, 359; *Brookshire Bros.*, 2010 WL 2982902, at *7; *Buckeye Ret.*, 239 S.W.3d at 401; *McMillin*, 180 S.W.3d at 198; *Schooley*, 984 S.W.2d at 667–68).

398. *Johnson*, 106 S.W.3d at 721.

399. *Id.*

The first and only in-depth discussion of negligence supporting the submission of an adverse inference instruction occurred in Justice Baker's concurrence in *Trevino v. Ortega*. In his concurrence, Justice Baker initially reviewed culpability in his discussion of breach of duty, and determined that because the parties' duty to preserve evidence is one of reasonability, the breach may be based on either negligent or intentional conduct, and the spoliator should be held accountable for either.[400] According to Justice Baker, such a standard would be consistent with crafting remedies to ameliorate the prejudicial effects of the unavailable evidence.[401] After reviewing the courts' authority to sanction and the availability of such sanctions for spoliation in general, Justice Baker turned specifically to the spoliation presumption and noted the broad discretion that Texas courts have in instructing juries.[402] He described two available presumptions, one a "rebuttable presumption" and the other an "adverse presumption," both of which may be submitted based on either negligent or intentional spoliation.[403] Notably, Justice Baker's opinion largely rests not on Texas law but on case law from other jurisdictions.[404] Prior to Justice Baker's opinion, no Texas court had specifically adopted negligence as the basis for the spoliation presumption or instruction.

Several of the courts of appeals have adopted most, if not all, parts of Justice Baker's framework in analyzing spoliation, and have also recited that the trial court has discretion to submit a spoliation instruction for negligent spoliation.[405] Some courts have relied on Justice Baker's concurrence in *Trevino*, explaining that because the duty to preserve evidence is one of reasonableness, it only makes sense that a similar standard should

400. *Trevino*, 969 S.W.2d at 957.

401. *See* TEX. R. CIV. P. 215.2 (explaining court sanctions for discovery violations); *Trevino*, 969 S.W.2d at 957 (outlining the three purposes served by remedying a spoliation violation: punishing the spoliator, deterring any spoliation in the future, and remedying the issue caused by lost or destroyed evidence).

402. *See Trevino*, 969 S.W.2d at 958 (stating that the trial court should have discretion to protect against spoliation).

403. *Id.* at 960.

404. *Id.*

405. *See, e.g.*, Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *7 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.) ("The trial court enjoys discretion to fashion an appropriate remedy for negligent spoliation.").

apply for breach of that standard.[406] The court of appeals in *Adobe Land Corp. v. Griffin, L.L.C.*, recognized that the "rebuttable presumption," described in Justice Baker's concurrence as shifting the burden of persuasion, can be used where spoliation severely hinders a party's claim, and held that the imposition of the rebuttable presumption may be sufficient to raise a fact issue.[407] The court of appeals' opinion relied on Justice Baker's concurrence in *Trevino*.[408]

As noted above, several courts of appeals have recited that in cases of destruction, deliberate intent is required to support a spoliation presumption or instruction.[409] In addressing deliberate destruction, some courts have concluded that the lack of "fraudulent intent or purpose" of the spoliator rebuts the spoliation presumption.[410] These cases imply that fraudulent intent or purpose is the level of intent required under the first rule, and express the courts' reluctance to invoke the spoliation presumption for less than intentional breach.[411]

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406. Clark v. Randalls Food, 317 S.W.3d 351, 356, 358–59 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (citing *Trevino*, 969 S.W.2d at 957); Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 359 (Tex. App.—Fort Worth 2007, pet. denied); *Brookshire Bros.*, 2010 WL 2982902, at *7; Buckeye Ret. Co. v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.); McMillin v. State Farm Lloyds, 180 S.W.3d 183, 198 (Tex. App.—Austin 2005, pet. denied); Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 667–68 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

407. *Adobe Land*, 236 S.W.3d at 359.

408. *See id.* (relying on *Trevino* to establish whether a duty to preserve evidence had been breached).

409. Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 225 (Tex. App.—Amarillo 2003, no pet.) (stating deliberate spoliation gives rise to a presumption); Brumfield v. Exxon Corp., 63 S.W.3d 912, 920 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (holding no evidence of intentional destruction of videotapes when evidence showed that tapes were routinely taped over); Clements v. Conard, 21 S.W.3d 514, 523 (Tex. App.—Amarillo 2000, pet. denied) ("The doctrine of spoliation refers to the improper intentional destruction of evidence relevant to a case."); Williford Energy Co. v. Submergible Cable Servs., 895 S.W.2d 379, 389 (Tex. App.—Amarillo 1994, no writ) ("There is no evidence in the record that Submergible intentionally disposed of the experimental bands so as to make them unavailable for discovery."); San Antonio Press, Inc. v. Custom Bilt Mach., 852 S.W.2d 64, 67 (Tex. App.—San Antonio 1993, no writ) (noting "the intentional, deliberate destruction of evidence" raises the spoliation presumption).

410. This Article previously discussed the error of using the spoliator's intent to rebut the unfavorable nature of the unavailable evidence.

411. *E.g.*, Ordonez v. M.W. McCurdy & Co., 984 S.W.2d 264, 273 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (stating that an "alleged spoliator may rebut the presumption by showing that the evidence in question was not destroyed with fraudulent intent or purpose" (citing H. E. Butt Grocery Co. v. Bruner, 530 S.W.2d 340, 344 (Tex.

Justice Baker's concurrence is the most detailed opinion regarding the culpability required to submit a spoliation instruction in Texas jurisprudence.[412] Courts of appeals either rely on Justice Baker's concurrence or avoid the culpability issue other than to recite the two rules. In contrast, the federal courts' discussion of the culpability to support an adverse inference instruction is robust.[413] The federal courts are split between those circuits that require more than gross negligence to support an inference and those that focus on the prejudice to the non-spoliator and permit an adverse inference instruction for gross negligence or less.[414] A brief review of the rationale that supports both sides is informative.

2. Federal Case Law

Most jurisdictions in the United States agree that the trial judge has significant discretion in imposing a myriad of spoliation remedies for negligent breach of the duty to preserve evidence.[415] Both federal and Texas rules of civil procedure contain a non-exclusive list of available sanctions for discovery abuse.[416] In federal court, the trial court's inherent authority will likewise support an award of sanctions for pretrial spoliation, including an adverse inference instruction, although some circuits view the court's inherent authority much more narrowly.[417] However, the

Civ. App.—Waco 1975, writ dism'd))); Buckeye Ret. Co., v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.); *In re* T.L.K., 90 S.W.3d 833, 836 (Tex. App.—San Antonio 2002, no pet.) (discussing that the spoliation presumption arises with "the deliberate spoliation of relevant evidence, which may be rebutted by showing that the evidence in question was not destroyed with fraudulent intent or purpose").

412. *See Trevino*, 969 S.W.2d at 959 (discussing how different levels of spoliation require different sanctions).

413. Federal courts uniformly refer to the spoliation instruction as an "adverse inference" instruction. *See* Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 686–87 (2009) (discussing the adverse inference instruction in several different federal circuits).

414. *Id.* (discussing the adverse inference instruction in several different federal circuits).

415. *Id.* (explaining the various remedies available to a court when presented with spoliation of evidence).

416. FED. R. CIV. P. 37(b); TEX. R. CIV. P. 215.2.

417. *See* Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1326 (Fed. Cir. 2011) ("The particular sanction imposed is within the sound discretion of the district court in exercising its inherent authority . . . ."); Rimkus Consulting Grp. v. Cammarata, 688 F.

federal circuits are more sharply split on the requisite culpability for submitting a spoliation instruction.[418] A review of this split shows the tension between the logical evidentiary basis of the inference that arises from the bad faith of the spoliator, and the trial court's discretion to remediate even negligent spoliation in extreme circumstances.

As in Texas state courts, the rationale behind the federal adverse inference is that a party who destroys relevant evidence, with the intent to make it unavailable for trial, must have done so because of the belief the evidence would prove unfavorable.[419] Most federal circuits require some form of willfulness or bad faith to submit an adverse inference instruction.[420] In the Fifth Circuit

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Supp. 2d 598, 611 (S.D. Tex. 2010) (recognizing that the court's inherent powers should be construed to orderly and expeditiously perform its duties).

418. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 533 (D. Md. 2010) (recognizing that the availability of possible sanctions varies by jurisdiction). The opinion contains an appendix with a spreadsheet that describes the culpability necessary for an adverse inference instruction by federal circuit. *Id.*; *see* Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 267–68 (2d Cir. 1999) (permitting an adverse inference on a showing of less than bad faith); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 155–56 (4th Cir. 1995) (discussing that bad faith is not necessarily a requirement for a spoliation instruction); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) (explaining that a spoliation instruction may be given when the spoliator acts with less than bad faith). *But see Micron Tech.*, 645 F.3d at 1326 (focusing on the bad faith of the spoliator when determining spoliation instructions); United States v. Laurent, 607 F.3d 895, 902–03 (1st Cir. 2010) (requiring bad faith); Henning v. Union Pac. R.R. Co., 530 F.3d 1206, 1219–20 (10th Cir. 2008) (relying on intentionality and bad faith in determining the necessity of a spoliation instruction); United States v. Boxley, 373 F.3d 759, 762 (6th Cir. 2004) (indicating that a spoliator's intentions are important in deciding whether a spoliation instruction may be issued); Morris v. Union Pac. R.R., 373 F.3d 896, 901 (8th Cir. 2004) (focusing on the spoliator's intent to determine the necessity of a spoliation instruction); Park v. City of Chicago, 297 F.3d 606, 616 (7th Cir. 2002) (stating that the cause behind a spoliator's actions directly determines whether a spoliation instruction is appropriate); Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (applying the bad-faith standard to spoliation cases).

419. Vick v. Tex. Emp't Comm'n, 514 F.2d 734, 737 (5th Cir. 1975).

420. *See* Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 553–56 (6th Cir. 2010) (discussing the requirement for intentional, bad-faith destruction); Booker v. Mass. Dep't of Pub. Health, 612 F.3d 34, 46 (1st Cir. 2010) ("A spoliation instruction is not warranted absent this threshold showing, because the trier of fact would have no basis for inferring that the destruction of documents stemmed from the party's consciousness that the documents would damage his case."); Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008) ("In order to draw an inference that the [destroyed documents] contained information adverse to Sears, we must find that Sears intentionally destroyed the documents in bad faith."); Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) ("A spoliation-of-evidence sanction requires 'a finding of intentional destruction indicating a desire to suppress the truth'" (quoting Stevenson v. Union Pac. R.R. Co., 354

bad faith is required, as with other severe sanctions, to grant an adverse inference instruction not only due to the logic of the inference but also because of limits to the inherent authority of judicial courts.[421] The bad-faith or fraudulent-intent jurisdictions reason that the adverse inference makes little sense absent a showing of intent; the presumption is premised upon the conscious desire of a party to make relevant evidence unavailable because the party believes the evidence is harmful.[422] An adverse inference does not logically arise from the negligent loss or destruction of evidence because the inference is predicated on the bad faith act of rendering the evidence unavailable.[423] Finally some courts express that the court's inherent authority should be narrowly construed and limited by its ultimate source, "the court's

F. 3d 739, 746 (8th Cir. 2004))); Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004) ("[S]uch an inference 'cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.'" (quoting *Vodusek*, 71 F.3d at 156)); Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1294 (11th Cir. 2003) ("[A]n adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith."); Wyler v. Korean Air Lines Co., 928 F.2d 1167, 1174 (D.C. Cir. 1991) ("Mere innuendo . . . does not justify drawing the adverse inference requested . . . .").

421. Russell v. Univ. of Tex. of the Permian Basin, 234 Fed. App'x 195, 208 (5th Cir. 2007); Condrey v. SunTrust Bank of Ga., 431 F.3d 191, 203 (5th Cir. 2005); King v. Ill. Cent. R.R., 337 F.3d 550, 556 (5th Cir. 2003); United States v. Wise, 221 F.3d 140, 156 (5th Cir. 2000); *Rimkus Consulting*, 688 F. Supp. 2d at 613–14 ("[T]o the extent sanctions are based on inherent power, the Supreme Court's decision in *Chambers* may also require a degree of culpability greater than negligence.").

422. *See Vick*, 514 F.2d at 737 (holding the adverse inference to be drawn from the destruction of records predicated on bad conduct); *Victor Stanley*, 269 F.R.D. at 526 ("[A]n adverse inference instruction makes little logical sense if given as a sanction for negligent breach of the duty to preserve . . . particularly if the destruction was of ESI and was caused by the automatic deletion function of a program that the party negligently failed to disable once the duty to preserve was triggered. The more logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful."); *see also* Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 78 (3d Cir. 1994) ("Such evidence permitted an inference, the 'spoliation inference,' that the destroyed evidence would have been unfavorable to the position of the offending party."); Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 691–96 (2009) (examining how many courts only allow an adverse inference when the spoliator intentionally destroyed the evidence).

423. *See Beaven*, 622 F.3d at 553–56 (considering what is necessary for intentional, bad-faith destruction); *Booker*, 612 F.3d at 46 (acknowledging there must be knowledge of document destruction); *Hodge*, 360 F.3d at 450 (needing willful conduct).

need to orderly and expeditiously perform its duties."[424]

The jurisdictions that require less than intentional or bad-faith spoliation focus on compensation to the non-spoliator and the accuracy of court proceedings as primary considerations.[425] These jurisdictions reason that the burden of production to show the documents were not harmful should be on the party who destroyed the evidence regardless of the intent.[426] "The adverse inference instruction provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss."[427]

According to the proponents of a less-than-bad-faith standard, the ability to remedy spoliation should not be limited to outrageous behavior. Instead, the accuracy purpose of spoliation law is furthered because the parties are placed evenly.[428] The deterrence purpose is also advanced because even absent bad faith, the imposition of an adverse inference instruction can deter future spoliation by placing the risk of accidental loss or destruction of evidence on the party in possession of the evidence.[429] The Second and Ninth Circuits permit a trial court to give an adverse inference instruction if a party can show that an opponent negligently, or with gross negligence, spoliated relevant

424. Newby v. Enron Corp., 302 F.3d 295, 302 (5th Cir. 2002) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)).

425. *See* Residential Funding Corp. v. DeGerorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (explaining that the purpose of court interaction is to place the harmed party in a better position); Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683, 694–95 (2009) (highlighting the rationales used by courts that promote a negligence standard for spoliation instruction).

426. *See Residential Funding*, 306 F.3d at 109 (indicating that the party responsible for the loss of the evidence bears the burden).

427. *Id.* at 108 (citing Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991)).

428. *Id.* at 108–09.

429. *See id.* at 108 (reiterating that the party responsible for the loss of evidence bears the burden); Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 359 (Tex. App.—Fort Worth 2007, pet. denied) ("While parties need not take extraordinary measures to preserve evidence, they have a duty to exercise reasonable care in preserving potentially relevant evidence.").

evidence.[430] Their rationales for extending the adverse inference to negligent or grossly negligent spoliation include: (1) Imposing a remedy for negligent loss or destruction of evidence places the risk of loss on the party possessing the evidence and encourages the safekeeping of evidence;[431] and (2) trial courts' discretion to fashion an appropriate remedy for spoliation of evidence should not be so limited.[432]

In crafting sanctions for spoliation, a significant concern for these courts is the prejudice of the spoliation to the non-spoliator, which is of key importance.[433] Remediation and restoring the parties to pre-spoliation positions are primary considerations.[434] Justice Scheindlin, in *Pension Committee of the University of Montreal Pension Plan v. Banc of America*,[435] gives an articulate and reasoned basis for the submission of an adverse inference instruction based on less than bad faith.[436] After reviewing the objectives to be achieved, she determined that a spoliation instruction for less than bad-faith destruction may sometimes be appropriate for three reasons: (1) There may be a need to explain to the jury why the evidence is unavailable to the nonspoliating party; (2) the spoliator should bear some of the burden resulting from the destruction of the evidence; and (3) the instruction can be

430. *See* Reilly v. Natwest Mkts. Grp. Inc., 181 F.3d 253, 267 (2d Cir. 1999) (allowing an inference instruction for cases involving gross negligence); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) (explaining that a showing of bad faith is not required in order to issue a spoliation instruction).

431. *See Residential Funding*, 306 F.3d at 108 (describing that each party is responsible for its own actions regarding evidence).

432. *See Reilly*, 181 F.3d at 267–68 (providing an example where the appeals court granted discretion to the trial court); *Glover*, 6 F.3d at 1329 (indicating that the discretion afforded to a trial court includes imposing sanctions for spoliated evidence).

433. *See* Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991) (explaining that the adverse inference "should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference.... The adverse inference provides the necessary mechanism for restoring the evidentiary balance."); *see also* Rogers v. T.J. Samson Cmty. Hosp., 276 F.3d 228, 232 (6th Cir. 2002); Lewis v. Ryan, 261 F.R.D. 513, 521 (S.D. Cal. 2009) (noting the California district courts have followed the Second Circuit's approach in *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F. 3d 99 (2d Cir. 2002)).

434. Victor Stanley, Inc., v. Creative Pipe, Inc., 269 F.R.D. 497, 533–34 (D. Md. 2010).

435. Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

436. *Id.* at 468.

crafted to reinforce the permissive nature of the inference.[437] Justice Scheindlin imposed a form of adverse inference instruction based on a finding of gross negligence in preserving information and producing it in discovery. Despite the articulate discussion of the culpability required for an adverse inference instruction, the instruction ordered in *Pension* is unclear and has been criticized as complicated, confusing, and contradictory.[438]

Notably, Judge Rosenthal of the Southern District of Texas, in the equally well-reasoned opinion of *Rimkus Consulting Group, Inc. v. Cammarata*,[439] declined to follow *Pension* recognizing that the Fifth Circuit requires bad faith before the adverse inference instruction may be submitted.[440] Interestingly, Judge Rosenthal questioned whether even bad-faith destruction of evidence justifies a court to presume that the destroyed evidence was relevant or whether its loss was prejudicial, noting, however, that there was evidence of the relevance of the destroyed emails in that particular case.[441] Judge Rosenthal also examined the use of an adverse inference instruction, viewing it as among the most severe sanctions, and determined that it must be "proportionate to the culpability involved and the prejudice that results."[442]

3. Recommendation

The split of federal authority illustrated by *Pension* and *Rimkus* represent the two sides of the question the Texas Supreme Court

437. *See id.* ("No matter what level of culpability is found, any presumption is rebuttable and the spoliating party should have the opportunity to demonstrate that the innocent party has not been prejudiced by the absence of the missing information."). For an opposing view from the same year, see *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613–14 (S.D. Tex. 2010) ("And even if there is an inadvertent loss of evidence but severe prejudice to the opposing party, that too will influence the appropriate response, recognizing that sanctions (as opposed to other remedial steps) require some degree of culpability.").

438. *See Pension*, 685 F. Supp. 2d at 497–98 (specifying the jury instruction). *See generally* Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH. TELECOMM. & TECH. L. REV. 1, 36–40 (2011) (describing the flaws in the *Pension* jury instruction).

439. *Rimkus Consulting*, 688 F. Supp. 2d at 613–14.

440. *Id.* at 617.

441. *Id.* at 615 ("In the Fifth Circuit and others, negligent as opposed to intentional, 'bad[-]faith' destruction of evidence is not sufficient to give an adverse inference instruction and may not relieve the party seeking discovery of the need to show that missing documents are relevant and their loss prejudicial.").

442. *Id.* at 618.

must eventually resolve. Clearly Justice Baker's concurrence supports the reasoning set forth in *Pension* that focuses on the prejudice to the spoliator and the remediation of the spoliation. But the longstanding requirement that the spoliation presumption arises from the deliberate destruction of relevant evidence or the (implicitly deliberate) failure to produce relevant evidence in a party's possession supports the requirement of some form of intent before a spoliation instruction may be given.

Justice Baker's concurrence and conclusion that negligence should support a spoliation presumption, and the submission of an adverse inference instruction, are compelling, but they are not based on Texas common law. An adverse inference instruction based on negligence requires the jury to make deductions that are illogical and not supported by the evidence—that the evidence was negligently spoliated because it was unfavorable to the spoliator. While the jury could logically infer that spoliated evidence was harmful to the spoliator because the spoliation was done with intent to conceal the contents of the evidence, accidental loss or deletion will not support such an inference.[443]

Finally, the trial court has discretion to craft appropriate discovery sanctions for spoliation.[444] The court's determination of the appropriate remedy for the destruction of evidence is factually intensive, focusing on a sliding scale of factors, including the goal of compensating the non-spoliator and the goals of deterring culpable conduct resulting in evidence spoliation.[445] There are few circumstances justifying the submission of a spoliation

443. *See* Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004) ("[S]uch an inference 'cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.'" (quoting Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995))).

444. The list of sanctions is non-exclusive and includes: (1) disallowing further discovery by the sanctioned party; (2) charging expenses of discovery or court costs against the sanctioned party or its attorney; (3) ordering a particular fact "to be established for the purposes of the action;" (4) refusing to allow the sanctioned party to offer evidence on the designated matter; (5) striking all or part of the sanctioned party's pleadings; (6) holding the sanctioned party in contempt; and (7) awarding the innocent party reasonable expenses, including attorney's fees, caused by the sanctioned party's actions. TEX. R. CIV. P. 215.2.

445. *See* Trevino v. Ortega, 969 S.W.2d 950, 953 (Tex. 1998) ("As with any discovery abuse or evidentiary issue, there is no one remedy that is appropriate for every incidence of spoliation[;] the trial court must respond appropriately based upon the particular facts of each individual case.").

instruction based on negligent spoliation because the trial court ultimately retains the ability to craft an appropriate remedy in a particular case.[446]

C. *Crafting the Spoliation Instruction*

Under Texas law, the spoliation presumption supports two types of remedies. In addition to the common spoliation instruction remedy, Justice Baker describes the more elusive rebuttable presumption that is available in certain limited circumstances.[447] The rebuttable presumption may be employed when there is negligent or intentional spoliation of critical evidence, resulting in the inability of the nonspoliating party to prove its case.[448] In that instance, a two-part instruction is employed. First, the jury is instructed that it "should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue.[449] Second, the court instructs the jury that the spoliating party bears the burden to disprove the presumed fact or issue."[450] In essence, the burden of persuasion on the critical issue or fact is shifted to the spoliator.[451] If the issue pertains to a jury question that is normally submitted, then the jury question should likewise reflect the shifted burden.[452] The first, based on an unrebutted presumption that spoliation has occurred and the legal conclusion that the unavailable evidence would be harmful, takes the form of a mandatory instruction that the unavailable evidence would be harmful to the spoliator.[453] As discussed earlier, in most spoliation cases some evidence is produced to rebut the

446. *See id.* (noting that remedies for spoliation may vary depending on the facts of a case).

447. *Id.* at 956–60.

448. *Id.* at 960.

449. *Id.*

450. *Id.*

451. *See id.* (discussing the value of the burden-shifting rebuttable presumption "when the nonspoliating party cannot prove its prima facie case without the destroyed evidence").

452. *See id.* (furthering discussion on the rebuttable presumption).

453. As noted in Part V, for the effect of an unrebutted spoliation presumption, see Rules 215.2(b)(3) and 215.3 of the Texas Rules of Civil Procedure that provide the court with the discretion to designate facts that shall be taken to be established as a sanction for the failure to produce discovery and discovery abuse. Thus, even if the presumption is rebutted, the trial court in effect has the ability to instruct the jury that a fact or issue is established.

presumption that the unavailable evidence would be harmful.[454] Consequently, the second and most common instruction is employed after the presumption is rebutted and vanishes leaving the jury to draw inferences from the circumstances surrounding the spoliation. This instruction is used to inform the jury that it may infer that a party that destroyed or failed to produce evidence did so because the evidence was unfavorable to that party. In federal parlance such an instruction is referred to as an "adverse inference" instruction.[455] The specific wording of the instruction will differ depending on the case and circumstances.

It must be quickly pointed out that the two instructions discussed above are those that flow from the spoliation presumption. Depending on the facts, sanctions could be imposed that require the jury be instructed that designated facts or issues are established.[456] Our focus in this section is on the second, and most common, spoliation instruction that permits the jury to infer the spoliated evidence would be harmful to the spoliator.

Because there are no rules and minimal case law describing the specific spoliation instruction to give to a jury, instructions vary greatly.[457] Two such instructions below illustrate the immediate differences in the specificity of the instruction and articulation of the underlying spoliation principle:

Offshore Pipelines, Inc. v. Schooley[458]:

> If a party fails to produce evidence which is under its control and reasonably available to it and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.[459]

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454. *See supra* Part V.

455. Russell v. Univ. of Tex. of the Permian Basin, 234 Fed. App'x 195, 207, 208 (5th Cir. 2007) (citing Vick v. Tex. Emp't Comm'n, 514 F.2d 734, 737 (5th Cir. 1975)).

456. Spohn Hosp. v. Mayer, 104 S.W.3d 878, 881 n.2 (Tex. 2003) (per curiam) (citing TEX. R. CIV. P. 215.2(b)(3)) (noting the court is empowered to order designated facts taken to be established).

457. *See infra* app'x (listing multiple variations of the spoliation instruction given in Texas cases).

458. Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

459. *Id.* at 666.

Brookshire Bros. v. Aldridge:

> In this case, Brookshire Brothers permitted its video surveillance system to record over certain portions of the store surveillance video of the day of the occurrence in question. If you find that Brookshire Brothers knew or reasonably should have known that such portions of the store video not preserved contained relevant evidence to the issues in this case, and its non-preservation has not been satisfactorily explained, then you are instructed that you may consider such evidence would have been unfavorable to Brookshire Brothers.[460]

Both cases involved the inability of the spoliating party to produce relevant evidence.[461] The *Offshore Pipelines* instruction is a general legal proposition that neither identifies the spoliating party nor the issue to which the lacking evidence is pertinent.[462] Presumably, the evidence presented at trial made those points clear. The *Brookshire Bros.* instruction is much more specific in identifying the destroyed evidence and the issue to which the destroyed evidence would pertain.[463] Another key difference is that the *Brookshire Bros.* instruction requires the jury to make findings relating to Brookshire Brothers's duty to preserve evidence before it may consider the unfavorable nature of the spoliated evidence.[464] Finally, the instruction places the burden on Brookshire Brothers to satisfactorily explain the non-preservation.[465] Both instructions give the jury the discretion to regard the evidence as harmful, and neither instruction informs the jury of the level of culpability of the spoliating party.[466] Although spoliation instructions will vary depending on the underlying circumstances and the remedy sought, a more unified and standard approach would benefit judges and practitioners alike.[467] To that

460. Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *9 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.).

461. *Schooley*, 984 S.W.2d at 657; *Brookshire Bros.*, 2010 WL 2982902, at *1.

462. *See Schooley*, 984 S.W.2d at 666 (quoting the jury instruction upon which the trial court submitted).

463. *See Brookshire Bros.*, 2010 WL 2982902, at *9 (addressing the spoliation instruction submitted to the jury).

464. *Id.*

465. *Id.*

466. *See Schooley*, 984 S.W.2d at 666 (restating the instruction given to the jury); *Brookshire Bros.*, 2010 WL 2982902, at *9 (addressing the spoliation instruction submitted to the jury).

467. *See, e.g.*, Trevino v. Ortega, 969 S.W.2d 950, 960–61 (Tex. 1998) (discussing that

end, it is important to briefly review the rules relating to jury instructions and subsequently address questionable components of the spoliation instruction as exemplified by certain instructions that have been submitted to a jury or requested by a party.

D. *Rules Governing Jury Instructions*

Although a trial court retains broad discretion to remediate spoliation, it is not unbounded in terms of the instructions that it gives.[468] In general, Texas Rules of Civil Procedure 277 and 278 provide that jury instructions "must: (1) assist the jury, (2) accurately state the law, and (3) find support in the pleadings and evidence."[469] Moreover, deciding whether to give a jury instruction will ordinarily lie in the trial court's discretion.[470] On appeal, the burden rests with the appellant to prove the jury instruction was harmful error.[471]

As previously mentioned, one goal of the spoliation instruction is to level the evidentiary playing field between the parties.[472] A secondary goal in willful or intentional spoliation is to "punish the spoliator."[473] A secondary goal in negligent spoliation is deterrence and promoting the policy of safeguarding evidence for trial.[474] The variety of instructions that have been given by Texas courts suggests confusion over how to accomplish these goals. Several questions warrant discussion, including: Does the judge or jury determine the elements of spoliation? Is the instruction permissive? And how is the instruction reviewed on appeal?

Texas judges may submit a jury instruction containing a rebuttable presumption or adverse presumption in spoliation cases).

468. Buckeye Ret. Co., v. Bank of Am., N.A., 239 S.W.3d 394, 401 (Tex. App.—Dallas 2007, no pet.) ("Trial courts have broad discretion to take measures to correct the ill effects resulting from spoliation, including a jury instruction on the spoliation presumption and death[-]penalty sanctions."); Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 471 (Tex. App.—San Antonio 1998, pet. denied) (concluding that the trial judge should not have given a spoliation instruction when the party who was unable to produce the evidence provided a reasonable explanation for the absence of the evidence and testified about what the evidence contained).

469. *Middleton*, 982 S.W.2d at 470 (citing TEX. R. CIV. P. 277, 278).

470. *Id.* (citing Perez v. Weingarten Realty Investors, 881 S.W.2d 490, 496 (Tex. App.—San Antonio 1994, writ denied)).

471. *Id.*

472. *Trevino*, 969 S.W.2d at 954.

473. *Id.*

474. *See id.* (explaining the purposes of the remedies for the spoliation of evidence).

E. *Issues in Crafting Spoliation Instructions*

1. Who is the Spoliation Fact Finder?

As discussed above, spoliation often involves the resolution of factual issues underlying the three elements: (1) duty, (2) breach, and (3) prejudice.[475] This raises the question of who should make factual determinations, and whether a jury should be instructed to make the underlying findings. Several variations can be observed in the cases discussed below[476]:

Wal-Mart Stores, Inc. v. Johnson:

> You are instructed that, when a party has possession of a piece of evidence at a time he knows or should have known it will be evidence in a controversy, and thereafter he disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it. If you find by a preponderance of the evidence that Wal-Mart had possession of the reindeer at a time it knew or should have known they would be evidence in this controversy, then there is a presumption that the reindeer, if produced, would be unfavorable to Wal-Mart.[477]

The jury instruction given in *Johnson* designates the jury as the fact finder that must find certain facts that indicate a breach of duty prior to applying the spoliation presumption.[478] Interestingly, the *Johnson* instruction asked the jury to consider the possession and knowledge of claim components of the duty element, implying that the presence of these components would result in a breach of duty sufficient to support the presumption.[479] Other jury instructions regarding spoliation incorporate the trial

475. *See id.* at 954–55 ("This legal inquiry involves considering: (1) whether there was a duty to preserve evidence; (2) whether the alleged spoliator either negligently or intentionally spoliated evidence; and (3) whether the spoliation prejudiced the non-spoliator's ability to present its case or defense.").

476. In the examples given, it is important to note that the language of the instructions was never addressed by the respective appellate courts. In *Wal-Mart Stores, Inc. v. Johnson*, the supreme court refused to approve or disapprove the language of the instruction. *See* Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003) (explaining that the court's analysis was focused exclusively on the question of whether Wal-Mart had a duty to preserve evidence).

477. *Id.* at 720–21.

478. *Id.*

479. *Id.*

court's findings, as seen in the following instruction in *Wackenhut Corrections Corp. v. de la Rosa*:

> You, the jury, are instructed that Wackenhut Corrections Corporation and Warden David Forrest destroyed, lost, or failed to produce to this [c]ourt 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 Forrest.[480]

Finally, some instructions reflect a combination of a trial court's findings and instruction that a jury should also make a finding on a separate fact issue.[481] For example, the jury instruction in *Brookshire Bros.*, quoted above, contained a trial court finding that Brookshire Brothers was responsible for the destruction of evidence, and permitted the jury to consider the evidence unfavorable to Brookshire Brothers if it first found that "Brookshire Brothers knew or reasonably should have known that such portions of the store video not preserved contained relevant evidence."[482] Like the *Johnson* instruction, the *Brookshire Bros.* instruction also advised the jury on the knowledge of claim issue, but also instructed the jury on the relevance component of the duty element and required the jury to determine whether Brookshire Brothers satisfactorily explained why portions of the video surveillance were deleted.[483] As seen from the instructions above, some courts are instructing juries to make findings pertinent to the initial finding of spoliation before applying the inference that the missing evidence was harmful to the spoliator's case.[484] In the *Johnson* and *Brookshire Bros.* cases, the instructions permit the jurors to reassess the evidence and

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

481. *See, e.g.*, Brookshire Bros. v. Aldridge, No. 12-08-00368-CV, 2010 WL 2982902, at *9 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.) (providing the jury with the trial court's findings, and instructing the jury to determine whether Brookshire Brothers "knew or reasonably should have known" that the video contained evidence relevant to the case).

482. *Id.*

483. *Id.*

484. *See Johnson*, 106 S.W.3d at 720–21 (requiring the jury to make factual findings on the spoliation issue before permitting application of the adverse inference); *Brookshire Bros.*, 2010 WL 2982902, at *9 (giving the jury to opportunity to make a factual finding prior to applying the adverse inference).

determine whether, in their judgment, spoliation has even occurred.[485] Thus, although the trial court initially found spoliation, the spoliator may argue the issue before the jury anew.[486]

The better practice would be to accept the trial court's findings of spoliation and instruct the jury on the inference to be drawn.[487] The jury's role should be limited to deciding whether or not to draw an adverse inference and how to weigh the inference with the balance of the evidence.[488] Spoliation instructions requiring juries to make a particular factual finding before deciding whether to apply the adverse inference, such as in the *Johnson* and *Brookshire Bros.* instructions, should be avoided.[489] Fact issues that could result in the imposition of a spoliation instruction should be resolved before the charge conference.[490]

There is much support for this practice. According to Justice Baker, the trial court must first find the three elements of

485. *See Johnson*, 106 S.W.3d at 720–21 (instructing the jury to determine whether Wal-Mart had possession of the evidence at a time it "knew or should have known" that it would be needed in a subsequently filed lawsuit); *Brookshire Bros.*, 2010 WL 2982902, at *9 (advising the jury that it should consider whether Brookshire Brothers "knew or reasonably should have known" that the surveillance video would be relevant to the issues at trial).

486. *E.g.*, *Brookshire Bros.*, 2010 WL 2982902, at *9 (providing the jury with explanation that Brookshire Brothers allowed segments of the video from the day of the incident to be recorded over, and instructing the jury to consider whether there was a reasonable justification for the loss of the evidence).

487. *See* Nucor Corp. v. Bell, 251 F.R.D. 191, 202–03 (D.S.C. 2008) (recognizing the duplication of effort when the trial court finds spoliation and then the jury repeats the effort). *Compare* Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 496–97 (S.D.N.Y. 2010) (announcing a detailed, complex, and difficult instruction), *with* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 619–20 (W.D. Tex. 2010) (suggesting a simple instruction).

488. *Cf.* United States v. Lanzon, 639 F.3d 1293, 1302 (11th Cir. 2011) (describing the circumstances necessary for an adverse inference instruction—"a showing of bad faith"); Energy W. Mining Co. v. Oliver, 555 F.3d 1211, 1220 (10th Cir. 2009) (addressing the destruction of evidence issue, and determining that there was a lack of deliberate misconduct, and thus, no violation of the Fifth Amendment).

489. *See generally Johnson*, 106 S.W.3d at 720–21 (requiring jury to make fact-finding prior to application of the adverse inference); *Brookshire Bros.*, 2010 WL 2982902, at *9 (allocating the responsibility of making factual findings to the jury prior to applying the adverse inference).

490. *But see Johnson*, 106 S.W.3d at 720–21 (declining to resolve factual issues underlying the spoliation issue prior to submission to the jury); Trevino v. Ortega, 969 S.W.2d 950, 960 (Tex. 1998) (Baker, J., concurring) ("Deciding whether to submit this instruction is a legal determination . . . the trial court should first find that there was a duty to preserve evidence, . . . breach [of that duty] . . . , and . . . prejudice[]. . . .").

spoliation before submitting the spoliation instruction to the jury.[491] Courts generally view the *submission* of a jury instruction, rather than the presumption or inference that may be drawn from a finding of spoliation, as the *remedy* for spoliation.[492] This view is supported by the fact that a spoliation instruction imposes a burden on the alleged spoliator to rebut the alleged harm contained in the missing evidence.[493] Thus, it is questionable that courts should have any discretion to submit a spoliation instruction without first finding the required elements of spoliation. In *Johnson*, the supreme court determined that the submission of the instruction absent evidence of duty was harmful and required reversal. Thus, to avoid reversal, a trial court must be certain that there is evidence of duty.[494]

Claims that an opponent failed to produce or destroyed evidence most often arise in the context of discovery disputes for which trial courts, not juries, are responsible for resolving. Thus, trial courts will ordinarily have to determine the "history of the litigation and the progression of events specific to the discovery dispute."[495] Despite Justice Baker's admonition that trial courts should make a preliminarily determination of whether sanctions or a presumption is justified, some courts wait until evidence is presented at trial to resolve the issue—which often means that prejudicial evidence of spoliation has been presented to the jury without assurance that spoliation is present.[496]

A separate, but related, reason why trial courts are the appropriate fact finders for spoliation issues is that the spoliation presumption is an evidentiary concept,[497] and it is the trial court's

491. *Trevino*, 969 S.W.2d at 960.

492. *E.g.*, *Johnson*, 106 S.W.3d at 721 (explaining that trial judges have discretion in providing a remedy for the unavailability of evidence at trial, one such remedy being the spoliation instruction).

493. *See, e.g.*, *Trevino*, 969 S.W.2d at 960 (describing the two presumptions trial courts may submit to the jury, the first being a burden-shifting presumption).

494. *Johnson*, 106 S.W.3d at 721 (holding that the trial court abused its discretion in submitting the instruction absent a duty to preserve evidence).

495. McMillin v. State Farm Lloyds, 180 S.W.3d 183, 200 (Tex. App.—Austin 2005, pet. denied); *see* Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 667 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (discussing the potential need to conduct a preliminary hearing to determine if there are underlying factors to support spoliation).

496. *See, e.g.*, Tex. Elec. Coop. v. Dillard, 171 S.W.3d 201, 209 (Tex. App.—Tyler 2005, no pet.) (discussing the testimony at trial—which included an admission of evidence destruction—prior to the trial court's spoliation finding).

497. *See* Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004)

duty to be a gatekeeper of the evidence and to apply the rules of evidence.[498] Thus, sound reasons exist for having a preliminary hearing to determine whether a spoliation instruction is the appropriate remedy in the case. If a spoliation instruction is appropriate, then there is no need to ask the jury to duplicate the findings made by the judge. Evidence surrounding the spoliation as well as the missing evidence will be relevant to the jury's determination of the weight to give the inference.

2. Specificity of a Spoliation Instruction

Most instructions, in an effort to avoid the proverbial comment on the weight of the evidence, are statements of legal principles with very little language applying the legal principle to the case at hand.[499] In several spoliation instructions, there is a generic statement regarding spoliation law without discussing whether a party spoliated evidence or asking the jury to determine the issue.[500] One such instruction is from *Offshore Pipelines* (quoted above). Another example of a nonspecific instruction generally stating the law is the following instruction from *Whiteside v. Watson*[501]:

> A party is entitled to show that the opposing party has destroyed documents that would bear on a crucial issue in the case. You are instructed that the destruction of relevant evidence raises a presumption that the evidence would have been unfavorable to the spoliator or to the one destroying the document.

("Moreover, spoliation is not a substantive claim or defense but a 'rule of evidence,' and thus is 'administered at the discretion of the trial court.'" (quoting Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 155 (4th Cir. 1995))); *Trevino*, 969 S.W.2d at 952 ("This traditional response to the problem of evidence spoliation properly frames the alleged wrong as an evidentiary concept, not a separate cause of action.").

498. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142–43 (1997) (explaining that the admission of expert testimony is an issue of law to be determined by the trial court as gatekeeper); City of San Antonio v. Pollock, 284 S.W.3d 809, 823 (Tex. 2009) (describing the trial court's role as gatekeeper regarding the admission of evidence).

499. *See Schooley*, 984 S.W.2d at 666 (providing jury with statement of the law without any application of the law to the facts).

500. *But see* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 746 (8th Cir. 2003) (instructing the jury "[Y]ou may, but are not required to, assume that the contents of the voice tape and track inspection records would have been adverse, or detrimental, to the defendant.").

501. Whiteside v. Watson, 12 S.W.3d 614 (Tex. App.—Eastland 2000, pet. denied, judgm't vacated w.r.m.).

A further example is the spoliation instruction from *Texas Electric Cooperative v. Dillard*[502]:

> You are instructed that if there is evidence that is pertinent to the issues in this cause, which was in the exclusive possession and control of a party and which cannot be produced, and its disappearance or [nonproduction] has not been satisfactorily explained, then you may consider that such evidence contained information adverse to the position taken by the party who was in the possession.

Comparing these two instructions also shows that the expressions of the significance of spoliated evidence are very different. In *Whiteside*, the evidence destroyed was labeled as "crucial,"[503] and in *Dillard*, the evidence was merely "pertinent to the issues."[504]

Additionally, some instructions have limited the fact issue to which the evidence likely would have been relevant to prove. For example, the instruction from *Roberts v. Whitfill*[505] reads:

> You are instructed that Dan Roberts has intentionally destroyed QuickBooks data. You are further instructed that you should presume that the QuickBooks data destroyed was unfavorable to Dan Roberts concerning the damages suffered by Whitfill. You are further instructed that you should presume that the QuickBooks data destroyed was unfavorable to Dan Roberts concerning whether he breached a fiduciary duty owed to Whitfill. You are further instructed that you should presume that the QuickBooks data

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502. Tex. Elec. Coop. v. Dillard, 171 S.W.3d 201 (Tex. App.—Tyler 2005, no pet.).

503. *Whiteside*, 12 S.W.3d at 620.

504. *Dillard*, 171 S.W.3d at 208. A better example of this is the following instruction from *Lively v. Blackwell*:

> You are instructed that Dr. Blackwell negligently or intentionally destroyed a videotape of the laparoscopy procedure that was created at the time of the procedure. Therefore, you may presume that the videotape would have been harmful to Dr. Blackwell.

51 S.W.3d 637, 642 (Tex. App.—Tyler 2001, pet. denied). By identifying the spoliator (Dr. Blackwell) and describing the evidence that was not produced (the videotape of the laparoscopy procedure that was created at the time of the procedure), this instruction is more likely to assist the jury in drawing an inference from the evidence and to fulfill the remedial purposes of submitting a spoliation instruction than a general statement of the law.

505. Roberts v. Whitfill, 191 S.W.3d 348, 361–62 (Tex. App.—Waco 2006, no pet.) (remanding the case on another issue, but raising questions about the mandatory nature of the presumptions).

> destroyed was unfavorable to Dan Roberts concerning whether he contracted to unreasonably restrain trade or commerce. You are further instructed that Dan Roberts bears the burden to disprove these presumptions.[506]

Jury instructions must assist the jury and be supported by the evidence.[507] These two principles, combined with the remedial purpose of the spoliation instruction, should be specific rather than state general legal principles.[508] Thus, to assist a jury and be supported by the evidence, a proper spoliation instruction should at least identify the alleged spoliator, the evidence that is missing, and the issues to which the spoliated evidence is relevant.

In other contexts, the specific identification of the spoliator, the missing evidence, and the issue to which the inference is to apply might be considered a comment on the weight of the evidence.[509] However, in a correct spoliation instruction, there are no fact issues to resolve; the trial court has found the underlying facts, and it is a matter for the jury to determine whether to draw inferences from the evidence presented.[510] Perhaps due to some concern about not commenting on the weight of the evidence, some instructions, such as those found in *Dillard* and *Whiteside*, contain only a general description of the spoliation doctrine.[511]

The *Dillard* and *Whiteside* instructions quoted above are so general in nature that they provide little assistance to the jury in drawing inferences from the evidence presented. They also run the risk of the jury drawing inferences that the evidence would be unfavorable to an entire case even when the destroyed evidence

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506. *Id.* at 360.

507. Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied).

508. *See id.* ("For an instruction to be proper, it must: (1) assist the jury, (2) accurately state the law, and (3) find support in the pleadings and evidence." (citing TEX. R. CIV. P. 277, 278)).

509. *See* Halmos v. Bombardier Aerospace Corp., 314 S.W.3d 606, 617 (Tex. App.—Dallas 2010, no pet.) (recognizing that a "comment on the weight of the evidence" occurs when: (1) "the judge assumes the truth of a material controverted fact[;]" or (2) if the instruction "suggests to the jury the trial judge's opinion concerning the matter about which the jury is asked").

510. Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 159 S.W.2d 854, 858 (1942).

511. *See* Tex. Elec. Coop. v. Dillard, 171 S.W.3d 201, 208 (Tex. App.—Tyler 2005, no pet.) (outlining the spoliation doctrine in a single sentence in the jury instruction); Whiteside v. Watson, 12 S.W.3d 614, 620 (Tex. App.—Eastland 2000, pet. denied, judgm't vacated w.r.m.) (delineating the spoliation doctrine in a brief jury instruction).

only related to a particular issue.[512] The better practice in crafting spoliation instructions is to inform the jury of the relevant facts found by the court: the identity of the spoliator, the evidence destroyed in general terms, and the issue for which the harmful evidence may be considered.

3. "Presumption Versus Inference" Revisited (Again)

Jury instructions given and requested in Texas cases have also varied the effect that the jury should give to the findings or evidence of spoliation.[513] In the *Whiteside* instruction, a "presumption is raised" as to the unfavorable effects of the missing documents, while in *Dillard*, the jury was permitted to consider the missing evidence adverse to the position of the party in possession.[514] This, again, raises the question of whether the spoliation presumption is a true presumption or merely, as federal courts call it, an adverse inference.[515] Additionally, an inference of unfavorable evidence does not logically arise from negligent spoliation.

In this Article's view, the spoliation instruction should instruct the jury that it may consider that the evidence, if produced, would have been harmful to the spoliator. The parties should be able to offer evidence of: (1) the circumstances under which the nonproduced evidence was spoliated; and (2) what the spoliated evidence likely would have supported. This evidence would enable the jury to determine whether it believes that the

512. *See* Trevino v. Ortega, 969 S.W.2d 950, 958 (Tex. 1998) (Baker, J., concurring) ("Most importantly, courts should consider the destroyed evidence's relevancy.... [T]he spoliating party is still free to attempt to show that the negligently destroyed evidence was irrelevant and that no prejudice resulted from its destruction." (citing Brewer v. Dowling, 862 S.W.2d 156 (Tex. App.—Fort Worth 1993, writ denied))).

513. *Compare* McMillin v. State Farm Lloyds, 180 S.W.3d 183, 198 (Tex. App.—Austin 2005, pet. denied) ("You may draw whatever inference you feel is reasonable from the Defendant's defiance of the Court's Order to produce Mr. Leffew in Austin for a deposition."), *with* Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 720–21 (Tex. 2003) ("If you find by a preponderance of the evidence that Wal-Mart had possession of the reindeer at a time it knew or should have known they would be evidence in this controversy, then there is a presumption that the reindeer, if produced, would be unfavorable to Wal-Mart.").

514. *Dillard*, 171 S.W.3d 201, 208 (Tex. App.—Tyler 2005, no pet.); *Whiteside*, 12 S.W.3d at 620.

515. *See, e.g.*, United States v. Lanzon, 639 F.3d 1293, 1298 (11th Cir. 2011) (discussing an "instruction on spoliation, which would have permitted the jury to draw an adverse inference"), *cert. denied*, 132 S. Ct. 333 (2011).

nonproduced evidence, if produced, would have been harmful to the spoliator. The trial judge should not instruct the jury on whether the evidence was intentionally or negligently spoliated. The jury can make credibility determinations regarding the evidence of spoliation and draw inferences of the spoliator's intent or negligence from the evidence.[516]

If the trial judge determines that there has been a breach, the evidence offered at trial could support either negligent or intentional destruction of evidence.[517] The spoliator may offer evidence that it did not spoliate the evidence in bad faith or reasonable explanations for its nonproduction of the evidence.[518] However, as some instructions have suggested, the mere fact of producing this evidence disposes of the jury's role in determining the credibility of the evidence offered.[519] If the jury believes that the spoliator intentionally destroyed the evidence, it may infer from the destruction that the evidence would have been harmful to the spoliator.[520] This will be based on the circumstances surrounding the destruction of the evidence. However, the spoliator may offer evidence that the spoliated evidence would not have contained harmful information.[521]

Even if the jury could believe that the evidence was negligently destroyed, this would not preclude the trial court from submitting an instruction for negligent spoliation.[522] A jury could still believe that the spoliated evidence was harmful to the spoliator. Rather

516. *See* Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 159 S.W.2d 854, 857–58 (1942) (suggesting the jury may consider the facts and circumstances that give rise to a presumption and draw inferences accordingly).

517. *See Trevino*, 969 S.W.2d at 957 ("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.").

518. *See id.* (observing that spoliators may offer alternative explanations to contradict claims of intentional or negligent spoliation).

519. *See infra* app'x (listing instructions that allow a spolitator to rebut the spoliation presumption with evidence suggesting a reasonable explanation or lack of fraudulent intent or purpose).

520. *See* Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 157 (4th Cir. 1995) (concluding the district court acted within its discretion in allowing the jury to draw an adverse inference from intentional destruction of evidence).

521. *See Trevino*, 969 S.W.2d at 958 (clarifying the ability of the spoliating party to show destroyed evidence was irrelevant and thus not harmful).

522. *See* DeLaughter v. Lawrence Cnty. Hosp., 601 So. 2d 818, 822 (Miss. 1992) (suggesting trial courts should offer an instruction on spoliation in circumstances where the jury could believe negligent spoliation occurred).

than drawing an adverse inference from the act of bad-faith spoliation, in negligence cases the jury would make credibility determinations with regard to the parties' assertions and evidence supporting what the spoliated evidence likely would have contained.[523] This Article's proposal that the spoliation instruction should contain the term "you may consider" permits the parties to argue the evidence to the jury and allows the jury to rely on the instruction in considering the evidence when weighing the issues in the case.

Based on the preceding discussion, the spoliation instruction ideally should not instruct on an inference or a presumption. Instructions to the jury on a presumption are probably erroneous because juries should not be instructed on presumptions;[524] presumptions are legal principles that are a legal matter for the trial court to apply.[525] However, the jury may still make logical inferences from the intentional spoliation and make credibility determinations with regard to the parties' evidence about the contents of the spoliated evidence.[526]

Moreover, many of the spoliation instructions conflict on whether the consideration is permissive (i.e., "may consider") or mandatory (i.e., "must presume").[527] The prior discussion concerning the distinction between presumptions and inferences shows that the former are mandatory conclusions whereas the

523. *See* Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 159 S.W.2d 854, 857 (1942) (opining that the evidentiary facts giving rise to a presumption are valid for fact-finder consideration); Pub. Health Trust of Dade Cnty. v. Valcin, 507 So. 2d 596, 599 (Fla. 1987) (indicating a jury could infer information about the contents of destroyed evidence from the circumstances).

524. *See Greenwade*, 159 S.W.2d at 858 (stating the general rule that a jury does not consider a presumption itself, but rather the resulting inferences and facts).

525. 1 McCormick & Ray, *Texas Evidence* § 103, at 141 (2d ed. 1956).

526. *See Greenwade*, 159 S.W.2d at 857–58 (rejecting the view that facts giving rise to a presumption are beyond consideration by the trier of fact).

527. *Compare* Tex. Elec. Coop. v. Dillard, 171 S.W.3d 201, 208 (Tex. App.—Tyler 2005, no pet.) ("You are instructed that if there is evidence that is pertinent to the issues in this cause, which was in the exclusive possession and control of a party and which cannot be produced, and its disappearance or [nonproduction] has not been satisfactorily explained, then you may consider that such evidence contained information adverse to the position taken by the party who was in the possession."), *with* Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 469 (Tex. App.—San Antonio 1998, pet. denied) ("You are instructed that w[h]ere evidence, such as photographs of the accident scene, was peculiarly within the control of Wal-Mart and Wal-Mart fails to produce that evidence, you must presume that the missing evidence, if offered, would have been unfavorable to Wal-Mart. You are further instructed that such presumption may be rebutted by Wal-Mart.").

latter are permissive. The jury, when it believes the evidence supports intentional spoliation, could believe that even though the evidence was intentionally destroyed, that it likely would not have been harmful to the spoliator. Because this reasoning process is based upon probability, the conclusion the jury draws—that the evidence is unfavorable to the spoliator—is permissive. Therefore, as instructed by a spoliation instruction, a jury may consider that the evidence was harmful to the non-spoliator. An instruction that the jury must consider the spoliated evidence to be harmful to the spoliator is likely subject to an attack as an improper comment on the weight of the evidence.[528]

F. *Recommended Spoliation Instructions*

The sanctions awarded in any case are very fact specific, and the remedy for spoliation likewise will differ on a case-by-case basis. However, some uniformity would be beneficial, and there are some simple instructions that could be applied in many cases with a minimum amount of tweaking. Based on the foregoing discussion, a model jury instruction is recommended to be used to instruct a jury on the "adverse inference":

> The [*spoliating party*] has [*destroyed or failed to produce*] [*description of the evidence*]. You may consider that this evidence, if produced, would have been unfavorable to [*spoliating party*] on the issue of [*description of the issue(s) to which the evidence would have been relevant*].
>
> The [*spoliating party*] has [*destroyed or failed to produce*] [*description of the evidence*]. You may, but are not required to, consider that this evidence, if produced, would have been unfavorable to [*spoliating party*] on the issue of [*description of the issue(s) to which the evidence would have been relevant*].

No instructions that this Article has reviewed have instructed on Justice Baker's burden-of-persuasion-shifting instruction. However, it is possible, as the court in *Adobe Land* determined, that a trial court may impose such an instruction to remedy severe prejudice.[529] The recommendation for this type of instruction, if

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529. *See* Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351, 360 n.11 (Tex. App.—Fort Worth 2007, pet. denied) ("However, when the [nonspoliating] party is unable to

used, should instruct a jury that the burden of persuasion on the particular fact issue has shifted to the spoliator and that the spoliator may disprove that fact by a preponderance of the evidence. If the fact is an ultimate question in the case (e.g., whether the jury has found causation), this Article would recommend that the question should be framed in the negative (e.g., "Do you find that the defendant was *not* the cause of plaintiff's injuries?").

VII. CONCLUSION

The digital age has greatly increased the amount of discoverable information and the corresponding preservation and production problems.[530] In the federal court system, spoliation, or the failure to preserve and produce electronic discovery, has resulted in the submission of adverse inference instructions in a number of cases.[531] Issues regarding electronically stored information and the failure to preserve such information are beginning to make their way through the Texas courts.[532] But spoliation in Texas has traditionally been concerned with tangible objects. Is our spoliation doctrine robust and flexible enough to handle the impending wave of digital discordance?

This Article has reviewed and considered the unique development of Texas's spoliation law. The convergence of the common law based spoliation presumption and the modern discovery practice has created confusion. As more cases dealing with electronic discovery arise, the Texas Supreme Court should take opportunities to address outstanding issues in Texas spoliation law that continue to bewilder parties and courts. Specifically, further guidance from the supreme court is necessary on a number of issues, including: (1) the culpability required to submit a spoliation instruction; (2) the evidence necessary to establish relevance and prejudice; (3) the available remedies for

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prove its prima facie case without the destroyed evidence, a spoliation presumption will support that party's assertions and serves as some evidence of the particular issue or issues that the destroyed evidence might have supported.").

530. *See* Dan H. Willoughby et al., *Sanctions for E-Discovery Violations by the Numbers*, 60 DUKE L.J. 789, 794 (2010) ("[T]he number of e-discovery sanction cases and the number of e-discovery sanction awards more than tripled between 2003 and 2004.").

531. *Id.* at 812–13.

532. *See generally In re* Weekley Homes, 295 S.W.3d 309 (Tex. 2009) (considering the federal spoliation rules and applying them to Texas case law).

negligent spoliation; and (4) whether the trial court may shift the burden of persuasion on a material issue to the other party in a case of high prejudice resulting from unavailable evidence.

Throughout this Article, the case law has been analyzed to provide some recommendations for clarifying Texas spoliation law, particularly regarding the submission of a spoliation instruction to the jury. It is recommended that Texas courts expressly recognize that deliberate loss, destruction, or nonproduction of evidence is necessary to submit a spoliation instruction and that negligent destruction of evidence will rarely, if ever, justify the submission of a spoliation instruction. Moreover, the trial judge is the appropriate fact finder in determining whether spoliation has occurred and the appropriate remedy. When submitting a spoliation instruction, the trial judge should submit an instruction that is specific to the case, identifying the party who spoliated the evidence, the evidence spoliated, and, when appropriate, the issues to which the spoliated evidence would have been relevant. Finally, the instruction should be permissive and permit the jury to infer that the spoliated evidence would have been unfavorable to the spoliator. These recommendations, we believe, reflect the current state of the law and clarify how to craft an appropriate spoliation instruction that is understandable and helpful for the jury.

APPENDIX: SAMPLE ADVERSE INFERENCE INSTRUCTIONS

This appendix lists several jury instructions either requested by a party or given by a trial court. This list is intended to aid the reader in following the discussion in subpart V(B) of this Article:

1. *Wal-Mart Stores, Inc. v. Johnson*

You are instructed that, when a party has possession of a piece of evidence at a time he knows or should have known it will be evidence in a controversy, and thereafter he disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it. If you find by a preponderance of the evidence that Wal-Mart had possession of the reindeer at a time it knew or should have known they would be evidence in this controversy, then there is a presumption that the reindeer, if produced, would be unfavorable to Wal-Mart.[533]

2. *State v. Gonzalez*

With respect to actual knowledge, if any, of the Defendant . . . you are instructed that if a party fails to produce evidence within its control or intentionally destroys evidence, a presumption is raised that the evidence not produced or destroyed would be unfavorable to the party not producing or destroying the evidence.[534]

3. *Brookshire Bros. v. Aldridge*

In this case, Brookshire Brothers permitted its video surveillance system to record over certain portions of the store surveillance video of the day of the occurrence in question. If you find that Brookshire Brothers knew or reasonably should have known that such portions of the store video not preserved contained relevant evidence to the issues in this case, and its non-preservation has not been satisfactorily explained, then you are instructed that you may

533. Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 720–21 (Tex. 2003).

534. State *ex rel.* State Dep't of Highways & Pub. Transp. v. Gonzalez, 24 S.W.3d 533, 540 (Tex. App.—Corpus Christi 2000), *rev'd*, 82 S.W.3d 322 (Tex. 2002).

consider such evidence would have been unfavorable to Brookshire Brothers.[535]

4. *Wackenhut Corrections Corp. v. de la Rosa*

You, the jury, are instructed that Wackenhut Corrections Corporation and Warden David Forrest 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 Forrest.[536]

5. *Roberts v. Whitfill*

You are instructed that Dan Roberts has intentionally destroyed QuickBooks data. You are further instructed that you should presume that the QuickBooks data destroyed was unfavorable to Dan Roberts concerning the damages suffered by Whitfill. You are further instructed that you should presume that the QuickBooks data destroyed was unfavorable to Dan Roberts concerning whether he breached a fiduciary duty owed to Whitfill. You are further instructed that you should presume that the QuickBooks data destroyed was unfavorable to Dan Roberts concerning whether he contracted to unreasonably restrain trade or commerce. You are further instructed that Dan Roberts bears the burden to disprove these presumptions.[537]

6. *Texas Electric Cooperative v. Dillard*

You are instructed that if there is evidence that is pertinent to the issues in this cause, which was in the exclusive possession and control of a party and which cannot be produced, and its disappearance or [nonproduction] has not been satisfactorily explained, then you may consider that such evidence contained information adverse to the position taken by the party who was in the possession.[538]

535. Brookshire Bros. v. Aldridge, 12-08-00368-CV, 2010 WL 2982902, at *9 (Tex. App.—Tyler July 30, 2010, pet. granted) (mem. op.).

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

537. Roberts v. Whitfill, 191 S.W.3d 348, 360 (Tex. App.—Waco 2006, no pet.).

538. Tex. Elec. Coop. v. Dillard, 171 S.W.3d 201, 208 (Tex. App.—Tyler 2005, no pet.).

7. *McMillin v. State Farm Lloyds*

You are instructed that State Farm employee Floyd Leffew was a principal author of Policy Guideline O.G. 75–110 entitled *Mold Mildew and Other Fungi.* Mr. Floyd Leffew has testified in another case that he is the principal author for O.G. 75–110. He has also testified that he sits on a committee that reviews, modifies, and updates other policy guidelines that potentially govern water claims involving mold. The Defendant should have but failed to identify Mr. Leffew as a person with knowledge of facts relevant to this case. The Defendant was ordered by the Court to produce Mr. Leffew for a deposition in Austin. The Defendant refused to comply with the Court's Order.

You may draw whatever inference you feel is reasonable from the Defendant's defiance of the Court's Order to produce Mr. Leffew in Austin for a deposition.[539]

8. *Cresthaven Nursing Residence v. Freeman*

You are instructed that, when a party has possession of a piece of evidence at a time he knows or should have known it will be evidence in a controversy, and thereafter he disposes of it, alters it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it. If you find by a preponderance of the evidence that Cresthaven Nursing Residence had possession of original, unaltered nurses notes pertaining to Wanda Granger at a time it knew or should have known they would be evidence in this controversy, then there is a presumption that the original, unaltered nurses notes pertaining to Wanda Granger, if produced, would be unfavorable to Cresthaven Nursing Residence. This presumption may be rebutted by Cresthaven Nursing Residence with the evidence of a reasonable explanation for the [nonproduction] of the evidence.[540]

9. *Lively v. Blackwell*

You are instructed that Dr. Blackwell negligently or intentionally destroyed a videotape of the laparoscopy procedure that was

539. McMillin v. State Farm Lloyds, 180 S.W.3d 183, 198 (Tex. App.—Austin 2005, pet. denied).

540. Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 225 (Tex. App.—Amarillo 2003, no pet.).

created at the time of the procedure. Therefore, you may presume that the videotape would have been harmful to Dr. Blackwell.[541]

10. *Whiteside v. Watson*

A party is entitled to show that the opposing party has destroyed documents that would bear on a crucial issue in the case. You are instructed that the destruction of relevant evidence raises a presumption that the evidence would have been unfavorable to the spoliator or to the one destroying the document.[542]

11. *Offshore Pipelines, Inc. v. Schooley*

[I]f a party fails to produce evidence which is under its control and reasonably available to it and not reasonably available to the adverse party, then [the jury] may infer that the evidence is unfavorable to the party who could have produced it and did not.[543]

12. *Wal-Mart Stores, Inc. v. Middleton*

You are instructed that w[h]ere evidence, such as photographs of the accident scene, was peculiarly within the control of Wal-Mart and Wal-Mart fails to produce that evidence, you must presume that the missing evidence, if offered, would have been unfavorable to Wal-Mart. You are further instructed that such presumption may be rebutted by Wal-Mart.[544]

13. *Brewer v. Dowling*

In *Brewer*, twenty variations of the same spoliation instruction were requested. Some of them included:

You are instructed that if you find that one or more Defendants, or their agents or employees intentionally misplaced, discarded or destroyed fetal heart monitor strips, or other evidence, relating to Shane or Lorie Brewer, or otherwise intentionally caused fetal heart monitor strips, or other evidence, to be misplaced, discarded or destroyed, then you must presume that the missing evidence would have been unfavorable to that Defendant or Defendants, if any,

541. Lively v. Blackwell, 51 S.W.3d 637, 642 (Tex. App.—Tyler 2001, pet. denied).

542. Whiteside v. Watson, 12 S.W.3d 614, 620 (Tex. App.—Eastland 2000, pet. denied, judgm't vacated w.r.m.).

543. Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 657 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (alteration in original).

544. Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 469 (Tex. App.—San Antonio 1998, pet. denied).

whom you have found to have misplaced, discarded, destroyed, or otherwise caused evidence to be missing. You are further instructed that such presumption may be rebutted by a Defendant. . . .

You are instructed that where evidence, such as fetal heart monitor strips, was peculiarly within the control of a Defendant and the Defendant fails to produce that evidence, you must presume that the missing evidence, if offered, would have been unfavorable to the Defendant. . . .

You are instructed that if the Plaintiffs have established by a preponderance of the evidence that Robert W. Dowling, M.D., Womens Clinic West, P.A. or their agents or employees intentionally misplaced, discarded or destroyed the fetal monitor strips, or other evidence, or otherwise intentionally caused the fetal heart monitor strips, or other evidence, relating to Lorie and Shane Brewer to be misplaced, discarded or destroyed, then there is a presumption that Robert W. Dowling, M.D. was negligent which proximately caused the occurrence in question, and he must prove by a preponderance of the evidence that he was not negligent and did not proximately cause the occurrence in question. . . .

In answering this question, you are instructed that if you find that one or more Defendants, or their agents or employees, intentionally or negligently misplaced, discarded or destroyed fetal heart monitor strips, or other evidence, relating to Shane or Lorie Brewer, or otherwise caused fetal heart monitor strips, or other evidence, to be misplaced, discarded or destroyed, then you must presume that the missing evidence would have been unfavorable to that Defendant or Defendants, if any, whom you have found to have misplaced, discarded, destroyed, or otherwise caused evidence to be missing.

You are further instructed that such presumption may be rebutted by a Defendant.[545]

545. Brewer v. Dowling, 862 S.W.2d 156, 158 (Tex. App.—Fort Worth 1993, writ denied).