

SPOILIATION OF EVIDENCE SUMMARY—TEXAS 2006

1. Spoliation can occur when a party destroys discoverable information that it has a duty to preserve. *Smith v. United States*, 293 F.3d 984, 988 (7th Cir.2002) (citing *Crabtree v. Nat'l Steel Corp.*, 261 F.3d 715, 721 (7th Cir.2001)); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y.2003). 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. *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 919 n. 3, 920 (Tex. App.-Houston [14th Dist.] 2002, pet. denied).

2. To determine whether the deletion of electronically stored information amounts to spoliation, a court must analyze whether that information was subject to a preservation duty. *Zubulake*, 220 F.R.D. at 216. A party's duty to preserve evidence that it knows or reasonably should know is relevant to imminent or on-going litigation arises as soon as the party has notice that it possesses or controls material evidence relevant to the litigation. *Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 58 (Tex. App.-San Antonio 2006) (citing *Albertson's, Inc. v. Arriaga*, No. 04-03-00697-CV, 2004 WL 2045389 at *2 (Tex. App.-San Antonio Sept. 15, 2004, no pet).

3. If a court finds spoliation, whether and what sanction is appropriate depends on whether the party acted in bad faith and the extent of any prejudice that resulted. See *Anadarko Petroleum Corp. v. Davis*, Slip Copy, 2006 WL 3837518 at *27 (S.D.Tex. 2006). The Fifth Circuit requires a finding that relevant information was destroyed in bad faith. *Id.* (citing *King v. Il. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003); *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000)). The severity of any sanction should be proportionate to the culpability involved in the destruction and the prejudice that resulted. *Id.* (citing *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994); *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263, 267 (8th Cir. 1993)).

4. Remedies for the spoliation of evidence serve three purposes. First, they punish the spoliator for destroying relevant evidence. Second, they deter future spoliators. See *Nation-Wide Check Corp. v. Forest Hills Distribs.*, 692 F.2d 214, 218 (1st Cir. 1982). And third, perhaps most importantly, they serve an evidentiary function. See *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 446 (1st Cir. 1997). When evidence spoliation prejudices non-spoliating parties, courts can levy a sanction or submit a presumption that levels the evidentiary playing field and compensates the nonspoliating party. See *Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 75 (S.D.N.Y.1991); *Bachmeier v. Wallwork Truck Ctrs.*, 507 N.W.2d 527, 533 (N.D.1993)).

5. Finally, when a party demonstrates an entitlement to a spoliation presumption, the presumption precludes a court from granting a summary judgment. See *Aguirre v. S. Tex. Blood and Tissue Ctr.*, 2 S.W.3d 454, 457 (Tex. App.-San Antonio 1999, pet. denied).