FOR MORE INFORMATION

QUILLING, SELANDER, LOWNDS, WINSLETT & MOSER, PC
Dallas, Texas
www.qslwm.com

Kimberly Harris
kharris@qslwm.com

LORANCE THOMPSON, P.C.
Houston, Texas
LoranceThompson.com

Melanie R. Cheairs
MRC@LoranceThompson.com

Kathryn "Kathy" L. Ward
KW@LoranceThompson.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

TEXAS

SPOLIATION

1. Elements/definition of spoliation: Is it an "intentional or fraudulent" threshold or can it be negligent destruction of evidence.

A party's spoliation of evidence can support a trial court's decision to rectify the action regardless of whether the spoliation was negligent or intentional. *In re Advanced Powder Solutions, Inc.*, 496 S.W.3d 838, 855 (Tex. App.—Houston [1st Dist.] 2016, no pet.) But in the case of negligence, a different spoliation standard applies.

Definition of Spoliation

"Spoliation is the deliberate destruction of, failure to produce, or failure to explain the non-production of relevant evidence…" *MRT, Inc. v. Vounckx*, 299 S.W.3d 500, 510 (Tex. App.—Dallas 2009, no pet.) (citing *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003)). If a trial court finds that a party spoliated evidence, this finding may give rise to a presumption, all things are presumed against the wrongdoer. *Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9, 18 (Tex. 2014).

The first step of the spoliation analysis requires the trial court to determine whether a party spoliated evidence. *Brookshire Bros.*, 438 S.W.3d at 14. If the trial court finds that a spoliation has occurred, the second step of the spoliation analysis requires the court to assess an appropriate remedy. *Id*.

Elements of Spoliation

To conclude that a party spoliated evidence, the trial court must find:

1) the spoliating party had a duty to reasonably preserve the evidence;
2) and the party intentionally or negligently breached that duty by failing to do so.

Brookshire Bros, 438 S.W.3d at 14.

The party alleging spoliation bears the burden of establishing that the spoliating party had a duty to preserve the evidence. *In re Larsen*, 2021 WL 1759866, at *4 (Tex. App.—San Antonio May 5, 2021, no pet.) (quoting *Brookshire Bros.*, 438 S.W.3d at 20). A duty to preserve evidence arises only when (1) a party knows or reasonably should know that there is a substantial chance that a claim will be filed; and (2) the evidence in its possession or control will be material and relevant to that claim. *Petroleum Solutions, Inc. v. Head*, 454 S.W.3d 482, 488 (Tex. 2014).

An objective test for when a party is in anticipation of litigation is whether a reasonable person would conclude from the severity of the accident and other circumstances surrounding it that there was a substantial chance of litigation. *Texas. Elec. Co-op. v. Dillard*, 171 S.W.3d 201, 209 (Tex. App.—Tyler 2005, no pet.). A "'substantial chance of litigation'" arises when "'litigation is more than merely an

abstract possibility or unwarranted fear.'" *Brookshire Bros.*, 438 S.W.3d at 20 (quoting *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993)).

A party cannot breach its duty without *at least* acting negligently. *Petroleum Solutions, Inc.*, 454 S.W.3d at 488 (emphasis added). If a party possesses a duty to preserve evidence, the party inherently breaches the duty by failing to exercise reasonable care to do so. *Brookshire Bros.*, 438 S.W.3d at 20.

Intentional Action v. Negligence

A party's destruction of or failure to produce evidence can support a trial court's decision to rectify the action regardless of whether the spoliation was negligent or intentional. *In re Advanced Powder Solutions, Inc.*, 496 S.W.3d 838, 855 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Brookshire Brothers v. Aldridge*, 438 S.W.3d 9, 19-20 (Tex. 2014)). In *Brookshire Brothers*, the Texas Supreme Court identified a narrow exception to the intentionality requirement of spoliation, explaining that a spoliation instruction for negligent conduct might be appropriate "if the act of spoliation, although merely negligent, so prejudices the non-spoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense." 438 S.W.3d at 25-26. Additionally, the Texas Supreme Court stated that intentional spoliation includes the concept of willful blindness, which includes a scenario where a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless allows for it to be destroyed. *In re Advanced Powder Solutions, Inc.*, 496 S.W.3d at 856 (citing *Brookshire Bros.*, 438 S.W.3d at 24-25).

2. Distinction between first party and third-party spoliation.

The doctrine of spoliation only applies to the conduct of the parties to the lawsuit. *Scolaro v. State ex rel. Jones*, 1 S.W.3d 749, 755 (Tex. App.—Amarillo 1999, no pet.). The Texas Supreme Court noted that "spoliation for conduct of a party is an evidentiary matter, not a separate cause of action." Accordingly, the Court "declined to decide if an independent claim for spoliation of evidence could be asserted against a non-party." *Id*. (*citing Trevino v. Ortega*, 969 S.W.2d 950, 951, n. 1 (Tex. 1998)). The foundation of common law spoilation in Texas is the "[f]ailure to produce evidence *within a party's control*…" *See Moers v. Columbia Hosp. Corp. of West Houston*, 2001 WL 607877, at *3 (Tex. App.—Amarillo June 5, 2001, no pet.) (*citing Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied)) (emphasis added).

3. Whether there is a separate cause of action for a spoliation claim.

An allegation of spoliation does not give rise to an independent cause of action. *Rico v. L-3 Communications Corp.*, 420 S.W.3d 431, 436 (Tex. App.—Dallas 2014, no pet.) (citing *Trevino v. Ortega*, 969 S.W.2d 950, 952-53 (Tex. 1998)). Spoliation should be remedied "within the context of the lawsuit, not by an independent cause of action." *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 666 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing *Trevino*, 969 S.W.2d at 953).

4. Remedies when spoliation occurs:

Trial courts have relatively broad discretion in awarding spoliation remedies depending on severity, including a negative interference instruction, dismissal, potential criminal sanctions, and other sanctions.

The remedial purpose of a trial court's rectification of spoliation in Texas is "to restore the parties to a rough approximation of their positions if all evidence were available." *Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9, 21 (Tex. 2014). The trial court has broad discretion to impose a remedy if it finds that spoliation has occurred, but that remedy must be proportionate to the conduct giving rise to the sanction and may not be excessive. *Id.* (*citing TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991)).

In determining what remedy is appropriate, the court should weigh the spoliating party's culpability and the prejudice to the non-spoliating party. *Petroleum Solutions, Inc. v. Head*, 454 S.W.3d 482, 488-89 (Tex. 2014).

The court should also consider whether there is a lesser remedy available that will avoid substantial unfairness to the opposing party. *Brookshire Bros.*, 438 S.W.3d at 21.

- Negative inference instruction

A spoliation instruction is the harshest sanction a trial court may utilize to remedy an act of spoliation. *Brookshire Brothers Ltd. v. Aldridge*, 438 S.W.3d 9, 23 (Tex. 2015). A trial court may *only* submit a spoliation instruction to the jury in the event it finds that:

1) The spoliating party acted with intent to conceal discoverable evidence; or
2) The spoliating party acted negligently and caused the non-spoliating party to be irreparably deprived of any meaningful ability to present a claim or defense.

Wackenhut Corporation v. Gutierrez, 453 S.W.3d 917, 921 (Tex. 2015) (citing *Brookshire Bros.*, 438 S.W.3d at 23-26). Because an improper spoliation instruction can deprive either party of their right to a fair trial on the merits of the case, spoliation jury instructions should be used cautiously. *Brookshire Bros.*, 438 S.W.3d at 23 (citing *TransAmerican*, 811 S.W.2d at 917).

Though the Texas Supreme Court recognizes the severity of a spoliation jury instruction and typically requires that the spoliating party act with culpability for a trial court to justify utilizing it, "a situation may arise in which a party's negligent breach of its duty to reasonably preserve evidence irreparably prevents the non-spoliating party from having any meaningful opportunity to present a claim or defense." *Brookshire Bros.*, 438 S.W.3d at 25. This particular destruction of evidence may "completely subvert the factfinder's ability to ascertain the truth," so a trial court has the discretion to remedy the prejudice to the non-spoliating party with a spoliation jury instruction regardless of culpability. *Id*. at 25-26.

- Dismissal

The remedy of dismissal under TEX. R. CIV. P. § 215.2(b)(5) is available in the spoliation context. *Brookshire Bros.*, 438 S.W.3d at 21 (citing *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998)). Texas courts have imposed death penalty sanctions against spoliating parties in certain extraordinary cases. *E.g. Cire v. Cummings*, 134 S.W.3d 835, 841 (Tex. 2004) (Death penalty sanctions were warranted when the plaintiff destroyed audio tapes which took away the defendant's ability to show objective proof that they were not liable). However, such sanctions are appropriate only as an "'exception rather than the rule.'" *In re Advanced Powder Solutions, Inc*., 496 S.W.3d 838, 859 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (quoting *TransAmerican Nat. Gas v. Powell*, 811 S.W.2d 913, 919 (Tex. 1991)).

- Criminal sanctions

The Texas Penal Code recognizes the alteration, destruction, or concealment of evidence during an investigation or official proceeding as a third-degree felony. TEX. PENAL CODE ANN. §§ 37.09(a); 37.09(c). However, Texas cases that address the question of the penalty under this statutory scheme involve criminal investigations. *E.g. Cuadra v. State*, 715 S.W.2d 723, 724 (Tex. App.—Houston [14th District] 1986, no writ.) (Investigation for reckless conduct); *Dillard v. State*, 640 S.W.2d 85, 85 (Tex. App.—Fort Worth, 1982, no writ.). This statute has rarely, if ever, been applied to civil cases. *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) (footnote omitted).

- Other sanctions

The remedies under Texas Rule of Civil Procedure 215 available to a trial court considering discovery abuse are also available in the spoliation context. *Brookshire Bros.*, 438 S.W.3d at 21. Further, the trial court has the discretion "to craft other remedies it deems appropriate in light of the particular facts of an individual

case." *Id*. The remedies under TEX. R. CIV. P. 215 include an award of attorney's fees or costs to the harmed party, exclusion of evidence, striking a party's pleadings, or even dismissing a party's claims. *Id*. (citing TEX. R. CIV. P. 215.2-.3).

5. Spoliation of electronic evidence and duty to preserve electronic information.

"Due to the exponential increase in the volume of electronic data being generated and stored, maintaining the balance between the significant interest in preserving relevant evidence and the burdens associated with doing so has become increasingly difficult." *Brookshire Bros.*, 438 S.W.3d 9, 14 (Tex. 2014). The Federal Rules of Civil Procedure were amended in 2006 to prohibit federal courts from imposing sanctions when discoverable electronic evidence is lost "'as a result of the routine, good-faith operation of an electronic information system.'" *Id*. at 17 (citing FED. R. CIV. P. 37(e)). The Texas rules do not contain a comparable provision. *Id*. at 18. Because of spoliation's basis in common law, the Texas Supreme Court has warned that "*courts* must fill in the gaps to maintain the consistency and predictability that is basic to the rule of law in our society." *Id*. at 29 (emphasis added).

6. Retention of surveillance video.

The entire crux of *Brookshire Brothers v. Aldrige*, which is foundational to the current law of spoliation in Texas, was whether the trial court erred in charging the jury in a slip-and-fall premises-liability case with a spoliation instruction when the grocery store owner retained surveillance footage of the actual fall but allowed footage surrounding the incident to be erased or recorded over. *Brookshire Bros.*, 438 S.W.3d 9, 14 (Tex. 2014). Ultimately, the appellate court held that the trial court abused its discretion because there was no evidence that the grocery store intentionally concealed or destroyed the video in question or that plaintiff was deprived of any meaningful ability to present his claim to the jury. *Id*. at 30.

In a more recent slip-and-fall case, an appellant argued the court of appeals should reverse the trial court's summary judgment after denying her request for a remedy from appellee's alleged spoliation of evidence. *Gregg v. Walgreen Co.*, 2021 WL 1881158, at *2 (Tex. App.—Houston [14th Dist.] May 11, 2021, no pet.). Appellant fell in appellee's store, the manager of the store maintained a CD of the surveillance period from the time appellant entered the store to the time she left, and the surveillance machine automatically recorded new footage over the surveillance video after three months. *Id*. at *3. Because the store did not preserve surveillance evidence from two hours before the fall, appellant argued that defendant spoliated the evidence. *Id*. at *4.

When appellant sent a letter to appellee two and a half months after her fall and requested appellee preserve surveillance evidence, appellant failed to mention that she slipped and fell on water or that her injuries were related to a condition at the store. *Id*. Ultimately, the appellate court held that appellant requested appellee preserve "'any store surveillance videotape which captured some or all of the incident in question,'" and that is exactly what appellee did. *Id*. at *5. Accordingly, the trial court did not abuse its discretion by denying appellant's request for spoliation relief. *Id*.

COLLATERAL SOURCE

7. Can plaintiff submit to a jury the total amount of his/her medical expenses, even if a portion of the expenses were reimbursed or paid for by his/her insurance carrier?

The entire premise of the collateral source rule is that a tortfeasor should not "'have the benefit of insurance independently procured by the injured party, and to which the wrongdoer was not privy.'" *Haygood v. De Escabedo*, 356 S.W.3d 390, 395 (Tex. 2011) (quoting *Brown v. American Transfer and Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980)). The collateral source rule precludes reduction of a tortfeasor's liability based on

benefits that a plaintiff receives from someone else, and thus insurance payments to or for a plaintiff are not credited to damages awarded against the defendant. *PHI, Inc. v. LeBlanc*, 2016 WL 747930, at *7 (Tex. App.—Corpus Christi Feb. 25, 2016, pet. denied) (quoting *Haygood*, 356 S.W.3d at 394-95).

However, A plaintiff may only recover medical or health care expenses in the amount "actually paid or incurred by or on behalf of the claimant." TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105. The Texas Supreme Court reasons that "to impose liability for medical expenses that a health care provider is not entitled to charge does not prevent a windfall to a tortfeasor; it creates one for a claimant…" *Haygood*, 356 S.W.3d at 395. Thus, "actually paid and incurred" expenses under § 41.0105 refers to "expenses that have been or will be paid, and excludes the difference between such amount and charges the service provider bills but has no right to be paid." *Id*. at 397. Accordingly, the inflated or un-negotiated "list rates" that healthcare providers charge are irrelevant to the question of damages, and only the reimbursement rates actually charged and collected by the healthcare provider may be offered as evidence. *See generally Haygood v. De Escabedo*, 356 S.W.3d 390.

8. **Is the fact that all or a portion of the plaintiff's medical expenses were reimbursed or paid for by his/her insurance carrier admissible at trial or does the judge reduce the verdict in a post-trial hearing?**

"Because a claimant is not entitled to recover medical charges that a provider is not entitled to be paid, evidence of such charges is irrelevant to the issue of damages." *Haygood v. De Escabedo*, 356 S.W.3d 356 S.W.3d 390, 398 (Tex. 2011) (citing TEX. R. EVID. 402). Unadjusted medical bills are irrelevant and inadmissible in trial. *Henderson v. Spann*, 367 S.W.3d 301, 104 (Tex. App.—Amarillo 2012, pet denied). Accordingly, the Supreme Court of Texas holds that "only evidence of recoverable medical expenses is admissible at trial" and that "the jury **should not** be told that [the expenses] will be covered in whole or in part by insurance" or that the healthcare provider adjusted the expenses. *Haygood*, 356 S.W.3d at 399-400 (emphasis added).

9. **Can defendants reduce the amount plaintiff claims as medical expenses by the amount that was actually paid by an insurer? (i.e. where plaintiff's medical expenses were $50,000 but the insurer only paid $25,000 and the medical provider accepted the reduced payment as payment in full).**

Yes; to allow otherwise would be reversible error. Following the *Haywood* opinion, the Amarillo court of appeals held that, pursuant to the Texas Supreme Courts findings, a trial court erroneously allowed evidence of inflated, unreduced medical bills to be introduced into evidence is harmful and, importantly, reversible. Henderson v. Spann, 367 S.W.3d 301, 305 (Tex. App.—Amarillo 2012, pet. denied). The court found that "the trial court's erroneous evidentiary rulings in conjunction with its post-verdict adjustment of the amount of past medical expenses probably caused the rendition of an improper judgment." *Id*. (citing TEX. R. APP. P. 44.1(a)). "As a result of the trial court's evidentiary rulings, the judgment, even as adjusted, is based on what amounts to no evidence, and the post-verdict adjustment itself serves as a deprivation of the constitutional right to trail by jury." *Id*.

ACCIDENT AND INCIDENT REPORTS

10. **Can accident/incident reports be protected as privileged attorney work product prepared in anticipation of litigation or are they deemed to be business records prepared in the ordinary course of business and discoverable?**

It depends on whether or not the investigation is found to be conducted "in anticipation of litigation." This is the key component in determining the work product privilege in Texas. Work product comprises: (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or (2) a communication made in anticipation of litigation or for trial between a party and the party's

representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. TEX. R. CIV. P. 192.5.

To determine when a party anticipates litigation under this definition, the Courts have created a two prong test. An investigation is conducted in anticipation of litigation when:

1) Objective prong: a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and
2) Subjective prong: the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

National Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). See also, *In re Fairway Methanol LLC*, 515 S.W. 3d 480, 490 (Tex. App.-Houston [14th Dist.] 2017.

If a reasonable person would conclude from the severity of the accident and the other circumstances surrounding it that there was a substantial chance that litigation would ensue, then the objective prong is satisfied. *Brotherton* at 204. The inquiry by the Court is to examine the totality of the circumstances to determine whether the investigation is conducted in anticipation of litigation. Id. The language of Rule 192.5 does not require that the sole or primary purpose of the material or communication be for preparing for litigation. *In re Fairway Methanol LLC at 409.*

SOCIAL MEDIA

11. What means are available in your state to obtain social media evidence, including but not limited to, discovery requests and subpoenas? Can you give some examples of your typical discovery requests for social media?

In Texas, there are several ways to attempt to obtain social media evidence. The preliminary method is through informal discovery. Many persons do not have any privacy settings on their social media accounts, and it is simple to search for the person on the various social media sites, and find their posts, pictures, videos; and friends and family members, who may have pictures and videos of the person of interest on their account pages.

The next step is through formal discovery, such as interrogatories and requests for production, and/or depositions.

The following is an example interrogatory regarding a Plaintiff's social media:

INTERROGATORY NO. 1:

From the 18 months preceding the incident made basis of this lawsuit to the present, have you used any online social or professional networking or blogger sites, including but not limited to: LinkedIn, Facebook, Instagram, Twitter, TikTok, Snapchat, YouTube, MySpace, Pinterest, Google+, Tumblr, Flickr, Vine, Discord, Yelp, WhatsApp, Hot Jobs, Career Builder, Monster, job.com, salesjobhunter.com; MSN.com, MyLife (Reunion.com), Fixter, Tagged, Classmates, My Yearbook, LiveJournal, Imeem, E-Harmony, Match.com, Yahoo!Personal, Chemistry.com, PerfectDate.com, J. Date, PictureTrail, and/or Snapfish? Use of such site or service means: where you are a registered user, or maintain a user profile, and have posted photos, videos, or electronic information such as status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments or applications. If your answer to Interrogatory No. 1 is affirmative, provide the following information for every social or professional networking or blogger site you have used:

a. Name and uniform resource location (URL) address of the site;

b. The specific URL address of your account profile on the site;
c. Your account name and real names or pseudonyms you have used to identify yourself on the site;
d. Your user ID or log in and password used to access your account on the site;
e. The date range that you used the site;
f. The email address(es) used by you in registering for the site;
g. Your account User ID number, if applicable; and
h. Any account identification other than that listed above.

The following are examples of Requests for Production regarding social media:

REQUEST FOR PRODUCTION NO. 1:

Produce each digital image, including videos and photographs, depicting Plaintiff after the incident made basis of this lawsuit that is stored on any internet or by any internet/social media service provider, including but not limited to online social or professional networking or blogger sites identified in Interrogatory No. 1. This includes photos posted or others in which Plaintiff is depicted. Please include any accompanying comments to any image or video produced.

REQUEST FOR PRODUCTION NO. 2:

Produce each digital image, including videos and photographs, depicting Plaintiff for the 24 months preceding the incident that is stored on any internet or by any internet/social media service provider, including but not limited to online social or professional networking or blogger sites identified in Interrogatory No. 1. This includes photos posted or others in which Plaintiff is depicted. Please include any accompanying comments to any image or video produced.

REQUEST FOR PRODUCTION NO. 3:

From the time following the incident made basis of this suit until the present, produce each digital image, including videos and photographs, depicting Plaintiff that is stored on any electronic storage device including computer hard-drives, external hard drives, USB drives, cellular telephones, media cards for digital cameras, iPhones, iPods, iPads, or any other device, or any web-based photo and video storage platforms, including but not limited to Picasa, Kodak Gallery, Lifestudio, Snapfish, PictureTrail, MiMedia, Shutterfly, Mozy.com, Sharefile.com, or any similar web-based file storage location.

REQUEST FOR PRODUCTION NO. 4:

Produce the contents of Plaintiff's Facebook Page. To do so, please go to the bottom of your Facebook Page and select "Download a Copy of Your Facebook Data". If you are unable to do so, do not remove any materials on your Facebook Account and provide your username and password for the limited purpose of downloading the content of your Facebook account. Please consider this a formal request to preserve all of the content of your Facebook Account.

REQUEST FOR PRODUCTION NO. 5:

Printouts of every post Plaintiff has made on Twitter since the incident made basis of this lawsuit. In the alternative, please provide Plaintiff's username and password for her Twitter account.

REQUEST FOR PRODUCTION NO. 6:

Copies of any video depicting Plaintiff posted on YouTube, Vimeo, Vine, Instagram or any other online video hosting site whether posted by you or by another, since the date of the incident.. If you cannot provide a copy of the video itself, please provide a link to same and username/password access as requested in the previous Requests.

REQUEST FOR PRODUCTION NO. 7:

Copies of any photos or video of Plaintiff from any cellular phone with photographic or video capabilities in Plaintiff's possession or constructive possession since the date of the incident.

Subpoenas may also be used as a last resort, as even Facebook itself recommends that parties to litigation should produce and authenticate the contents of their account "by using Facebook's 'Download Your Information' tool, which is accessible through the Settings drop down menu." Facebook, HelpCenter, available at https://www.facebook.com/help/473784375984502 (last visited September 28, 2021).

As an aside, this year Texas also amended its rules to permit service of citation via social media. Specifically, Texas Rule of Civil Procedure Rule 106(a) no longer requires service of citation "by any person duly authorized under Rule 103" and expands the methods for service of citation. It now allows for *substituted service* of citation by social media, email or technology. If you are requesting the Court to allow substituted service through a form of technology, you must present evidence that the technology actually belongs to the defendant and that the defendant regularly uses or recently used that technology.

12. Which, if any, limitations do your state's laws impose on a party on obtaining social media evidence from an opposing party? Possible limitations include a privacy defense, relevance, etc.

Typical objections to social media discovery requests include invasion of privacy, relevance, overbreadth, harassment, hearsay and/or unfair prejudice.

See In the Interest *of K.R.B, a Child*, 2010 Tex. App. LEXIS 8161 (Tex. App.—Fort Worth 2010)(Facebook and MySpace pages relevant to custody issues); In *The Matter of J.W.*, a Juvenile, 2009 Tex. App. LEXIS 9830 (Tex. App.—Waco 2009)(MySpace evidence admitted regarding juvenile delinquent conduct); *In the Interest of K.E.L.*, 2009 Tex. App. LEXIS 1382 (Tex. App.—Beaumont 2009)(MySpace pages admitted into evidence to determine a child's primary residence; *Hall v. State*, 2011 Tex. App. LEXIS 6970 (Tex. App.—Austin Aug. 24, 2011)(Facebook pages admitted into evidence in a murder trial); and *In the Interests of T.T., et al.*, 228 S.W.3d 312, 322-23 (Tex. App.—Houston [14th Dist.] 2007)(MySpace account admitted into evidence in a case to terminate parental rights).

More recently, the Beaumont Court of Appeals, provided some insight into the specificity needed to overrule objections to your discovery requests. *In re Indeco Sales, Inc.*, 09-14-00405-CV, 2014 WL 5490943 (Tex. App.—Beaumont Oct. 30, 2014, no pet.). In *In re Indeco Sales, Inc.*, the disputed requests for production were as follows:

1) A color copy of any and all photographs and/or videos of you (whether alone or accompanied by others) posted on your Facebook page(s)/account(s) since the date of the accident on August 23, 2013.
2) A color copy of all Facebook posts, Facebook messages and/or Facebook chat conversations, other than those protected by the attorney-client privilege, authored, sent or received, and/or otherwise entered into by you since August 23, 2013.
3) A color copy of any and all photographs and/or videos of you (whether alone or accompanied by others) posted on your Facebook page(s)/ account(s) prior to August 23, 2013.
4) A color copy of all Facebook posts, Facebook messages and/or Facebook chat conversations, other than those protected by the attorney-client privilege, authored, sent or received, and/or otherwise entered into by you prior to August 23, 2013.

The Court of Appeals ruled the trial court did not err in sustaining the objections to these requests as overbroad or in denying realtors motion to compel. With respect to the first request, the Court noted that the request on its face requested Plaintiff produce every photograph and video posted since the date of the

accident regardless of when the photograph was taken or created. Further, the second request required that Plaintiff produce every post, message or chat conversation authored, sent, or received by her, no matter how mundane or remote, regardless of the topic, content, or subject, and included everything anyone sent or posted to her account. Though there were some limitations on the time period, there was no limit on the scope of the request or the subject matter of the post, making the request overbroad. *Id.*

13. What, if any, spoliation standards has your state's Bar or courts set forth on social media for party litigants?

Concerns over spoliation of evidence have been around long before the existence of social media; in fact, spoliation concerns have probably persisted for as long as evidence itself.

When the Federal Rules of Civil Procedure were amended, effective in 2006, they addressed issues related to preserving, disclosing, or seeking electronically-stored information (ESI), social networking was in its infancy and its paradigm-shifting impact on how people communicate and share information was yet to be felt. It has since been established that this type of evidence should be held to the same standards as all other ESI. The Federal Rules of Civil Procedure 37(e) was amended in 2015 to explicitly state that ESI must be preserved "in the anticipation or conduct of litigation," or else a person could face consequences in court. A litigation hold can be placed on social media data, and subsequently, it is the responsibility of the person(s) with legal or practical control over that information to preserve it appropriately.

The August 2012 Amendments to the Model Rules of Professional Conduct included a change in what is considered competent representation (lawyers must now keep abreast not only of changes in the law and its practice, but also of "the benefits and risks associated with relevant technology") attorneys must be sufficiently conversant in social media to ethically and competently advise their clients.

At the most fundamental level, lawyers have an ethical obligation, independent of the duties imposed on their clients, to preserve evidence. Most state ethical rules governing evidence preservation and addressing spoliation are derived from Rule 3.4 of the ABA Model Rules of Professional Conduct.

The Texas analogue to this is found in Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct. Under the heading of "Fairness in Adjudicatory Proceedings," it states that lawyers shall not "(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy, or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04 (West 2005)

Parties increasingly address preservation of social media content during discovery prior to a judge's order. This can include sending preservation letters prior to formal discovery requests. Additionally, parties may request opposition preserve and store social networking content by use of readily available technology.

For a much more complete discuss on spoilation in Texas see *Wal–Mart Stores v. Johnson*, *106 S.W.3d* 718, *722* (Tex. 2003) (declining to decide whether a spoliation instruction is justified when evidence is unintentionally lost or destroyed; and *Brookshire Bros. v. Aldridge*, *438 S.W.3d* 9, 20 (Tex. 2014); (observing that the initial inquiry in determining if discovery abuse has occurred is whether a party has a duty to preserve evidence).

In Texas, one court has suggested, however, under the right circumstances the mere act of taking one's Facebook profile from publicly viewable to private can give rise to an adverse inference. See *In re Platt*, No. 1 1-12367-CAG, 2012 WL 5337197, at *3 (Bankr. W.D. Tex. Oct. 29, 2012). While the result in the *Platt* case might indicate that such advice runs the risk of costing the client an adverse inference, it is important to know that the court's ruling in *Platt* hinged on the totality of the circumstances and the timing of Platt's sudden decision to make his profile private.

Cases have consistently pronounced that there can be no sanction-worthy spoliation if the evidence is not relevant: i.e., the destroyed or unavailable evidence would have been helpful to the movant. *MRT, Inc. v. Vounckx*, 299 S.W.3d 500, 510 (Tex. App.-Dallas 2009, no pet.) (articulating the standard that under Texas law, a duty to preserve evidence only arises when the evidence in the party's possession or control "will be material and relevant" to the claim).

14. What standards have your state's courts set for getting various types of social media into evidence? Please address relevance, authenticity, and whether any exclusionary rule might apply (e.g., Rules 404(a) or 802).

Authenticity

In Texas, the judge functions as the initial gatekeeper of the reliability of the evidence, with the jury assessing the weight and credibility of admitted evidence.

The test for authenticating and admitting electronic evidence is whether the proponent of the evidence has offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. The court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.

The Amendments to Federal Rules of Evidence 902 (13) and (14) provide a pathway to authentication of social media posts. However, authenticity is only the first hurdle to admissibility.

Additional admissibility grounds include relevance, hearsay and prejudice. The Texas Court of Criminal Appeals released a 2012 opinion that dealt extensively with authenticating social media evidence. See *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). See also *Campbell v. State*, 382 S.W.3d 545, 551-53 (Tex. App.—Austin 2012, no pet.) regarding admissibility of Facebook evidence.

In *Musgrove v. State*, a Texas court addressed an online personal ad, and found that it was not necessary for authentication to show that the person placed the ad, only that the exhibit was an authentic copy of the actual online ad. *Musgrove v. State*, No. 03-09-00163-CR, 2009 WL 3926289 (Tex.App.—Austin 2009) (memo. op.).

In *In re J.A.S.*, a mother objected to the admission of provocative photographs of her, allegedly posted to an adult website. *In Re J.A.S.*, No. 11-09-00176-CV, 2011 WL 3926289 (Tex. App.—Eastland January 13, 2011) (memo. op.). On appeal, the court held that the objection had not been preserved because, although she objected at trial that the photos were not of her, she failed to object to their authentication as pictures that were posted on an adult website.

In *Longoria v. State* the court permitted printouts of emails, internet chat room dialogues, and cell phone text messages into evidence when found to be sufficiently linked to the purported author so as to justify submission to the jury for its ultimate determination of authenticity. *Longoria v. State*, No. 08-13-00083-CR, 2015 WL 8952257 (Tex. App.—El Paso Dec. 15, 2015, no pet.).

Relevance

In *Hall v. State*, a Texas murder case, the court allowed the admission of incriminating statements from Hall's Facebook page as evidence of her guilt. *Hall v. State,* 283 S.W.3d 137, 149 (Tex. Crim. App. 2009, pet. ref'd.). As proper evidence of motive, the Court of Appeals upheld the admission of Facebook postings stating, "I should really be more of a horrific person. Its [sic] in the works," as well as the admission of Hall's screen name, favorite quotes, and an online list of her favorite films, which were notable for their violent nature. *Id.* Like any other discovery, a party need only show that the information is "reasonably calculated to lead to the discovery of admissible evidence" in order to seek it in discovery. See TRCP 192.3(a).

Hearsay

State and Federal Rules of Evidence forbid out-of-court statements offered into evidence to prove the truth of the matter asserted with certain exceptions. "Non-hearsay" exceptions that are useful to authenticate e-evidence are: (1) a statement offered for any relevant purpose other than for the truth of the matter asserted; (2) a declarant's prior consistent statements in rebuttal to a charge "against the declaration of recent fabrication or improper influence or motive"; and (3) a party-opponent's admissions. Fed. R. Evid. 801.

Normally, a party's statements made on its own website are admissible pursuant to Fed. R. Evid. 801(d)(2). However, there is a hearsay hurdle when dealing with the admissibility of statements a witness posts on a website, like in a chat room comment section, that they do not own. Unless there is evidence, normally via testimony, that those statements were authored or adopted by the declarant, then they will remain inadmissible.

Litigators may also use the hearsay exceptions to their benefit to argue that a witness's Facebook check-in at a local restaurant is not hearsay but instead are a "present sense impression" or admissible under the "state of mind" hearsay exception. Additional exceptions may include Excited Utterance; and Then Existing Mental, Emotional or Physical Condition.

Reliable documents is another exception which may include variety of computer- or internet-stored data. Anything from online flight schedules, to personal financial records, to emails could potentially be admitted under hearsay exceptions.

15. How have your State's courts addressed an employer's right to monitor employees' social media use?

Currently, there does not appear to be any federal laws that prohibit an employer from monitoring employees on social networking sites. Employers may install software on company computers that does this, or hire third-party companies to monitor online activity.

There appears to be very little case law on this topic in Texas.

In *Sumien v. CareFlite*, NO. 02-12-00039-CV (Tex. App. Fort Worth July 5, 2012), employee Robert Sumien appealed the trial court's ruling granting his employer's motion for summary judgment and dismissing his claim for invasion of privacy. Id. at *2. After a fellow employee was offended by a Facebook comment written by Sumien, it was reported, and Sumien was terminated. Id. at *1-2. Sumien sued CareFlite "for unlawful termination, intrusion upon seclusion, and public disclosure of private facts." *Id.* at *2. CareFlite filed a summary judgment motion relating to all three causes of action, and the trial court granted this motion without specifying the ground upon which it relied and dismissed Sumien's claims. *Id*. Sumien appealed the sole issue of his claim for invasion of privacy. *Id.* at *1. The appellate court held that the trial court did not err by granting the employer's motion for summary judgment because the employee failed to offer proper explanation as to the first element of the tort of unwarranted intrusion upon seclusion was satisfied. *Id.* at *4-5. Sumien failed to show that the employer intruded on his private affairs or concerns by viewing a comment he posted on a social media network. *Id.* at *6. Sumien's argument regarding public disclosure of private facts was not relevant, because disclosure was not an element of the intrusion tort. *Id.* at *5. Sumien's argument that employers could not fire employees for engaging in concerted work place related discussions on the social media website was irrelevant because the court's inquiry did not involve whether the employer could terminate the employee for posting his comment. *Id.* at *5-6. Robert Sumien failed to present any evidence showing that his misunderstanding of his coworker's social media network privacy settings meant that the employer intentionally intruded upon his seclusion. *Id.* at *6.

In *Roberts v. CareFlite*, (a related case to *Sumien v. CareFlite*), one of CareFlite's former employees Janis E.

Roberts, also fired after involvement in the Facebook posting incident, who challenged the trial court's ruling on her invasion of privacy by intrusion on seclusion claim. NO. 02-12-00105-CV (Tex. App. Oct. 4, 2012) at *1. She failed to appeal the trial court's granting of summary judgment on her wrongful termination claim. Id. at *9. The facts and procedural history are essentially the same as in *Sumien v. CareFlite*. The Court of Appeals made a similar ruling in *Roberts* that the trial court had not erred in granting CareFlite's no-evidence motion for summary judgment, because Roberts failed to offer any evidence that she produced to raise a fact issue on whether CareFlite intruded upon her seclusion. *Id.* at *14. Roberts failed to argue as to why her employer's review of her Facebook postings was an intrusion upon her seclusion, considering those postings were open for third parties to view. Roberts did not cite any cases to support her arguments, and as such, the trial court's ruling was upheld. Texas legislature has also made attempts to regulate this in Texas.

In the past there have been several bills introduced in Texas legislature that addressed this issue; however all of them died in committee.

Generally, it seems clear that what was protected activity before the advent of social media (i.e., pay discussions, complaints about working conditions, and the like) remains protected even if it takes place online. However, not all online activity is protected. For example, an employee's "freedom" to disparage co-workers while off-duty should be limited by the co-workers' right to be free of a hostile work environment. Similarly, unauthorized disclosure of confidential information is not protected (aside from discussions of pay and benefits between employees).

It is hard to define where that line is, but employees can be held accountable when they cross it. It is really no different from other forms of off-duty conduct that damage workplace relationships - courts have long held employers responsible if they fail to take effective action with respect to employees who commit illegal harassment against co-workers, whether the harassment occurs on- or off-duty.

In general, a company has the right under Texas law to take action against an employee for off-duty conduct if such conduct has the effect of damaging company business or work relationships.

It is best for companies to adopt written policies on computer and Internet usage and on the use of social media by employees.

16. How have your State's state or federal courts addressed limitations on employment terminations relating to social media?

Texas is an at will employment state. Accordingly, employees may be terminated for any reason or no reason, as long as it does not run afoul of a protected class or activity under the National Labor Relations Act.

Furthermore, an employer may take disciplinary action upon social media posts made outside working hours if: the post identifies (directly or indirectly) that the person is an employee of the organization and if violates policies on social media use that the employee has been trained in.

In addition to the *Sumien* and *Roberts* cases described above, see also, *Edinburg Consol. Indep. Sch. Dist. v. Esparza*, 603 S.W.3d 468 (Tex. App. 2020). *Esparza* concluded that an employee's use of electronic media that violated state or federal law or District policy**, or interferes with the employee's ability to effectively perform his or her job duties, the employee is subject to disciplinary action, up to and including termination of employment.**

Esparza occupied the high-level position of principal for the middle school. A nude photo of Esparza had been in circulation since before the end of the 2015-2016 school year; the photo "was being passed around some students and was also seen by some staff" in June of 2016; Esparza learned of the photo's existence in the public domain on June 14, 2016; a parent inquired or complained to the school about the photo on June 22,

2016; "there was zero community outcry or outrage due to the unauthorized dissemination of Ms. Esparza's nude photo" and "there was no media coverage about Ms. Esparza's nude photo" prior to June 23, 2016; the story of the disseminated nude photo was reported on various media outlets; Gutierrez "received calls, texts, or emails from several media sources" on June 29, 2016; the photo had gone "viral" by July 20, 2016; and ECISD sent Esparza the notice of her proposed termination on August 25, 2016. The court affirmed that it was reasonable for the school board to infer from the escalating media coverage and the fact that the photo had recently "gone viral" that the disruption and distraction from the photo would continue and interfere with Esparza's ability to effectively perform her job duties, in violation of ECISD's policy.

Esparza argued that a third party was responsible for the photo's dissemination and, therefore, there can be no good cause to terminate her. The court disagreed. While it is unfortunate that Esparza was a victim of a crime, the fact remains that there is a naked picture of Esparza voluntarily taken circulating among the students and the school's community.