

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED NEW SPOILIATION RULE OF CIVIL PROCEDURE 215.7

I. **Exact language of existing Rule:** None.

II. **Proposed New Spoliation Rule:** **RULE 215.7. Spoliation**

(a) *Motion for Order Granting Spoliation Remedies.* A party, upon reasonable notice to other parties, may move for an order seeking spoliation remedies if:

- (1) another party intentionally or negligently breached a duty to preserve a document or tangible thing—as described by Rule 192.3(b)—that may be material and relevant to a claim or defense;
- (2) the document or tangible thing cannot be reproduced, restored, or replaced through additional discovery; and
- (3) the movant is unfairly prejudiced as a result.

The motion should be filed reasonably promptly after the discovery of the spoliation.

(b) *Standards.*

- (1) The court must consider the spoliation motion outside the presence of the jury, as provided in Texas Rule of Evidence 104. The court must determine the spoliation motion based on the pleadings, any stipulations of the parties, any affidavits, documents or other testimony filed by a party, discovery materials, and any oral testimony. Unless the court orders otherwise, if the movant will be relying on affidavits, the movant must file any affidavits at least fourteen days before the hearing date and if the non-movant will be relying on affidavits, the non-movant must file any controverting affidavits at least seven days before the hearing date.
- (2) To find spoliation, the court must find that the allegedly spoliating party had a duty to preserve a document or tangible thing that may be material and relevant to a claim or defense and breached that duty by intentionally or negligently destroying the document or tangible thing or by failing to take reasonable steps to preserve the document or tangible thing.

- (3) If the court finds that spoliation occurred, the remedies ordered by the court must be proportionate to the wrongdoing and not excessive. The court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party based on the relevance of the spoliated evidence to key issues in the case, the harmful effect of the evidence on the spoliating party's case, the degree of helpfulness of the evidence to the nonspoliating party's case, and whether the evidence is cumulative of other available evidence.
 - (4) In the order, the court must specify the conduct that formed the basis or bases for its ruling.
- (c) *Spoliation Remedies.* If the court finds that spoliation occurred, the court may make such orders in regard to the spoliation as are just, and among others the following¹ :
- (1) If the court finds that a nonspoliating party is prejudiced because of the loss of the document or tangible thing, then the court may order one or more of the following remedies:
 - (A) awarding the nonspoliating, prejudiced party the reasonable expenses, including attorneys' fees and costs, caused by the spoliation; or
 - (B) excluding evidence.
 - (2) If the court finds that the spoliating party acted intentionally or acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense, then the court may order an instruction to the jury regarding the spoliation in addition to the remedies in (c)(1). If the court submits a spoliation instruction to the jury, then evidence of the circumstances surrounding the spoliation may be admissible at trial. The admissibility at trial of evidence of the circumstances surrounding the spoliation is governed by the Texas Rules of Evidence.
 - (3) If the court finds that a party acted with intent to spoliator, then in addition to the remedies set forth in (c)(1) and (c)(2), the court may order one or more of the following remedies:
 - (A) finding that the lost document or tangible thing was unfavorable to the spoliating party;
 - (B) striking the spoliating party's pleadings;
 - (C) dismissing the spoliating party's claims or defenses; or

¹ This language is derived from Tex. R. Civ. P. 215.2(b).

(D) entering a default judgment in part or in full against the spoliating party.

The remedies in this section are in addition to the remedies available under Rules 215.2 and 215.3.

III. Brief statement of reasons for requested changes and advantages to be served by proposed new rule:

A. General Purpose and Reasons

Considering the recent revisions to Federal Rule of Evidence 37(e) pertaining to spoliation of Electronically Stored Information and existing Texas law regarding spoliation,² the State Bar Court Rules Committee believes that a rule providing a procedure for litigants and courts to follow when considering allegations of spoliation would be helpful to the bar.

B. The Proposed Rule's 3-Part Structure

The proposed Rule has three parts:

Part (a) pertains to what the non-spoliating party should do when seeking judicial remedies.

Part (b) pertains to the standards the trial court should consider when faced with a spoliation complaint.

Part (c) pertains to the three broad categories of remedies the trial court may order depending on the particular facts and circumstances. Part (c) sets out the different standards and categories: (1) when remedies such as fees or exclusion of evidence may suffice; (2) when a jury instruction is warranted; and (3) when more severe remedies are needed to address the intentional destruction of evidence.

C. The Court's Standards Guiding the Proposed Rule

To submit a spoliation instruction, the trial court must find that “(1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense.” *Wackenhut v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015). Moreover, the court must find that a less severe remedy would be

² This includes the clarifications of the law of spoliation in Texas in 2014 and 2015 by the Court. *See Wackenhut v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015); *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 19-29 (Tex. 2014); *Petro. Solutions, Inc. v. Head*, 454 S.W.3d 482, 488-89 (Tex. 2014).

insufficient to reduce the prejudice caused by the spoliation. *Brookshire Bros.*, 438 S.W.3d at 25.

Trial courts have historically had broad discretion in fashioning remedies in the event of actual spoliation. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003); *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998). However, as the Texas Supreme Court has recognized, evidence may be unavailable for a number of reasons: it could be lost, altered, or destroyed in bad faith, or for completely innocent reasons with good explanations. *Johnson*, 106 S.W.3d at 721. Texas law disfavors spoliation instructions when evidence is merely lost or missing as opposed to when there is evidence of intentional destruction.

D. The Proposed Rule Diverges on Admissibility of Evidence Surrounding Spoliation

While acknowledging the proposed rule's divergence from the Court's precedent, the majority of the Committee believes that the rule of spoliation should specifically state that evidence of the circumstances surrounding the spoliation may be admissible at trial. In *Brookshire Bros.*, the Court wrote that evidence of the circumstances surrounding the spoliation is generally not admissible at trial. *Brookshire Bros.*, 438 S.W.3d at 14, 26 (“Accordingly, evidence bearing directly upon whether a party has spoliated evidence is not to be presented to the jury except insofar as it relates to the substance of the lawsuit.” and “However, there is no basis on which to allow the jury to hear evidence that is unrelated to the merits of the case, but serves only to highlight the spoliating party's breach and culpability.”).

E. Reference to PJC Instruction

The Texas Pattern Jury Charge has the following commentary on whether “may” or “must” should be used:

In *Brookshire Bros.*, the majority does not articulate the specific language that should be included in the instruction, particularly whether the jury “must” or “may” consider that the missing evidence would have been unfavorable to the spoliator. The dissent in *Brookshire Bros.* interpreted the majority as requiring the use of the term *must*. *Brookshire Bros.*, 2014 WL 2994435, at *19. The overarching guideline, as with any sanction, remains proportionality. *Brookshire Bros.*, 2014 WL 2994435, at *1 (“Upon a finding of spoliation, the trial court has broad discretion to impose a remedy that, as with any discovery sanction, must be proportionate; that is, it must relate directly to the conduct giving rise to the sanction and may not be excessive.”).

Whether *may* or *must* is used should be based on the facts applied to the standards articulated above.

An erroneous spoliation jury instruction can constitute reversible error. *Johnson*, 106 S.W.3d at 724. Unavailable evidence does not necessarily mandate a spoliation instruction, but rather a fact-specific showing of bad conduct and harm should be presented to the trial court by the party requesting a spoliation instruction to evaluate contentions that missing evidence should allow the party to “tilt” or “nudge” the jury.

Respectfully submitted,



Carlos R. Soltero
Chair, State Bar Court Rules Committee
March 7, 2016