

# THE TEXAS INVESTIGATOR

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# The Legal Corner



## ***Spoliation – What is it and can we still eat it?***

By Wes Bearden, Esq.

Recently, I was meeting with a client corporation in downtown Houston who was about to undergo some substantial employment litigation. They had yet to hire outside counsel. And, during the meeting asked whether or not they should just get rid of the terminated employee's laptop, phone and office papers. What should they do?

Obviously, we as investigators shouldn't provide legal advice to potential clients. However, there are times as an investigator when you need to realize the importance of a client's situation and then refer them immediately to the appropriate professional. That may not necessarily mean halting the service you are providing. It does mean that, even in the face of client instruction, you need to take the long view and try and protect your client's interests to the best of your ability. It also requires some understanding of legal issues that your client may confront.

In many cases, we are hired to obtain and preserve evidence. Lots of those times are prior to a lawsuit arising. The above situation has a question which should be answered: Does a party owe a duty to preserve relevant evidence for the opposing party? The answer may be yes and it may be earlier than you expect.

Spoliation of evidence is defined as the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a legal proceeding. When spoliation is discovered, it becomes an evidentiary matter, a form of discovery abuse,

which is resolved by the court outside of the jury. Its effects can be devastating and include contempt, to exclusion of evidence, to adverse jury instructions, and even death penalty of striking plaintiff's pleadings.

Within the last couple of years, the Texas Supreme Court has ruled on a seminal case on spoliation in *Brookshire Bros., Ltd v. Aldridge*, 438 S.W.3d 9 (Tex. 2014). In that case, the plaintiff slipped and fell in defendant's grocery store. A few days later he went back to the store to complain of back injuries caused by the fall. The defendant's security department only kept part of the store's surveillance video. That consisted of a few seconds before the fall to a few minutes after.

After filing suit, Plaintiff's attorney attempted to obtain the entire video which might have showed the surrounding circumstances causing the fall. However, defendant's camera system recorded over the footage after thirty days. At trial, the court found that the store's refusal to provide all of the video footage constituted spoliation. The court allowed a spoliation inference instruction which permitted the jury to find that the defendant actions (or lack thereof) was an attempt to hide evidence that defendant knew would be damaging to its case. The jury returned a million dollar plus verdict for plaintiff. The Supreme Court eventually reversed the verdict finding abuse of discretion by the trial court for not ordering a less severe restriction.

Although reversed, the lesson learned is that when a party is found to have not preserved evidence, then the effect may be dramatic in a trial. When that duty to preserve evidence comes about may be before litigation. In *Brookshire*, the court claimed that duty to preserve evidence arises “when a party knows or reasonably knows 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.” *Id* at 20. All that may be needed is the potential that litigation may arise.

This duty can be when you as the defense investigator begin your internal investigation into any incident. It can apply to electronic information, recordings and documents. This duty is not necessarily a duty to investigate. But, it is a duty that when evidence likely to be relevant is in possession of one, you can't just

delete it. As an investigator, it is good to know when this may apply to protect your client and refer them to counsel if needed.

Although a concept based in civil litigation, it can be useful as an argument as a criminal defense investigator. With the Michael Morton Act, the discovery process has become increasingly open. However, an argument can be made that even when the evidence may have existed, the police should have taken efforts to preserve it. Ask yourself, did the police fail to get a neighboring video? Choose not to perform a forensic analysis of a cell phone? Did police never ask for a DNA swab? Although it may not get the spoliation remedies above, the unaggressive police work may be enough for a jury to see things your way.

