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Brookshire Brothers v. Aldridge: Making the Spoliation Instruction a Litigation Unicorn

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NOTE

BROOKSHIRE BROTHERS V. ALDRIDGE: MAKING THE SPOILIATION INSTRUCTION A LITIGATION UNICORN

*By: Shawn A. Johnson**

ABSTRACT

In July 2014, the Texas Supreme Court issued a new framework for analyzing and remedying the destruction of evidence, holding that spoliation jury instructions are warranted only when a trial court finds that a party acted with the specific intent to conceal discoverable evidence or that a party's negligent destruction wholly prevented another from presenting a claim or defense. The Court addressed whether the trial court abused its discretion in submitting a spoliation instruction in a slip-and-fall case in which the defendant premises owner retained only eight minutes of video of the plaintiff's fall and allowed the remaining footage to erase automatically. Although the Court recognized that a party's willful blindness is sufficient to satisfy the intent requirement, according to critics, the Court's application of the rule raises questions about the actions constituting willful blindness in the spoliation context and will likely invite parties to freely destroy relevant evidence without fearing a spoliation instruction or other harsh sanction. Although a thorough analysis of Texas spoliation law shows that the Brookshire framework largely follows the Trevino test previously used by a majority of Texas courts, the Court's application of the framework indicates that spoliation instructions will now be nearly impossible for litigants to obtain.

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I. INTRODUCTION

“Documents create a paper reality we call proof. The absence of such documentary proof may stymie the search for the truth.”¹ Over a decade ago, U.S. District Court Judge Shira A. Scheindlin recognized that missing evidence severely impacts parties in litigation and that the matter is made more complex by the rise of electronic information, which can be intentionally or inadvertently destroyed easily.² Since that time, courts and legal scholars have sought to resolve the lack of clear guidance on how courts should handle missing electronic evidence in litigation.³ In *Brookshire Brothers v. Aldridge*, a classic slip-and-fall spoliation case, the Texas Supreme Court answered many questions left unresolved by prior cases regarding the framework with

1. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003) (footnote and internal quotations omitted).

2. *Id.*

3. See, e.g., Justice Rebecca Simmons & Michael J. Ritter, *Texas's Spoliation "Presumption"*, 43 ST. MARY'S L.J. 691, 693 (2012).

which courts are to analyze and remedy the destruction of evidence.⁴ Specifically, the Court seems to have adopted most of Justice James A. Baker's framework laid out in his *Trevino v. Ortega* concurrence,⁵ but the updated framework will likely make it almost impossible for litigants to obtain spoliation jury instructions or other meaningful remedies.

Legal commentators quickly joined the *Brookshire* dissent's criticisms of the framework, arguing that the majority's application of the framework blends the culpability and prejudice elements and raises serious questions about the actions that constitute intentional destruction of evidence.⁶ These critics also argue that the Court's new framework significantly limits the broad discretion traditionally granted to judges to remedy spoliation,⁷ which will likely entice parties to freely destroy relevant evidence without fearing one of the most serious spoliation sanctions—a spoliation jury instruction.⁸ Part II of this Note provides a brief overview of the rise of electronically stored information (“ESI”) and electronic discovery (“e-discovery”). Part III gives a background of historical Texas spoliation law and describes how a majority of Texas courts analyzed spoliation issues before *Brookshire*. Part IV presents the new *Brookshire* spoliation framework and the Texas Supreme Court's application of the framework to the facts of the case. Part V considers the *Brookshire* dissenting opinion and other commentators' criticisms of the new framework, discussing the merits of each. Part VI surveys subsequent cases interpreting and applying the *Brookshire* spoliation framework, highlighting the substantial challenges faced by those seeking to obtain a spoliation jury instruction. Finally, Part VII suggests technological, procedural, and judicial mechanisms that may alleviate the challenges posed by the destruction of evidence in the age of digital information.

4. *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014); see also Simmons & Ritter, *supra* note 3; Neal A. Hoffman, *The New Spoliation: How the Texas Supreme Court Clarified and Redefined the Law*, 78 TEX. B.J. 270, 270 (Apr. 2015) (asserting that *Brookshire* “was the first time that the court would significantly address the substantive requirements of seeking and obtaining a spoliation instruction in almost a decade”).

5. Compare *Brookshire*, 438 S.W.3d at 19–27, with *Trevino v. Ortega*, 969 S.W.2d 950, 955–61 (Tex. 1998) (Baker, J., concurring).

6. See, e.g., Kent Sullivan, *Advice on Evidence Preservation Stops Short*, TEX. LAW. IN-HOUSE TEX., Sept. 8, 2014, at 6, 7, <http://www.texaslawyer.com/the-newspaper> [<http://perma.cc/NZ2D-WH33>]; Judge Xavier Rodriguez, *Brookshire Bros.: Cleanup on Aisle 9. The Current Messy State of Spoliation Law*, 46 ST. MARY'S L.J. 447, 448 (2015).

7. Hon. Shira A. Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 FORDHAM L. REV. 1299, 1301 (2014) (discussing spoliation frameworks akin to that laid out in *Brookshire*).

8. *Brookshire*, 438 S.W.3d at 34, 37–38 (Guzman, J., dissenting).

II. THE RISE OF ELECTRONICALLY STORED INFORMATION AND E-DISCOVERY

Pretrial discovery is central to the litigation process.⁹ The primary pretrial discovery devices are interrogatories, depositions, requests for admissions, and requests for production.¹⁰ Although pretrial discovery promotes the economical use of judicial resources by reducing the number of controverted issues for trial, identifying groundless claims, and increasing the possibility of pretrial settlement, it also imposes significant risks in litigation, such as delay, increased costs, and the possibility of harassment through pretrial “fishing expeditions.”¹¹ In fact, litigants can use discovery devices abusively by imposing “large and unjustifiable costs” on the opposing party, leading to burdensome and expensive discovery disputes.¹² Therefore, courts must balance the benefits of pretrial discovery with the risks inherent in its abuse.

Amplifying these concerns, utilization of and reliance on ESI is certainly at an all-time high, but is yet to reach its zenith. For example, in the corporate context, over 90% of all business records are created in digital form and are never converted to paper.¹³ Likewise, according to a report by The Sedona Conference in 2007, the average worker sends and receives 100 emails per day,¹⁴ and as early as 2003, daily email traffic equaled annual deliveries by the U.S. Postal Service.¹⁵ In fact, some experts estimate that by 2020, there will be nearly 26 billion devices on the Internet.¹⁶ Similarly, a national survey in 2012 reported that approximately 72% of reporting retailers utilize digital video recording systems, with 21% planning to increase use of these systems the next year.¹⁷ Even law enforcement is beginning to use technology in new ways, such as the use of police dashboard and body cameras.¹⁸

9. The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 192 (2007) [hereinafter Sedona 2007]; see also *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

10. BLACK’S LAW DICTIONARY 235 (4th pocket ed. 1996).

11. *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 942 (1961).

12. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989).

13. Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 8 & n.4 (2006).

14. Sedona 2007, *supra* note 9, at 198.

15. Kathy Perkins & Dave Deppe, “Byte” Me! *Protecting Your Backside in an Electronic Discovery World (Not Just for Litigators)*, 76 J. KAN. B. ASS’N 22, 23 (2007).

16. JUDICIAL CONFERENCE OF THE U.S., REPORT OF ADVISORY COMMITTEE ON CIVIL RULES (May 2, 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2014.pdf> [<http://perma.cc/77GM-9CWD>] [hereinafter MAY 2 REPORT].

17. RICHARD C. HOLLINGER & AMANDA ADAMS, NATIONAL RETAIL SECURITY SURVEY, FINAL REPORT, 21–22 (2012) (on file with author).

18. Justin Sink, *Obama to Provide Funding for 50,000 Police Body Cameras*, THE HILL (Dec. 1, 2014), <http://thehill.com/homenews/administration/225583-obama-to>

As the use of technology continues to increase in all facets of daily life, there is a greater demand for clear and workable legal guidelines pertaining to the retention and use of digital information in criminal and civil litigation. However, legal rules develop slowly compared to the rapid development and widespread adoption of information technology,¹⁹ and new technologies can quickly make legal rules obsolete or unworkable.

Discovery disputes are not new, but the growing reliance on ESI poses unique challenges.²⁰ For example, discoverable information could be found throughout multiple storage devices, such as mainframes, offsite backup tapes, desktop and laptop computers, removable storage devices, emails, and handheld devices.²¹ Likewise, multiple copies or versions of the requested information could be stored across the various devices.²² To combat these challenges, many organizations have retention policies that call for the purging of email and associated electronic documents according to a schedule.²³ Of course, businesses are justified in desiring to rid their computer systems of unnecessary data in order to improve system efficiencies.²⁴ However, another reason to define a limited duration retention policy is “[t]o reduce the dangers of eDiscovery. Minimizing the amount of electronic material an organization keeps means it has less material to produce during eDiscovery—and consequently it is less likely to hand over incriminating evidence.”²⁵ In fact, the U.S. Supreme Court has recognized that “[d]ocument retention policies . . . are created in part to keep certain information from getting into the hands of others . . . [and] are common in business.”²⁶ Adding greater complexity, embedded documentary details—metadata—may contain particularly relevant information but also creates burdens for corporations entirely

provide-funding-for-50000-police-body-cameras [http://perma.cc/2D8A-SJBG]; Martina Kitzmueller, *Are You Recording This?: Enforcement of Police Videotaping*, 47 CONN. L. REV. 167, 177–79 (2014).

19. Sharon D. Nelson & John W. Simek, “*May I Have My Electronic Discovery in Paper Please?*” *Lawyers Inch Their Way Toward a Paperless Practice*, VT. B. J., Summer 2004, at 47.

20. Sedona 2007, *supra* note 9, at 192.

21. *Id.* at 196.

22. *Id.*

23. Perkins & Deppe, *supra* note 15, at 24.

24. See Crist, *supra* note 13, at 9. In fact, Judge Scheindlin recognized in *Zubulake IV* that, were a corporation required to “preserve every shred of [evidence] . . . [it] would cripple large corporations.” *Zubulake IV*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

25. DAVID FERRIS, SETTING RETENTION POLICY FOR ELECTRONIC INFORMATION 2 (Mona Cohen ed., Ferris Research, Inc. 2011), <http://www.ironmountain.com/Knowledge-Center/Reference-Library/View-by-Document-Type/White-Papers-Briefs/S/Setting-Retention-Policy-for-Electronic-Information.aspx> [http://perma.cc/7H8W-6VMF].

26. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005) (internal quotations omitted) (“It is . . . not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.”).

distinct from the paper form.²⁷ Similarly, documentary proof may have been deleted from its primary source but remain on backup tapes long after its destruction.²⁸ Thus, courts must balance the interests of adjudicating disputes on the evidence with the burdens faced by litigants bearing high financial and resource costs to preserve every shred of potentially relevant ESI.

III. SPOILIATION OVERVIEW

Suppression and destruction of evidence is commonly cited as “a regular or frequent problem” in litigation.²⁹ But missing evidence can be irreplaceable. This suppression or destruction of evidence, also known as *spoliation*, “can thereby undermine the truth-seeking function of the judicial system and the adjudicatory process.”³⁰ In response, many states, including Texas, and federal courts have recognized that the destruction of evidence raises a presumption, or “adverse inference” under the Federal Rules of Civil Procedure, that the missing evidence was unfavorable to the party that caused its destruction.³¹

In the personal tablet, smartphone, and social-networking age, the ability to preserve evidence has become much easier, but these same technologies enhance the risk of both intentional and accidental spoliation in the context of electronic discovery.³² Even more, businesses are departing from paper records and moving to electronic document storage.³³ Due to increased tension between these forces and the release of a landmark judicial attempt to ease that tension, sanctions relating to e-discovery violations started to increase rapidly in 2004 and have continued to do so ever since.³⁴

27. See Crist, *supra* note 13, at 21–22, 26–29.

28. *Id.* at 24–25.

29. Simmons & Ritter, *supra* note 3, at 699 (quoting Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991)).

30. *Id.* at 701.

31. 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*).

32. Spoliation can even occur when a civil defendant deletes content off social media sites at the direction of her employer. Scott McConchie, *Social Media and Spoliation—Can A Client Delete Her Facebook Posts?*, NAT'L L.R. (Sept. 29, 2014), <http://www.natlawreview.com/article/social-media-and-spoliation-can-client-delete-her-facebook-posts> [<http://perma.cc/NAJ5-EVEG>]; see also Crist, *supra* note 13, at 9 n.5.

33. Crist, *supra* note 13, at 8; see also The Sedona Conference, *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 5 SEDONA CONF. J. 151, 151 (2004) [hereinafter *Sedona 2004*].

34. Dan H. Willoughby, Jr. et. al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 794 (2010). Sanctions for e-discovery abuses are not limited to certain categories of claims. *Id.* at 798 (ranking the occurrence of e-discovery sanctions: employment (17%); contract (16%); intellectual property (15.5%); tort (11%); civil rights (8.5%); bankruptcy (3%)).

That landmark spoliation case is *Zubulake v. UBS Warburg LLC*.³⁵ Zubulake was an equities trader who sued her employer for gender discrimination, failure to promote, and retaliation.³⁶ She argued that the evidence necessary to prove her case existed in email correspondence sent between various employees that were stored only on UBS's computer systems because UBS had deleted all other data stores.³⁷ After U.S. District Court Judge Shira A. Scheindlin ordered the parties to share the cost of restoring certain backup tapes that contained emails relevant to Zubulake's claims, the parties discovered that particular tapes were missing.³⁸ Zubulake then sought sanctions against UBS for its failure to preserve the missing tapes and deleted emails.³⁹ Specifically, she requested an order requiring UBS to pay the full costs of restoring the remaining tapes, an adverse inference instruction against UBS with respect to the missing tapes, and an order directing UBS to bear the costs of re-deposing individuals concerning issues raised in newly produced emails.⁴⁰

After finding that UBS had a duty to preserve the backups and emails because litigation was reasonably anticipated and information contained therein was relevant to the anticipated claim,⁴¹ Judge Scheindlin found that UBS had failed to satisfy its duty despite its three-year data retention policy and attorney-imposed litigation hold.⁴² Judge Scheindlin explained that an "adverse inference instruction is an extreme sanction and should not be given lightly" and that a

35. *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003). *Zubulake V*, a 2004 decision, has been cited as the case that "propel[led] the e-discovery industry into . . . one worth billions." Victor Li, *Zubulake 10 Years After*, ABA J., September 2014, at 48, 49, http://www.abajournal.com/magazine/article/looking_back_on_zubulake_10_years_later [<http://perma.cc/CKY3-68UK>]. However, *Zubulake* was not the first case to severely punish litigants for misconduct during the discovery phase. *See, e.g., Fuqua v. Horizon/CMS Healthcare Corp.*, 199 F.R.D. 200, 206 (N.D. Tex. 2000) (granting plaintiff's motion for sanctions relating to suppression of evidence and, in order to punish and deter future misconduct, entering a judgment against the defendants for actual and punitive damages, barring the plaintiffs from presenting witnesses or evidence during the subsequent trial on damages, and awarding the plaintiffs attorneys' fees and expenses).

36. *Zubulake IV*, 220 F.R.D. at 215.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 215–16. An adverse inference instruction is a jury charge instructing the jury that it may (or must) "infer that the party who destroyed potentially relevant evidence did so out of a realization that the evidence was unfavorable" to its case. *Id.* at 219–20 (internal quotations and alterations omitted).

41. *Id.* at 217–18. Litigants are not required to retain every document in their possession, but they must preserve what they know, or reasonably should know, is relevant in the action, reasonably calculated to lead to the discovery of admissible evidence, reasonably likely to be requested during discovery, or the subject of a pending discovery request. *Id.* at 217.

42. *Id.* at 218–19. A defendant must suspend its routine document retention/destruction policy and impose a "litigation hold" once it reasonably anticipates litigation to ensure relevant documents are preserved. *Id.* at 218.

party requesting the instruction must show that: (1) the spoliating party had an obligation to preserve the evidence at the time it was destroyed; (2) the records were destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the party's claim or defense such that a reasonable factfinder could conclude that it would support the party's claim or defense.⁴³ Judge Scheindlin noted that when a party destroys evidence intentionally or willfully, "that fact alone is sufficient to demonstrate relevance," but when the destruction is merely negligent, the party seeking sanctions must establish the relevance of the destroyed evidence.⁴⁴

Considering the facts on hand, Judge Scheindlin found that UBS may have been grossly negligent, but did not willfully destroy the backup tapes.⁴⁵ Zubulake therefore had to show that the information contained on the (destroyed) tapes was relevant to her case. However, Judge Scheindlin found that Zubulake failed to meet her burden and held that, in the case of negligent spoliation, "it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him."⁴⁶ Even though Judge Scheindlin did not grant Zubulake's requested adverse inference instruction, she did grant her request that UBS bear the costs of re-deposing certain witnesses to inquire into issues raised by the destruction of evidence and any newly discovered emails.⁴⁷

Following the re-depositions, Zubulake learned of more deleted emails and of emails existing on UBS's active servers that it never produced despite Zubulake's discovery request almost two years earlier, and again moved for an adverse inference instruction.⁴⁸ The new evidence showed that UBS personnel deleted relevant emails from their computers after the litigation hold that were lost forever, even though they had received at least two directives from counsel not to,⁴⁹ and that UBS failed to timely deliver multiple emails that were unquestionably relevant to Zubulake's claim.⁵⁰ Zubulake finally had evidence to show "that UBS acted wilfully in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production," so that the lost information was presumed relevant.⁵¹ Judge Scheindlin granted Zubulake's requested adverse inference instruction with regard to the deleted emails, recognizing that it was necessary to (1) punish UBS and deter future mis-

43. *Id.* at 220.

44. *Id.*

45. *Id.* at 221.

46. *Id.*

47. *Id.* at 222.

48. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 426–27, 430 (S.D.N.Y. 2004).

49. *Id.* at 429, 434–35.

50. *Id.* at 430.

51. *Id.* at 436.

conduct and (2) “restore Zubulake to the position that she would have been in had UBS faithfully discharged its discovery obligations.”⁵² Judge Scheindlin ruled that the following instruction would be given to the jury:

You have heard that UBS failed to produce some of the e-mails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants’ control and would have proven facts material to the matter in controversy.

If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.

In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS’s failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.⁵³

Zubulake won a \$29.2 million jury verdict and settled with UBS before appeal,⁵⁴ and Judge Scheindlin’s groundbreaking spoliation framework created an industry, setting the tone for spoliation law ever since.⁵⁵

Since *Zubulake*, spoliation instructions have been on the rise. For example, while a spoliation instruction was the selected sanction in 23% of federal and state cases in 2004, by 2011, it had become the most common sanction granted—being imposed 57% of the time when courts issued ESI discovery sanctions.⁵⁶ However, practitioners and their clients have not been welcoming of what they call excessively burdensome and overreaching obligations.⁵⁷

But spoliation issues existed long before 2004. For example, in *H. E. Butt Grocery Co. v. Bruner*, a 1975 Texas premises liability case sharing many similarities with *Brookshire*, a plaintiff sued after slipping on an onion stalk near the checkout counter in the defendant’s grocery store.⁵⁸ After seeing the onion that caused the plaintiff’s fall, an em-

52. *Id.* at 437 (“No one can ever know precisely what was on those tapes, but the content of e-mails recovered from other sources—along with the fact that UBS employees wilfully deleted e-mails—is sufficiently favorable to Zubulake that I am convinced that the contents of the lost tapes would have been similarly, if not more, favorable.”).

53. *Id.* at 439–40.

54. *Li, supra* note 35, at 51.

55. *Id.* at 52.

56. The Honorable David C. Norton et. al., *Fifty Shades of Sanctions: What Hath the Goldsmith’s Apprentice Wrought?*, 64 S.C. L. REV. 459, 468 (2013).

57. *Li, supra* note 35, at 53.

58. *H. E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 342 (Tex. Civ. App.—Waco 1975, writ dismissed). *Bruner* “is considered a seminal case in Texas spoliation law.”

ployee that had come to her aid said to another, “Get rid of that thing.”⁵⁹ On appeal, the court found significant that “the Defendant’s employees deliberately ‘got rid’ of the onion stalk [It] was last known to have been in possession of Defendant’s employees, was not produced in court, nor did Defendant offer any explanation for the intentional and deliberate spoliation of this vital piece of evidence.”⁶⁰ The court upheld the lower court’s finding of negligence, holding:

The intentional spoliation and destruction of the onion stalk created the presumption that its introduction into evidence would have been unfavorable to Defendant, that is to say, that it would have shown that it was sufficiently “stepped on and mashed” as to lead to the conclusion that it had lain on the floor for a sufficient period of time that the Defendant should have, by the exercise of reasonable diligence, discovered and removed it.⁶¹

A. *Texas’s Historical Approach to Spoliation*

This Section dives further into the elements that a majority of Texas courts have traditionally required to prove spoliation and the remedies available to cure that misconduct. It also provides a brief overview of the upcoming changes to Federal Rule of Civil Procedure 37(e), the federal spoliation rule for electronically stored information.

Texas courts have historically treated spoliation law as a common law evidentiary concept rather than an independent tort, and in *Trevino v. Ortega*, the Texas Supreme Court refused to recognize a tort for spoliation because the missing evidence does not cause an injury independent of the underlying action in which it arises.⁶² Instead, Texas courts have sought to rectify spoliation within the lawsuit where the improper conduct occurred and have left the proper remedial action to the trial judge’s broad discretion, based on the particular facts of each case.⁶³ For more than a decade, a majority of Texas courts followed the spoliation framework announced by Justice Baker in his *Trevino* concurring opinion.⁶⁴ Under Justice Baker’s framework, a

Simmons & Ritter, *supra* note 3, at 709.

59. *Bruner*, 530 S.W.2d at 342.

60. *Id.* at 343.

61. *Id.* at 344.

62. *Trevino v. Ortega*, 969 S.W.2d 950, 952–53 (Tex. 1998).

63. *Id.* at 953.

64. *See* Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 18–19 (Tex. 2014); *see also* Rodriguez, *supra* note 6, at 458. However, courts have not defined spoliation and the degree of culpability or prejudice required to trigger judicial remedies consistently. *Compare* Ham v. Equity Residential Prop. Mgmt. Servs., Corp., 315 S.W.3d 627, 631 (Tex. App.—Dallas 2010, pet. denied) (defining spoliation as “the deliberate destruction of, failure to produce, or failure to explain the non-production of relevant evidence, which, if proved, may give rise to a presumption that the missing evidence would be unfavorable to the spoliator.”), *with* Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 101 (Tex. App.—Corpus Christi 2008) (“Spoliation is the improper destruction of evidence”), *rev’d on other grounds*, 298 S.W.3d 631 (Tex. 2009).

party alleging spoliation must prove three components: duty, breach, and prejudice.⁶⁵ This Section will discuss each. Note the striking similarities between Justice Baker's 1998 *Trevino* concurrence and Judge Scheindlin's 2004 *Zubulake* decision.⁶⁶

1. Duty

Under Justice Baker's spoliation framework, a party alleging spoliation must first establish that the spoliating party had a duty to preserve the evidence.⁶⁷ This duty may arise through statute, regulation, a lawyer's ethical duty, or through the common law.⁶⁸ At common law, the duty to preserve evidence arises "when a party reasonably anticipates or foresees litigation," with the primary inquiry being "whether a reasonable person in the party's position would have anticipated litigation and whether the party actually did anticipate litigation."⁶⁹ This is akin to the standard used by courts when determining whether a party may assert an investigative privilege.⁷⁰ But Justice Baker explained that, unlike in the investigative privilege context, actual, subjective notice of possible litigation is not necessary: "[A] party may reasonably anticipate suit being filed . . . before the plaintiff manifests an intent to sue. . . . [T]here may be times when certain independent facts will put a party on notice of the potential for litigation."⁷¹ Once litigation becomes reasonably foreseeable, that party must take steps to ensure that *relevant evidence* is preserved.⁷² Thus, in order to establish the second prong of the duty analysis, the party alleging spoliation must establish that the spoliating party had a duty to preserve that specific evidence.⁷³ However, a party reasonably anticipating litigation need not keep everything; he or she must only preserve evidence he or she "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 requested during discovery, [or] is the subject of a pending discovery sanction."⁷⁴ The Texas Supreme Court adopted Justice Baker's duty component in 2003.⁷⁵

65. *Trevino*, 969 S.W.2d at 954–55 (Baker, J., concurring).

66. *Compare Trevino*, 969 S.W.2d at 955–58, with *Zubulake IV*, 220 F.R.D. 212, 217–21 (S.D.N.Y. 2003).

67. *Trevino*, 969 S.W.2d at 955.

68. *Id.*

69. *Id.* at 956.

70. *Id.* (citing *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993)).

71. *Id.* (internal quotations omitted).

72. *Id.* at 955, 957; see also *Zubulake V*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004).

73. *Trevino*, 969 S.W.2d at 957 (Baker, J., concurring).

74. *Id.* at 957 (quoting *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)). Implicit in this element is that the movant must show that the evidence existed. See *Simmons & Ritter*, *supra* note 3, at 729.

75. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003).

2. Breach

Next, Justice Baker's framework requires the party alleging spoliation to show that the other party breached its duty to preserve the relevant missing or altered evidence by failing to exercise reasonable care.⁷⁶ Justice Baker specifically noted that "[w]hile allowing a court to hold a party accountable for negligent as well as intentional spoliation may appear inconsistent with the punitive purpose of remedying spoliation, it is clearly consistent with the evidentiary rationale supporting it because the remedies ameliorate the prejudicial effects resulting from the unavailability of evidence."⁷⁷ Importantly, Justice Baker said that a data retention policy that conflicts with the preservation duty "will not excuse the obligation to preserve evidence."⁷⁸ However, the degree of culpability (intentional, reckless, negligent, etc.) is also relevant to determining the appropriate remedy.

3. Prejudice

Finally, Justice Baker's framework requires that the party alleging spoliation show that the missing evidence "hinders its ability to present its case or defense."⁷⁹ Justice Baker provided a number of factors for trial judges to consider when determining whether a party's case has been prejudiced. "Most importantly, courts should consider the destroyed evidence's relevancy. . . . giv[ing] deference to the non-spoliating party's assertions about relevancy."⁸⁰ This deference stems from the spoliation presumption—first recognized by the Texas Supreme Court in 1852—that all things are presumed against the spoliator.⁸¹ Moreover, if the spoliator breached his duty to preserve the evidence intentionally or in bad faith, a court may find "relevancy based solely on this fact," assuming that there is no evidence to the contrary.⁸² However, if the breaching party was merely negligent, the movant must present some evidence regarding what the missing evidence would have shown that suggests it "would have been helpful to the nonspoliating party's case or defense."⁸³ A party that has been deprived of particularly relevant evidence will naturally be able to show higher prejudice. Another factor Justice Baker provided was "whether the destroyed evidence was cumulative of other competent evidence that a party can use in place of the destroyed evidence, and

76. *Trevino*, 969 S.W.2d at 957 (Baker, J., concurring). The party alleging spoliation should also move to compel production of the evidence before trial to avoid waiving the issue. *Simmons & Ritter*, *supra* note 3, at 729.

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

78. *Id.*

79. *Id.* at 957–58.

80. *Id.* at 958.

81. *Cheatham v. Riddle*, 8 Tex. 162, 167 (1852); *see also* *H. E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dismissed).

82. *Trevino*, 969 S.W.2d at 958 (Baker, J., concurring).

83. *Id.*

whether the destroyed evidence supports key issues in the case.”⁸⁴ In other words, as the availability of other evidence increases, the prejudicial effects of any missing relevant evidence decreases.⁸⁵ However, the spoliating party may show that the missing or altered evidence is irrelevant, cumulative of other available evidence, or that it did not intentionally breach its preservation duty.⁸⁶

4. Spoliation Remedies

The final step in Justice Baker’s framework, if the nonspoliating party can reach this point, is the *judicial* determination as to what sanctions to impose on the spoliator.⁸⁷ In Texas, the primary objective underlying spoliation law is remedial—to restore the injured party to the same position he or she would have been in had the evidence been available.⁸⁸ Of course, a missing piece of evidence could be irreplaceable, and often only the spoliator knows the precise contents and value of the missing evidence, so courts must speculate to some extent as to what sanction will compensate the injured party for the lost evidence.⁸⁹ This is also important because it recognizes that, irrespective of the spoliator’s culpability (even if mere negligence), sanctions are required to “ameliorate the prejudicial effects resulting from the unavailability of evidence.”⁹⁰ But spoliation remedies also serve punitive and deterrence functions.⁹¹ For example, the risk of a severe spoliation sanction deters parties from destroying key evidence before trial.⁹² Moreover, the spoliation instruction’s allowable inference that the missing evidence was harmful to the person that destroyed it punishes the spoliator by “placing the risk of an erroneous judgment on the party that wrongfully created that risk.”⁹³

The Texas Rules of Civil Procedure grant trial judges broad authority to issue discovery sanctions, including 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.⁹⁴ Although the Rules

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 959.

88. Simmons & Ritter, *supra* note 3, at 706; 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.”); *see also Trevino*, 969 S.W.2d at 954 (Baker, J., concurring).

89. *See Trevino*, 969 S.W.2d at 953 (“[T]here 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.”).

90. *Id.* at 957.

91. *Id.* at 954.

92. Norton, *supra* note 56, at 468.

93. *Id.*

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

enumerate many sanctions, the list is not inclusive.⁹⁵ Rule 215's remedies, in addition to other discretionary case-specific remedies, are available for spoliation.⁹⁶ Even in the pre-litigation context where the Rules do not apply, a court may remedy the spoliation through its inherent power to "aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity."⁹⁷ However, *trial judges* must "*weigh . . . the spoliator's culpability and the prejudice the nonspoliator suffers.*"⁹⁸ This is similar to the balancing test used by federal courts, considering the degree of fault, the degree of prejudice, and fairness.⁹⁹ Ultimately, the sanction must be "properly tailored to remedy the prejudice."¹⁰⁰

Potential sanctions range from dismissal or default judgment against the spoliator, exclusion of evidence or testimony, or imposition of a spoliation jury instruction.¹⁰¹ The power to issue spoliation instructions is granted to courts irrespective of Rule 215's remedies, through Rule 277's grant of broad discretion for courts to instruct juries.¹⁰² Importantly, Justice Baker recognized that this is a *legal* question, solely in the province of the trial judge: "Deciding whether to submit this instruction is a *legal determination*. As stated earlier, *the 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."¹⁰³

In *Trevino*, Justice Baker described two types of available spoliation instructions.¹⁰⁴ Under the rebuttable presumption, the court instructs the jury that the spoliating party negligently or intentionally destroyed evidence and that it should presume that the destroyed evidence was unfavorable to the spoliator on the particular fact or issue that the destroyed evidence might have supported, with the spoliating party bearing the burden to disprove the presumed fact.¹⁰⁵ Here, the nonspoliating party can use the presumption itself to prove an element of his or her case.¹⁰⁶ Justice Baker recommended this presumption as *prima facie* evidence when the nonspoliating party could not survive a

95. *Id.*

96. *Trevino*, 969 S.W.2d at 953–54 (Baker, J., concurring).

97. *Id.* at 958 (quoting *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979)).

98. *Id.* at 959 (emphasis added).

99. *See Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994).

100. *Trevino*, 969 S.W.2d at 959 (Baker, J., concurring).

101. *See id.* at 959–60 (noting that default judgment or dismissal is the most severe sanction and should only be imposed under the most egregious circumstances: when the spoliator intended to subvert the discovery process, or when the nonspoliating party suffers great prejudice and no other sanction could cure the prejudice).

102. TEX. R. CIV. P. 277; *Trevino*, 969 S.W.2d at 960.

103. *Trevino*, 969 S.W.2d at 960 (emphasis added).

104. *Id.*

105. *Id.*

106. *Id.*

directed verdict, summary judgment, or factual or legal sufficiency challenge on appeal without the missing evidence.¹⁰⁷ In the adverse presumption, the court instructs the jury that the evidence would have been unfavorable to the spoliating party, but the presumption itself is insufficient to prove the nonspoliating party's case—it is just another factor for the jury's consideration when weighing the evidence.¹⁰⁸

Spoilation instructions serve as essential remedies that help preserve the judicial system's truth-seeking function and enable parties to present their case even after evidence has been destroyed. However, as recognized in *Brookshire*, a spoliation instruction can also negatively affect the trial's fairness by shifting the jury's focus from the merits to improper conduct during discovery, skewing its verdict based on pretrial conduct rather than the facts of the case.¹⁰⁹ Even more, by encouraging the jury to find against the spoliator,¹¹⁰ a spoliation instruction “often ends litigation—it is too difficult a hurdle for the spoliator to overcome.”¹¹¹ These effects certainly serve to punish the spoliator and deter future spoliators, but they exceed the central compensatory purposes behind spoliation.¹¹² In fact, Judge Scheindlin has recently argued that the adverse inference instruction is not a well-suited sanction for punitive purposes because it “can affect the relative strength of the parties' positions in a lawsuit.”¹¹³ Instead, Judge Scheindlin argues that a monetary sanction, such as bearing discovery costs or awarding attorney fees, “punishes the wrongdoer without distorting the evidentiary balance.”¹¹⁴ Moreover, a sanction that leads to the determination of the case, such as striking pleadings, default judgments, or even a spoliation instruction, may raise Due Process concerns.¹¹⁵ Notably, spoliating parties, or their attorneys, may be subject to criminal prosecutions or disciplinary or contempt proceedings in addition to in-trial sanctions.¹¹⁶ However, these collateral proceedings do not operate to compensate the victim's injuries,¹¹⁷ and thus do not comport with the primary purpose of discovery sanctions—fashioning “an appropriate remedy to restore the parties to a

107. *Id.*

108. *Id.* at 960–61.

109. *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 13–14 (Tex. 2014).

110. *Id.* at 17.

111. *Zubulake IV*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

112. *Brookshire*, 438 S.W.3d at 17; *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 724 (Tex. 2003).

113. Scheindlin & Orr, *supra* note 7, at 1301.

114. *Id.*

115. *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917–18 (Tex. 1991) (noting that there are constitutional limitations on the courts' power to adjudicate a party's claims without regard to the merits).

116. *Simmons & Ritter*, *supra* note 3, at 703.

117. *Id.*; see also TEX. PENAL CODE ANN. § 37.09 (West Supp. 2014); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005); TEX. R. CIV. P. 215.2; Sarbanes-Oxley Act of 2002 § 802(a), 18 U.S.C. § 1519 (2012).

rough approximation of their positions if all evidence were available.”¹¹⁸

B. Federal Changes

Most federal courts require proof of bad faith for the submission of a spoliation instruction—what they call an “adverse inference instruction.”¹¹⁹ In this context, “bad faith” means that there is “some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth.”¹²⁰ However, the federal circuits face the same opposing approaches as did Texas courts pre-*Brookshire*.¹²¹ Some circuits use the adverse inference instruction for negligent spoliation,¹²² and others require less than bad faith but more than ordinary negligence.¹²³

Just as the Texas Supreme Court sought to resolve the appellate split in *Brookshire*, federal rule makers are in the process of amending the Federal Rules of Civil Procedure Rule 37(e) to resolve the circuit split. Likewise, a proposed change to Rule 26(b)(1) would require “proportional discovery,” and restrict discovery to information relevant to the asserted claims and defenses.¹²⁴ In 2014, the U.S. Judicial Conference approved the proposed Rule 37(e) and Rule 26(b)(1) changes.¹²⁵ The Supreme Court approved the changes on April 29,

118. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003); *see also* *Simmons & Ritter*, *supra* note 3, at 707.

119. *See, e.g.*, *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000); FED. R. CIV. P. 37(e) (prohibiting courts from imposing discovery sanction when evidence lost “as a result of the routine, good-faith operation of an electronic information system”). *But see* *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002) (authorizing adverse inference instructions on a finding of negligence or gross negligence).

120. *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 747 (8th Cir. 2004).

121. *Scheidlin & Orr*, *supra* note 7, at 1300–01.

122. *Id.* (citing *Grosdidier v. Broad. Bd. of Governors, Chairman*, 709 F.3d 19, 27 (D.C. Cir. 2013), *cert. denied sub nom.* *Grosdidier v. Isaacson*, 134 S. Ct. 899 (2014); *DeGeorge Fin. Corp.*, 306 F.3d at 108).

123. *Id.* (citing *Stocker v. United States*, 705 F.3d 225, 235 (6th Cir. 2013) (knowingly, even if without intent to breach a duty to preserve); *Gomez v. Stop & Shop Supermarket Co.*, 670 F.3d 395, 399 (1st Cir. 2012) (requiring “notice of a potential claim and of the relevance to that claim of the destroyed evidence”); *Vulcan Materials Co. v. Massiah*, 645 F.3d 249, 259 (4th Cir. 2011) (willful conduct)).

124. *Li*, *supra* note 35, at 53.

125. THOMAS Y. ALLMAN, THE 2015 CIVIL RULES PACKAGE AS APPROVED BY THE JUDICIAL CONFERENCE (Mar. 2015), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015-sac/written_materials/5_1_2015_summary_of_rule_package.authcheckdam.pdf [<http://perma.cc/4WJ9-3U34>] [hereinafter 2015 CIVIL RULES PACKAGE]; *see also* JUDICIAL CONFERENCE OF THE U.S., REPORT OF ADVISORY COMMITTEE ON CIVIL RULES: CIVIL RULES EXCERPT (APPENDIX B) (Sept. 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf> [<http://perma.cc/M3VA-VESE>] [hereinafter SEPT. 2014 APPENDIX].

2015.¹²⁶ If left untouched by Congress, the amendments will take effect December 1, 2015.¹²⁷

Under the approved changes, Rule 37(e) applies when there has been: (1) an ESI preservation duty and trigger, arising when litigation is reasonably foreseeable; followed by (2) a party's failure to take reasonable steps to preserve the information; and (3) the lost ESI cannot be restored or replaced through additional discovery.¹²⁸ After the movant meets this test, the trial judge must determine whether there has been prejudice; if so, the judge may not order sanctions greater than necessary to cure the prejudice.¹²⁹ Specifically, a court may not order the most serious remedies—a spoliation instruction, dismissal, or default judgment—absent a finding of “intent to deprive.”¹³⁰ Since the remedies are compensatory rather than punitive, rule makers have sought to reserve the most serious remedies for cases where bad faith or intent to deprive the adversary of the evidence is shown.¹³¹ Importantly, the Advisory Committee's Notes state that the Rule “would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence . . . in making its decision.”¹³² This Note will show that the changes to Rule 37(e) and the *Brookshire* spoliation framework are quite similar but contain some important distinctions.

IV. SPOILIATION UNDER *BROOKSHIRE V. ALDRIDGE*

A. *Facts*

On September 2, 2004, Jerry Aldridge entered a Brookshire Brothers grocery store and then slipped and fell near a display table.¹³³ He did not initially alert store employees that he was injured, so store employees did not complete an investigation or accident report.¹³⁴ However, Aldridge went to the hospital about ninety minutes after his fall.¹³⁵ Five days later, Aldridge returned to the store to report the incident, and Brookshire prepared an incident report based on his

126. Order Adopting Amendments to Federal Rules of Civil Procedure (Apr. 29, 2015), [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf) [<http://perma.cc/T52A-2VSK>].

127. *Id.*; see also 2015 CIVIL RULES PACKAGE, *supra* note 125, at 1.

128. James S. Kurz et. al, *The Long-Awaited Proposed FRCP Rule 37(3), its Workings, and its Guidance for ESI Preservation*, ROCKET DOCKET NEWS, Sept. 2014, at 8, 11–12, <http://www.fedbar.org/image-library/chapters/northern-virginia-chapter/fall-2014.pdf> [<http://perma.cc/SDM6-QB3X>].

129. *Id.* at 13.

130. *Id.*

131. *Id.* at 13–14.

132. Scheindlin & Orr, *supra* note 7, at 1301–02 (citing MAY 2 REPORT, *supra* note 16, at 322).

133. *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 15 (Tex. 2014).

134. *Id.*

135. *Id.*

statements and the recollections of the assistant manager in charge at the time of Aldridge's fall.¹³⁶ The report stated that "Aldridge slipped on grease that had leaked out of a container by the 'Grab N Go'"—a cooked and packaged rotisserie chicken display in the store's deli, located about fifteen feet from the area of Aldridge's fall.¹³⁷

Brookshire maintained surveillance cameras near the checkout counters that recorded in a continuous loop, overwriting footage every thirty days.¹³⁸ However, the camera's placement prevented a clear view of the fall because of its distance from the area where Aldridge fell and because of its placement in relation to a cloth-covered display table, which was positioned such that it prevented a direct view of the spill.¹³⁹ Sometime after Aldridge had reported the incident, Robert Gilmer, Brookshire's Vice President of Human Resources and Risk Management, made the decision to retain only an eight-minute copy, beginning when Aldridge walked into the store and ending shortly after his fall.¹⁴⁰ Accordingly, the remaining footage of Aldridge's September 2 fall was automatically overwritten in early October.¹⁴¹ However, Aldridge had requested the footage of his fall on September 13, which Gilmer denied on September 29.¹⁴²

According to its routine practice, Brookshire initially offered to pay some of Aldridge's medical expenses¹⁴³—only for his first medical bill, a follow-up visit, and prescriptions related to those visits.¹⁴⁴ However, on September 29, the same day Gilmer rejected Aldridge's request for the full tape, Brookshire offered to pay for "a visit with a neurosurgeon and several weeks of physical therapy."¹⁴⁵ Nevertheless, in June 2005, Gilmer wrote to Aldridge, stating, "that he had reviewed the video and determined that Brookshire Brothers was going to deny responsibility."¹⁴⁶ In August 2005, following the commencement of the underlying lawsuit, Aldridge's counsel requested additional footage, but Brookshire could not complete the request because the recording system had recorded over those events.¹⁴⁷ At trial, Aldridge argued that Brookshire's failure to produce the additional footage amounted

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* Specifically, six minutes and fifty-three seconds of the preserved video were from the period directly before Aldridge fell. *Brookshire Bros. v. Aldridge*, 12-08-00368-CV, 2010 WL 2982902, at *1 (Tex. App.—Tyler July 30, 2010) (mem. op.) (not designated for publication), *rev'd*, 438 S.W.3d 9 (Tex. 2014).

141. *Brookshire*, 438 S.W.3d at 15.

142. *Id.*

143. *Id.*

144. *Id.* at 31 (Guzman, J., dissenting).

145. *Id.* (internal quotations omitted).

146. *Id.* at 15 (majority opinion).

147. *Id.*

to spoliation of key evidence relating to Brookshire's constructive knowledge of the spill and requested a spoliation instruction.¹⁴⁸

A key issue in slip-and-fall cases is whether the defendant had actual or constructive knowledge of a dangerous condition—such as a slippery substance on the floor.¹⁴⁹ A plaintiff can satisfy his burden of proof by showing that the defendant actually knew that the substance was on the floor or that it is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it.¹⁵⁰ Gilmer testified at trial that he instructed Brookshire employees to retain only five to six minutes before the fall to capture from the time Aldridge entered the store to his fall and that he believed the remaining video “[w]asn’t relevant.”¹⁵¹ However, Gilmer also testified that he understood that whether Brookshire employees should have known about the spill would be a critical issue in a slip-and-fall case, but averred that he did not decide to save only eight minutes “in anticipation of this trial.”¹⁵²

The Brookshire employee that executed Gilmer's order testified that he only watched the video beginning with the approximate time of Aldridge's fall, and no other evidence showed that any other Brookshire employee watched anything but the eight-minute copy.¹⁵³ The eight-minute copy did not show a spill or leak occurring nor did it show the spill area.¹⁵⁴ However, it did show Brookshire employees walking past the area minutes before Aldridge fell, Aldridge's fall, and an employee signaling for clean-up help thereafter.¹⁵⁵ Additionally, a store employee testified that a substance should not remain on the floor longer than five minutes without an employee cleaning it up.¹⁵⁶

Rather than hearing this evidence and deciding on Aldridge's spoliation request outside of the jury's presence, the trial judge allowed the jury to hear the aforementioned evidence and, exercising his discretion, gave the following spoliation jury instruction:

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

148. *Id.* at 16. It should be noted that in June 2005, when Aldridge's lawyer requested more surveillance footage of Aldridge's fall than the eight-minute video provided, Brookshire refused “to assist [Aldridge] in helping [him] build [his] case,” claiming that the video did not focus on the area of his fall. *Id.* at 32 (Guzman, J., dissenting).

149. *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992).

150. *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002).

151. *Brookshire*, 438 S.W.3d at 16 (alteration in original).

152. *Id.*

153. *Id.* at 27–28.

154. *Id.* at 30.

155. *Id.*

156. *Id.*

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.¹⁵⁷

Notably, this instruction left it for the jury to determine whether spoliation had occurred.¹⁵⁸ The jury determined that Brookshire Brothers' negligence proximately caused Aldridge's fall and awarded Aldridge just over \$1 million in damages to compensate him for past and future medical expenses and lost earnings.¹⁵⁹

B. Texas's New Spoliation Framework

On review by the Texas Supreme Court, the *Brookshire* Court laid out a new framework governing spoliation and the circumstances in which a trial judge may impose a spoliation instruction as a sanction.¹⁶⁰ First, the Court held that spoliation is the *intentional or negligent* breach of duty to preserve relevant evidence, where the spoliating party had such duty.¹⁶¹ Second, the Court held that the trial judge, not the jury, determines as a matter of law whether spoliation has occurred, and then assesses a proportionate remedy.¹⁶² This makes sense because spoliation is not an independent tort, but a discovery abuse like other evidentiary misconduct.¹⁶³ This approach also mitigates the risk that spoliation evidence will unfairly detract the jury's attention from the merits to the spoliator's misconduct during the litigation process. Thus, instead of offering spoliation evidence to the jury, the judge should conduct an initial hearing to determine whether spoliation has occurred.¹⁶⁴

1. Finding Spoliation: Duty, Scope, and Breach

The new spoliation framework includes a two-step process. First, the court must determine whether spoliation has occurred, with the initial burden on the party alleging spoliation.¹⁶⁵ This includes two different inquiries—whether there was a preservation duty at the time and the scope of that duty.¹⁶⁶ A party is under a duty to preserve evidence when he or she knows or reasonably should know that there

157. *Id.* at 16.

158. *Id.*

159. *Id.*

160. *Id.* at 14.

161. *Id.*

162. *Id.*

163. *See, e.g.,* *City of San Antonio v. Pollock*, 284 S.W.3d 809, 823 (Tex. 2009).

164. *Brookshire*, 438 S.W.3d at 20.

165. *Id.* This aligns closely with Justice Baker's framework, which required the trial court to determine whether spoliation had occurred. *Trevino v. Ortega*, 969 S.W.2d 950, 954 (Tex. 1998) (Baker, J., concurring).

166. *Brookshire*, 438 S.W.3d at 20.

is a substantial chance—more than an abstract possibility—of litigation and that evidence in his or her possession or control will be material and relevant to that claim.¹⁶⁷ Next, the court must determine that the alleged spoliator breached its duty to preserve that material and relevant evidence through a lack of reasonable care.¹⁶⁸ In reality, this is not new—it directly aligns with Justice Baker’s framework laid out in *Trevino*.¹⁶⁹

2. Determining the Remedy: Prejudice, Culpability, and Proportionality

After finding that spoliation has occurred, the trial judge must determine the appropriate remedy.¹⁷⁰ The Court recognized the remedies available under Texas Rule of Civil Procedure 215.2 but also highlighted the trial court’s “discretion to craft other remedies it deems appropriate in light of the particular facts of an individual case.”¹⁷¹ Thus, the Court will require that any spoliation sanction be *proportionate* to the act of spoliation, considering the spoliator’s culpability and the prejudice inflicted on the nonspoliating party.¹⁷² The Court explained that the proportionality requirement “logically follows from the remedial purpose . . . of a spoliation remedy under Texas law, which is to restore the parties to a rough approximation of their positions if all evidence were available.”¹⁷³

In measuring prejudice, trial judges should consider the destroyed or missing evidence’s relevancy to key issues, detriment to the spoliating party, assistance to the nonspoliating party, and whether the spoliated evidence was cumulative of other competent evidence that the nonspoliator can use instead of the missing evidence.¹⁷⁴ However, the “differences in kind and quality” between the available and missing evidence is “a key factor in analyzing prejudice.”¹⁷⁵ For example, eyewitness testimony may serve as competent evidence in lieu of missing video, but that testimony may be inherently flawed and less persuasive than the video. Therefore, trial judges should consider these differences when measuring prejudice.

Moreover, the Court recognized the applicability of the spoliation presumption in the context of intentional spoliation, explaining that

167. *Id.*

168. *Id.*

169. *Trevino*, 969 S.W.2d at 956–57 (Baker, J., concurring) (“While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know is relevant . . .”).

170. *Brookshire*, 438 S.W.3d at 21.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 21–22. The Court also noted that some harm is required before any spoliation remedy can be granted. *Id.* at 21 n.9.

175. *Id.* at 22.

intentional destruction of evidence may, “[a]bsent evidence to the contrary,” suffice to support a finding of relevancy and prejudice.¹⁷⁶ However, if the spoliation was merely negligent, the party moving for a spoliation instruction must offer “some proof about what the destroyed evidence would show.”¹⁷⁷ Importantly, the Court explained that intentional spoliation includes the concept of willful blindness, “which encompasses the scenario in which a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless ‘allows for its destruction.’”¹⁷⁸ The Court noted that “[t]he issue of willful blindness is especially acute in the context of automatic electronic deletion systems. A party with control over one of these systems who intentionally allows relevant information to be erased can hardly be said to have only negligently destroyed evidence.”¹⁷⁹

a. The Spoliation Instruction as a Remedy

The Court did not discuss other remedies in detail, but it held that a spoliation instruction may only be submitted to the jury where the trial judge has determined that a party acted (1) with the *specific intent* to conceal relevant evidence and other remedies are insufficient to reduce the prejudice caused by the spoliating party’s actions or (2) *negligently*, causing irreparable harm to the nonspoliating party’s ability to present a claim or defense in any meaningful way.¹⁸⁰ The Court rationalized this decision primarily on two grounds. First, applying the spoliation presumption against a negligent spoliator makes little sense because the presumption infers that the spoliation occurred because the evidence was harmful to that party’s case.¹⁸¹ Second, the harsh spoliation instruction, which can “be tantamount to a death-penalty sanction,” serves remedial rather than punitive objectives, and sanctions should bear a direct relationship to the offensive conduct involved.¹⁸²

C. Application

Skirting its new rule, the Court jumped to the remedy analysis and found that there was no evidence that Brookshire allowed the footage

176. *Id.* (alteration in original).

177. *Id.* (quoting *Trevino v. Ortega*, 969 S.W.2d 950, 958 (Tex. 1998) (Baker, J., concurring)).

178. *Id.* at 24–25 (quoting Andrew Hebl, *Spoliating of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 97–98 (2008)).

179. *Id.* at 24–25 n.17.

180. *Id.* at 14.

181. *Id.* at 23.

182. *Id.* Sanctions that adjudicate a claim and preclude the presentation of the merits of the case, such as striking pleadings or rendering default judgments, constitute “death-penalty” sanctions. *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 184–85 (Tex. 2012).

to overwrite with *intent* to conceal or destroy relevant evidence.¹⁸³ The Court also found that any negligence by Brookshire in keeping only eight minutes of footage did not cause irreparable harm so as to permit a spoliation instruction under the narrow exception.¹⁸⁴ Rather, the Court explained that the negligence exception applies when the spoliated evidence is the *only* evidence available for a party to develop its claim or defense, and here, additional evidence was available to prove Aldridge's claim.¹⁸⁵ The Court did not address whether Brookshire had the requisite duty to preserve the video or that its failure to keep a longer portion prejudiced Aldridge short of irreparable harm.¹⁸⁶

The Court based its finding of no intent in part on the fact that, prior to the footage automatically overwriting, Aldridge had only requested footage of "the fall," and did not request additional footage until almost one year later, after the remaining footage had been destroyed.¹⁸⁷ Further, the Court explained that there was no evidence that Brookshire's employees viewed anything other than the eight minutes; thus, there was no way that Brookshire based its decision to preserve only the smaller portion on what the footage would have shown.¹⁸⁸ Apparently, because there was no proof that Brookshire viewed anything but the eight-minute tape, the Court found it speculative that Brookshire knew what the remaining video contained so as to purposefully conceal relevant evidence.¹⁸⁹

V. CRITICISMS OF THE COURT'S APPROACH

Although the Court propagated a seemingly reasonable spoliation framework that answers many questions it had previously left unresolved,¹⁹⁰ the *Brookshire* dissent and legal commentators have criticized the framework and its application in *Brookshire*.¹⁹¹ These criticisms boil down to four basic complaints. First, the dissent argued

183. *Brookshire*, 438 S.W.3d 9 at 27; see also Rodriguez, *supra* note 6, at 462–64 (“[T]he court never addressed whether Brookshire Brothers actually possessed a duty to preserve. . . . The court also did not address when the duty to preserve was triggered. . . . [T]he court makes no conclusion as to whether the missing hours of videotape contained material and relevant evidence.”).

184. *Id.* at 28.

185. *Id.* (noting that the eight-minute video was preserved and shown to the jury, as was the incident report, and that Aldridge testified).

186. *Id.* at 27.

187. *Id.*

188. *Id.* at 27–28 (noting that if Brookshire had let the full video overwrite, the outcome might be different).

189. *Id.* at 28.

190. See *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722–23 (Tex. 2003) (leaving open the questions of mental culpability, degree of prejudice required, and burden of proof).

191. See, e.g., *Brookshire*, 438 S.W.3d at 30 (Guzman, J., dissenting); Sullivan, *supra* note 6; Scheindlin & Orr, *supra* note 7, at 1302–03, 1308–10, 1312–13; Rodriguez, *supra* note 6.

that the *Brookshire* framework significantly departs from decades of Texas spoliation jurisprudence by failing to provide trial courts with the necessary discretion to remedy spoliation in a time that limited duration retention policies have become the norm.¹⁹² Second, the dissent believed that the Court's application of the framework renders the concept of "willful blindness" meaningless.¹⁹³ Third, legal commentators have noted that the Court left open important questions, such as the meaning of a "reasonable" data retention policy.¹⁹⁴ Finally, both the dissent and legal commentators have argued that the Court should have deferred to the rulemaking process.¹⁹⁵ This Section explores each criticism's strength.

A. A Significant Departure from Decades of Spoliation Jurisprudence

The *Brookshire* dissent argued that the majority's framework significantly departs from decades of Texas spoliation jurisprudence.¹⁹⁶ Specifically, Justice Guzman highlighted the Court's departure from the broad discretion traditionally granted to trial courts regarding the admission of spoliation evidence at trial and for crafting appropriate remedies.¹⁹⁷ The dissent emphasized that judges need this broad discretion to respond appropriately in the era of limited duration retention policies.¹⁹⁸ However, a review of historical spoliation jurisprudence shows that the *Brookshire* framework is not much more than a reinvigorated variant of Justice Baker's framework.

1. Finding Spoliation and the Admissibility of Spoliation Evidence

Regarding the first step of the spoliation inquiry, where the trial court determines as a matter of law whether spoliation has occurred, both Justice Baker and the *Brookshire* Court recognized that the judge, rather than the jury, must determine whether spoliation has occurred, and then impose an appropriate remedy.¹⁹⁹ This naturally flows from the fact that spoliation is not an independent tort but rather a discovery abuse like other evidentiary misconduct,²⁰⁰ and it is

192. *Brookshire*, 438 S.W.3d at 30–32; Scheindlin & Orr, *supra* note 7, at 1302–03, 1308–10, 1312–13.

193. *Brookshire*, 438 S.W.3d at 37; *see also* Rodriguez, *supra* note 6, at 469–70.

194. Sullivan, *supra* note 6.

195. *Brookshire*, 438 S.W.3d at 38–39; Scheindlin & Orr, *supra* note 7, at 1308 n.57.

196. *Brookshire*, 438 S.W.3d at 30.

197. *Id.* at 34–35.

198. *Id.* at 31.

199. *Compare* Trevino v. Ortega, 969 S.W.2d 950, 954 (Tex. 1998) (Baker, J., concurring) (“[T]he trial court should determine whether sanctions or a presumption are justified. This is a question of law for the trial court.”), *with Brookshire*, 438 S.W.3d at 20–21 (majority opinion).

200. *Trevino*, 969 S.W.2d at 952 (explaining that the “traditional response to the problem of evidence spoliation properly frames the alleged wrong as an evidentiary concept, not a separate cause of action”).

well established that judges resolve evidentiary matters.²⁰¹ By contrast, the dissent argued that trial judges historically could allow spoliation discussions at trial, as allowed by the Texas Rules of Evidence.²⁰² The dissent pointed to a 2001 appellate decision, *Lively v. Blackwell*, holding that the question of spoliation is not exclusively reserved to the trial court as a question of law.²⁰³ However, the dissent, like the *Lively* court, presupposed that evidence pertaining to the act of spoliation is relevant under Rule 401 and skipped ahead to Rules 402 and 403.²⁰⁴

It is clear that the circumstances relating to the spoliation of evidence fail to satisfy the definition of “relevancy” under Rule 401 of the Texas Rules of Evidence and that the question of spoliation is at best a preliminary question under Rule 104(a). Rule 401 defines relevant evidence as that having any tendency to make the existence of any fact that is *of consequence to the determination of the action* more probable or less probable than it would be without the evidence.²⁰⁵ In other words, as the first step towards admissibility, evidence must tend to prove or disprove some issue relevant to the parties’ underlying claims.²⁰⁶

Whether a party spoliated evidence necessarily differs from whether the missing evidence is itself relevant because spoliation is not a tort in Texas and does not become a fact issue for a party to prove in his or her case. The issues relevant to Aldridge’s slip-and-fall claim related to evidence tending to show that: (1) Brookshire had actual or constructive knowledge of the spill; (2) the spill posed an unreasonable risk of harm; (3) Brookshire did not exercise reasonable care to reduce or eliminate the risk; and (4) Brookshire’s failure to use such care proximately caused his injuries.²⁰⁷ Of course, Aldridge could have proven knowledge with evidence indicating that the spill existed long enough to give Brookshire “a reasonable opportunity to discover it,”²⁰⁸ which the full tape would likely have done. However, evidence regarding what happened to the tape does not bear on one of these ultimate issues that Aldridge had to prove in order to prevail.

201. See, e.g., *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007); *Interstate Northborough P’ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001); TEX. R. CIV. P. 215.2(b) (“[T]he court in which the action is pending may, after notice and hearing, *make such orders in regard to the failure as are just . . .*” (emphasis added)).

202. *Brookshire*, 438 S.W.3d at 33–35 (Guzman, J., dissenting).

203. *Lively v. Blackwell*, 51 S.W.3d 637, 641 (Tex. App.—Tyler 2001, pet. denied).

204. *Brookshire*, 438 S.W.3d at 33–35 (Guzman, J., dissenting); *Lively*, 51 S.W.3d at 640–41.

205. TEX. R. EVID. 401 (emphasis added).

206. *Sims v. Dempsey-Tegler & Co.*, 487 S.W.2d 824, 827–28 (Tex. Civ. App.—San Antonio 1972, no writ).

207. See *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992).

208. *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002).

Instead, spoliation issues have historically been a question for the judge under Texas law.²⁰⁹ Indeed, the *Lively* decision directly contradicts Justice Baker's framework that a majority of Texas courts would later adopt,²¹⁰ which specifically held that the question is one of law.²¹¹ In fact, the *Lively* court based its decision on a Texas Supreme Court opinion holding that the trial court did not abuse its discretion in excluding the spoliation evidence, merely because the Court did not take the opportunity to expressly hold that spoliation is purely a question of law.²¹² But even that decision recognized the matter as a Rule 104(a) preliminary question.²¹³ Moreover, the *Lively* court did not hold that the spoliation evidence was admissible; it instead held that the trial court had not abused its discretion in excluding the evidence.²¹⁴ Regardless, Justice Baker also recognized that the issue of spoliation is a question of law for the judge to decide. In fact, when explaining the duty prong of the spoliation initial inquiry, Justice Baker adopted the "anticipation of litigation" definition used in the context of investigative privileges,²¹⁵ which are widely recognized as Rule 104(a) preliminary questions for the judge alone.²¹⁶ Thus, one can hardly argue that *Brookshire's* endorsement of Justice Baker's framework constitutes a "significant departure" from past jurisprudence.

Like the *Brookshire* dissent, Judge Scheindlin and U.S. District Court Judge Xavier Rodriguez²¹⁷ have argued that juries are capable of hearing spoliation evidence and deciding on the issue of intent and that juries should play that role.²¹⁸ While agreeing that judges typi-

209. See, e.g., *Massie v. Hutcheson*, 270 S.W. 544 (Tex. Comm'n App. 1925) (whether destruction or loss of deed was prompted by motives innocent of corrupt intent or design was preliminary question for court); TEX. R. EVID. 104(a).

210. See, e.g., *Clark v. Randalls Food*, 317 S.W.3d 351, 356 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *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, 199 (Tex. App.—Austin 2005, pet. denied).

211. *Trevino v. Ortega*, 969 S.W.2d 950, 954 (Tex. 1998) (Baker, J., concurring) (citing *Miller v. Stout*, 706 S.W.2d 785, 787–88 (Tex. App.—San Antonio 1986, no writ) ("Only ultimate issues of fact are to be submitted to a jury. . . . Such proceedings as those involving determination of motions for sanctions because of failure to respond to discovery requests . . . often involve resolution [by a judge] of questions of fact.")).

212. *Lively v. Blackwell*, 51 S.W.3d 637, 640–41 (Tex. App.—Tyler 2001, pet. denied) ("We note that in *Malone v. Foster* . . . a case decided the same day as *Trevino*, the Texas Supreme Court declined to adopt this position when given the opportunity to do so.").

213. *Malone v. Foster*, 977 S.W.2d 562, 564 (Tex. 1998).

214. *Lively*, 51 S.W.3d at 642.

215. *Trevino*, 969 S.W.2d at 956 (Baker, J., concurring).

216. See, e.g., TEX. R. EVID. 104(a); *Kos v. State*, 15 S.W.3d 633, 637 (Tex. App.—Dallas 2000, pet. ref'd); *McDuffie v. State*, 854 S.W.2d 195, 212 (Tex. App.—Beaumont 1993, writ ref'd).

217. Judge Rodriguez is former Texas Supreme Court Justice and currently serves as a District Judge in the Western District of Texas. Rodriguez, *supra* note 6, at 447.

218. Scheindlin & Orr, *supra* note 7, at 1309 ("We respectfully disagree with the Texas Supreme Court that juries are institutionally incapable of drawing reasoned

cally resolve evidentiary matters, Judge Scheindlin explains that “evaluating competing factual scenarios and determining a party’s intent are exactly the type of functions that juries routinely perform.”²¹⁹ But this misses the point: The trial judge must determine, as a question of law, whether spoliation occurred before determining what sanction is appropriate.²²⁰ Judge Rodriguez appears to recognize this point:

Prior to *Brookshire Bros.*, in a hypothetical slip-and-fall case, if the trial court had made all the appropriate findings to support the submission of a spoliation instruction, at trial both parties would submit evidence regarding what the missing video would show.²²¹

However, Judge Rodriguez argues that some evidence about the spoliation is necessary “to give the jury context.”²²² That’s true—evidence “regarding the content of the spoliated evidence that is relevant to a claim or defense [is] admissible.”²²³ But evidence that is not relevant is inadmissible.²²⁴ Because spoliation is, at best, a Rule 104(a) preliminary question, evidence regarding the acts of spoliation must go before the trial judge, acting as the gatekeeper, to apply the rules of evidence.²²⁵ Additionally, the trial judge, not the jury, is in the best position to evaluate the facts and equities of discovery disputes to determine whether a discovery abuse has occurred, the spoliator’s culpability, and harm to the other party.²²⁶ Even more, judges who allow parties to present spoliation evidence at trial before deciding the issue unnecessarily risk presenting prejudicial evidence to the jury.²²⁷ Therefore, although juries may be capable, trial judges are in the best position and are required by the rules of evidence to resolve whether spoliation has occurred.

2. Detaching Prejudice from the Spoliation Inquiry

Although Justice Baker and the *Brookshire* Court chose the same standard to determine whether a preservation duty exists and deter-

conclusions about how evidence was lost or destroyed.”); Rodriguez, *supra* note 6, at 475–76 (“This evidence would be absolutely critical in assisting the jury in understanding the nature of the spoliated evidence and the inference to be drawn from its destruction.”).

219. Scheindlin & Orr, *supra* note 7, at 1309.

220. *Trevino*, 969 S.W.2d at 954 (“[T]he trial court should determine whether sanctions or a presumption are justified. This is a question of law for the trial court.”).

221. Rodriguez, *supra* note 6, at 477 (emphasis added).

222. *Id.*

223. *Id.* at 475.

224. TEX. R. EVID. 402.

225. See, e.g., *City of San Antonio v. Pollock*, 284 S.W.3d 809, 823 (Tex. 2009) (Medina, J., dissenting) (describing the trial court’s role as “gatekeeper” regarding the admission of expert testimony); *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654, 666–68 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

226. *McMillin v. State Farm Lloyds*, 180 S.W.3d 183, 199 (Tex. App.—Austin 2005, pet. denied).

227. *Simmons & Ritter*, *supra* note 3, at 775.

mined that a party can breach its duty to preserve evidence intentionally or negligently,²²⁸ the *Brookshire* Court apparently sought to deviate from Justice Baker's framework in one important respect. Under Justice Baker's framework, a party is entitled to a spoliation remedy *only after* the trial court finds prejudice—that the missing evidence hinders the nonspoliator's ability to present its case or defense.²²⁹ By contrast, the *Brookshire* Court eliminated the prejudice prong as it relates to the initial finding of spoliation.²³⁰ Instead, under *Brookshire*, the trial court analyzes prejudice only when determining an appropriate, proportionate remedy.²³¹ Nevertheless, the *Brookshire* Court approved Justice Baker's factors for determining prejudice, including the missing evidence's relevancy to key issues, the likely effect of the evidence in the case, the spoliator's culpability, and whether the missing evidence was cumulative of other available evidence.²³² Likewise, both frameworks require a finding of prejudice in order to afford any remedy and before the judge can give a spoliation instruction to the jury, with the goal of tailoring the remedy to cure the prejudice.²³³ As such, this deviation is more a change in form than in substance.

3. A Mandatory Spoliation Instruction

According to the dissent, *Brookshire* also deviates from Justice Baker's framework in the application of the spoliation instruction.²³⁴ Specifically, the dissent argued that a trial judge could historically submit a variety of spoliation instructions—including those permitting and mandating the jury to rely on the spoliation presumption and those allowing the jury to find spoliation.²³⁵ According to the dissent, *Brookshire* mandates one instruction—that the court has found spoliation and the jury must presume the evidence is harmful.²³⁶

Justice Baker's framework included two different jury instructions, depending on the severity of prejudice resulting from spoliation.²³⁷ As explained in Part III, Section A, the two spoliation jury instructions available under Justice Baker's framework are rebuttable presumption and adverse presumption instructions.²³⁸ However, these instruc-

228. Compare *Trevino v. Ortega*, 969 S.W.2d 950, 956–57 (Baker, J., concurring), with *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 20–21 (Tex. 2014).

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

230. *Brookshire*, 438 S.W.3d at 21 n.9 (describing Justice Baker's "two-step analysis" for analyzing prejudice in the spoliation finding and when imposing a remedy as "unnecessary").

231. *Id.* at 21.

232. *Id.* at 22.

233. Compare *Trevino*, 969 S.W.2d at 959, with *Brookshire*, 438 S.W.3d at 21.

234. *Brookshire*, 438 S.W.3d at 33 (Guzman, J., dissenting).

235. *Id.*

236. *Id.* at 34.

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

238. *Id.* at 960–61.

tions operate to vary the burden of proof and do not mandate a permissive or mandatory instruction. Even more, one of the cases the dissent cited to support that juries should determine whether the spoliation was intentional came before Justice Baker's *Trevino* concurrence,²³⁹ minimizing its value to the analysis. Further, that court held that the trial court did not abuse its discretion *in refusing the spoliation instruction*.²⁴⁰ Likewise, in the other case cited by the dissent, the Texas Supreme Court *held that the trial court erred in submitting the spoliation instruction* and reversed.²⁴¹ Thus, neither case endorses instructions allowing the jury to decide on the spoliation issue. Moreover, the *Brookshire* Court never expressly mandated one type of spoliation instruction over another; it merely mandated the circumstances in which a judge may present any type of spoliation instruction. At this point, there is no reason to believe that a trial judge cannot choose between either of Justice Baker's spoliation instructions. A spoliation instruction simply cannot put the issue of whether spoliation has occurred in the jury's hands, which aligns with the matter historically being in the judge's domain.²⁴²

4. The Purpose of Spoliation Law: Compensatory or Punitive?

Brookshire and Justice Baker's framework highlight that the historical purpose behind spoliation law is compensatory rather than punitive.²⁴³ This is consistent with the Court's previous holdings, including *Wal-Mart Stores v. Johnson*, where the Court noted that the purpose of spoliation remedies are "to restore the parties to a rough approximation of their positions if all evidence were available."²⁴⁴ Both frameworks seek to balance the harm to the nonspoliator with the severe effects of harsh sanctions such as dismissal and the spoliation instruction. This is because "an unfortunate consequence of submitting a spoliation instruction is that it 'often ends litigation' because 'it is too difficult a hurdle for the spoliator to overcome.'"²⁴⁵ Of course,

239. *Brookshire*, 438 S.W.3d at 33 (citing *Ordonez v. M.W. McCurdy & Co.*, 984 S.W.2d 264, 273 (Tex. App.—Houston [1st Dist.] 1998, no pet.)).

240. *Ordonez*, 984 S.W.2d at 274.

241. *Brookshire*, 438 S.W.3d at 33 (citing *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 724 (Tex. 2003)).

242. *Trevino*, 969 S.W.2d at 954 (Baker, J., concurring) (citing *Miller v. Stout*, 706 S.W.2d 785, 787–88 (Tex. App.—San Antonio 1986, no writ) ("Only ultimate issues of fact are to be submitted to a jury. . . . Such proceedings as those involving determination of motions for sanctions because of failure to respond to discovery requests . . . often involve resolution [by a judge] of questions of fact." (alterations in original))).

243. Compare *Brookshire*, 438 S.W.3d at 17 (explaining that a spoliation instruction "is given to compensate for the absence of evidence that a party had a duty to preserve"), with *Trevino*, 969 S.W.2d at 954 ("When evidence spoliation prejudices nonspoliating parties, courts can levy a sanction or submit a presumption that levels the evidentiary playing field and compensates the nonspoliating party.").

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

245. *Brookshire*, 438 S.W.3d at 17 (citing *Zubulake IV*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003)).

if the nonspoliator is unable to present its claims or defenses due to missing evidence, the judicial system's truth-seeking function becomes impossible. However, the spoliation instruction necessarily presumes some wrongdoing by the spoliator, so if a party is not completely deprived of presenting its claims, it is reasonable to require intent or bad faith before permitting the harshest sanctions. Moreover, courts risk violating the Due Process clause when they prevent a party from having the merits of its case adjudicated by imposing the harshest discovery sanctions.²⁴⁶ The *Brookshire* Court and Justice Baker sought to mitigate these risks by making the question of spoliation a matter of law for the judge, keeping evidence of spoliation away from the jury, to keep the jury's focus on the merits and away from the parties' pre-trial misconduct. Likewise, both frameworks mitigate these risks by imposing a proportionality requirement—that the sanction directly relate to the conduct giving rise to the sanction and must not be excessive.

Although the *Brookshire* spoliation framework deviates from past spoliation law in some ways, the framework is not much more than a revived variation of Justice Baker's spoliation framework that seeks to balance the unfairness caused by missing evidence with the harsh effects caused by shifting the jury's focus away from the merits to the litigant's conduct during discovery. Moreover, *Brookshire's* focus on compensatory rather than punitive objectives directly aligns with the historical purposes behind spoliation law.

B. *Rendering Willful Blindness Meaningless*

The dissent asserted that *Brookshire* might permit the destruction of relevant evidence so long as the spoliator acts in compliance with a stated retention policy.²⁴⁷ Specifically, Justice Guzman argued that the Court failed to find willful blindness where *Brookshire* allowed the surveillance footage to erase with knowledge of the fall, of Aldridge's claim, and of Aldridge's request for a copy, and where the employee responsible for the footage admitted that he knew the footage would be key to Aldridge's slip-and-fall claim.²⁴⁸ Because the Court did not find willful blindness, there is significant merit to the dissent's argument that the Court's application of the new rule opens the door for defendants to destroy relevant evidence in the name of a document retention policy, despite the notice of circumstances likely to give rise to future litigation.²⁴⁹ Moreover, the Court's holding sends a message

246. *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917–18 (Tex. 1991) (discussing the constitutional limitations on the power of courts to adjudicate a party's claims without regard to the merits and instead based on a party's conduct in discovery).

247. *Brookshire*, 438 S.W.3d at 31 (Guzman, J., dissenting).

248. *Id.* at 36–37.

249. *Id.* at 38.

to trial and appellate judges that it strongly disfavors spoliation instructions and that lower courts should be extremely cautious in granting such a severe remedy.

1. What is Willful Blindness?

One acts intentionally when he desires to cause the consequences of his act or believes that the consequences are substantially certain to result from it.²⁵⁰ It is also a well-established principle that a party may not intentionally bury his head in the sand to avoid obtaining basic knowledge.²⁵¹ In other words, if there is knowledge that a person could and should have, but somehow the party manages not to have it, then the law deems that the party chose ignorance by his own willful blindness.²⁵² The Fifth Circuit Pattern Jury Instruction on willful blindness is instructive. It states, “You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. . . . [K]nowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.”²⁵³ It follows that two elements must be shown. First, the party must have some subjective awareness of a high probability of the existence of the fact.²⁵⁴ Second, the party must have purposely contrived to avoid learning the fact.²⁵⁵

2. A Deeper Look at the *Brookshire* Court’s Application of the New Framework

The *Brookshire* majority assumed that Brookshire breached an existing duty to preserve a longer portion of the video and that its failure to do so harmed Aldridge’s case.²⁵⁶ By contrast, this Note starts its analysis from the beginning of the framework and works through every step.

250. *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985); RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965); *see also* *Nugent v. Pilgrim’s Pride Corp.*, 30 S.W.3d 562, 575 (Tex. App.—Texarkana 2000, pet. denied) (holding that trespass is intentional if “while the actor did not know his conduct would result in a trespass, his actions were practically certain to have that effect”).

251. *Spurr v. United States*, 174 U.S. 728, 735 (1899) (explaining that an “evil design may be presumed if the [actor] purposely keeps himself in ignorance”); *Bonner v. Stephens*, 60 Tex. 616, 619 (1884) (“[I]f there be any ‘wilful blindness,’—‘any turning away from evidence,’ the party will be charged with notice.”).

252. *See Bonner*, 60 Tex. at 619.

253. FIFTH CIRCUIT DISTRICT JUDGES ASSOCIATION PATTERN JURY INSTRUCTIONS COMMITTEE, PATTERN JURY INSTRUCTIONS, CRIMINAL CASES § 1.37A (2012), <http://www.lb5.uscourts.gov/juryinstructions/fifth/crim2012.pdf> [<http://perma.cc/6U66-BMGG>].

254. *See, e.g., United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

255. *Id.*

256. *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 27 (Tex. 2014).

Under *Brookshire*, a spoliation inquiry commences with a finding of duty, which includes both timing and scope.²⁵⁷ First, the duty to preserve evidence is only triggered once litigation becomes reasonably foreseeable.²⁵⁸ Second, the scope of that duty is limited to evidence in the party's possession or control that will be material and relevant to that foreseeable claim.²⁵⁹ As explained above, the Texas Rules of Evidence defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.²⁶⁰ Once the party moving for the spoliation sanction satisfies this requirement, the movant must demonstrate that the other party breached its duty to preserve evidence.²⁶¹

Applying these rules to *Brookshire*, the record demonstrates that Brookshire breached its duty to preserve material and relevant evidence after litigation was reasonably foreseeable. First, Brookshire's argument that it did not anticipate litigation is without merit because, most likely, Brookshire would not have retained any video whatsoever or offered to pay Aldridge's medical expenses if it did not anticipate a chance of litigation.²⁶² Moreover, Gilmer's (Brookshire's Vice President of Human Resources and Risk Management) testimony that he "didn't know there was going to be a case"²⁶³ is irrelevant—Brookshire's duty to preserve the tape arose when it reasonably should have known that there was a substantial chance, meaning "more than merely an abstract possibility or unwarranted fear," that a claim would be filed and that evidence in its possession or control would be material and relevant to that claim.²⁶⁴ Thus, it is clear that Brookshire breached its duty to preserve relevant evidence by allowing the remaining footage to erase automatically.

The next question goes to remedy. To warrant a spoliation instruction, the spoliator must have intentionally destroyed the evidence, or the missing evidence must have been so important that, without it, the other side is completely prevented from proving its case.

Interestingly, when the majority analyzed Brookshire's culpability, it did not consider the reasonableness of Brookshire's data retention

257. *Id.* at 20.

258. *Id.*

259. *Id.*

260. TEX. R. EVID. 401.

261. *Brookshire*, 438 S.W.3d at 20.

262. *Id.* at 16; *see also* Rodriguez, *supra* note 6, at 463 (arguing that Brookshire's preservation duty arose "at the latest, when [it] authorized the medical expenses to be paid, in an amount above and beyond its usual policy").

263. *Id.*

264. *Id.* at 20 (quoting Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 204 (Tex. 1993)); *see also* Trevino v. Ortega, 969 S.W.2d 950, 955 (Tex. 1998) (Baker, J., concurring) ("A party should not be able to subvert the discovery process and the fair administration of justice simply by destroying evidence before a claim is actually filed.").

policy.²⁶⁵ However, the majority did say that it was “in no way suggesting that parties may immunize themselves from the consequences of evidence spoliation by hiding behind unreasonable limited duration retention policies.”²⁶⁶ The Court rationalized that the reasonableness of Brookshire’s policy was not at issue,²⁶⁷ but it flows from the benefits of data retention policies, which make parties “less likely to hand over incriminating evidence,”²⁶⁸ that this would be relevant in assessing Brookshire’s intent to conceal or destroy discoverable evidence.²⁶⁹ Indeed, the dissent implied that the data retention practices should be part of the culpability determination as evidence of willful blindness, and, therefore, intent.

Regardless of the reasonableness of Brookshire’s retention policy, the evidence shows that Brookshire intended to deprive Aldridge of the full recording. First, Brookshire is quite familiar with slip-and-fall litigation.²⁷⁰ In fact, during his testimony, Gilmer confirmed his understanding that a key issue in a slip-and-fall case is whether store employees knew or should have known there was something on the floor that caused the fall.²⁷¹ Further, Gilmer knew that any video not saved would be overwritten.²⁷² Despite this knowledge, he specifically instructed the employee to review the video from the time of the fall and save five or six minutes before the fall, blinding himself as to what any other footage would have shown.²⁷³ Moreover, on September 29, the same day Gilmer rejected Aldridge’s request for the full tape, Brookshire offered to pay for “a visit with a neurosurgeon and several weeks of physical therapy,” which was beyond Brookshire’s routine practice.²⁷⁴ This occurred days before the footage automatically erased and concurrently with Brookshire’s refusal to provide Aldridge

265. *Brookshire*, 438 S.W.3d at 27 n.19. It is important to note that the Court does not seem to see a distinction between Brookshire’s thirty-day deletion standard operating practice and a stated data retention policy. *Id.*

266. *Id.*

267. *Id.*

268. FERRIS, *supra* note 25, at 2.

269. *Brookshire*, 438 S.W.3d at 24.

270. *See, e.g.*, *Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406, 407 (Tex. 2006) (plaintiff slipped and fell on a piece of partially melted ice on the floor in front of a self-service soft drink dispenser in a Brookshire grocery store); *Bowman v. Brookshire Grocery Co.*, 317 S.W.3d 500, 501 (Tex. App.—Tyler 2010, pet. denied) (plaintiff tripped on a floor mat placed near the exit and fell in a Brookshire grocery store); *Brookshire Grocery Co. v. Goss*, 208 S.W.3d 706, 711 (Tex. App.—Texarkana 2006), *rev’d*, 262 S.W.3d 793 (Tex. 2008) (plaintiff-employee tripped over a lowboy cart while working in a Brookshire grocery store); *Akin v. Brookshire Grocery Co.*, No. 05-99-01067-CV, 2001 WL 88194, at *1 (Tex. App.—Dallas Jan. 26, 2001, no pet.) (plaintiff slipped and fell on a pink liquid that was spilled on the floor of the deli area of a Brookshire’s grocery store) (not designated for publication).

271. *Brookshire*, 438 S.W.3d at 16.

272. *Id.*

273. *Id.*

274. *Id.* at 31 (Guzman, J., dissenting).

with a copy of the video, clearly showing that Brookshire at one point intended to deprive Aldridge of the footage.²⁷⁵

Because the Court did not find intent, many of its findings ignore the “presumption that the missing evidence would be unfavorable to the spoliator.”²⁷⁶ However, judge or jury, it is within the factfinder’s domain to decide whether to believe that Brookshire only viewed eight minutes of footage.²⁷⁷ The factfinder (i.e., the trial court judge) could have determined that Brookshire did watch the footage. It was also within the factfinder’s discretion to determine that Brookshire did not watch it to avoid seeing what it contained. The majority accused the dissent of speculating about what the remaining footage might have showed and discounted its value due to the low quality of the footage.²⁷⁸ However, given that spoliation victims can prove the contents of missing evidence through circumstantial evidence,²⁷⁹ it should have been within the fact-finding judge’s discretion on remand to speculate about the contents of the missing footage—something a judge must do when evidence is missing. But here, the majority supplanted its own opinion about the contents of the missing evidence as a matter of law while reviewing for an abuse of discretion.

Finally, the majority itself explained in a footnote that “in the context of automatic electronic deletion systems. . . [a] party with control over one of these systems *who intentionally allows relevant information to be erased* can hardly be said to have only negligently destroyed evidence.”²⁸⁰ Brookshire controlled the video recording system and intentionally preserved eight minutes of footage, knowing the remaining footage would overwrite less than thirty days later. Even more, the fact that Brookshire consciously chose to maintain some of the footage provides greater evidence that it intended to deprive Aldridge of the remaining footage, irrespective of willful blindness. This seems to fall squarely within the Court’s footnote, yet the Court did not find intentional spoliation. Instead, the only way to reconcile this footnote with the rest of the Court’s opinion is to infer that the Court did not find the missing footage *prejudicial*.²⁸¹

275. *Id.* at 15 (majority opinion); *see also* Rodriguez, *supra* note 6, at 468–69 (reviewing the facts described above and concluding that it “constituted at least some evidence that Brookshire Brothers allowed the remaining video footage to be written over in a deliberate effort to hide relevant evidence”).

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

277. *See Brookshire*, 438 S.W.3d at 16.

278. *Id.* at 28 n.21.

279. Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 817 (Tex. 2002).

280. *Brookshire*, 438 S.W.3d at 24 n.17 (emphasis added).

281. *But see* Hoffman, *supra* note 4, at 272 (resolving the gap in the Court’s analysis by concluding “that a finding of ‘willful blindness’ also requires a showing that the spoliating party had a ‘subjective purpose’ to conceal or destroy relevant evidence”).

3. Blending the Culpability and Prejudice Requirements

Perhaps the Court meant to hold that Brookshire intentionally spoliated evidence but found that Aldridge was not prejudiced because the eight-minute tape was preserved.²⁸² The Court explained that many other sources of information were available for Aldridge's use at trial.²⁸³ Moreover, the Court seemed to place great weight on the poor quality and obscured visibility of the footage and indicated that these facts somehow refuted any presumption of harm.²⁸⁴ In contrast to the Court's finding of no intent, one could reasonably infer that Aldridge did not suffer sufficient prejudice—that sufficient evidence was available for Aldridge to use in proving his case.²⁸⁵

On the other hand, the video Brookshire did save indicates that the absence of the remaining footage was prejudicial. As recognized by the Court, the video showed store employees walking past the area before Aldridge fell and an employee signaling for help shortly after the fall.²⁸⁶ If Brookshire would have saved more of the video, the jury might have seen when the spill occurred, how many employees walked by the area prior to Aldridge's fall, or the amount of effort required to clean up the spill, and therefore, the size of the spill area.²⁸⁷ These are all reasonable inferences stemming from the eight-minute video and are far from speculative in nature. Certainly, this is not irreparable harm warranting the narrow exception for negligent spoliation, but can one say that the poor video quality alone could defeat the spoliation presumption or that Aldridge was not somewhat prejudiced? This appears to be the position taken by Judge Rodriguez.²⁸⁸

Because of the plethora of other available evidence to show that Brookshire employees had constructive knowledge of the spill, the Court was correct to refuse a spoliation instruction. This comports with the compensatory rather than punitive purposes underlying spoli-

282. But, the majority said, “there is no evidence that [Brookshire] did so with the requisite intent to conceal or destroy relevant evidence” *Brookshire*, 438 S.W.3d at 27.

283. *Id.* at 28.

284. *Id.* at 29.

285. In fact, the Court's analysis seems to directly align with Justice Baker's prejudice prong from his concurring opinion in *Trevino* that has been almost universally adopted by Texas courts. *Trevino v. Ortega*, 969 S.W.2d 950, 957–58 (Tex. 1998) (Baker, J., concurring) (recommending that courts consider the relevancy of the absent evidence and the availability of cumulative evidence when determining the severity of prejudice). Moreover, in 2010, the First District Court of Appeals affirmed a trial court's refusal to find prejudice under almost the exact same facts. *Clark v. Randalls Food*, 317 S.W.3d 351, 359–60 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

286. *Brookshire*, 438 S.W.3d at 30.

287. *Id.* at 32 n.4 (Guzman, J., dissenting); see also *Clark*, 317 S.W.3d at 358 (holding that the defendant knew surveillance footage was relevant even though the recording did not show the floor where shopper fell because it could show, *inter alia*, whether someone else slipped or almost slipped in the hour before the plaintiff fell).

288. Rodriguez, *supra* note 6, at 470–74.

ation law. First, the available footage—showing the fall, several minutes before the fall, and one minute after the fall—was shown to the jury at trial.²⁸⁹ Second, Aldridge presented Brookshire’s incident report confirming “that Aldridge had slipped in grease that leaked out of a container by the Grab–N–Go located near the area of the fall.”²⁹⁰ Third, Aldridge himself testified about the circumstances surrounding his fall.²⁹¹ Fourth, and most importantly, the footage the jury watched at trial showed Brookshire employees walking by Grab–N–Go minutes before Aldridge fell and “an employee signaling for help to clean up the spill right before the video ended, suggesting that the spill was too large to be cleaned [using] paper towels.”²⁹² This shows that the employee that walked by the spill minutes before Aldridge fell should have attempted to clean it up or stood guard over it to ensure that a customer would not slip. Moreover, the store manager testified that substances should not reasonably remain on the floor for longer than five minutes without an employee noticing and cleaning it up.²⁹³ Thus, not only was Aldridge not “wholly deprived” from presenting his claim, he had ample evidence to establish that Brookshire had actual notice of a seemingly large spill five minutes before the fall—an unreasonable amount of time per the store manager’s testimony.

It is difficult to understand why the *Brookshire* majority did not find willful blindness, but even if it had, the facts of the case did not warrant a spoliation instruction because Aldridge did not suffer sufficient prejudice. However, because the Court did not rely on the more practical ground, there is significant merit to the dissent’s argument that *Brookshire* opens the door for litigants to destroy relevant evidence in the name of a document retention policy despite anticipating future litigation.²⁹⁴ Moreover, the holding certainly highlights the Court’s strong reluctance to uphold spoliation instructions—sending a message to lower courts to be vigilant in granting severe spoliation instructions in only the most extreme circumstances.

C. What is a “Reasonable” Data Retention Policy?

As mentioned above, the majority did not consider the reasonableness of Brookshire’s data retention policy when it analyzed whether Brookshire had intentionally deprived Aldridge of relevant evidence.²⁹⁵ In addition to the dissent’s criticisms, legal commentators have complained that, in not considering the reasonableness of Brookshire’s policy, the Court missed an opportunity to provide data

289. *Brookshire*, 438 S.W.3d at 28.

290. *Id.*

291. *Id.*

292. *Id.* at 30.

293. *Id.*

294. *Id.* at 37–38 (Guzman, J., dissenting).

295. *Id.* at 27 n.19 (majority opinion).

preservation guidelines to those accumulating voluminous records or other potential evidence as part of normal operations.²⁹⁶ In fact, Texas courts have been silent on this question.²⁹⁷ However, federal law speaking directly on the issue, which both the *Brookshire* majority and dissent referenced, is instructive and provides particularly reliable guidance to potential litigants.

In 1988, the Eighth Circuit enumerated a framework for determining the reasonableness of a document retention policy when deciding *Lewy v. Remington Arms*.²⁹⁸ In *Lewy*, a firearms manufacturer appealed the lower court's submission of an adverse inference jury instruction based on the company's inability to produce certain documents, including information about customer complaints, which it had destroyed pursuant to its record retention policy that had been in place for more than a decade.²⁹⁹ Under Remington's policy, information was kept for three years, and if no action regarding a particular record was taken during that period, it was destroyed.³⁰⁰ Although the court lacked the necessary findings to make a decision, it remanded, instructing the district court to consider: (1) whether the retention period was reasonable in relation to the particular record; (2) whether lawsuits concerning the complaints at issue had been filed; (3) the frequency and magnitude of similar complaints; and (4) whether the document retention policy was instituted in bad faith or, in other words, with intent to deprive another of relevant evidence.³⁰¹ Since *Lewy*, other federal courts have added requirements that the company follow its document retention policy in a reasonably consistent manner³⁰² and suspend the policy, implementing a litigation hold to ensure

296. Sullivan, *supra* note 6 (“Although the court implicitly acknowledges that indefinite data retention is impractical, it offers no guidance on how long to preserve potential evidence if there is otherwise no objective notice of potential litigation.”); Zach Wolfe, *Key Issues When Employees Leave to Compete*, HOUS. LAW., Jan.–Feb. 2015, at 30, 32, <http://www.thehoustonlawyer.com/past.html>; Hoffman, *supra* note 4, at 273 (“Given that a number of businesses have enacted video-retention policies, appellate courts will likely have to evaluate the relative merits of these policies in the context of alleged spoliation in the near future.”); *see also Brookshire*, 438 S.W.3d at 27 n.19.

297. *See, e.g.,* Wackenhut Corp. v. Gutierrez, 453 S.W.3d 917 (Tex. 2015); *Brookshire*, 438 S.W.3d 9; Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718 (Tex. 2003); Trevino v. Ortega, 969 S.W.2d 950, 956 (Tex. 1998) (Baker, J., concurring); Doe v. Mobile Video Tapes, Inc., 43 S.W.3d 40 (Tex. App.—Corpus Christi 2001, no pet.) (refusing to find spoliation when alleged spoliator did so in the regular course of business); Aguirre v. S. Texas Blood & Tissue Ctr., 2 S.W.3d 454, 457 (Tex. App.—San Antonio 1999, pet. denied) (same).

298. *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988).

299. *Id.* at 1111.

300. *Id.*

301. *Id.* at 1112.

302. *See, e.g.,* Day v. LSI Corp., No. CIV 11-186-TUC-CKJ, 2012 WL 6674434, at *16 (D. Ariz. Dec. 20, 2012); Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 490 (S.D. Fla. 1984).

preservation, when litigation becomes reasonably foreseeable.³⁰³ However, the *Lewy* court also explained that even reasonable data retention policies may give rise to intentional spoliation in particular circumstances, explaining that parties cannot “blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.”³⁰⁴

Alternatively, the Texas Supreme Court could rely on the Advisory Committee’s Notes to the upcoming amendments to Federal Rules of Civil Procedure Rule 37(e).³⁰⁵ The Notes state that the Rule focuses on a party’s failure to take “reasonable steps to preserve” digital information as opposed to singling out data destruction policies.³⁰⁶ The Notes also state that the Committee intends to continue with the old safe-harbor provision, which treated the “routine, good-faith operation of an electronic information system” as a factor in considering whether reasonable steps were taken to preserve the evidence, with the caveat that “the prospect of litigation may” require the suspension or modification of routine destruction practices.³⁰⁷ Additionally, the Notes list as factors: (1) the sophistication of the parties with regard to evaluating preservation efforts in litigation; (2) the extent to which the parties knew of and protected against casualty losses outside the party’s control; and (3) the parties’ staff and financial resources available to devote to preservation efforts in proportion to the effectiveness of other alternatives.³⁰⁸

Although the Texas Supreme Court has not explicitly defined the boundaries of a reasonable data retention policy, despite the opportunity to do so in *Brookshire*, the majority’s desire to align with the proposed Rule 37(e) amendments and the dissent’s appraisal of *Lewy* gives litigants at least some insight into the Court’s expectations.³⁰⁹ Moreover, both approaches provide the flexibility necessary to tailor remedies to the circumstances of each case and preserve a significant degree of judicial discretion rather than enumerating rigid rules. Finally, given that the majority did not consider the reasonableness of *Brookshire*’s data retention practices relevant to the issue of culpability,³¹⁰ the better question is whether the policy’s reasonableness indicates culpability whatsoever as opposed to evidence of reasonable care in the breach determination.³¹¹

303. See, e.g., *Micron Tech., Inc. v. Rambus Inc.*, 255 F.R.D. 135, 148 (D. Del. 2009) (citing *Zubulake IV*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

304. *Lewy*, 836 F.2d at 1112.

305. See generally SEPT. 2014 APPENDIX, *supra* note 125, at 38.

306. *Id.* at 40.

307. *Id.* at 41.

308. *Id.* at 41–42.

309. Compare *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 22, 24 (Tex. 2014) (aligning the prejudice and intent requirements with the Federal Rules (plus a narrow negligence caveat)), with *id.* at 38 (Guzman, J., dissenting).

310. *Id.* at 27 n.19 (majority opinion).

311. *Id.* at 20.

D. *Should Courts Defer to the Rulemaking Process?*

The *Brookshire* dissent, Judge Scheindlin, and Judge Rodriguez believe that courts should defer to the rulemaking process in creating spoliation rules.³¹² They reason that, because spoliation is an evidentiary concept and discovery issue with far-reaching impacts, spoliation issues should be resolved through the rulemaking process with input from the Rules Advisory Committee to provide uniformity and precision that is otherwise lacking when the Court limits itself to facts of one case.³¹³ However, while it is true that rulemaking is the route chosen by the federal courts, which defer to the Standing Committee on Rules of Practice and Procedure, rulemaking does not necessarily produce the best, most complete outcome for the facts of every case. In fact, Judge Scheindlin has recently outlined many shortcomings in the proposed changes to Rule 37(e).³¹⁴ Ultimately, courts must fill the gaps left open by the rulemaking process, and no Texas Rule currently addresses the nuances involved with spoliation.³¹⁵ Although rulemaking will likely produce beneficial results, the *Brookshire* Court had to resolve the issues before it in the absence of a rule on point. Finally, the Court will save valuable resources by continuing to observe the results of the federal rulemaking process and implementing parts of those rules once officially enacted and vetted in unique, real-world contexts.

To summarize this Part, the *Brookshire* majority took a conservative approach to spoliation—restricting “death-penalty sanctions” such as dismissal of claims and spoliation instructions to narrowly defined circumstances.³¹⁶ The framework clearly attempts to balance the harsh effects of these litigation-ending sanctions with the remedial purposes behind spoliation law.³¹⁷ Moreover, the framework significantly aligns with the upcoming Rule 37(e) amendments while also providing a narrow exception for negligent spoliation.³¹⁸ This Part has shown that, contrary to the dissent and Judge Rodriguez’s criticisms, the framework itself is not a significant change from Justice Baker’s *Trevino* concurrence, which a majority of Texas courts had adopted prior to *Brookshire*. At the same time, the Court’s application of the framework to the *Brookshire* facts motivates lower courts to exercise extreme caution when deciding to present a spoliation instruction to the jury. It is troubling that the majority did not find willful blindness despite the persuasive evidence of such conduct, especially given that

312. *Id.* at 38 (Guzman, J., dissenting); Scheindlin & Orr, *supra* note 7, at 1308; Rodriguez, *supra* note 6, at 481.

313. *Brookshire*, 438 S.W.3d at 38–39 (citing TEX. CONST. art. V, § 31).

314. Scheindlin & Orr, *supra* note 7, at 1301–02, 1314–15.

315. *Id.*

316. *Id.* at 23 (majority opinion).

317. *Id.*

318. Compare SEPT. 2014 APPENDIX, *supra* note 125, at 38–43, with *Brookshire*, 438 S.W.3d at 24–25 n.17.

it could have reached the same outcome without creating any confusion by finding that the cumulative evidence was so abundant that a spoliation instruction was not called for despite Brookshire's intent to deprive Aldridge of evidence. Likewise, it is unclear why the Court did not consider the reasonableness of Brookshire's retention policy when analyzing intent. Unfortunately, these missteps will likely motivate courts to deny spoliation instructions and entice litigants to destroy evidence without fearing the harshest sanctions.

VI. SUBSEQUENT *BROOKSHIRE* INTERPRETATIONS

Courts have applied the *Brookshire* framework to a handful of new fact patterns. Although the specific issues in those cases have not required courts to confront significant open questions or interpret the framework's perplexing nuances, they share one commonality—the denial or reversal of a severe spoliation sanction.³¹⁹ It appears that the post-*Brookshire* era might be one where the spoliation instruction, or any other harsh spoliation sanction, becomes a rarity.

Two appellate court applications of the *Brookshire* framework in which a spoliation sanction was refused are worthy of special mention. First, in *IQ Holdings v. Stewart Title Guaranty Co.*, the First District Court of Appeals analyzed whether a trial court abused its discretion in denying a plaintiff's motion for spoliation sanctions.³²⁰ IQ sued its title insurer and escrow agent for damages sustained in relation to the sale of a condominium unit.³²¹ During pretrial discovery, IQ moved for spoliation sanctions against both defendants, but the trial court denied IQ's motion.³²² Stewart Title had a document retention policy that called for the destruction of its hard copy closing file but required its employees to preserve "all the pertinent data" in a system called FileStor.³²³ IQ alleged that Stewart Title did not preserve all of the hardcopy documents in FileStor.³²⁴ However, Stewart Title also used another electronic file retention system called SureClose, where all of

319. See, e.g., *Petrol. Sols., Inc. v. Head*, 454 S.W.3d 482, 489 (Tex. 2014) (extending *Brookshire*'s restrictions on the spoliation instruction remedy to other "death-penalty sanctions," such as striking a party's claims or affirmative defenses, and reiterating that determining whether spoliation has occurred and crafting an appropriate curative remedy are questions of law for the trial court and that evidence relating to the circumstances of the alleged spoliation is generally inadmissible at trial); *Bazan v. Munoz*, 444 S.W.3d 110 (Tex. App.—San Antonio 2014, no pet. h.) (upholding the trial court's denial of a spoliation sanction and noting that the alleged spoliator testified that he had removed the business receipts from company file cabinets to take them to his accountant well before filing the lawsuit and that it would not have been in his best interest to destroy those receipts from a tax liability standpoint).

320. *IQ Holdings, Inc. v. Stewart Title Guar. Co.*, 451 S.W.3d 861 (Tex. App.—Houston [1st Dist.] 2014, no pet. h.).

321. *Id.* at 865.

322. *Id.*

323. *Id.* at 866.

324. *Id.*

the sales documents were allegedly stored.³²⁵ On appeal, the court held that the documents in the closing file were potentially relevant to IQ's claims and that the employee had a duty to preserve them.³²⁶ However, when the court reached the issue of breach, it found that Stewart Title had produced a copy of the title commitment that it had preserved in SureClose.³²⁷ IQ responded that the document was a fabricated copy, noting some suspect inconsistencies, but the court held that the trial court reasonably could have accepted Stewart Title's explanations for the inconsistencies and found that the document was genuine.³²⁸ Thus, the court ultimately concluded that the trial court could have reasonably determined that Stewart Title did not breach its duty to preserve.³²⁹ The court also noted that the existence of the SureClose records also supported a finding that IQ did not suffer any prejudice from the destruction of the hard copy files.³³⁰

The second notable case is the Fifth District Court of Appeals' decision in *Flagstar Bank v. Walker*.³³¹ In *Flagstar*, the appellate court upheld the trial court's denial of a spoliation instruction where the defendant made evidence unavailable by replacing its servers shortly before the case was filed without first backing up the data.³³² Notably, in denying the plaintiff's spoliation instruction request, the trial judge said, "It's just too hard of a burden to meet and I don't think it was met here."³³³ Very much like the *Brookshire* holding, the appeals court held that there was no proof that the defendants had intentionally concealed evidence. But the court did not discuss this finding and instead based its decision on a lack of relevancy and the possibility that the evidence would have been cumulative of other available evidence.³³⁴

The Texas Supreme Court recently applied the *Brookshire* framework in *Wackenhut Corp. v. Gutierrez*.³³⁵ Wackenhut was the owner and operator of a charter bus that collided with a car driven by Gutierrez. The bus was equipped with four video cameras that recorded while the bus was running, and one camera located outside the passenger door was positioned so that it might have captured the impact.³³⁶ The cameras automatically looped over and erased previously

325. *Id.*

326. *Id.* at 868.

327. *Id.*

328. *Id.* at 868–69.

329. *Id.* at 869.

330. *Id.* at 869 n.4.

331. *Flagstar Bank, FSB v. Walker*, 451 S.W.3d 490 (Tex. App.—Dallas 2014, no pet. h.).

332. *Id.* at 506.

333. *Id.*

334. *Id.* at 507.

335. *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917 (Tex. 2015) (per curiam).

336. *Id.* at 918.

recorded data every seven days.³³⁷ Two days after the accident, Gutierrez delivered a letter to Wackenhut recounting his memory of the accident and asserting that Wackenhut's driver was at fault.³³⁸ He also completed a notice and claim form that was sent with the letter to Wackenhut's corporate headquarters.³³⁹ Despite this, Wackenhut did not preserve the recording, and it automatically erased after seven days.³⁴⁰ Two years after the accident, Gutierrez sued Wackenhut and the driver for negligence.³⁴¹ Gutierrez filed a pretrial motion for spoliation of evidence, requesting that the judge impose a spoliation jury instruction against Wackenhut.³⁴² At the close of Gutierrez's case-in-chief, the trial court ruled that Wackenhut had negligently spoliated evidence and granted the requested spoliation instruction.³⁴³ The charge submitted read:

Parties to a lawsuit are under a duty to preserve evidence that they know or should know is relevant to the dispute. In this case, *The Wackenhut Corporation negligently failed to preserve the video on the bus*, and it did so while there was an anticipation of litigation and while it had a duty to preserve evidence. You *may*, therefore, presume that the videotape was unfavorable to The Wackenhut Corporation."³⁴⁴

The jury found in Gutierrez's favor, and the trial court rendered a \$1.2 million judgment.³⁴⁵ Wackenhut petitioned the Texas Supreme Court for review after the Fourth District Court of Appeals affirmed, arguing that the trial court abused its discretion in submitting the instruction.³⁴⁶ The Court explained that the trial court's finding of negligent spoliation included an express finding that Wackenhut had not intentionally destroyed the video.³⁴⁷ As a result, the Court considered only whether Wackenhut irreparably deprived Gutierrez of any meaningful ability to present a claim or defense.³⁴⁸ The Court found that other competent evidence existed such that Gutierrez was not irreparably deprived of presenting his claims and held that the trial court had abused its discretion.³⁴⁹ Specifically, the Court noted that Gutierrez had available at trial: (1) both drivers' testimony; (2) the testimony of an eyewitness Wackenhut employee; (3) their corresponding statements prepared at the time of the accident; (4) testimony of the re-

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 919.

342. *Id.*

343. *Id.*

344. *Id.* at 919 n.2 (emphasis added) (internal quotations omitted).

345. *Id.* at 919.

346. *Id.*

347. *Id.* at 921 n.4.

348. *Id.* at 921.

349. *Id.*

sponding police officer; (5) the police report; (6) Wackenhut's report to its corporate headquarters; and (7) photos of the vehicles and the accident scene.³⁵⁰ Finally, the Court held that the trial court's error likely resulted in an improper judgment and remanded for a new trial because of the highly contested liability, counsel's courtroom statements referencing the missing recording, and the recording's "highly speculative probative value" because it was 8:00 p.m. and raining at the time.³⁵¹

Ultimately, it does not appear that courts have had trouble applying *Brookshire*. These cases illustrate, however, that parties seeking a spoliation jury instruction face substantial obstacles when attempting to satisfy the new framework. They also indicate that the Texas Supreme Court and Texas appellate courts are very apprehensive about issuing spoliation instructions. For example, *Wackenhut* shows that a negligent spoliation instruction is only appropriate in the most exceptional circumstances and that "differences in kind and quality between the available evidence and the spoliated evidence"³⁵² are not truly key factors in analyzing prejudice because the testimony of interested witnesses—including the spoliator's own employees—and documents prepared by the spoliator's agents can serve as competent evidence for the spoliating victim to prove his case.³⁵³ Further, *IQ Holdings* indicates that even allegedly fabricated and altered copies of relevant evidence can serve as competent evidence, precluding a party from showing the prejudice necessary for a negligent spoliation instruction.³⁵⁴ Moreover, *Wackenhut* and *Flagstar* show that, following *Brookshire*, lower courts are not likely to find intentional spoliation when related to an automatic destruction system, adding greater weight to the *Brookshire* dissent's argument that the new framework may permit spoliation when done in accordance with a data retention policy.³⁵⁵

On the other hand, *Wackenhut* shows that the *Brookshire* dissent's argument that the framework forces judges into one mandatory spoliation instruction was overstated.³⁵⁶ The trial court in *Wackenhut* did not give a mandatory instruction and instead instructed the jury that it *may* presume the evidence was harmful; on review, the Court did not

350. *Id.*

351. *Id.* at 922. Apparently Chief Justice Roberts is wrong; a picture is *not* worth a thousand words. See *FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012).

352. *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 22 (Tex. 2014).

353. Compare *Wackenhut*, 453 S.W.3d at 921, with *Brookshire*, 438 S.W.3d at 22, 28.

354. *IQ Holdings, Inc. v. Stewart Title Guar. Co.*, 451 S.W.3d 861, 868–69 (Tex. App.—Houston [1st Dist.] 2014, no pet. h.).

355. *Wackenhut*, 453 S.W.3d at 921; *Flagstar Bank, FSB v. Walker*, 451 S.W.3d 490, 506 (Tex. App.—Dallas 2014, no pet. h.); *Brookshire*, 438 S.W.3d at 31, 38 (Guzman, J., dissenting).

356. Compare *Wackenhut*, 453 S.W.3d at 919 n.2., with *Brookshire*, 438 S.W.3d at 34 (Guzman, J. dissenting).

correct or otherwise discuss the instruction's language.³⁵⁷ But irrespective of the distinctions between permissive and mandatory spoliation presumptions in the actual jury charge, these cases show that it has become exceedingly difficult for parties to reach the issue of what language to use in the spoliation instruction.

VII. LOOKING AHEAD: THE FUTURE OF SPOILIATION IN THE ESI CONTEXT

Courts continue attempting to strike a balance between the harsh trial effects of destroyed evidence and the significant burdens of maintaining voluminous amounts of data. Because of the vast expansion in spoliation motions since the early 2000s, businesses face high costs in implementing and maintaining data retention systems to store otherwise unnecessary documents, which they claim to keep only out of fear of spoliation sanctions.³⁵⁸ However, this ignores the real differences between paper and electronic storage, the costs of each, the genuine reasons why businesses are storing more data electronically, and the operational and technological advances in data retention practices. Nevertheless, courts and rule makers have started down the path of appeasing lawyers and businesses that argue against these allegedly burdensome and overreaching preservation obligations, ignoring the realities that led to the rise of sanctions for the destruction of evidence in the first place.

A key driver for the rise of ESI is that the cost per gigabyte of data storage has gone down by half every fourteen months over the past thirty years.³⁵⁹ For example, one gigabyte of storage cost nearly \$105,000 in 1985 but fell to \$1,120 in 1995, to \$1.24 in 2005, and to \$0.03 in 2014.³⁶⁰ By contrast, storing just one cubic foot of records in paper form is estimated to cost over \$30 per year when stored onsite

357. *Wackenhut*, 453 S.W.3d at 919 n.2.

358. Creighton Magid, *New Discovery Rules to Rein in Litigation Expenses*, CORPORATE COUNSEL (Oct. 29, 2014), <http://www.corpcounsel.com/id=1202674945208/New-Discovery-Rules-to-Rein-in-Litigation-Expenses#ixzz3IQAcS6QD> [<http://perma.cc/J39V-TY4Y>] (“A report issued earlier this year by professor William Hubbard of the University of Chicago Law School pegged the ‘fixed’ cost of implementing hardware and software systems to preserve electronic data to be \$2.5 million per year for large companies, and the additional, lawsuit-specific costs of preserving data to range from \$12,000 per year for small companies to nearly \$39 million per year for large companies.”); see also FERRIS, *supra* note 25, at 5 (“As blanket deletion policies have become suspect . . . the new approach to retention is: Keep everything and never delete it, except for spam and other obviously useless stuff.”); Kenneth J. Withers, *Risk Aversion, Risk Management, and the “Overpreservation” Problem in Electronic Discovery*, 64 S.C. L. REV. 537, 546 (2013) (explaining that “[f]ear of sanctions drives the pressure for overpreservation”).

359. *Average Cost of Hard Drive Storage*, STATISTICS BRAIN, <http://www.statisticbrain.com/average-cost-of-hard-drive-storage/> [<http://perma.cc/NAJ9-3JY7>]; see also Sedona 2007, *supra* note 9, at 198 (“the costs of storage have plummeted from \$20,000 per gigabyte in 1990 to less than \$ 1 per gigabyte today”).

360. *Average Cost of Hard Drive Storage*, *supra* note 359.

and \$1.50 when stored offsite.³⁶¹ Today, one cannot reasonably argue that the cost of storing forty boxes of information in paper form (or approximately one gigabyte of printed text) is cheaper than storing the same data electronically.³⁶² Thus, the legal system should not give businesses a pass on data preservation based on the inordinate cost of data storage alone. Moreover, sympathy for these businesses is arguably unfounded because a significant driver for the increased duty to retain a growing number of records comes from statutes and regulations having nothing to do with the duty to preserve evidence for litigation.³⁶³

Some argue that the high burden is not because of data storage costs but instead due to legal costs associated with reviewing this data—which can exceed \$30,000 for one gigabyte of data.³⁶⁴ This is a reasonable argument, but it ignores that businesses are likely storing more information *because of* the low costs associated with electronic storage, aggressively leveraging technology to increase productivity,³⁶⁵ and that associates would still be required to review relevant evidence in preparation of litigation and in response to discovery requests regardless of its form. In fact, large companies often invest millions of dollars in “big data” technologies not because they are thinking about discovery sanctions but to understand their customers, streamline sales processes, optimize the supply chain, product pricing, and packaging, and drive research and development.³⁶⁶ Thus, claims that businesses are facing outrageous data storage costs due to over preservation solely because they fear discovery sanctions are disingenuous and operate to distract lawmakers, who may lack technological and corporate insight, from the real drivers behind the rise of ESI.

Courts also seem to ignore the operational and technological advances in data retention and discovery practices. For example, predictive coding, “an algorithm-based computer program that predicts the relevancy of documents after an attorney has ‘trained’ the computer through the manual review of a ‘seed set’ of documents,” could easily

361. Steve Mackes, *Paper vs. Digital Records*, GRM DOCUMENT MGMT., http://www.grmdocumentmanagement.com/wp-content/uploads/2014/10/GRM-WP_Paper-vs.-Digital-Records.pdf [<http://perma.cc/8XEJ-THJ5>].

362. Sedona 2007, *supra* note 9, at 192 n.2.

363. *See, e.g.*, 15 U.S.C. § 7213 (2012) (duty to maintain audit work papers for seven years); 29 U.S.C. § 1027 (2012) (ERISA records to be retained for six years); 26 U.S.C. § 6001 (2012) (duty to maintain tax records); 7 U.S.C. § 136i-1 (2012) (requiring use records for restricted pesticides to be retained for two years); TEX. HEALTH & SAFETY CODE ANN. § 241.103 (West Supp. 2014) (duty to preserve health records for ten years); TEX. FIN. CODE ANN. § 151.602 (West 2013) (requiring money services licensees to preserve records for at least five years).

364. Sedona 2007, *supra* note 9, at 192, 198 n.13.

365. *See, e.g.*, Thomas H. Davenport & Jill Dyché, *Big Data in Big Companies*, SAS INT’L INST. FOR ANALYTICS 3 (2013), <http://tinyurl.com/pdd9mvg> [<http://perma.cc/C5PD-FDQM>] (explaining that companies can obtain a complete picture of their customers and operations by combining unstructured and structured data).

366. *Id.* at 8, 11, 19.

remedy the high costs businesses and lawyers must face.³⁶⁷ These and other document review systems, such as automated classification technologies, will continue to improve, making it easier for legal departments to manage discovery requests without bearing disproportionate costs (or, perhaps, making it even easier for businesses to destroy incriminating evidence).³⁶⁸

In time, market forces will also cause law firms and businesses to change how they view and approach document collection, storage, and review by adopting ever-evolving best practices.³⁶⁹ For example, legal departments should employ project management and planning techniques to develop a reasonable review method tailored to the circumstances of each case.³⁷⁰ Additionally, utilizing the “clawback” or “quick peek” provisions contained in federal or state procedural rules may protect against the inadvertent production of privileged or otherwise confidential information and lessen the need for lawyers to comb through each page of production.³⁷¹ A “clawback” provision allows for the return of inadvertently produced privileged materials.³⁷² “Quick peek” provisions allow for the production of all documents thought to be responsive without any initial privilege review so that the requestor can take a “quick peek” to determine which documents it actually wishes to use at trial, which are then screened for privileged information by the producing party.³⁷³ Although each provision has risks, these types of discovery arrangements facilitate “prompt and economical discovery . . . by reducing the cost and burden of review by the producing party.”³⁷⁴

Further, businesses might consider bringing e-discovery responsibilities in-house, using internal resources to reduce costs and increase efficiencies. At the same time, businesses and law firms have the option of outsourcing to overseas legal support providers that offer low-cost, efficient, and reliable alternatives to document review by high-cost associates.³⁷⁵ For example, in 2006, DuPont outsourced its litigation support department to an offshore provider to save an expected

367. Kristi A. Davidson, *A Game of Tug of War: Balancing Broad Discovery Against Burdensome ESI*, 2014 WL 2344837, at *1 (Apr. 2014) (discussing Zubaluke, Rule 37(e) amendments, and adverse inference instruction statistics from a 2008–2009 study).

368. FERRIS, *supra* note 25, at 10.

369. The Sedona Conference, *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 15 SEDONA CONF. J. 265, 269 (2014) [hereinafter Sedona on Quality 2014].

370. *Id.* at 273–76.

371. *Id.* at 293–94; *see also* FED. R. CIV. P. 26(b)(5); TEX. R. CIV. P. 193.3(d).

372. Sedona on Quality 2014, *supra* note 369, at 293–94.

373. *Id.*

374. FED. R. CIV. P. 26(f) (Advisory Committee’s Notes to 2006 amendments).

375. *See generally* Carlo D’Angelo, *Overseas Legal Outsourcing and the American Legal Profession: Friend or “Flattener”?*, 14 TEX. WESLEYAN L. REV. 167, 172–74 (2008).

40% to 60% in document work and cut its annual legal costs by 3% worldwide.³⁷⁶ After fifteen years of outsourcing discovery review processes, DuPont is still satisfied with the decision.³⁷⁷

These strategic, technological, and process-driven innovations to traditional document collection, preservation, and review methods show that businesses and legal departments have alternatives to the high costs caused by fear of discovery sanctions. Courts and rule makers should give businesses more time to adopt these modern best practices before intervening to cut back established discovery rules.

This is not to say that data retention policies are bad practice, but to avoid culpability, parties implementing such policies should have to show a balancing system of internal controls and compliance with those controls to ensure that potentially relevant data is not automatically destroyed when litigation has become reasonably foreseeable. Otherwise, how is this not willful blindness? In fact, the amendments to the Federal Rules of Civil Procedure will replace the current safe-harbor provision, which states that, “a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”³⁷⁸ Instead, the amended Rule will impose a duty to take reasonable preservation steps when litigation is objectively foreseeable, with “the routine, good-faith operation of an electronic information system” serving as one factor for the court in determining whether a party took reasonable care to preserve missing evidence.³⁷⁹ The Advisory Committee’s Notes also explain that the prospect of litigation may call for stopping or modifying any routine deletion operations.³⁸⁰ This shows that federal rule makers realize that those anticipating litigation should not be permitted to stand idly by and “exploit [their] routine [destruction policy] to thwart discovery obligations” by allowing for the destruction of evidence they are required to preserve.³⁸¹ Likewise, Justice Baker and Judge Scheindlin recognized that data retention policies at odds with a duty to preserve should not excuse the obligation.³⁸² Of course, parties taking reasonable steps to preserve information when a claim is reasonably foresee-

376. *Id.* at 174 (citing Pete Engardio, *Let’s Offshore the Lawyers: DuPont is Farming Out Legal Services to Asia and Saving A Bundle*, BUS. WEEK, Sept. 18, 2006, at 42).

377. *DuPont Legal Finds a Trusted Partner in DTI Philippines Location*, METRO. CORP. COUNS., Feb. 2014, at 17, <http://www.metrocorp.counsel.com/pdf/2014/February/17.pdf> [<http://perma.cc/X8N5-TRWA>].

378. SEPT. 2014 APPENDIX, *supra* note 126, at 38 (quoting Rule 37(e) as adopted in 2006).

379. *Id.* at 41.

380. *Id.*

381. *See, e.g.*, FED. R. CIV. P. 37(f) (Advisory Committee’s Notes to the 2006 Amendment, subdivision (f)).

382. *Trevino v. Ortega*, 969 S.W.2d 950, 957 (Tex. 1998) (Baker, J., concurring); *Zubulake IV*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

able, for example, by stopping their routine destruction policy in relation to certain data stores, should not fear a finding of intentional spoliation. However, courts should closely scrutinize the reasonableness of those preservation efforts to ensure that an alleged spoliator is not actually hiding behind its retention policy.

Nevertheless, the upcoming amendments to the Federal Rules and judicial decisions such as *Brookshire* show that rule makers and courts are not willing to wait for market forces to prevail. Instead, spoliation law, which expanded in the early 2000s in response to widespread corporate document destruction such as the extensive document shredding that occurred during Enron's collapse,³⁸³ is contracting. This Part has shown that the justifications for this contraction are overstated and that other alternatives have not been thoroughly explored. Although rule makers and courts primarily seek only to restrict the harshest spoliation sanctions, these sanctions, which now require an almost unattainable burden of proof, are most important because they serve the necessary deterrence functions that will prevent misconduct and push law firms, legal departments, and corporations to reevaluate the old approaches to document management and move to efficient, flexible models.

VIII. CONCLUSION

Although the destruction of evidence has always threatened the court's truth-seeking function, the rise of electronically stored information poses unique problems for all parties involved. As the cost of data storage continues to decline rapidly and the technologies available to analyze voluminous amounts of electronic information mature, increasing numbers of businesses and individuals are converting expensive, cumbersome paper records to highly accessible digital mediums. However, storing and processing electronic information increases the risk of unintentional evidence spoliation, making litigants susceptible to potential "death-penalty" sanctions for the destruction of evidence.³⁸⁴ In the early 2000s, courts began granting increased numbers of spoliation jury instruction requests, and spoliation disputes regarding electronically stored information became commonplace. Businesses responded by implementing routine data purging policies that insure against the harshest sanctions, including the spoliation instruction. Recognizing the need to balance the interests of adjudicating legal disputes on the evidence with the financial and resource costs associated with preserving every piece of potentially relevant electronic information, most courts have endorsed rea-

383. See generally Christopher R. Egan, *Arthur Andersen's Evidence Destruction Policy: Why Current Spoliation Standards Do Not Adequately Protect Investors*, 34 TEX. TECH L. REV. 61, 62-64 (2002).

384. *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177, 184-85 (Tex. 2012).

sonable routine data retention policies. But others have been skeptical, reasoning that companies can merely hide behind such policies to protect against compelled disclosure of incriminating evidence while avoiding severe sanctions.³⁸⁵ Irrespective of the split among the courts, all courts recognize that, regardless of any routine document destruction policy, once a party should reasonably anticipate litigation, that party should take reasonable care to ensure that relevant evidence is preserved. However, most courts, soon to include all federal courts under the Rule 37(e) amendments, save the harshest sanctions for intentional rather than merely negligent spoliation.

While the federal system is undergoing changes to its spoliation law under the rules of civil procedure, in *Brookshire*, the Texas Supreme Court delivered a comprehensive and facially reasonable framework that resolves many questions left unanswered by past decisions—including the circumstances under which courts may issue “death-penalty” sanctions. In its opinion, the *Brookshire* majority recognized that, although necessary in some cases, spoliation instructions can negatively influence trial fairness by shifting the jury’s focus away from the merits of the case to the parties’ improper conduct during discovery. Because Texas spoliation has always focused on compensating injured parties for missing evidence, the Court held that parties should not present spoliation evidence to the jury and “death-penalty” spoliation sanctions, specifically the spoliation jury instruction, should be used only in extreme circumstances.³⁸⁶

Although many of the initial *Brookshire* criticisms are overstated, there is significant merit to the dissent’s argument that the Court’s application of the framework indicates that the Court is not likely to find intentional spoliation when a litigant merely allows for the destruction of evidence pursuant to a routine destruction policy. The majority held that a party can intentionally spoliates through “willful blindness,” where “a party does not directly destroy evidence known to be relevant and discoverable, but nonetheless ‘allows for its destruction.’”³⁸⁷ However, it is difficult to understand why the majority found insufficient evidence of willful blindness where the *Brookshire* facts strongly suggest such culpability. Even if the Court had found intentional spoliation, it would have reached the same conclusion by finding that Aldridge had not shown sufficient prejudice to warrant a spoliation instruction. But instead, the majority presumed that Aldridge had been prejudiced and couched its holding on the culpability prong, blending the two elements into one insurmountable requirement. Further, the *Brookshire* majority highlighted its strong aversion to “death-penalty” spoliation sanctions, which it exercised when ap-

385. *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 37–38 (Tex. 2014) (Guzman, J., dissenting) (citing *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988)).

386. *Id.* at 14 (majority opinion).

387. *Id.* at 24 (quoting Hebl, *supra* note 178, at 97–98).

plying the new framework to the facts. These shortcomings open the door for litigants to destroy evidence in compliance with a document retention policy without fearing the most severe sanctions, even though the framework itself points the other direction.

Brookshire's progeny shows that the lower courts have received the Court's message—spoliation instructions should only be given in the most extreme circumstances, and courts granting or affirming these instructions face a significant chance of reversal on review. The Court's most recent decision in *Wackenhut* shows that trial judges should zealously consider all other available evidence when determining prejudice, even testimony from the spoliator's own employees,³⁸⁸ and that “[t]he difference in kind and quality between the available evidence and the spoliated evidence”³⁸⁹ is not all that important. It further shows that the Court is unlikely to find intentional spoliation when data merely erases “on its own” according to routine procedure, even when the data owner is fully aware that litigation is imminent but not yet filed. As a result, decisions following *Brookshire* demonstrate that courts are now finding curious ways to avoid the harshest spoliation sanctions. Thus, despite purporting to take a strong position against spoliation, *Brookshire* effectively makes it near impossible to prevail on a motion requesting a spoliation jury instruction.

Although cases in the early 2000s initiated an increase in the number of severe sanctions relating to the destruction of electronically stored information, such sanctions have fallen out of favor among courts and rule makers. Changes in Texas spoliation law and proposed amendments to the Federal Rules of Civil Procedure will make it harder for litigants to show intentional spoliation of electronic evidence and meet the other heightened requirements to support a spoliation jury instruction. Thus, the era of the spoliation instruction may be ending, so these instructions will likely become a fabled phenomenon, rarely seen in future litigation. One hopes that courts and rule makers will remember the cases that gave rise to the spoliation instruction in the first place, and realize that the purportedly high preservation costs associated with electronic evidence are largely overstated and will likely be reduced in time through operational and technological advances in data management and discovery practices.

388. *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 921 (Tex. 2015) (per curiam).

389. *Brookshire*, 438 S.W.3d at 22.