The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

April 18, 2016

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rule of Appellate Procedure 49. The Court of Criminal Appeals' rules advisory committee has approved the amendments to Rule 49 set out in the attached memorandum from the Court of Criminal Appeals' general counsel, Sian Schilhab. The Supreme Court and the Court of Criminal Appeals generally approve each other's changes in the appellate rules.

The Court also requests that the Committee draft amendments to clarify when a motion for rehearing en banc may be filed. Rule 49.7 states that a motion for en banc reconsideration may be filed "within 15 days after the court of appeals' judgment or order, *or when permitted*, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration." The "when permitted" language has caused confusion among practitioners and courts.

Texas Rule of Civil Procedure 183. Rule 183 authorizes the trial court to direct that a court-appointed interpreter's fee be taxed against a party as court costs. In the attached letter, the U.S. Department of Justice takes the position that charging a party for the cost of an interpreter violates federal civil rights laws.

Time for Jury Demand in a De Novo Appeal in County Court. In the attached memorandum, Justice Christopher points out a conflict in the Rules of Civil Procedure on the time for filing a jury demand in county court in a de novo appeal from an eviction judgment and proposes amendments to resolve the conflict.

Discovery Rules. The Court requests that the Committee review Part II, Section 9 of the Rules of Civil procedure and consider whether changes should be made to modernize the rules, increase efficiency, and decrease the cost of litigation. The Committee should specifically consider the December 2015 amendments to the Federal Rules of Civil Procedure and the attached proposals of the State Bar Court Rules Committee to amend Rule 192.3 and to add a new rule governing spoliation.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

MEMORANDUM

To: Judge Alcala, all CCA Judges, and Martha Newton
From: Sian R. Schilhab
Date: November 10, 2015
Subject: Proposed Changes to Texas Rule of Appellate Procedure 49.5, 49.6, and 49.7

Judges and Martha –

As I understand it, TRAP Rules 49.5, 49.6, and 49.7 are ready for review and potential passage by both Courts. Following are the changes to these rules as proposed by the CCA Rules Committee:

49.5. Further Motion for Rehearing

(a) An appellate court must not consider a further motion for rehearing that does not comply with these requirements.

(b) After a motion for rehearing is ~~decided~~ruled on, a further motion for rehearing may be filed within 15 days of the court's action if the court:

(~~a~~1) modifies its judgment;

(~~b~~2) vacates its judgment and renders a new judgment; or

(~~c~~3) issues a different opinion.

(c) A further motion for rehearing that does not comply with these rules will not toll the time for filing a petition for discretionary review.

49.6. Amendments

A motion for rehearing or en banc reconsideration may be amended as a matter of right anytime before the 15-day period allowed for filing the motion expires~~,~~ as long as the court of appeals has not yet ruled on the motion. ~~and~~ The motion may be amended with leave of the court~~,~~ anytime before the court of appeals ~~decides~~rules on the motion.

49.7. En Banc Reconsideration

(a) A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing. The motion must be filed within 15 days after the court of appeals' judgment or order, or when permitted, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing ~~or en banc reconsideration~~.

(b) An appellate court must not consider a further motion for en banc reconsideration that does not comply with these requirements.

(c) After a motion for en banc reconsideration is ruled on, a further motion for en banc reconsideration may be filed within 15 days of the court's action if the court:

(1) modifies its judgment;

(2) vacates its judgment and renders a new judgment; or

(3) issues a different opinion.

(d) A further motion for en banc reconsideration that does not comply with these rules will not toll the time for filing a petition for discretionary review.
(e) While the court has plenary power, a majority of the en banc court may, with or without a motion, order en banc reconsideration of a panel's decision. If a majority orders reconsideration, the panel's judgment or order does not become final, and the case will be resubmitted to the court for en banc review and disposition.

U. S. Department of Justice

Civil Rights Division

Assistant Attorney General *Washington, D.C. 20530*

August 16, 2010

Dear Chief Justice/State Court Administrator:

In the past decade, increasing numbers of state court systems have sought to improve their capacity to handle cases and other matters involving parties or witnesses who are limited English proficient (LEP). In some instances the progress has been laudable and reflects increased recognition that language access costs must be treated as essential to sound court management. However, the Department of Justice (DOJ) continues to encounter state court language access policies or practices that are inconsistent with federal civil rights requirements. Through this letter, DOJ intends to provide greater clarity regarding the requirement that courts receiving federal financial assistance provide meaningful access for LEP individuals.

Dispensing justice fairly, efficiently, and accurately is a cornerstone of the judiciary. Policies and practices that deny LEP persons meaningful access to the courts undermine that cornerstone. They may also place state courts in violation of long-standing civil rights requirements. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.* (Title VI), and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3789d(c) (Safe Streets Act), both prohibit national origin discrimination by recipients of federal financial assistance. Title VI and Safe Streets Act regulations further prohibit recipients from administering programs in a manner that has the effect of subjecting individuals to discrimination based on their national origin. *See* 28 C.F.R. §§ 42.104(b)(2), 42.203(e).

The Supreme Court has held that failing to take reasonable steps to ensure meaningful access for LEP persons is a form of national origin discrimination prohibited by Title VI regulations. *See Lau v. Nichols*, 414 U.S. 563 (1974). Executive Order 13166, which was issued in 2000, further emphasized the point by directing federal agencies to publish LEP guidance for their financial assistance recipients, consistent with initial general guidance from DOJ. *See* 65 Fed. Reg. 50,121 (Aug. 16, 2000). In 2002, DOJ issued final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 67 Fed. Reg. 41,455 (June 18, 2002) (DOJ Guidance). The DOJ Guidance and subsequent technical assistance letters from the Civil Rights Division explained that court systems receiving federal financial assistance, either directly or indirectly, must provide meaningful access to LEP persons in order to comply with Title VI, the Safe Streets Act, and their implementing regulations. The federal requirement to provide language assistance to LEP individuals applies notwithstanding conflicting state or local laws or court rules.

Despite efforts to bring courts into compliance, some state court system policies and practices significantly and unreasonably impede, hinder, or restrict participation in court proceedings and access to court operations based upon a person's English language ability. Examples of particular concern include the following:

1. Limiting the types of proceedings for which qualified interpreter services are provided by the court. Some courts only provide competent interpreter assistance in limited categories of cases, such as in criminal, termination of parental rights, or domestic violence proceedings. DOJ, however, views access to *all* court proceedings as critical. The DOJ Guidance refers to the importance of meaningful access to courts and courtrooms, without distinguishing among civil, criminal, or administrative matters. *See* DOJ Guidance, 67 Fed. Reg. at 41,462. It states that "every effort should be taken to ensure competent interpretation for LEP individuals during *all* hearings, trials, and motions," *id.* at 41,471 (emphasis added), including administrative court proceedings. *Id.* at 41,459, n.5.

Courts should also provide language assistance to non-party LEP individuals whose presence or participation in a court matter is necessary or appropriate, including parents and guardians of minor victims of crime or of juveniles and family members involved in delinquency proceedings. Proceedings handled by officials such as magistrates, masters, commissioners, hearing officers, arbitrators, mediators, and other decision-makers should also include professional interpreter coverage. DOJ expects that meaningful access will be provided to LEP persons in all court and court-annexed proceedings, whether civil, criminal, or administrative including those presided over by non-judges.

2. Charging interpreter costs to one or more parties. Many courts that ostensibly provide qualified interpreters for covered court proceedings require or authorize one or more of the persons involved in the case to be charged with the cost of the interpreter. Although the rules or practices vary, and may exempt indigent parties, their common impact is either to subject some individuals to a surcharge based upon a party's or witness' English language proficiency, or to discourage parties from requesting or using a competent interpreter. Title VI and its regulations prohibit practices that have the effect of charging parties, impairing their participation in proceedings, or limiting presentation of witnesses based upon national origin. As such, the DOJ Guidance makes clear that court proceedings are among the most important activities conducted by recipients of federal funds, and emphasizes the need to provide interpretation free of cost. Courts that charge interpreter costs to the parties may be arranging for an interpreter's presence, but they are not "providing" the interpreter. DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the persons involved.

3. Restricting language services to courtrooms. Some states provide language assistance only for courtroom proceedings, but the meaningful access requirement extends to court functions that are conducted outside the courtroom as well. Examples of such court-managed offices, operations, and programs can include information counters; intake or filing offices; cashiers; records rooms; sheriff's offices; probation and parole offices; alternative dispute resolution programs; *pro se* clinics; criminal diversion programs; anger management classes; detention facilities; and other similar offices, operations, and programs. Access to these points of public contact is essential to the fair administration of justice, especially for unrepresented LEP persons. DOJ expects courts to provide meaningful access for LEP persons to such court operated or managed points of public contact in the judicial process, whether the contact at issue occurs inside or outside the courtroom.

4. Failing to ensure effective communication with court-appointed or supervised personnel. Some recipient court systems have failed to ensure that LEP persons are able to communicate effectively with a variety of individuals involved in a case under a court appointment or order. Criminal defense counsel, child advocates or guardians *ad litem*, court psychologists, probation officers, doctors, trustees, and other such individuals who are employed, paid, or supervised by the courts, and who are required to communicate with LEP parties or other individuals as part of their case-related functions, must possess demonstrated bilingual skills or have support from professional interpreters. In order for a court to provide meaningful access to LEP persons, it must ensure language access in all such operations and encounters with professionals.

DOJ continues to interpret Title VI and the Title VI regulations to prohibit, in most circumstances, the practices described above. Nevertheless, DOJ has observed that some court systems continue to operate in apparent violation of federal law. Most court systems have long accepted their legal duty under the Americans with Disabilities Act (ADA) to provide auxiliary aids and services to persons with disabilities, and would not consciously engage in the practices highlighted in this letter in providing an accommodation to a person with a disability. While ADA and Title VI requirements are not the same, existing ADA plans and policy for sign language interpreting may provide an effective template for managing interpreting and translating needs for some state courts.

Language services expenses should be treated as a basic and essential operating expense, not as an ancillary cost. Court systems have many operating expenses – judges and staff, buildings, utilities, security, filing, data and records systems, insurance, research, and printing costs, to name a few. Court systems in every part of the country serve populations of LEP individuals and most jurisdictions, if not all, have encountered substantial increases in the number of LEP parties and witnesses and the diversity of languages they speak. Budgeting adequate funds to ensure language access is fundamental to the business of the courts.

We recognize that most state and local courts are struggling with unusual budgetary constraints that have slowed the pace of progress in this area. The DOJ Guidance acknowledges that recipients can consider the costs of the services and the resources available to the court as part of the determination of what language assistance is reasonably required in order to provide meaningful LEP access. *See id.* at 41,460. Fiscal pressures, however, do not provide an exemption from civil rights requirements. In considering a system's compliance with language access standards in light of limited resources, DOJ will consider all of the facts and circumstances of a particular court system. Factors to review may include, but are not limited to, the following:

- The extent to which current language access deficiencies reflect the impact of the fiscal crisis as demonstrated by previous success in providing meaningful access;
- The extent to which other essential court operations are being restricted or defunded;
- The extent to which the court system has secured additional revenues from fees, fines, grants, or other sources, and has increased efficiency through collaboration, technology, or other means;
- Whether the court system has adopted an implementation plan to move promptly towards full compliance; and
- The nature and significance of the adverse impact on LEP persons affected by the existing language access deficiencies.

DOJ acknowledges that it takes time to create systems that ensure competent interpretation in all court proceedings and to build a qualified interpreter corps. Yet nearly a decade has passed since the issuance of Executive Order 13166 and publication of initial general guidance clarifying language access requirements for recipients. Reasonable efforts by now should have resulted in significant and continuing improvements for all recipients. With this passage of time, the need to show progress in providing all LEP persons with meaningful access has increased. DOJ expects that courts that have done well will continue to make progress toward full compliance in policy and practice. At the same time, we expect that court recipients that are furthest behind will take significant steps in order to move promptly toward compliance.

The DOJ guidance encourages recipients to develop and maintain a periodically-updated written plan on language assistance for LEP persons as an appropriate and cost-effective means of documenting compliance and providing a framework for the provision of timely and reasonable language assistance. Such written plans can provide additional benefits to recipients' managers in the areas of training, administrating, planning, and budgeting. The DOJ Guidance goes on to note that these benefits should lead most recipients to document in a written LEP plan their language assistance services, and how staff and LEP persons can access those services. In court systems, we have found that meaningful access inside the courtroom is most effectively implemented in states that have adopted a court rule, statute, or administrative order providing for universal, free, and qualified court interpreting. In addition, state court systems that have strong leadership and a designated coordinator of language services in the office of the court administrator, and that have identified personnel in charge of ensuring language access in each courthouse, will more likely be able to provide effective and consistent language access for LEP

individuals. Enclosed, for illustrative purposes only, are copies of Administrative Order JB-06-3 of the Supreme Judicial Court of Maine, together with the September 2008 Memorandum of Understanding between that court and DOJ. Also enclosed for your information is a copy of "Chapter 5: Tips and Tools Specific to Courts" from DOJ, *Executive Order 13166 Limited English Proficiency Document: Tips and Tools from the Field* (2004).

The Office of Justice Programs provides Justice Assistance Grant funds to the states to be used for state and local initiatives, technical assistance, training, personnel, equipment, supplies, contractual support, and criminal justice information systems that will improve or enhance criminal justice programs including prosecution and court programs. Funding language services in the courts is a permissible use of these funds.

DOJ has an abiding interest in securing state and local court system compliance with the language access requirements of Title VI and the Safe Streets Act and will continue to review courts for compliance and to investigate complaints. The Civil Rights Division also welcomes requests for technical assistance from state courts and can provide training for court personnel. Should you have any questions, please contact Mark J. Kappelhoff, Acting Chief, Federal Coordination and Compliance Section (formally known as Coordination and Review Section) at (202) 307-2222.

Sincerely,

Thomas E. Perez
Assistant Attorney General

Enclosures

Memorandum

To: Justice Nathan Hecht
Martha Newton

From: Tracy Christopher

Date: February 25, 2016

Re: Rules conflicts

Our court has had two cases involving an apparent conflict between the Justice Court rules and the District and County Court rules governing a de novo appeal from an eviction from JP court.

Rule 510.12 states "An eviction case appealed to county court will be subject to trial at any time after the expiration of 8 days after the date the transcript is filed in the county court." This conflicts with the general rule requiring 45 days notice for trial (Rule 245). While we could certainly construe the two rules and conclude that the more specific rule applies, it raises another problem—the jury demand. A jury demand in JP court needs to be on file 3 days before trial (Rule 510.7), while a jury demand in county court requires 30 days (Rule 216). There is nothing importing the 3 day demand into county court. It then becomes impossible for a person with only 8 days notice of trial to timely request a jury.

I understand the desire to deal with these cases promptly but it would be good to cross reference 510.12 and 245, and to amend 510.10 to include a 3 day jury demand for the de novo appeal, notwithstanding rule 216.

My suggestions are:

Amend Rule 510.12

"Notwithstanding Rule 245, a~~A~~n eviction case appealed to county court will be subject to trial at any time after the expiration of 8 days after the date the transcript is filed in the county court."

Amend Rule 510.10 to add a new section (c) and renumber (c) to (d)

(c) *Jury Trial Demanded.* Notwithstanding Rule 216, any party may file a written demand for trial by jury by making a request to the county court at least 3 days before the trial date. The demand must be accompanied by payment of a jury fee or by filing a sworn statement of inability to pay the jury fee.

Thank you for considering these changes.

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 192.3(c)

I. Exact language of existing Rule: TRCP 192.3(c)

(c) **Persons with knowledge of relevant facts.** A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation.

II. Proposed changes to existing rule:

(c) **Persons with knowledge of relevant facts.** A party may obtain discovery of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. A responding party may not satisfy its obligations to provide the addresses and telephone numbers of persons having knowledge of relevant facts by providing the address and telephone number of counsel. A person has knowledge of relevant facts when that person has or may have knowledge of any discoverable matter. The person need not have admissible information or personal knowledge of the facts. An expert is "a person with knowledge of relevant facts" only if that knowledge was obtained firsthand or if it was not obtained in preparation for trial or in anticipation of litigation.

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

The Committee's proposed amendment seeks to address the practice of only providing an attorney's information rather than a witness' actual information in response to discovery requests. Oftentimes when a witness is a party or is represented by the party's attorney, the attorney provides his or her address and telephone number instead of the witness's address and telephone number. This can lead to problems contacting the witness when the party settles or is otherwise no longer in the case. This proposed amendment would resolve that problem.

Respectfully submitted,

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

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 192.3(d)

I. Exact language of existing Rule: TRCP 192.3(d)

(d) **Trial witnesses.** A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial.

II. Proposed changes to existing rule:

(d) **Trial witnesses.** A party may obtain discovery of the name, address, and telephone number of any person who is expected to be called to testify at trial. This paragraph does not apply to rebuttal or impeaching witnesses the necessity of whose testimony cannot reasonably be anticipated before trial. If requested by interrogatory, and unless the court orders otherwise, at least 45 days before trial a party must provide the name and, if not previously provided, the address, and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises.

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

Currently, Rule 192.3(d) permits a party to discover trial witnesses. However, in practice a discovery request seeking that information rarely receives a meaningful response. The underlined proposed addition to the rule—primarily adapted from FED. R. CIV. P. 26(a)(3)(A)(i) and FED. R. CIV. P. 26(a)(3)(B)—places an obligation upon the party responding to a discovery request to provide its trial witness and also to identify those who may be called if the need arises. Unlike the federal counterpart, the proposed rule does not require that the information be provided in the absence of a discovery request.

Respectfully submitted,

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

STATE BAR OF TEXAS COMMITTEE ON COURT RULES

PROPOSED NEW SPOLIATION RULE OF CIVIL PROCEDURE 215.7

I. Exact language of existing Rule: None.

II. Proposed New Spoliation Rule: RULE 215.7. Spoliation

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

(1) another party intentionally or negligently breached a duty to preserve a document or tangible thing—as described by Rule 192.3(b)—that may be material and relevant to a claim or defense;

(2) the document or tangible thing cannot be reproduced, restored, or replaced through additional discovery; and

(3) the movant is unfairly prejudiced as a result.

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

(b) *Standards.*

(1) The court must consider the spoliation motion outside the presence of the jury, as provided in Texas Rule of Evidence 104. The court must determine the spoliation motion based on the pleadings, any stipulations of the parties, any affidavits, documents or other testimony filed by a party, discovery materials, and any oral testimony. Unless the court orders otherwise, if the movant will be relying on affidavits, the movant must file any affidavits at least fourteen days before the hearing date and if the non-movant will be relying on affidavits, the non-movant must file any controverting affidavits at least seven days before the hearing date.

(2) To find spoliation, the court must find that the allegedly spoliating party had a duty to preserve a document or tangible thing that may be material and relevant to a claim or defense and breached that duty by intentionally or negligently destroying the document or tangible thing or by failing to take reasonable steps to preserve the document or tangible thing.

(3) If the court finds that spoliation occurred, the remedies ordered by the court must be proportionate to the wrongdoing and not excessive. The court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party based on the relevance of the spoliated evidence to key issues in the case, the harmful effect of the evidence on the spoliating party's case, the degree of helpfulness of the evidence to the nonspoliating party's case, and whether the evidence is cumulative of other available evidence.

(4) In the order, the court must specify the conduct that formed the basis or bases for its ruling.

(c) *Spoliation Remedies.* If the court finds that spoliation occurred, the court may make such orders in regard to the spoliation as are just, and among others the following[1] :

(1) If the court finds that a nonspoliating party is prejudiced because of the loss of the document or tangible thing, then the court may order one or more of the following remedies:

(A) awarding the nonspoliating, prejudiced party the reasonable expenses, including attorneys' fees and costs, caused by the spoliation; or
(B) excluding evidence.

(2) If the court finds that the spoliating party acted intentionally or acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense, then the court may order an instruction to the jury regarding the spoliation in addition to the remedies in (c)(1). If the court submits a spoliation instruction to the jury, then evidence of the circumstances surrounding the spoliation may be admissible at trial. The admissibility at trial of evidence of the circumstances surrounding the spoliation is governed by the Texas Rules of Evidence.

(3) If the court finds that a party acted with intent to spoliate, then in addition to the remedies set forth in (c)(1) and (c)(2), the court may order one or more of the following remedies:

(A) finding that the lost document or tangible thing was unfavorable to the spoliating party;
(B) striking the spoliating party's pleadings;
(C) dismissing the spoliating party's claims or defenses; or

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

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

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

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

A. General Purpose and Reasons

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

B. The Proposed Rule's 3-Part Structure

The proposed Rule has three parts:

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

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

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

C. The Court's Standards Guiding the Proposed Rule

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

[2] This includes the clarifications of the law of spoliation in Texas in 2014 and 2015 by the Court. *See Wackenhut v. Gutierrez,* 453 S.W.3d 917, 921 (Tex. 2015); *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W3d 9, 19-29 (Tex. 2014); *Petro. Solutions, Inc. v. Head*, 454 S.W.3d 482, 488-89 (Tex. 2014).

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

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

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

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

E. Reference to PJC Instruction

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

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

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

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

Respectfully submitted,

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