706 Liar, Liar, Pants on Fire: How to Establish an Effective Internal Investigation Program

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Faculty Biographies

William C. Johnson

William C. Johnson is the employment counsel for Quest Diagnostics Incorporated, a national provider of clinical laboratory services. He has responsibility for all legal employment matters including managing employment litigation, reviewing all corporate employment policies and benefits, and providing counseling to the human resources community.

Prior to joining Quest Diagnostics, Mr. Johnson was in private practice specializing in all areas of employment and labor law for management.

In addition to his membership with ACCA, Mr. Johnson is cochairman of the Employment and Labor Section of ACCA's New Jersey Chapter. Mr. Johnson also serves as a volunteer mediator for the Equal Employment Opportunity Commission as part of the EEOC's Mediation Program and provides pro bono services in employment matters through the ProBono Partnership.

Mr. Johnson received his undergraduate degree from Cornell University and his JD from Pace University where he was editor-in-chief for the Pace University School of Law.

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Neal O. Williams is associate general counsel for St. Jude Medical Inc.'s Cardiac Rhythm Management Division in Sylmar, CA, where they design and manufacture implantable medical devices such as pacemakers and defibrillators. He provides counsel on labor and employment law and general business law matters. His hand in revamping the employee screening and hiring process at St. Jude was singled out for recognition in the "2002 Profiles In Excellence" issue of *Human Capital*.

Previously, Mr. Williams served as in-house corporate counsel for TIG Insurance Group, Transamerica Insurance Company, and other companies in the insurance industry. His responsibilities included labor and employment law, general business law, and litigation management.

He is an instructor at UCLA Extension, where he teaches employee relations and the legal aspects of human resources law. He also currently serves as pro bono counsel and is a member of the board of directors for Project Touch Corporation, a community-based organization working with at-risk youth.

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Internal Investigations

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I. What Are Internal Investigations?

The internal investigation is a tool used by companies to look into facts after they have received information suggesting that some form of misconduct has been committed either by, or against, the business organization. Due to the implementation of the Federal Organizational Sentencing Guidelines in 1991, internal investigations have become commonplace in the corporate arena. The Guidelines replace much of the federal judges' discretion with mandatory penalties for convicted corporations, including remedial measures and substantial fines.

A. Advantages of performing internal investigations

Management is not required to investigate each time it receives information that there may be wrongdoing committed by or against the company. However, in many instances, events such as complaints from customers or employees are enough to notify management that there is a situation that warrants a closer look. There are several advantages for companies who perform their own internal investigations:

- Performing internal investigations can shield the company from liability, or at least reduce it. Through investigation, the company may become aware of problems or practices which could expose the company to criminal liability, civil lawsuits, or sanctions. Identifying and repairing these problems before a possible outside investigation commences can afford companies the opportunity to take remedial measures, comply with relevant laws or regulatory standards, or eliminate other problems that were previously unknown to management.
- Investigating may help to identify and thwart wrongdoing committed by others against the company.
- Corporations that initiate internal investigations of wrongdoing within the company and report their own misconduct may be afforded certain benefits under the Organizational Sentencing Guidelines.[1]

B. Disadvantages of performing internal investigations

- One unfortunate side effect of conducting internal investigations is that they may disrupt business—employees may be required to abandon their usual duties to take part in the investigation, either to become part of the investigative team or to comply with document and interview requests by investigators. Employee morale and productivity may decrease due to anxiety caused by the investigation.
- Investigations can be time-consuming and may require a considerable amount of resources

[1] See Deputy Attorney General Eric Holder, DOJ Memorandum: "Bringing Criminal Charges Against Corporations," June 1999.

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Many times, knowledge of an internal investigation can be a cause of concern to both management and employees, even if there has been no wrongdoing on their part

- If a government investigation ensues, the corporation may later be forced to waive attorney-client privilege and turn over to the government materials from an internal investigation. Doing this may also waive all objections to producing the same materials to civil litigants.[2]

[2] Cahill, Lisa A., "Internal Investigations: You May Be Working for the Government," *Outside Counsel: Enforcement and Compliance Strategies*, Winter 2001, p. 1.
http://www.acca.com/protected/pubs/oc/winter01/Zuckerman.pdf

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II. When Should Internal Investigations Be Conducted?

Events prompting an investigation can be either internal or external. Events such as customer or vendor complaints, civil lawsuits, government inquiries, or news media inquiries are external events that often lead to an investigation. However, internal events such as routine internal audits, employee complaints, or anonymous tips regarding the company's ethics are more likely to prompt internal investigations.[3]

Because it is a fiduciary duty of a corporation's management and board of directors to act in good faith with the care of an ordinarily prudent person, internal investigations are a useful tool in ensuring that their decisions are well-informed, and they are thereby acting in the corporation's best interest. Absent overt evidence of wrongdoing by the corporation or its employees, there is no affirmative duty to investigate or to report findings, unless such duty is specifically imposed by statute. Although some companies may do periodic internal audits as routine, many companies choose to perform internal investigations only when management determines that they are necessary. Corporations are given broad discretion in the exercise of their business judgment.

Several issues may be considered in determining whether an internal investigation is appropriate, including:

- The titles, roles and responsibilities of the people alleged to have engaged in the wrongdoing;
- Whether the company was a victim or the perpetrator of the alleged wrongdoing;
- If the company was a victim of the wrongdoing, is it likely to recur and will the company likely recover much, if anything, in pursuing the wrongdoers?
- The nature, length, and scope of the alleged conduct in question;
- The dollar value of any loss to the company if it was a victim of any wrongdoing;
- Does the wrongdoing involve ongoing business conduct or existing business relationships, or is it historical and unlikely to recur due to changed business practices or other circumstances?
- The likely—not merely the possible—potential economic exposure to the company;
- Whether alleged wrongdoing, if true, is placing any third party at risk;
- Whether the allegations are susceptible to verification;
- The cost and effort of the investigation as compared with any results it may yield; and

[3] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:2, citing a Coopers & Lybrand survey of general counsel conducted in the mid-1990s, finding that over 60 percent of internal investigations occurred as a result of internal events.

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- The nature and source of allegations, including the motivation and the potential gain to those making the allegation, if that party is known.[4]

Because performing internal investigations can prove to be costly and distracting, an important function of in-house counsel is to determine whether, given the issues at hand, an investigation is necessary. Once the decision has been made to undertake an internal investigation, it should be "[well]-planned and executed with a definite objective and strategy."[5] Corporations that fail to plan each step of the investigation and consider the potential consequences place themselves at risk for potentially devastating consequences, including:

- Allegations of obstruction of justice
- Damage to the corporation's reputation
- Damage to employee morale
- Creation of negative evidence that may be used in future criminal or civil proceedings
- Destruction of evidence that could be helpful in the company's defense

[4] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:2.
[5] Id. at § 35:1.

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III. Who Should Conduct Internal Investigations?

Investigations should be conducted by a team of professionals who have a defined objective, and knowledge of the company as well as the issues it seeks to resolve. An important consideration in creating an investigative team is whether the corporation should use in-house counsel or employ outside counsel to lead the investigation. Factors to consider include:

- The purpose of the investigation
- The nature and complexity of the problem
- Whether the corporation is a victim of wrongdoing, or whether the corporation is investigating allegations of its own wrongdoing, thereby calling into question in-house counsel's objectivity.

In deciding whether to use in-house counsel or to retain outside counsel to conduct the investigation, the following advantages of each should be considered:

Advantages of in-house counsel	**Advantages of outside counsel**
o More familiar with company's organization, personnel, and culture, thereby enabling things to proceed more quickly and less expensively.	o An outside attorney who specializes in corporate internal investigations will probably have more experience dealing with similar issues.
o Employees may be more forthcoming and comfortable when talking with other members of the organization rather than with an outside lawyer.[6]	o If the goal is to investigate allegations of the company's wrongdoing, outside counsel will probably be viewed as being more objective.
	o Since many prosecutors/ regulators view in-house counsel as part of the corporation, outside counsel may have more credibility dealing with the government.

[6] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:4.

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Advantages of outside counsel (cont'd)

- Should there be a subsequent government investigation, evidence generated by an investigation by outside counsel will more easily be protected by the attorney-client privilege and work-product doctrine.

Additionally, depending on the scope and complexity, corporate counsel may not have sufficient staff and resources available to conduct the investigation. Companies should keep in mind that a corporation that relies on other employees, such as managers, security officers, and even in-house counsel, will face greater difficulty in protecting the fruits of its investigation.[7]

[7] Villa, John, Corporate Counsel Guidelines, Volume 2, § 5.11 (A).

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IV. Scope Of Investigation And Process

A. Preparation

In preparing to undertake an internal investigation, there are several steps that both counsel and management should take:

1. Define the issues;
2. Clearly define the investigation's objective;
3. Determine the likely scope of the investigation, "that is, what the lawyer is authorized and expected to investigate;"[8]
4. Plan the way the investigation will be conducted;
5. Plan a likely time frame for the investigation to be completed; and
6. Create a team to conduct the investigation.

Counsel should seek authority from management that will be sufficient to conduct a credible and competent investigation of the issues, and the scope of the investigation should be agreed upon in writing by both counsel and the organization.[9] It is important to note that "an investigation which lacks credibility because of too many restrictions will cause as many problems as the failure to conduct one at all."[10]

B. Creating the investigative team

It is almost always beneficial for the corporation to have the investigation led by counsel. There are two major benefits of doing this: an attorney will be more cognizant of potential liability issues, and any work papers or reports generated as a result of the investigation will more likely be protected under the attorney-client privilege and work product doctrine. Such documents, if prepared by someone other than an attorney, will probably not be protected.

Even if experts are hired to take part in the investigation, the corporation will, nevertheless, benefit from them working closely with a senior lawyer.[11] Ideally, the investigation team will be comprised of both in-house and outside counsel working together, as well as experts, if necessary, from both inside and outside the corporation.

C. Document Collection

Generally, document collection and review should precede employee interviews. The following steps should be taken in collecting, preserving, and reviewing relevant documents:

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[8] Wallance, Gregory, *Conducting Internal Investigations After Enron*, Corporate Counsellor, April 2002.
[9] Wallance, Gregory, *Conducting Internal Investigations After Enron*, Corporate Counsellor, April 2002.
[10] Id.
[11] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:4.

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- Careful planning should occur before the collection process begins.
- The company should issue a "non-destruct memorandum" to employees who may hold relevant documents.[12] This memo should include direction to preserve electronic documents as well. Try to make the request as non-alarming as possible.[13]
- Investigators should also be aware of the company's routine document destruction policy and take affirmative steps to ensure that key documents, in both paper and electronic form, are not destroyed.[14]
- In-house counsel must work with knowledgeable managers to identify a knowledgeable team of people who can be of assistance in this process, such as paralegals.[15]
- Conduct limited interviews of people who can explain:
    1. What the records are
    2. Who would be the people most likely to have copies of those records
    3. Whether those people are inside or outside the company,
    4. How those records are physically kept
    5. When and how those documents, or copies of them, may be destroyed in a normal course of business.[16]
- Consider the impact that pulling these documents may have on the company's ongoing business. Copies of important documents may need to be made before forwarding them to the investigative team.[17]
- The team should prepare and disseminate a list specifying, in as much detail as possible, the documents it is seeking from employees throughout the company.[18]
- Prior to document collection, counsel should prepare by deciding what to do with documents once retrieved—where they will be stored; who will be involved in their review; what will they be reviewed for; and what will be done with them once the review is complete.[19]

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[12]For more information on document retention, please see ACCA's *Records Retention* InfoPAK[SM]. www.acca.com/infopaks/recretent.html.
[13] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:12.
[14] Id.
[15] Id. at § 35:13.
[16] Id.
[17] Id.
[18] Id.
[19] Id.

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- After documents are received, their source should be recorded, and they should be organized in a fashion that makes them accessible and understandable in context. Electronic organization usually works best.[20]

D. Interviewing Witnesses

The portion of the internal investigation that presents perhaps the most significant challenges is the witness interview. An important factor that is often overlooked is the identity of the interviewers. However, an interviewer's personality, many times, is very determinative of how much information is gained from an interview.[21] At least two interviewers should be present for each interview, and counsel should avoid allowing a non-lawyer investigator to lead important interviews.[22] The following factors should be considered before interviewing witnesses:

- Timing and location of interview;
- Who should conduct the interview;
- In preparing for an interview, counsel should become familiar with documents relevant to the witness;
- The comfort of the witness being interviewed should be taken into consideration in an effort to facilitate candid discussion;
- Be aware of any potential bias that may be held by the witness;
- Decide whether and how to memorialize the interview.[23] It is preferable that verbatim notes or quotes not be written down.[24]

At the beginning of the interview, each witness must be advised of the following facts, commonly referred to as the *Upjohn* warning[25]:

1. Counsel represents the corporation, not the employee;

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[20] Id. at § 35:14.
[21] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:16.
[22] Id.
[23] Id.
[24] In certain instances, verbatim or substantially verbatim statements of employees may be required to be disclosed. For example, the "reverse-*Jencks*" doctrine requires that when an indicted corporation calls an employee as a defense witness at trial, the corporation must produce for the government's use on cross-examination, that witness' prior verbatim statements, as they relate to the subject matter of the witness' testimony on direct. Therefore, witness statements memorialized by tape-recordings, written statements or summaries of interviews that have been signed, reviewed, or adopted by the witness, and other documents purporting to quote the employee's responses to questions posed by counsel during an interview will likely be given no protection. As a general rule, to protect confidentiality, counsel should restrict his writing (as well as the writing of others present during the interview) to notes. Villa, John, Corporate Counsel Guidelines, Volume 2, § 5.13 (A).
[25] See *United States v. UpJohn*, 449 U.S. 383 (1981). See page 13 of this InfoPAK℠ for an in-depth discussion of this case.

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2. The purpose of the interview is to enable counsel to provide legal advice to the corporation;
3. The information provided by the employee initially will be treated as confidential. However, it is solely the right of the corporation to determine whether to maintain confidentiality or to disclose the information to law enforcement agencies or other third parties at a later date.

The employee should also be advised that he/she is expected to answer the questions fully and truthfully, and should not discuss the interview with anyone, either inside or outside the corporation (other than his or her own attorney). Depending on the circumstances, counsel may choose to inform the employee that he/she is free to retain counsel.[26] The failure by counsel to provide these necessary warnings prior to the interview may not only result in ethical violations, but may also jeopardize the confidentiality of the information received and the company's ability to invoke the attorney-client privilege later on.[27]

It is important to note that since 1975, unionized employees have had the right to insist on the "presence of a union representative during any investigative interview which may lead to disciple of that employee."[28] This is conditioned on the fact that the union representative is not permitted to hamper the interview in any way.[29] Recently, the NLRB extended this right to all employees, including those not represented by a union, when it held that "non-union employees have the right, upon request, to be accompanied in an interview by a co-worker if the employee reasonably believes that disciplinary action may result from the interview."[30]

The following are some guidelines that may be effective in questioning witnesses:

- Review relevant documents and prepare a written outline of topics to be covered prior to interview;
- If possible, choose an interview location that will put the witness at ease;
- *Upjohn* warnings may be given ahead of time in the form of a non-threatening memorandum that confirms the time and place of the interview, instead of stating them orally at the beginning of the interview;
- Begin with simpler topics before moving on to more difficult points;
- If possible, ask non-leading questions that will engage the witness in a dialogue;

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[26] Wallance, Gregory J. & Waks, Jay W., *Internal Investigation of Suspected Wrongdoing by Corporate Employees*. Practicing Law Institute, Corporate Law and Practice Course Handbook Series (February 2000).
[27] See ABA Model Rules of Professional Conduct, Rule 1.13 (d)-(e), Rule 4.3 (1998).
[28] Id. See also NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).
[29] Id. See also New Jersey Bell Tel. Co., 308 NLRB No. 32 (1992).
[30] Savarese, John F. & Miller, Carol, *Crisis Management & Business Recovery: Are You Prepared? Protecting Privilege and Dealing Fairly With Employees While Conducting an Internal Investigation*, Practicing Law Institute, Corporate Law and Practice Course Handbook Series, February 2002, quoting Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92 (2000).

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- Understand that sometimes the witness will not know the answers to questions; and
- Try to empathize with the inevitable stress and anxiety of the witness, and account for that in every aspect of your planning and questioning.[31]

Several courts have held that communications between counsel for the organization and its former employees concerning their former employment are also privileged because former employees may possess information needed by counsel to advise the corporate client.[32] It is possible for the attorney-client privilege to survive even after an employee has left the company. Courts have also been liberal in allowing ex parte interviews of former employees since they are not in the same position to bind the company as current employees, and the same considerations of fairness are not necessarily present.[33]

E. Employees' duty to cooperate

Employees owe their employers a duty of loyalty, and this duty has been applied by the courts, to an employee's conduct during internal investigations. Employees are required to cooperate with reasonable requests of employers during internal investigations, such as interviews regarding matters within the employee's scope of employment and document requests.[34] In some states, this duty is created by statute, while in others, it is implied by the courts.[35]

Whether an employee can be terminated for refusal to cooperate with an internal investigation is a question of state law. In certain states, where employment for an unspecified term is considered "at will," an employee can be fired for any reason. In other states, employers must meet a "good cause" standard.[36] Where the "good cause" standard is applied, courts consider several factors in determining whether the employee's refusal to cooperate constitutes "good cause:"

- The nature of the investigation;
- The importance of the employee's information in relation to the investigation;
- Whether other alternative means of discovering the information exist;
- The corporation's purpose in questioning the employee;
- The employee's position in the company;
- The employee's reason for withholding the information; and

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[31] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:18-19.
[32] Wallance, Gregory J. & Waks, Jay W., *Internal Investigation of Suspected Wrongdoing by Corporate Employees*. Practicing Law Institute, Corporate Law and Practice Course Handbook Series (February 2000).
[33] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:20.
[34] Savarese, John F. & Miller, Carol, *Crisis Management & Business Recovery: Are You Prepared? Protecting Privilege and Dealing Fairly With Employees While Conducting an Internal Investigation*, Practicing Law Institute, Corporate Law and Practice Course Handbook Series, February 2002.
[35] Id. See also United States v. Sawyer, 878 F. Supp. 295, 296 (D. Mass 1995) and Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143, 148 (1 superst Dep't. 1994).
[36] Id.

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- Any other relevant facts.[37]

In certain cases, the employee's conduct would meet the "good cause" standard and the employee could, therefore, be terminated for insubordination. Hence, "the employee is free to leave or to refuse to answer questions only at his/her own peril."[38] To ensure that all employees are aware of their duty of loyalty to the company, "personnel policies should specifically provide that all employees are required to cooperate in an investigation and that failure to do so will result in disciplinary action, up to and including termination."[39]

[37] Id.
[38] Wallance, Gregory J. & Waks, Jay W., *Internal Investigation of Suspected Wrongdoing by Corporate Employees*. Practicing Law Institute, Corporate Law and Practice Course Handbook Series (February 2000).
[39] Id.

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V. Protecting The Fruits Of The Investigation From Disclosure

A primary function of internal investigations is to provide management with an accurate, timely assessment of the company's criminal, civil or administrative exposure, if any. Without the proper safeguards, however, the investigation may be discoverable by the government or other adverse parties.[40]

A. Attorney-Client Privilege

The corporate attorney-client privilege applies to communications between employees of the corporation and outside counsel, as well as to in-house counsel acting as legal counsel and not merely as a business adviser. This privilege belongs solely to the client corporation, and counsel has a duty to assert this privilege on the client's behalf if he/she believes that it applies.[41] This privilege also extends to communications to agents, consultants, and subordinates of an attorney working to assist the attorney in rendering legal advice.[42]

Once the decision has been made to conduct an internal investigation, there are several options corporations should employ to protect the attorney-client privilege:

- Corporate management should formally authorize an internal investigation in writing. This is known as the "Upjohn letter" from the Supreme Court case, *United States v. Upjohn*, 449 U.S. 383 (1981). In this case, the Supreme Court held that the policies served by the attorney-client privilege outweighed the government's need for convenience in obtaining information gathered by the corporate defendant's internal investigation. "The Court found the corporate attorney-client privilege applicable in *Upjohn* based on the following facts:
    1. Communications were made by corporate employees to counsel;
    2. Communications were made at the direction of corporate superiors in order for the company to obtain legal advice from counsel;
    3. The employees were aware that the communications were being made in order for the company to obtain legal advice;
    4. The information needed was not available from upper management;

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[40] MacKay, Scott W., *A Primer for Lockheed Martin Corporation In-House Counsel: Handling Government and Internal Investigations, p. 18 (March 2002).*
www.acca.com/protected/legres/internali/investigationsprimer.pdf

[41] *Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967) ("Not only may an attorney invoke the privilege in his client's behalf . . ., but he should do so, for he is duty-bound to raise the claim in any proceeding in order to protect communications made in confidence.")*

[42] MacKay, Scott W., *A Primer for Lockheed Martin Corporation In-House Counsel: Handling Government and Internal Investigations, p. 20 (March 2002).*
www.acca.com/protected/legres/internali/investigationsprimer.pdf

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5. Communications concerned matters within the scope of employees' corporate duties; and
6. The communications were confidential when made and were kept confidential by the company.

Note: If any one of these elements is missing, there is a risk that the communication will not be privileged."[43]

- The authorization should specifically authorize the attorney conducting the investigation to interview employees and to advise them that their cooperation is required. Also, the authorization should direct that the conduct and results of the investigation be kept confidential except as necessary to provide legal advice to senior management.[44]
- Where materials are intended to serve both a legal and business purpose, counsel should clearly state the legal purpose for which they were prepared.[45]
- Documents prepared or gathered should be marked, "**PRIVILEGED & CONFIDENTIAL: ATTORNEY-CLIENT/ WORK PRODUCT**."

The following are types of communications and documents not protected by the attorney-client privilege:

- Transfer of non-privileged documents from the corporation to its attorney;
- Communications made for purposes other than to obtain counsel's professional legal advice, including communications made to third parties;
- Communications for business purposes;
- Attorney advice obtained by the client in furtherance of a future or ongoing crime.[46]

[43] Wallance, Gregory J. & Waks, Jay W., *Internal Investigation of Suspected Wrongdoing by Corporate Employees*. Practicing Law Institute, Corporate Law and Practice Course Handbook Series, p. 8 (February 2000). See also, *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 654 F. Supp. 1334, 1364-65 (D.D.C. 1986), cert. denied, 112 S. Ct. 1777 (1992).*

[44] MacKay, Scott W., *A Primer for Lockheed Martin Corporation In-House Counsel: Handling Government and Internal Investigations, p. 19 (March 2002).*
www.acca.com/protected/legres/internali/investigationsprimer.pdf

[45] Id.

[46] Wallance, Gregory J. & Waks, Jay W., *Internal Investigation of Suspected Wrongdoing by Corporate Employees*. Practicing Law Institute, Corporate Law and Practice Course Handbook Series, p. 9-10 (February 2000).

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B. Work-Product Doctrine

This doctrine has been codified in Fed. R. Civ. P. 26 (b)(3), and protects against discovery of documents and tangible things which are prepared in anticipation of litigation or for a trial.[47] "The fundamental principle underlying the work product doctrine is that a party and its counsel should be allowed to work to prepare the party's case without fear that the product of their work can be viewed by an opponent."[48] There are two types of work-product:

- "Fact" work product—work product that reflects certain facts rather than the attorney's mental impressions, strategies, ideas or opinions. The privilege afforded this type of work product is not absolute; it may be qualified and possibly overcome by a showing of substantial need and undue hardship.
- "Opinion" or non-fact work product—generally regarded as non-discoverable, even upon a showing of substantial need. It may be discoverable in very rare circumstances, such as where a crime of fraud on the part of the lawyer has been shown.[49]

The following is a comparison of the two privileges and the protections they offer:

Attorney-Client Privilege	Work Product Doctrine
· Absolute privilege to be asserted by counsel on client's behalf	· Not absolute—it may be overcome by a showing of substantial hardship or need
· Client is sole holder of the privilege	· Both the lawyer and the client are holders of the privilege
· Applies only to communications with attorney in the capacity of a legal adviser	· Broader privilege in that it protects communications with non-attorneys
	· Narrower in that the communication must be in anticipation of litigation or in preparation for trial[50]

[47] See Fed. R. Civ. P. 26 (b)(3). See also Wallance, Gregory J. & Waks, Jay W., *Internal Investigation of Suspected Wrongdoing by Corporate Employees*. Practicing Law Institute, Corporate Law and Practice Course Handbook Series, p. 8 (February 2000).

[48] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:9.

[49] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:9, citing *In re* Sealed Case, 676 F.2d 793 (D.C. Cir. 1982); Cox v. Administrator U.S. Steel & Carnegie Pension Fund, 17 F.3d 1386 (11th Cir. 1994).

[50] Silverstein, Ira B. *"Hear No Evil, See No Evil" No Longer Viable*, Outside Counsel Corporate Investigations, p. 2 (Summer/Fall 2000).

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C. Self-evaluative Privilege

The "self-critical" or "self-evaluative" privilege has been recognized by a few courts under very limited circumstances. This privilege operates to protect the free flow of information when organizations whose activities affect the public interest engage in self-evaluation.[51] The investigation must meet three basic requirements to qualify for this privilege:

1. The investigation must regard a subject relevant to the public interest;
2. Investigation must be evaluative in nature; and
3. Investigation must be confidential.[52]

The self-evaluative privilege has only been "applied in rare instances—generally in situations such as:

- Medical peer review
- EEOC information reports and affirmative action plans
- Media review of allegations of libel, or
- Reports of environmental deficiencies."[53]

Although there is a slight trend towards the codification of this privilege, currently, it is not given broad deference and should not be relied upon as the sole basis for confidentiality.[54]

It is important to note that for the self-evaluative privilege to apply, it is not necessary that a lawyer participate in the investigation. However, due to the tenuous status of this privilege, companies should ensure that their investigations are conducted or directed by attorneys in order to afford themselves the advantages of asserting the attorney-client privilege and work product doctrine, "whose protections are far more rigid and certain than those afforded by the self-critical doctrine."[55]

D. Steps to protect confidentiality

The most significant consideration for counsel in an investigation is confidentiality. The following are precautions that should be taken to safeguard the integrity of the investigation:

- Managers within the corporation should be given information regarding the investigation solely on a "need to know" basis. An exception to this may be

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[51] Wallance, Gregory J. & Waks, Jay W., *Internal Investigation of Suspected Wrongdoing by Corporate Employees*. Practicing Law Institute, Corporate Law and Practice Course Handbook Series, p. 14 (February 2000), citing Note, "The Privilege of Self-Critical Analysis," 96 Harv. L. Rev. 1083, 1086 (1983).
[52] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:10.
[53] Id.
[54] Id.
[55] Wallance, Gregory J. & Waks, Jay W., *Internal Investigation of Suspected Wrongdoing by Corporate Employees*. Practicing Law Institute, Corporate Law and Practice Course Handbook Series, p. 15 (February 2000).

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where the company's investigation is in response to a well-known government inquiry, and senior management needs to communicate with employees to calm fears, obtain cooperation, and dispel possible misinformation.[56]

- Keep investigative materials secure– in-house counsel should keep written and electronic materials at the company secure by using locked file cabinets, remote or secure office space, and code word access to electronic data. If possible, communication regarding the status or progress of the investigation should be oral, rather than written.[57]
- If outside counsel is conducting the investigation, she—not the corporation—should retain any experts, and those experts should be directed to report their findings directly to counsel.[58]
- Any retention of experts should be put in writing, setting forth the basic terms of the relationship, thereby increasing the likelihood that investigative work will remain confidential.[59]
- Non-essential persons and those whose conduct is in any way the subject of the investigation should be excluded from meetings with senior management regarding the investigation.[60]
- Participants in meetings should be reminded that any notes taken during the meeting might be subpoenaed, and the corporate secretary should limit references to legal advice in the minutes of the meeting.[61]
- Counsel should instruct all persons involved in the investigation, including retained experts, that their work is to remain strictly confidential, and should advise those individuals about applicable privileges.[62]
- Employees and other document recipients should be instructed not to make copies of documents. All documents should be marked, "**DO NOT DUPLICATE,"** and **"PRIVILEGED AND CONFIDENTIAL: ATTORNEY-CLIENT/WORK PRODUCT**."[63]

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[56] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:7.
[57] Id.
[58] Villa, John, Corporate Counsel Guidelines, Volume 2, § 5.11 (B).
[59] Id.
[60] Id.
[61] Id.
[62] Id.
[63] Savarese, John F. & Miller, Carol, *Crisis Management & Business Recovery: Are You Prepared? Protecting Privilege and Dealing Fairly With Employees While Conducting an Internal Investigation*, Practicing Law Institute, Corporate Law and Practice Course Handbook Series, February 2002.

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VI. Reporting The Findings: Advantages & Disadvantages Of Preparing A Written Report

The purpose of internal investigations is to assess the company's liability and allow management to make informed decisions. Whether these goals will best be served by producing an oral or written report depends on the facts of each investigation. Where a written report is not mandated by law, a company may opt to defer the question of a written report as long as possible.[64] At the outset, it may be appealing for corporations to set, as one of the investigation's goals, the production of a conclusive written report of the findings. However, as the investigation progresses, the "need or desirability of creating such a report may dissipate."[65]

Advantages of a written report	**Disadvantages of a written report**
o A written report creates a lasting record of the findings and allows the recipient to consider its contents over time and review the report as needed.[66]	o An adversary might take the report, or parts of it, out of context and attempt to use it to prove a certain level of knowledge or an intent that might not, in fact, have existed.[69]
o Written reports can be valuable aids for management in developing corrective procedures to avoid the repetition of questionable conduct.[67]	o If a subsequent government investigation ensues, the government may exert intense pressure on the company to disclose the written report. Such disclosure will likely result in a waiver of the attorney-client and work product privileges, and may also result in a subject-matter waiver.[70]
o A written report may be a persuasive way of communicating to the government that wrongful conduct did not occur or that corrective action has been taken, and that the government need not proceed with an enforcement action.[68]	o The report will substantially ease the government's or a private plaintiff's

[64] MacKay, Scott W., "*A Primer for Lockheed Martin Corporation In-House Counsel: Handling Government and Internal Investigations*," March 14-15, 2002. www.acca.com/protected/legres/internali/investigationsprimer.pdf
[65] Id.
[66] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:29.
[67] MacKay, Scott W., "*A Primer for Lockheed Martin Corporation In-House Counsel: Handling Government and Internal Investigations*," March 14-15, 2002. www.acca.com/protected/legres/internali/investigationsprimer.pdf
[68] Id.
[69] Id.
[70] Id.
[71] Id.

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	burden in developing a case against the corporation.[71]

Although many internal investigations may lead to the preparation of written reports, "the trend seems to be toward greater use of oral reports, sometimes using overheads or outlines rather than full-blown texts to transmit the relevant information."[72] Although the question of whether to prepare a written or oral report is best-answered by looking at the facts of a particular investigation, the following are some factors that should also be considered in making this determination:

- *Whether a written report is required by law*[73]—is the investigation mandated by the government or a highly-regulated industry? In this case, the company has little choice.
- *Whether the report would be discoverable in civil or criminal litigation*[74]—the company may be asked by the government to waive confidentiality privileges and release the written report. The absence of a written report would avoid this dilemma.
- *Whether the nature of the problems somehow would benefit from a written report*—the report may be beneficial in helping to resolve the problem, but counsel should be aware that using it for this purpose may cause it to be considered a communication prepared for 'business,' rather than 'legal,' purposes, thus jeopardizing its privileged status.[75]
- *Whether a written report is worth the expense it will cost to prepare*—a thorough written report may be fairly expensive.[76]

Whether a report is oral or written, there are several elements that should be included to be thorough and effective:

1. Overview of the allegation;
2. Brief statement of conclusion or findings;
3. Description of the methodology;
4. Discussion of legal issues;
5. Description of key players—who are the main characters of the investigation?
6. Discussion of the factual issues;
7. Discussion of any special legal significance of the facts discovered; and
8. Possible corrective measures.[77]

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[72] Hester, Thomas P., et al., *Successful Partnering Between Inside and Outside Counsel*, § 35:29.
[73] Id.
[74] Id.
[75] Id.
[76] Id.
[77] Id. at § 35:30.

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VII. Sample Forms and Polices

Title: Internal Investigation Report
Source: Anonymous

Internal Investigation
INVESTIGATION REPORT

Date:

Investigation initiated by:

Investigation oversight contact:

Investigator:

Investigation Assigned on:

Investigator's support team:
(e.g., HR Mgr., Employee Relations rep., legal counsel, auditor)

Name	**Title/Position**	**Responsibility**

1. **Issue:**
   What specifically is the perceived issue/violation? (i.e., conflict of interest, anti-trust, ethical standards, lack of respect - shared values, etc.) Description of allegation:

   Is there more than one issue? (If so, each issue should be investigated separately)

2. **Potential Issues, e.g., legal, financial, etc.:**

3. **Investigation Objective:**

4. **Person(s) raising the issue**

   Name of Person(s) raising issue:
   Business Unit:
   Department:
   Position:
   Work Phone:
   Other Methods of Contact:

   Is this individual comfortable with you handling the investigation?
   Detailed order of events -- Who, What, When, Where, Why:

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With whom does the individual wish you to speak? What information are they expected to provide?

What are they seeking or what are their expectations regarding the investigation?

What was discussed regarding confidentiality and the investigation process?

What prompted the individual to bring the concern forward at this time?

Other Comments:

5. **Business Unit concerned**
Business Unit:
Business Unit Department Head:
Business Unit Manager:
Business Unit Legal Counsel/Employee Relations Attorney:
Business Unit Human Resources contact:

6. **Supporting Information**
Documents:
Company policies and/or procedures:
Business Unit policies and directives:
Internal expert opinions:

7. **Persons Involved in the Issue**
Name Title/Position Role

8. **Documents Generated**
Issue Confirmation memo from: to: date sent:
Non-destruction memo from: to: date sent:
Other (explain) to: date sent:

9. **Documents to review** (i.e., personnel file, calendars, travel records, expense reports)
Document Document date Purpose of review

10. **List of Persons interviewed**
Name Title/Position Interview questions Date interviewed

11. **Investigation summary**
What is the issue?
What are the facts?
Where are the discrepancies?
Are there mitigating circumstances?
Were any organizational policies breached?
Were any organizational policies followed?

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Were any promises made or broken?

12. **Can you substantiate the allegation?**

13. **What conclusions are supported by what you have found?**

14. **Are there any wrongs that need to be made right?**

15. **What individual(s) are accountable for the violation?**

16. **What remedies are within the realm of possibilities?**
What, if any, is the policy for corrective action in this situation?
How have similar situations been handled? Was it effective?
What is the appropriate level of discipline? (training? mentoring? termination?)

17. **What are your recommendations?**

18. **What remedies or concluding actions were decided upon?**
Who determined the disciplinary measures (if appropriate)?
Who will implement the corrective action(s)?
What documents need to be generated?
(e.g., letter to person raising issue, letter to accused, revised policy or directive, suspension letter, etc.)
Who is responsible for verifying that the appropriate action occurred?

19. **When was the issue closed?**

20. **If there was a violation of our ethics standards, was the appropriate compliance organization notified? If so, when and by whom?**

21. **For business reasons, was anyone else within the organization made aware of the investigation results? If so, whom?**

Investigation Report Prepared by: _____
Title: _____
Date: _____

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Title: Internal Investigations Memo
Excerpted from: Benedict P. Kuehne, *Protecting the Privilege In the Corporate Setting: Conducting and Defending Internal Corporate Investigations,* 9 St. Thomas L. Rev. 651 Appendixes H (1997)

Memo: Notification to Employees of Investigation

The law firm of (name of firm) has been hired by (name of company) to provide corporate representation in connection with a law enforcement investigation. The company is maintaining a courteous and cooperative relationship with the law enforcement agency conducting the investigation. Until further notice, all company records and documents are to be retained. This law firm will circulate additional memoranda concerning retrieving certain documents.

Because the investigation focuses on corporate activity, this law firm has been requested to identify potential witnesses, retrieve relevant documents, and coordinate a response to the law enforcement inquiry. It is possible corporate employees may be asked by my law firm or by law enforcement officers to agree to an interview. The company has requested that employees who are contacted by law enforcement officers notify this law firm, so that we are in a better position to understand the scope of the investigation. Your decision to notify this law firm is totally voluntary. You are not required to do so.

You do have the right to contact counsel prior to making any decision to speak with anyone about the corporation or the investigation. While the company is not required to provide employees with separate counsel, the company will seriously consider all requests to be represented by counsel. The decision to request counsel is an individual one, and counsel will represent the best interests of the client.

If you have any questions regarding the scope of the investigation or wish to report any communication about the corporation or the investigation, please contact (name of lawyer) at (contact number).

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VIII. Additional Resources

Successful Partnering Between Inside and Outside Counsel, (Robert L. Haig ed.) 2000. To order, call the West Group at (800) 344-5009 or visit www.westgroup.com.

John K. Villa, Corporate Counsel Guidelines, 2000. To order, call the West Group at (800) 344-5009 or visit www.westgroup.com.

David M. Benck & Tessa Thrasher Hughes "*Investigating a Sexual Harassment Complaint: Prompt Remedial Action."* ACCA Docket Vol. 20 No. 3 March 2002 www.acca.com/protected/pubs/docket/ma02/investigate1.php

Jerold S. Solovy, Joel J. Africk, David M. Greenwald, Michelle L. Patail, Anders C. Wick, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work-Product Doctrine*, 675 P.L.I./LITIG. 7 (2002).

John F. Savarese & Carol Miller, *Protecting Privilege and Dealing Fairly with Employees While Conducting an Internal Investigation*, 1178 P.L.I./CORP. 665 (2000).

Michael A. Knoerzer, *Attorney-Client Privilege and Work Product Doctrine*, 31 A.B.A. Wtr. Brief 40 (2002).

Ralph F. Boyd, Andrew E. Lelling, *Conducting Internal Investigations*, MASS. DISC. PRAC. CONT. LEGAL EDUC. ch. 5 (2002).

Michael J. Chepiga, *Federal Attorney-Client Privilege and Work Product Doctrine*, 653 P.L.I./LITIG. 519 (2001).

Joseph T. McLaughlin & J. Kevin McCarthy, *Corporate Internal Investigations-Legal Privileges and Ethical Issues In the Employment Law Context*, 2001 A.L.I.-A.B.A. CONT. LEGAL EDUC.

Catherine L. Fornias, *The Fifth Circuit Reconsiders Application of the Work Product Doctrine and the Privilege of Self-Evaluation: In Re Kaiser Aluminum & Chemical Co.*, 76 TUL. L. REV. 247 (2001).

Dennis J. Block & Simon C. Roosevelt, *Responding To A Corporate Crisis*, 1249 P.L.I./CORP. 531 (2001).

Carole Basri, *Confidentiality of Communications*, 1249 P.L.I./CORP. 181 (2001).

Mark D. Hopson & Griffith L. Green, *Internal Investigations: Practical and Privilege Considerations*, 2000 A.L.I.-A.B.A. CONT. LEGAL EDUC.

Kim S. Ruark, *Damned If You Do, Damned If You Don't? Employers' Challenges In Conducting Sexual Harassment Investigations*, 17 GA. ST. U. L. REV. 575 (2000).

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Sherry L. Talton, *Mapping the Information Superhighway: Electronic Mail and the Inadvertent Disclosure Of Confidential Information*, 20 REV. LITIG. 271 (2000).

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VIII. Article

"*The Law of Spoliation and privilege applied to an Internal Investigation of a high-profile mishap*," by Edward F. Fernandes Michael C. Singley and Ashley L. Rodgers Brobeck, Phleger & Harrison, L.L.P.

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THE LAW OF SPOLIATION AND PRIVILEGE APPLIED TO AN INTERNAL INVESTIGATION OF A HIGH-PROFILE MISHAP

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March 25, 2002

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2. P Waived Any Investigative Privilege By Disclosure

3. P Waived The Privilege By Its Offensive Use Of The Investigation Reports And Other Investigative Documents

V. Conclusion

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Excerpts from Deposition of In-House Counsel for Company P

* * *

Q: Did you have any concern for the preservation of evidence after the explosion?

A. I just told you, it was not a — anything was on our radar screen. We were responding to an incident. We were looking to minimize damages and get our unit up and running. We were not concerned with anything regarding preservation of evidence. We — the only thing we were looking at all in terms of monetary impacts and outsiders was just as an insurance claim. So I didn't see any reason to be concerned with preservation of evidence as such.

* * *

Q: Do you know if any procedures were put in place to prevent the tampering of specifically the valves immediately following the explosion?

A: No. Again—but, you know, this was not our concern at the time. We weren't worried about preserving evidence in any way for any claim. We were worried about getting this unit up and running again. We were worried about doing that safely. We were worried about understanding how this could have occurred so we could meet those goals. We were worried about servicing our customers. We were worried about the continuity of our business. We—we just weren't thinking about those issues.

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I. Spoliation and the Destruction of Evidence — The Basics

"Spoliation" is defined as the destruction or alteration of evidence without the permission of all interested parties. It "constitutes an obstruction of justice." *Black's Law Dictionary* 975 (6th ed. 1991).

This growing problem has been addressed in various ways. Some jurisdictions (excluding Texas) recognize independent tort actions for intentional and/or negligent destruction of evidence. Others (such as Texas) apply some form of evidentiary inference. Courts may also attempt to remedy the problem with sanctions. More severe sanctions may be appropriate when spoliation is intentional. P. Ainsworth, *"Spoliation and Destruction of Evidence,"* Wills and Probate Institute, South Texas College of Law, September 16-17, 1999 (hereafter, "Ainsworth").

A. Independent Tort Actions

1. Intentional Spoliation

Spoliation was first recognized as an independent tort by California in 1984. In *Smith v. Superior Court*, Smith was injured when a mag wheel flew off a van and crashed into the windshield of her car. 198 Cal. Rptr. 829 (Cal. Ct. App. 1984). Abbot Ford, who later became the defendant, towed the van back to its dealership for repairs and agreed to keep certain automotive parts until Smith's experts could inspect them for defects. Sometime later, Abbot allegedly lost, destroyed, or transferred the parts. Smith then sued Abbot Ford for "tortious interference with prospective civil action by spoliation of evidence." *Id. See* Ainsworth at N-1.

The trial court refused to recognize the tort, rendering judgment for Abbot Ford. The appellate court reversed. The court reasoned that both civil and criminal liability arose from spoliation of evidence, but criminal liability would not compensate the person injured by the wrongdoer. *Id.* at 834. The criminal statute was inapplicable because it punished willful destruction of material about to be produced in evidence; Abbot's actions occurred before Smith filed suit.

The California court was most troubled with the uncertainty of damages. The burden of proof of reasonable accuracy, the court stated, would suffice to prove Smith's damages. Absolute precision of proof was not a prerequisite. The court analogized to other claims which cannot be calculated with precision: wrongful death, patent infringement, libel, slander, invasion of privacy, and personal injury. *Id.* at 836; Ainsworth at N-1.

Ultimately, the court compared Smith's claim to intentional interference with a claim for prospective economic advantage. The court noted that prospective business relationships are important "probable expectancies" that are worthy of legal protection. *Id.* Since the plaintiff's prospective products liability action was a valuable "probable expectancy," the court reasoned that a cause of action existed for intentional spoliation of evidence. *Id.* at 837; Ainsworth at N-1; *see also* Phillip Lionberger's Comment, *Interference With Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt A New Tort?,* 21 ST. MARY'S L.J. 209 (1989).

Although California has recognized spoliation as an intentional tort, many jurisdictions have not. Some jurisdictions have refused to recognize the intentional spoliation tort for various reasons, primarily on the basis that the spoliating party had no duty to preserve evidence. Ainsworth at N-2. S*ee, e.g., Meyn v. State*, 594 N.W.2d 31 (Iowa 1999); *Larison v. City of Trenton*, 180 F.R.D. 261 (D. N.J. 1998); *Monsanto Co. v. Reed*, 950 S.W.2d 811 (Ky. 1997); *Moore v. U.S./U.S. Dept. of Agriculture Forest Service*, 864 F. Supp. 163 (D. Colo. 1994); *Baugher v. Gates Rubber Co.*, 863 S.W.2d 905 (Mo. Ct. App. 1993); *Edwards v. Louisville Ladder Company*, 796 F. Supp. 966 (W.D. La 1992) (Louisiana would not recognize

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claim for spoliation of evidence under facts of this case); *Murphy v. Target Prod.*, 580 N.E.2d 687 (Ind. Ct. App. 1991); *Diehl v. Rocky Mountain Communications, Inc.*, 818 S.W.2d 183 (Tex. App.—Corpus Christi 1991, writ denied); *Trump Taj Mahal v. Costruzioni Aeronautiche Giovanni*, 761 F. Supp. 1143 (D.N.J. 1991); *Akiona v. U.S.*, 938 F.2d 158 (9th Cir. 1991); *Headley v. Chrysler Motor Corporation*, 141 F.R.D. 362 (D. Mass. 1991); *Wilson v. Beloit Corp.*, 921 F.2d 765 (8th Cir. 1990); *Computer Associates Intern. v. American Fundware*, 133 F.R.D. 166 (D. Colo. 1990); *Panich v. Iron Wood Prod. Corp.*, 445 N.W.2d 795 (Mich. Ct. App. 1989); *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177 (Kan. 1987); *Coley v. Arnot Ogden Memorial Hospital*, 485 N.Y.S.2d 876 (N.Y. App. Div. 1985); *Coates v. Johnson & Johnson* 756 F.2d 524 (7th Cir. 1985); *Spano v. McAvoy*, 589 F. Supp. 423 (N.D.N.Y. 1984); *Parker v. Thyssen Mining Constr., Inc.*, 428 So.2d 615 (Ala. 1983); *Nation-Wide Check v. Forest Hills Distributors*, 692 F.2d 214 (1st Cir. 1982); *S.C. Johnson & Son, Inc. v. Louisville & Nashville R. Co.*, 695 F.2d 253 (7th Cir. 1982); *Boyd v. Ozark Airlines, Inc.* 568 F.2d 50 (8th Cir. 1977); *Vick v. Texas Employment Comm'n*, 514 F.2d 734 (5th Cir. 1975); *Wong v. Swier*, 267 F.2d 749 (9th Cir. 1959); *Austerberry v. U.S.*, 169 F.2d 583 (6th Cir. 1948). *But see* Solum & Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1102 (1987) (arguing that in order to prove intentional spoliation of evidence, there should be no need to show that the spoliator owed the plaintiff a duty to preserve evidence). *See generally*, Note, *Tortious Liability for Spoliation of Evidence*, 24 AM. J. TRIAL ADVOC. 381 (2000); Theresa A. Owens, *Should Iowa Adopt the Tort of Intentional Spoliation of Evidence in Civil Litigation?*, 41 DRAKE L. REV. 179, 184 (1992). Comment, *Spoliation of Evidence: A Troubling New Tort*, 37 U. RICH. L. REV. 563 (1989); Comment, *Civil Liability for Destruction of Evidence*, 20 U.RICH. L. REV. 191, 207 (1985).

2. Negligent Spoliation: The Florida Approach

Florida has expressly recognized a cause of action for negligent spoliation or the negligent destruction of evidence.

California was first to recognize the independent tort of negligent spoliation in *Velasco v. Commercial Bldg. Maint. Co.*, 215 Cal. Rptr. 504, 506-507 (Cal. Ct. App. 1985). Not only was the tort recognized, but it appeared that the court would extend liability to third parties in appropriate circumstances. In *Velasco*, the plaintiffs were injured when a bottle exploded. The remains of the bottle were taken to an attorney, who left the remains on his desk in an unmarked paper bag. The spoliation claim was made against the janitorial service that allegedly disposed of the bag while cleaning the office. The court recognized the tort of negligent interference with prospective economic advantage, but focused its reasoning on "foreseeability of harm" and the "policy of preventing future harm." The court concluded the harm was unforeseeable to the janitors and that "no policy would be furthered by a holding that maintenance workers have a duty not to throw away what appears to be trash simply because such objects are located in an attorney's office." *Id.;* Ainsworth at N-3-4. *See generally* Katz & Muscaro, *Spoilage of Evidence-Crimes, Sanctions, Inferences, and Torts*, 29 TORT & INS. L.J. 51, 64-65 (1993); Kerkorian, *Negligent Spoliation of Evidence: Satisfying the "Suit Within a Suit" Requirement of Legal Malpractice Action*, 41 HASTINGS L.J. 1077 (1990).

Florida recognized negligent spoliation as an independent tort in *Bondu v. Gurvich*, 473 So.2d 1307, 1309-10 (Fla. Dist. Ct. App. 1984) and again in *Builders Square, Inc. v. Shaw*, 755 So.2d 721 (Fla. Dist. Ct. App. 1999). In *Bondu*, Plaintiff brought a medical malpractice action for her husband's death. The plaintiff alleged negligence *per se* due to the hospital's failure to provide medical records, hindering "the plaintiff's ability to pursue certain proof which may be necessary to establish her case." Furthermore, Bondu claimed the hospital

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"purposely and intentionally lost and/or destroyed the anesthesiology records, again [hindering] the plaintiff's ability to pursue certain proof which may be necessary to establish her case." *Id.*

After losing the malpractice suit, Bondu filed an action alleging loss of her medical malpractice case due to the hospital's negligent loss of the pertinent medical records. Recognizing the cause of action, "the court explained that the 'timing' was the difference between the two spoliation claims." *Id.* at 1311; *Spoilage of Evidence*, 29 TORT & INS. L.J. at 65. The damages in the first action were uncertain because the malpractice suit was still pending. However, since the malpractice suit was decided against the plaintiff prior to filing of the second suit, the damage caused by the defendant's breach of duty was certain. The key to recovering damages was that the plaintiff was required to show that the defendant had a legal duty to preserve the lost or destroyed evidence. *See Bondu*, 473 So.2d at 1312.

The Florida District Court of Appeals subsequently articulated the following elements of a cause of action for negligent destruction of evidence: (1) existence of a potential civil action; (2) a legal or contractual duty to preserve evidence that is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destroyed and the inability to prove the lawsuit; and (6) damages. *Continental Ins. Co. v. Herman*, 576 So.2d 313, 315 (Fla. Dist. Ct. App. 1990). *See generally* W. Prosser & W. Keeton, *The Law of Torts* § 30 (5th ed. 1984) (stating the traditional formula for negligence as duty, breach, causation, and damages).

There are three possible ways an injured party may argue for a court to imply the duty to preserve evidence in a negligent spoliation tort. First, parties can agree certain evidence is to be preserved. *See Hazen v. Municipality of Anchorage*, 718 P.2d 456, 459 (Alaska 1986); *Smith v. Superior Court*, 198 Cal. Rptr. 829, 831 (Cal. Ct. App. 1984). Second, the duty to preserve evidence may be created by a civil statute. *See Bondu*, 473 So.2d at 1313. Third, where neither of the first two is present, a party may rely on a criminal statute prohibiting such conduct, establishing the required duty.

B. Evidentiary Inference/Jury Instruction

1. Texas Rejects the Tort of Spoliation

Texas courts have long provided a remedy for intentional interference with an individual's personal liberty and property rights. *See, e.g., Tippett v. Hart*, 497 S.W.2d 606, 610 (Tex. Civ. App.—Amarillo 1973, writ ref'd) (holding intentional invasion of contract sounds in tort). The right to sue for tort damages has also been recognized as a property right. Ainsworth at N-7. *See, e.g., Galarza v. Union Bus Lines, Inc.*, 38 F.R.D. 401, 404 (S. D. Tex. 1965); *Garrett v. Reno Oil Co.* 271 S.W.2d 764, 767 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

A spoliation tort, as previously discussed, is similar to the tort for intentional interference with prospective business relations, which Texas has adopted. The tort of interference with prospective business relations protects a party's expectation of commercial benefits. *Delz v. Winfree*, 16 S.W. 111, 112 (Tex. 1891). The tort of spoliation of evidence protects a party's expectation of compensation for his injuries. *See* Ainsworth at N-7; *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 464 (Alaska 1986).

In 1997, two Texas courts of appeals split in deciding whether Texas would recognize the independent tort of spoliation. Ainsworth at N-11. In *Ortega v. Trevino*, 938 S.W. 2d 219 (Tex. App.—Corpus Christi 1997, writ granted), the plaintiff's daughter was allegedly injured at birth and the family argued that their separate, medical malpractice suit was hindered by the destruction of crucial medical records. The Corpus Christi Court of Appeals held that the trial court's ruling on special exceptions was overly broad in dismissing the Plaintiff's petition as there exists a sufficient basis under Texas law for recognizing the tort. The court observed that the spoliation inference does not deter wrongdoers or compensate victims, is

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limited to parties in litigation only, and tends to reward those who destroy evidence.

Nevertheless, another Texas court of appeals granted partial summary judgment in a context involving alleged hospital negligence and an allegedly destroyed incident report. Ainsworth at N-11. The Dallas Court of Appeals noted that "the Texas Supreme Court has never recognized an independent cause of action for intentional spoliation of evidence. Absent controlling Supreme Court precedent we decline to expand the law to recognize such a cause of action." *Malone v. Foster*, 956 S.W.2d 573, 582 (Tex. App.—Dallas, 1997, writ granted).

The Texas Supreme Court consolidated the two cases for oral argument. Ainsworth at N-11. The conflict in the holdings, the inadequacy of the current law in addressing a need that should be addressed by the law, and the trend among other jurisdictions to recognize the tort might have resulted in a concise statement by the Texas Supreme Court recognizing a well-defined tort of spoliation. The Court could have based the tort on the public policy against the destruction of evidence embodied in both the Penal Code and the Health & Safety Code. Indeed, the Court could have limited the tort to those instances in which litigation requiring the destroyed evidence was reasonably anticipated (presumably, both medical malpractice cases involved article 4590i notice letters). The Court could also have addressed the distinction between intentional and negligent spoliation raised by the facts of the two cases.

Instead, the Texas Supreme Court rejected the recognition of the tort of spoliation. *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998); *Malone v. Foster*, 977 S.W.2d 562 (Tex. 1998). The Court, unanimous in its holding in *Trevino v. Ortega*, observed that:

> [w]hile the law must adjust to meet society's changing needs, we must balance the adjustment against boundless claims in an already crowded judicial system. We are especially adverse to creating a tort that would only lead to duplicate litigation, encouraging inefficient relitigation of issues better handled within the context of the core cause of action. We thus decline to recognize evidence spoliation as an independent tort.

Trevino, 969 S.W.2d at 952. The Court's opinion asserts that the "traditional response" of the trial courts to the destruction of evidence with the spoliation inference "properly frames the alleged wrong as an evidentiary concept, not a separate cause of action." *Id.* The Court specifically rejects the notion that the record-retention policy set forth in the TEX. HEALTH & SAFETY CODE ANN. § 241.103(b) gives rise to an independent cause of action. *Id.* at 953.

Clearly, the Court is attempting to avoid an "impermissible layering of liability collaterally attack[ing] an unfavorable judgment . . . [and] opposition to the sound policy of ensuring the finality of judgments." *Id.* However, in a footnote, the Court does comment that "[w]hether we recognize a cause of action for spoliation of evidence by persons who are not parties to the underlying lawsuit is not before the Court, and therefore we do not consider it." *Id.* at 951 n.1. Perhaps the Court's comment that it "is more logical to rectify any improper conduct in the context of the suit in which it is relevant" still leaves the door open to suits asserting a spoliation tort against a third party not originally named in the underlying suit.

Certainly, the Court's admonition against relitigating the same issues would suggest that the offending third party should be joined, if possible, in the original suit. In *Malone*, the court summarized its opinion in *Trevino* as holding "that Texas does not recognize an independent cause of action for evidence spoliation by persons who are parties to the underlying lawsuit." *Malone*, 977 S.W.2d at 563.

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2. The Texas Approach

In Texas, the intentional, deliberate destruction of evidence by a party creates a presumption that the evidence would have been unfavorable to the destroying party. *San Antonio Press, Inc. v. Custom Bilt Machinery*, 852 S.W.2d 64, 67 (Tex. App.—San Antonio 1993, no writ); *H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dism'd). This spoliation inference, sometimes called a negative inference, is rooted in the common law. Several jurisdictions have applied the maxim *omnia praesumuntur contra spoliatorem* (all things are presumed against a wrongdoer), to remedy or deter destruction of evidence. *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882); *Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. 1993). *See, e.g., Vick v. Texas Employment Comm'n*, 514 F.2d 734 (5th Cir. 1974); *Fuller v. Preston State Bank*, 667 S.W.2d 214, 220 (Tex. App.—Dallas 1983, writ ref d n.r.e.). Courts may allow the fact finder to infer that the evidence would have been harmful to the spoliator's case if the spoliator is unable to explain the disappearance of the evidence.

Although the Texas Supreme Court rejected the adoption of an independent tort of spoliation, Justice Baker's concurring opinion describes the "variety of remedies available to punish spoliators, deter further spoliators, and protect nonspoliators prejudiced by evidence destruction." *Trevino v. Ortega*, 969 S.W.2d 950, 960 (Tex. 1998) (Baker, J., concurring). Justice Baker discussed the use of various forms of an instruction to the jury to articulate the spoliation presumptions:

> . . . Texas courts have broad discretion in instructing juries. *See* TEX. R. Civ. P. 277; *Mobil Chem. Co. v. Bel*, 517 S.W.2d 245, 256 (Tex. 1975). Thus, when a party improperly destroys evidence, trial courts may submit a spoliation presumption instruction. *See, e.g., Watson v. Brazos Elec. Power Coop., Inc.*, 918 S.W.2d 639 (Tex. App.—Waco 1996, writ denied). 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.
>
> Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of presumptions. *See Welsh [v. U.S.]*, 844 F.2d 1239 [(6th Cir. 1988)]. The first and more severe presumption is a rebuttable presumption. This is primarily used when the nonspoliating party cannot prove its prima facie case without the destroyed evidence. *See Welsh*, 844 F.2d at 1248; *Sweet [v. Sisters of Providence in Washington]*, 895 P.2d [484] at 491 [(Ala. 1995)]; [*Public Health Trust of Dade Co. v.*] *Valcin*, 507 So.2d [596] at 599 [(Fla. 1987)]. The trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. Next, the court should instruct

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the jury that the spoliating party bears the burden to disprove the presumed fact or issue. *See Welsh*, 844 F.2d at 1247; *Sweet*, 895 P.2d at 491-92; *Valcin*, 507 So.2d at 600; *Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 484 S.E.2d 249, 251 (1997). This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires. *See Sweet*, 895 P.2d at 492 (quoting *Valcin* , 507 So.2d at 600-01).

In shifting the burden of proof to the spoliating party, trial courts are choosing a middle ground that neither "condones the . . . spoliation of evidence at the [nonspoliating party's] expense nor imposes an unduly harsh and absolute liability" upon the spoliating party. *Welsh*, 844 F.2d at 1249. Moreover, by shifting the burden of proof, the presumption will support the nonspoliating party's assertions and is some evidence of the particular issue or issues that the destroyed evidence might have supported. The rebuttable presumption will enable the nonspoliating party to survive summary judgment, directed verdict, judgment not withstanding the verdict, and factual and legal sufficiency review on appeal. *See Lane*, 484 S.E.2d at 251.

The second type of presumption is less severe. It is merely an adverse presumption that the evidence would have been unfavorable to the spoliating party. *See H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dism'd by agr.); s*ee also Vodusek [v. Bayliner Marine Corp.]*, 71 F.3d [148] at 155 [(4th Cir. 1995)]*; DeLaughter [v. Lawrence County Hosp.]*, 601 So.2d [818] at 821-22 [(Miss. 1992)]; *Hirsch [v. General Motors Corp.]*, 628 A.2d [1108] at 1126 [(N.J. Super. Ct. 1993)]. The presumption itself has probative value and may be sufficient to support the nonspoliating party's assertions. *See Bruner*, 530 S.W.2d at 344. However, it does not relieve the nonspoliating party of the burden to prove each element of its case. *See DeLaughter*, 601 So.2d at 822. Therefore, it is simply another factor used by the fact finder in weighing the evidence.

Trevino, 969 S.W.2d at 960-61.

C. Sanctions

There are several possible sanctions the Texas courts may use to address spoliation. Depending on the circumstances, sanctions may include discovery, criminal, and ethical sanctions. Ainsworth, at N-15.

1. Abuse of Discovery

A Texas court may issue orders sanctioning the offending party if that party "fails to comply with proper discovery requests or to obey an order to provide or permit discovery." TEX. R. CIV. P. 215.2(b). Appropriate discovery sanctions may include: dismissal of the lawsuit; entry of a default judgment; and exclusion of evidence, including test results, reports of examinations, and expert testimony based on the spoliated object or document. Ainsworth at N-15.

The court may also levy less severe sanctions. These may include disallowing

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discovery by the offending party, assessing discovery or court costs against the disobedient party or the party's attorney, striking part of the party's pleadings, and holding the party in contempt. *Id.*

Before the court imposes sanctions, it must meet the prerequisites set forth in *Transamerican Natural Gas v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991). The Texas Supreme Court set forth two standards to measure whether an imposed sanction was appropriate. First, there must be a direct relationship between the offensive conduct and the sanction imposed. It must be directed against the abuse and toward remedying the prejudice the abuse causes and be visited upon the offender, either the party, the party's attorney, or both. Secondly, it must not be excessive. *Id.* The sanction may vary with the degree of offensive conduct.

2. Criminal

TEX. PENAL CODE ANN. § 37.09(a)(1) provides that a person who "alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in [an] investigation or official proceeding" is guilty of a class A misdemeanor. TEX. PENAL CODE ANN. § 37.09(a)(1) (Vernon 1989). The person is also required by the section to have knowledge of a pending or on-going investigation, or other official proceeding. Most cases in Texas discussing this statute involve criminal investigations. Ainsworth at N-17. S*ee Cuadra v. State*, 715 S.W.2d 723 (Tex. App.—Houston [14th Dist.] 1986, no writ); *Dillard v. State*, 640 S.W.2d 85 (Tex. App.—Fort Worth 1982, no writ).

3. Ethical

A lawyer is prohibited from concealing, destroying, altering, or falsifying evidence which may be relevant to a pending or foreseeable proceeding. Ainsworth at N-17. *See* Texas Code of Professional Responsibility § 3.04(a) & (b). *See also* DR 3.04, comment 2, TEX. GOV'T CODE ANN. tit. 2, subtit. G-app, art. X § 9 (Vernon Supp. 1992). This includes material which a competent attorney would believe has potential or actual evidentiary value. The attorney is not required to have actual knowledge. As long as he anticipates a proceeding and acted unlawfully, he may be sanctioned. Similarly, other professionals including engineers should adhere to published ethical guidelines with regard to evidence to be used in litigation. *See* Designation E860-82 *Standard Practice for Examining and Testing Items That Are or May become Involved in Products Liability Litigation,* ASTM Standards on Technical Aspects of Products Liability Litigation (2d ed. 1988).

Ethical sanctions, however, are criticized as ineffective since courts are not uniform in levying sanctions. Sanctions may include disbarment, suspension, fine, simple reprimand, or no sanction at all. *See, e.g., In re Williams*, 23 N.W.2d 4,5-6 (Minn. 1946) (disbarred); *In re Nixon*, 385 N.Y.2d 305, 307 (N.Y. App. Div. 1976) (President Nixon disbarred); *Florida Bar v. Simons*, 391 So.2d 684, 686 (Fla. 1980) (suspended); *Barker v. Bledsoe*, 85 F.R.D. 545, 549 (W.D. Okla. 1979) (fined); *In re Bear*, 578 S.W.2d 928 (Mo. 1979) (reprimand); *Telectron v. Ohio*, 116 F.R.D. 107, 136-37 (S.D. Fla. 1987) (no sanction).

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II. An Application of the Texas Spoliation of Evidence Law to the Company P Explosion

A. The Facts

In September of 1995, Company P ("P") sent four valves to Company D ("D") for routine repairs. D repaired the valves for the sum of $1,476.00 and delivered the valves to P in September 1995. P installed these valves in the Cold Box unit at a facility where it manufactures acetic acid.

In April 1996, more than seven months after the valves were repaired and installed in P's facility, there was an explosion at the facility. Shortly after the explosion, P conducted a private investigation into the cause(s) of the explosion and an investigation report was created. There was no independent investigation of the explosion conducted by federal, state or municipal agencies.

Within three months of the explosion P had conducted an internal investigation revealing many key causes of the explosion, had hired (and fired) an investigation firm, identified the valves as a potential cause of the explosion, and completely rebuilt the Cold Box.

Approximately one year after the explosion, and after the Cold Box had been rebuilt and the site of the explosion had been irrevocably altered, P sent a demand letter to D. In the demand letter, P, relying upon select sections of its private investigation report, claimed that the valves that D repaired caused the explosion.

In April 1998, two years after the explosion, P filed a lawsuit against D. In its Original Petition, P claimed that the valves were the sole cause of the explosion and sought to recover $58 million dollars from D as a result of P's alleged property damages and lost profits. On November 8, 1998, D served discovery requests upon P specifically seeking the investigation reports created by P and other investigative documents. In response to these requests, P asserted the investigative and attorney-client privileges in an attempt to shield these documents from production, and subsequently provided a privilege log. After D filed a motion to obtain the reports, P produced the reports. Although D set up the spoliation issue during the discovery phase, the issue of a spoliation remedy was never addressed by the Court because the case settled.

B. Issues Presented

What remedies were available to D for P's spoliation of material evidence?

What factors will the Texas courts consider in determining whether to enter sanctions?

C. Short Answer

D must first convince the Court that evidence has been improperly spoliated. Several factors contribute to a spoliation finding. First, D must demonstrate that P had a duty to preserve evidence. P's duty arises out of a knowing or reasonable anticipation of litigation. Second, D must show that P either intentionally or negligently spoliated evidence, and that the prejudice to D is irreparably severe. The third factor, prejudice, is illustrated by D's hindrance or inability to prepare a viable defense due to the spoliation.

Once D demonstrates that evidence has been improperly spoliated, it must then convince the Court of the appropriate sanction. The sanctions available to the Court are: dismissal of P's claim, exclusion of evidence or testimony, or jury instruction (spoliation presumption against P). Dismissal of P's claim requires a showing of willful or intentional destruction of evidence. The less severe sanctions of exclusion of evidence/testimony or jury instruction are determined by the Court on a case by case basis.

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Since the Texas Supreme Court has declined to recognize an independent cause of action for spoliation of evidence, non-spoliating parties must look to other remedies. *Trevino v. Ortega*, 969 S.W.2d 950 (Tex. 1998). When a party believes that another party has improperly destroyed evidence, it may either move for sanctions or request a spoliation presumption instruction. The determination of the appropriate remedy is a question of law for the trial court. *Miller v. Stout*, 706 S.W.2d 785 (Tex.App.–San Antonio 1986, no writ). Upon a spoliation complaint, the trial courts should contemplate, before considering an appropriate remedy:

1) whether there was a duty to preserve evidence;
2) whether the alleged spoliator either negligently or intentionally spoliated evidence; and
3) whether the spoliation prejudiced the nonspoliator's ability to present its case or defense

Trevino, 969 S.W.2d at 954-55, *citing Chapman v. Auto Owners Ins. Co*., 220 Ga. App. 529, 469 S.E.2d 783 (1996).

Once the court finds that evidence has been improperly spoliated and that the nonspoliating party was prejudiced by the spoliation, the court should decide the appropriate sanctions. The sanctions available to the trial court include:

1. dismissal or default judgment;
2. exclusion of evidence or testimony; or
3. jury instruction (spoliation presumption).

Id. at 959-60.

D. Analysis

1. P's Duty to Preserve the Evidence

The threshold question in a spoliation complaint is whether the alleged spoliator was under any obligation to preserve evidence. *Trevino*, 969 S.W.2d at 955 (Baker, J., concurring). A party may have a statutory, regulatory, or ethical duty to preserve evidence. *See DeLaughter v. Lawrence County Hosp.*, 601 So.2d 818, 821-22 (Miss. 1992). Other jurisdictions have held that there is also a common law duty to preserve evidence. *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984). *See also Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993); *Unigard Sec. Ins. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363 (9th Cir. 1992); *Welsh v. United States*, 844 F.2d 1239 (6th Cir. 1988). These courts have recognized that a duty exists to preserve evidence during pending litigation.

Since P allegedly destroyed evidence prior to instigating litigation, the sub-issue became whether P had a duty to preserve evidence pre-litigation. A number of courts recognize the need for a duty to preserve evidence pre-litigation. *See, e.g., Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148 (1st Cir. 1996); *Dillon*, 986 F.2d at 267; *Welsh*, 844 F.2d at 1241. Justice Baker of the Texas Supreme Court "[agreed] with these courts." *Trevino*, 969 S.W.2d at 955 (Baker, J., concurring). Justice Baker elaborated by stating that "[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." *Trevino*, 969 S.W.2d at 955; *Fire Ins. Exch. v. Zenith Radio Corp.*, 747 P.2d 911, 913 (Nev. 1987).

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The prelitigation duty to preserve evidence arises when a party is on "notice" of potential litigation. *Glover v. BIC Corp*., 6 F.3d 1318 (9th Cir. 1992); *McGuire v. Acufex Microsurgical Inc.*, 175 F.R.D. 149 (D. Mass. 1997)*; Rice v. United States*, 917 F. Supp. 17, 20 (D.D.C. 1996) (finding that the defendant was on notice of potential litigation because it was aware of circumstances that were likely to give rise to future litigation); *White v. Office of the Public Defender*, 170 F.R.D. 138 (D. Md. 1997) ("[P]arties have been deemed to know that documents are relevant to litigation when it is reasonably foreseeable that a lawsuit will ensue.").

The Texas Supreme Court has stated that the trial court should consider the preservation of evidence a prelitigation duty once there is an "anticipation of litigation" similar to that used to assert an investigative privilege. *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993). The *Brotherton* Court opined that "common sense dictates that a party may reasonably anticipate suit before the plaintiff manifests an intent to sue." *Id.* at 204. Consequently, the Court held that to determine when a party reasonably anticipates or foresees litigation, trial courts must look at the totality of the circumstances and decide whether a reasonable person in the party's position would have anticipated litigation and whether the party actually did anticipate litigation. *Id.* at 207; *Trevino*, 969 S.W.2d at 956 (Baker, J., concurring).

Once a trial court determines when a duty to preserve evidence arises, the court should then determine what evidence a party must preserve. *Trevino*, 969 S.W.2d at 957. A party that is on notice of either potential or pending litigation has an *obligation* to preserve evidence that is relevant to the litigation. *Wm. T. Thompson*, 593 F. Supp. at 1455. "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 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." *Id. See also Dillon*, 986 F.2d at 267; *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 551 (D. Minn. 1989)*; Fire Ins. Exch.*, 747 P.2d at 914.

2. P's Intentional or Negligent Spoliation Results in Unavailable Evidence

Once the trial court finds that a party has a duty to preserve evidence, the court should then determine whether the party breached its duty through negligent or intentional spoliation. *See Hirsch v. General Motors Corp.*, 266 N.J. Super. 222 (1993). Some courts have allowed sanctions or jury instructions only for intentional or bad faith spoliation. *See Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997); *Aramburu v. Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995); S*pesco, Inc. v. General Elec. Co.*, 719 F.2d 233 (7th Cir. 1983). However, other courts have held parties accountable for either intentional or negligent spoliation. *See Langley v. Union Elect. Co.*, 107 F.3d 510 (7th Cir. 1997); *Sacramona v. Bridgestone/Firestone*, 106 F.3d 444 (1st Cir. 1997) (key evidence was excluded because of damage to it which changed its relevancy); *Dillon*, 986 F.2d at 267 (court disallowed plaintiff's expert's testimony as sanction for the destruction of evidence prior to litigation); *Unigard Sec. Ins.*, 982 F.2d at 368; *Pressey v. Patterson*, 898 F.2d 1018 (5th Cir. 1990) (bad faith or willful misconduct finding required to support the severest remedy – striking pleadings or dismissal – but less severe sanctions remain available). These courts have determined that because parties have a duty to reasonably preserve evidence, it is only logical that they should be held accountable for either negligent or intentional spoliation. Judge Baker concluded that while 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. *Trevino*, 969 S.W.2d at 957 (Baker, J., concurring). The burden of the prejudicial effects shifts to the culpable spoliating party rather than the innocent nonspoliating party. *See Welsh*, 844 F.2d at 1249; *Turner*, 142 F.R.D. at 75.

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3. P's Spoliation Prejudices D's Ability to Present Potential Defenses

One of the key reasons for allowing remedies for spoliation is that the spoliation has prejudiced the nonspoliating party[1]. *See Sacramona v. Bridgestone/Firestone, Inc.,* 106 F.3d 444, 446 (1st Cir. 1997) (court has inherent power to exclude evidence that has been improperly altered or damaged by a party where necessary to prevent the non-offending side from suffering unfair prejudice); *Dillon*, 986 F.2d at 267 (before a sanction for destruction of evidence is appropriate there must also be a finding that the destruction prejudiced the opposing party); *Unigard Sec. Ins.*, 982 F.2d at 368; *Headley v. Chrysler Motor Corp*., 141 F.R.D. 362, 365 (D. Mass. 1991). A party is entitled to a remedy only when evidence spoliation hinders its ability to present its case or defense. *See, e.g*., *Dillon*, 986 F.2d at 267-68; *Sweet*, 895 P.2d at 491. The Texas trial courts should look at a variety of factors in deciding whether destroying evidence has prejudiced a party, including the destroyed evidence's relevancy. *Trevino*, 969 S.W.2d 959 (Baker, J., concurring). The more relevant the destroyed evidence, the more harm the nonspoliating party will suffer from its destruction. However, once the evidence is destroyed, determining relevancy becomes difficult. Accordingly, trial courts should give deference to the nonspoliating party's assertions about relevancy. *Trevino,* 969 S.W.2d at 958. (Baker, J., concurring). Some courts have determined that the mere destruction of evidence is proof of its relevancy, regardless of whether the destruction occurred intentionally, with bad faith, or negligently. *See Welsh*, 844 F.2d at 1246, quoting *Nation-Wide Check Corp*., 692 F.2d at 218.

Moreover, courts around the country have determined that a manufacturer or producer of a product that is allegedly responsible for causing damages is prejudiced if it cannot have its own fire and/or explosion cause and origin expert(s) inspect the product and other materials to determine other potential causes. *See Baliotis v. McNeil and Fridgidaire Co., Inc.*, 870 F. Supp. 1285 (M.D. Pa. 1994) ("It is clear…. that a manufacturer of a product that is allegedly responsible for causing a fire is prejudiced if it cannot have its own cause and, origin expert inspect a fire scene for other potential causes"); *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 77-78 (3rd Cir. 1994).

In *Travelers Insurance Co. v. Dayton Power and Light Co.,* 76 Ohio Misc. 2d 17; 663 N.E.2d 1383 (1996), a case analogous to the matter *sub judice*, a fire broke out in electrical equipment owned by Travelers' insured Hammer Graphics, Inc. The expert hired by Travelers to conduct the investigation concluded that the fire was caused by the alleged failure of DP & L employees to sufficiently tighten a bolt located on the transition cabinet when they connected new cables to the transformer. The "key evidence" supporting the expert's theory was arc damage found on one of the four "pads" connected to the transformer. The expert permitted the insured to dispose of the transition cabinet, which contained the "key evidence." Two years after the fire and without prior warnings, Travelers sued DP & L based on their expert's report. The defendant, DP & L, argued spoliation of the "key evidence" prejudiced their ability to determine alternate sources of the fire. The court held that the defendant's experts were deprived of the opportunity to convince the court of alternate causes of the fire and provide reasonable rebuttal to opposing expert's theories. The loss of "key evidence" effectively forecloses the defendant from possible affirmative defenses. The *Travelers* court therefore struck the plaintiff's expert and excluded any other witnesses from relying on any of the expert's opinions concerning the case. *Id*.

[1] When the trial court must decide whether a party should be held accountable for spoliation and whether the other party has been prejudiced by such loss of evidence, the court may have to conduct a preliminary hearing to obtain the parties' testimony regarding the reasons for the unavailability of the evidence, the importance of the missing evidence, and the availability of other cumulative proof. *Offshore Pipelines, Inc. et al., v. Schooley,* 984 S.W.2d 654, 667 (Tex. App.–Houston [1st Dist.] 1998), citing *Trevino, supra*.

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In *Shelbyville Mutual Ins. Co., et al. v. Sunbeam Leisure Products Co.,* 634 N.E.2d 1319 (Ill. App. Ct. 1994), a gas grill owned by the insureds and manufactured by Sunbeam caught fire and destroyed the insured's possessions, including their home. Sunbeam moved to bar the plaintiff's evidence because the plaintiffs lost, misplaced, or destroyed parts of the grill alleged to be defective. In discovery, Sunbeam learned that different parts of the grill were shipped to different experts and that the chain of custody of the grill components could not be verified. Sunbeam successfully argued that they were prejudiced by the loss of key evidence, although their expert was able to review some grill components and form extensive opinions about the product. As a result, the plaintiff's evidence regarding the grill's defects was barred and Sunbeam thereafter prevailed on summary judgment. The appellate court stated in upholding the trial court's granting summary judgment, that the allegedly defective product, in the condition it was in at the time of the occurrence, is often important in determining how, why, and if the product is actually defective. *Id.* at 642. The court also found persuasive Sunbeams uncontroverted affidavit testimony that it might have been able to determine an alternative cause for the fire if its expert had been allowed to inspect the grill for improper assembly, alteration, modification, or maintenance. *Id.* Finally, the court concluded that the inadvertent destruction of a portion of the grill, effectively foreclosed a possible affirmative defense of what may have been the actual cause of the fire. *Id.* at 643.

Therefore, spoliation of evidence prejudices a defendant when the defendant is deprived of the opportunity to examine "key evidence" alleged against it. In the case at bar, P failed to notify D of the explosion for several years. P, by and through its experts, destructively tested "key evidence" which it concluded was the cause of the explosion. The "key evidence" has lost its integrity, and collateral materials which may offer alternate sources of the explosion are too damaged or lost. As a result, D is effectively foreclosed to assert possible affirmative defenses and is, therefore, irremediably prejudiced.

4. The Trial Court Has Authority to Sanction P for its Prelitigation Spoliation

The Texas trial courts are permitted to sanction parties whenever a party abuses the discovery process. *See* TEX. R. CIV. P. 215.3 However, in instances where Rule 215 may not apply (*e.g.*, prelitigation destruction of evidence), a trial court has inherent power to remedy spoliation. *Eichelberger v. Eichelberger,* 582 S.W.2d 395 (Tex. 1979). The Texas Supreme Court opined that trial courts have inherent judicial power to take action that will "aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity." *Id.* The destruction of potentially relevant evidence clearly inhibits a trial court's ability to hear evidence and accurately determine facts. Therefore, without the inherent power to protect against evidence destruction, trial courts would be prevented from hearing relevant evidence and would be unable to ensure the proper administration of justice. *Trevino,* 969 S.W.2d at 959 (Baker, J., concurring).

5. Available Sanctions for P's Spoliation

Once the trial court finds that evidence has been improperly spoliated and that the nonspoliating party was prejudiced, the trial court is empowered to determine the appropriate sanction. *Trevino,* 969 S.W.2d at 959 (Baker, J., concurring). The primary sanctions available are dismissal or default judgment against the spoliator, exclusion of evidence or testimony, or an adverse jury instruction (spoliation presumption). *Id. See also* Scott S. Katz & Anne Marie Muscaro, *Spoliation of Evidence–Crimes, Sanctions, Inferences and Torts,* 29 TORT & INS. L.J. 51 (1993). Justice Baker admits in his concurring opinion, that because of the varying degrees of sanctions available and because each case presents a unique set of circumstances, courts should apply sanctions on a case by case basis. *Trevino,* 969 S.W.2d at 958 (Baker, J., concurring). *See also Welsh*, 844 F.2d at 1247. The trial court should weigh the degree of the spoliator's culpability and the prejudice the nonspoliator suffers.

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a. Dismissal or default judgment

The most severe sanction available against P for evidence spoliation is to dismiss its complaint or render default judgment.[2] *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917-18 (Tex. 1991); *Clements v. Conard*, 21 S.W.3d 514, 523 (Tex. App—Amarillo 2000, pet. denied); *Ramirez v. Otis Elevator Co.*, 837 S.W.2d 405 (Tex.App.–Dallas 1992, writ denied). Courts have found that dismissal or default judgment is justified when a party destroys evidence with the intent to subvert discovery. *See Computer Assocs. Int'l, Inc. v. American Fundware*, 133 F.R.D. 166, 169 (D. Colo. 1990) ("Destruction of evidence cannot be countenanced in a justice system whose goal is to find the truth through honest and orderly production of evidence under established discovery rules. [N]othing less than default judgment on the issue of liability will suffice to both punish this defendant and deter others similarly tempted."); *Wm. T. Thompson Co.*, 593 F. Supp. at 1456. Therefore, the Courts can dismiss an action or render a default judgment when the spoliator's conduct was egregious, when the prejudice to the nonspoliating party was great, and imposing a lesser sanction would be ineffective to cure the prejudice. *TransAmerican*, 811 S.W.2d at 917-18; *Ramirez*, 837 S.W.2d at 410-11. *See also Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 171 (Tex. 1993); *National Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 640, 96 S. Ct. 2278, 49 L. Ed. 2d 747 (1976).

In *Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804 (7th Cir. 1995), the Seventh Circuit Court of Appeals affirmed the dismissal of the plaintiff's complaint due to the negligent spoliation of evidence. There the subrogee insurance company brought a products liability claim against the manufacturer of a gas grill kept at the home of the insureds, which allegedly caused a fire destroying the home. The insurance company hired an engineer to determine the cause of the fire. After the engineer and the insurance company's adjuster investigated the fire scene but before they identified the sole cause of the fire, they determined that the only significant evidence was the remains of the grill's fuel system. They subsequently discarded all the other parts which comprised the grill. Approximately two and a half years later, the subrogee insurance company filed suit against the defendant manufacturer. The defendant thereafter filed a motion to dismiss for evidence spoliation. The trial court determined that the defendant was *irremediably* prejudiced because it had been deprived of a possibly convincing defense, and that the manufacturer's defense was seriously and materially weakened.

P's destructive testing of materials and components comprising of the cold box equals the culpable conduct of the plaintiff in *Allstate.* P has irreparably and destructively tainted the integrity of every surviving component of the cold box. D now has the impossible task of conducting their investigation with insufficient and compromised materials. The imposition of a lesser sanction would be ineffective to cure the impossible position in which D now sits. Therefore, D has been irremediably prejudiced by P's spoliation and is entitled to the dismissal of P's claims as a matter of law.

b. Exclusion of Evidence or Testimony

Courts generally use this sanction when the spoliating party is attempting to admit testimony or evidence adduced from the destroyed evidence. *See, e.g., Sacramona*, 106 F.3d at 444; *Dillon*, 986 F.2d at 263; *Unigard Sec. Ins. Co.*, 982 F.2d at 363; *Fire Ins. Exch.*, 747 P.2d at 911. In these instances, the nonspoliating party is at a double disadvantage. The nonspoliating party is precluded from using evidence and testimony adduced from the destroyed materials when such is being used against the nonspoliating party. Since the nonspoliating party cannot defend against the spoliating party's allegations without being able to inspect the evidence, the proper sanction for the trial court is the exclusion of evidence or testimony. This sanction could be used against the spoliating party in fashioning a subsequent

[2] Obviously, a default judgment is an inappropriate procedural sanction against a plaintiff. As a result, D should seek dismissal against P when fashioning its arguments for spoliation sanctions.

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no-evidence summary judgment. *See Travelers*, 76 Ohio Misc. 2d 17; 663 N.E.2d 1383 ("In fashioning a remedy that is fair and equitable, the court focuses on the effect of the disposal and how it has adversely affected the defendant. The court finds that the defense experts will be prevented from buttressing their conclusion that the accident happened because of the defective transition cabinet without testing, tangible exhibits, or definitive photographs. As a result of the foregoing, it is the order of the court that the deposition testimony of [the] expert for plaintiff, shall be stricken. . . . Second, [plaintiff's expert] is precluded from testifying at trial."). S*ee also Shelbyville*, 634 N.E.2d 1319 (Ill. App. Ct. 1994) (upholding the lower court's barring the "key evidence" for spoliation and subsequently granting summary judgment as a result of plaintiff's lack of evidence).

c. Jury Instruction (Spoliation Presumption)

In addition to the above sanctions, the Texas courts have broad discretion in instructing juries. *See* TEX. R. CIV. P. 277; *Mobile Chem. Co. v. Bell*, 517 S.W.2d 245 (Tex. 1975). Therefore, trial courts may submit a spoliation instruction upon a determination of the improper destruction of evidence. *See e.g., Watson v. Brazos Elec. Power Coop., Inc.*, 918 S.W.2d 639 (Tex. App –Waco 1996, writ denied). The trial courts determination of whether to submit a spoliation instruction rather than impose sanctions depends on the prejudice to the non-spoliator.

There are two types of instructions available to the courts. The first and more severe is the rebuttable presumption. This instruction is used when the nonspoliating party cannot prove its case or defend on the merits without the destroyed evidence. *See Welsh*, 844 F.2d at 1248; *Sweet*, 895 P.2d at 491. The trial court should instruct the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. *Trevino*, 969 S.W.2d at 960 (Baker, J., concurring). Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. *See Welsh*, 844 F.2d at 1247; *Sweet*, 895 P.2d at 491-92; *Lane v. Montgomery Elevator Co.*, 484 S.E.2d 249, 251 (1997).

In shifting the burden of proof to the spoliating party, trial courts are choosing a middle ground that neither "condones the … spoliation of evidence at the [nonspoliating party's] expense nor imposes an unduly harsh and absolute liability" upon the spoliating party. *Welsh*, 844 F.2d at 1249. Moreover, by shifting the burden of proof, the presumption will support the nonspoliating party's assertions and is some evidence of the particular issue or issues that the destroyed evidence might have supported. *See Lane*, 484 S.E.2d at 251.

The second, less severe instruction, is merely an adverse instruction that the evidence would have been unfavorable to the spoliating party. *H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex. Civ. App.–Waco 1975, writ dism'd by agr.). This presumption has probative value and may be sufficient to support the nonspoliating party's assertion; however, it does not relieve the nonspoliating party of the burden to prove each element of its case or presenting its defense. *Trevino*, 969 S.W.2d at 961. Therefore, it is simply another factor used by the fact finder in weighing the evidence.

E. Conclusion

Although Texas has refused to create an independent cause of action for spoliation of evidence, multiple remedies are available to D for its resulting prejudice. P clearly had a duty to preserve every surviving component of the cold box. It is indisputable that P was anticipating litigation concurrent with its investigation. Further, a reasonable person would have concluded that the cold box would not have exploded but for the negligence of some party and that the preservation of every surviving material for litigation would be necessary. Therefore, P had a duty to preserve the evidence.

Additionally, it is immaterial whether P negligently or intentionally spoliated evidence because the prejudice to D is so severe that it precludes its ability to present a viable defense.

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P destructively and irreparably altered the integrity of the surviving materials after the cold box explosion. Further, there is no way of determining all of the surviving components of the cold box that may prove alternate sources of the explosion. As a result, D has been irremediably prejudiced by P's covert spoliation.

Since P has destroyed, discarded or altered material evidence that could support D's defenses, P's claim should be dismissed. Alternatively, the court should exclude evidence or expert testimony regarding evidence that was not made available to D in its post-explosion state. P should not be permitted to subvert the discovery process and the fair administration of justice, simply by destroying evidence before they notified D and filed their claim.

III. Texas Privilege Law and the Internal Investigation Report – The Basics

Investigations often follow an accident. In these investigations, internal investigation reports are often created. The pivotal question becomes: under what circumstances are internal investigation reports privileged and therefore cannot be compelled in response to discovery requests?

In order to avoid production of internal investigation documents, the resisting party must demonstrate that the documents are covered by a privilege. Under the 1999 revisions to the Texas Rules of Civil Procedure, the two key privileges in this situation are the attorney-client communication privilege and the work product privilege. TEX. R. EVID. 503 (attorney-client privilege); TEX. R. CIV. P. 192.5 (work product privilege). The work product privilege under the new rules includes not only the former attorney work product exemption to discovery, but also the former party communication and investigative privileges. TEX. R. CIV. P. 192.5, Comment 8.

The 1999 rules revisions made another key privilege change: witness statements are now ordinarily discoverable. The former witness statement exemption to discovery was eliminated, witness statements are expressly included within the ordinary scope of discovery, and witness statements are expressly excluded from coverage under the work product privilege. TEX. R. CIV. P. 192.3(h); 192.5(c)(1). Witness statements that fall within the scope of the attorney-client privilege, however, can be withheld as privileged on that basis even though the work product privilege does not apply. *In re Fontenot*, 13 S.W.3d 111, 113 (Tex. App.—Fort Worth 2000, orig. proceeding); TEX. R. CIV. P. 192.5, Comment 9.

Under the 1999 revisions to the Texas Rules, then, it is of paramount importance to ensure that all internal investigative reports and witness statements be covered by the attorney-client privilege. Fortunately, Texas has now adopted the "subject matter" test for the corporate attorney-client privilege.

A. Witness Statements, Investigation Reports, and the Attorney-Client Privilege

Texas Rule of Evidence 503 and *In re Monsanto Co., et al.*, 998 S.W.2d 917 (Tex. App.—Waco 1999, orig. proceeding) replaced *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993) as the benchmarks in the area of the corporate attorney-client privilege. In *Brotherton*, the Texas Supreme Court considered the issue of whether accident reports and witness statements prepared by a corporation resisting production were privileged from discovery under Texas' former evidence rules. The *Brotherton* court concluded that communications with "low-level" employees were not protected because they could not seek or act on attorney advice. In *Brotherton*, an explosion occurred on August 23, 1990, at a manufacturing facility operated by the National Tank Company (NATCO). The explosion critically injured a NATCO employee, and two other persons employed by independent contractors. NATCO's general counsel and secretary learned of the explosion the day it occurred and dispatched NATCO's safety and risk control coordinator to investigate. Although not a lawyer, NATCO's safety and risk control coordinator was employed in NATCO's legal department under the general counsel's supervision. The general counsel also immediately notified a brokerage supervisor with American International Adjustment Company (AIAC), a representative of NATO's

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liability insurer, who launched its own investigation.

NATCO and several other defendants were sued on January 15, 1991. Shortly thereafter, NATCO was requested to produce any reports prepared in connection with the accident investigation. NATCO objected, asserting the attorney-client, work-product, witness-statement, and party-communication privileges. In an order signed July 25, 1991, the trial court overruled NATCO's objections as to documents prepared prior to October 25, 1990, the date NATCO learned that it had been sued by one of the other persons injured in the explosion. The trial court thus ordered NATCO to produce the documents prepared prior to that date. The documents included 1) the transcripts of four interviews of NATCO employees conducted by NATO's safety and risk control coordinator shortly after the accident; 2) the transcripts of nine interviews of NATCO employees conducted by NATO's liability insurers shortly after the accident; and 3) three accident reports prepared by NATO's liability insurers and sent to the general counsel.

The Court reviewed each document separately for its discoverability. The Court first addressed the witness statements which NATCO's safety and risk control coordinator took from NATCO employees and then gave to the general counsel. NATCO argued that the initial communications from the employees to NATCO's safety and risk control coordinator were protected under subdivision (1) of Rule 503(b), as communications between representatives of the client and a representative of the lawyer. The Court concluded that the employees who were interviewed were not "representatives" of NATCO for purposes of the attorney-client privilege. However, since *Brotherton*, Texas Rule of Evidence 503 has been amended to revoke the "control group" test and adopt the "subject matter" test, probably permitting the attorney client privilege to extend to these types of employee communications.

Now, Rule 503(a)(2) reads: "A representative of the client is (A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or (B) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client." As the official comment to new Rule 503 states, Texas now employs the "subject matter" privilege test in the case of an entity, where it previously used the "control group" test. *In re Monsanto,* 998 S.W.2d at 919. As one Texas commentator notes, as part of the 1998 unification of the civil and criminal rules, the Texas Supreme Court proposed an amended definition of a "representative of a client" under Rule 503(a)(2) that incorporated a broad "subject matter" test and requested comment from the Bar.

The revised Rule 503(a)(2) is the broadest possible construction of the "subject matter test." It is much broader than either of the two revisions suggested by the State Bar Administration of the Rules of Evidence Committee. The rule includes, as a "representative of the client" any person who is acting in the "scope of employment" for the client. Presumably, this would include independent contractors, such as accountants, subcontractors, temporary personnel, and other agents, if they make or receive confidential communications while they are acting within the scope of their employment for the client. The privilege covers not only the lower-echelon employee or agent who *makes* a confidential communication but one who *receives* a confidential communication. The new definition does not require that the communication be made at the behest of any member of the control group. It does not require that the communication relate to the subject matter of the employee's job. It does not require that the communication be made to a lawyer or the lawyer's representative if the communication was made to effectuate legal representation for the entity. Therefore, under the new rule, the NATCO employees' statements would probably be protected.

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B. Investigation Reports and the Work Product Privilege

The 1999 revision to the work product privilege followed the holding of *Brotherton* that only documents or statements created or made in anticipation of litigation are covered by the privilege. TEX. R. CIV. P. 192.5 (a)(1) & (2). ***It is critical to note, however, that witness statements are not covered by the work product privilege, even if made in anticipation of litigation. TEX. R. CIV. P. 192.5 (c)(1).*** Thus, all witness statements generated as part of an internal investigation will be discoverable unless covered by the attorney-client privilege. *In re Fontenot*, 13 S.W.3d 111, 114 (Tex. App.—Fort Worth 2000, orig. proceeding); *In re Jimenez*, 4 S.W.3d 894, 895-96 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding); TEX. R. CIV. P. 192.5, Comment 9. Documents and communications generated as part of the investigation and in anticipation of litigation will be protected by the work product privilege only if they fall outside the definition of "witness statements."

Under the prior Texas rule, TEX. R. CIV. P. 166b(3), investigative documents were considered prepared in "anticipation of litigation" if: (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Texas has repealed Rule 166b and replaced the "work product" section of the rule with Rule 192.5. The new rule retains the "anticipation of litigation" language, but no cases have yet interpreted it.

In the past, the issue of whether an internal investigation report met the "prepared in anticipation of litigation" test has been determined on a case-by-case basis. This is likely to remain the law under the new rule. Where the party resisting disclosure asserts that it prepared the report "because of" anticipated litigation and that it would not have created the report or communication in substantially the same form "but for" the prospect of litigation, this test was usually met. This exempts from protection those documents prepared in the ordinary course of business. Therefore, in the context of an investigation report prepared after an explosion, the party resisting discovery must articulate that its investigation is not a part of its usual business practices, but was prepared because litigation often follows such an event and that the resulting investigation was conducted in preparation for the likely subsequent litigation. Ultimately, there must be a causal nexus between the asserted privileged communication and the prospect of litigation. Absent this relationship, the privilege will be defeated.

Both the federal and Texas courts construing the work-product privilege have struggled to delineate a standard to determine when a document has been created in anticipation of prospective litigation. They have applied several tests aimed at documents prepared primarily for litigation. *See e.g., United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982). Courts tend to exclude documents from work-product protection when they find that the prospect of litigation was too remote or where the documents were prepared in the ordinary course of business. *See United States Court of Appeals for the Second Circuit in the United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998).

In Texas, an investigation is conducted in anticipation of litigation if it meets the two-pronged test of *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 40-41 (Tex. 1989). The first prong of the *Flores* test is objective. The court is required to determine whether a reasonable person, based on the circumstances existing at the time of the investigation, would have anticipated litigation. The Court stated in *Flores* that "consideration should be given to outward manifestations which indicate litigation is imminent." *Id.* at 41. Upon further consideration, however, the Court concluded that the "imminence" requirement impairs the policy goals of the witness statement and party communication privileges. Serving the function filled in many jurisdictions by the work product

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doctrine, these privileges seek to strike a balance between open discovery and the need to protect the adversary system.

As the United States Supreme Court noted in *Hickman*, a party must be free to assemble information about the case free of undue interference from the other side:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385 (1947).

The investigative privileges promote the truthful resolution of disputes through the adversarial process by encouraging complete and thorough investigation of the facts by both sides. *See Coastal States Gas Corp. v. Department of En*ergy, 617 F.2d 854, 864 (D.C. Cir. 1980). At the same time, they do not unduly thwart discovery, as they are limited in scope and can be overcome by a showing of substantial need for the information and undue hardship in obtaining it from other sources. *Id.*

C. Objective Test – Reasonable to Anticipate Litigation

Considering these above-referenced policies, the objective prong of *Flores* is satisfied whenever the circumstances surrounding the investigation would have indicated to a reasonable person that there was a substantial chance of litigation. *Brotherton*, 851 S.W.2d at 204. The confidentiality necessary for the adversary process is not defeated because a party, reasonably anticipating future litigation, conducts an investigation prior to the time that litigation is "imminent." *Id.* Accordingly, the *Brotherton* Court modified *Flores* to the extent that it accords protection only to investigations conducted when litigation is imminent. *Id.* The underlying inquiry now is whether it was reasonable for the investigating party to anticipate litigation and prepare accordingly. *Brotherton*, 851 S.W.2d at 204.

D. Totality of the Circumstances

Some courts of appeals have held that the objective prong of Flores may be satisfied only where the plaintiff engages in some action indicating an intent to sue. *See, e.g., Boring & Tunneling Co. v. Salazar*, 782 S.W.2d 284, 287 (Tex. App—Houston [1st Dist.] 1989, no writ). *Flores*, however, is contrary to that contention. Rather, it requires the trial court to examine the totality of the circumstances to determine whether the investigation is conducted in anticipation of litigation. *Flores*, 777 S.W.2d at 41. Requiring that the plaintiff manifest an intent to sue would also be at odds with the policy goals of the witness statement and party communication privileges. These privileges are designed to promote the adversarial process by granting limited protection to investigations conducted in preparation for litigation. Common sense dictates that a party may reasonably anticipate suit being filed, and conduct an investigation to prepare for the expected litigation before the plaintiff manifests an intent to sue. *See Smith v. Thornton*, 765 S.W.2d 473, 477 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Lone Star Dodge, Inc. v. Marshall*, 736 S.W.2d 184, 189 (Tex. App.—Dallas 1987, orig. proceeding).

In *Stringer v. Eleventh Court of Appeals*, 720 S.W.2d 801 (Tex. 1986), the Court stated that "the mere fact that an accident has occurred is not sufficient to clothe all post-accident investigations . . . with a privilege." *Id.* at 802. The Court in *Brotherton* agreed with the opinion in *Stringer*, but disapproved to the extent that it held that the circumstances surrounding an accident can never by themselves be sufficient to trigger the privilege. *Brotherton*, 851 S.W.2d at 204. If a reasonable person would conclude

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from the severity of the accident and the other circumstances surrounding it that there was a substantial change that litigation would ensue, then the objective prong of *Flores* is satisfied. *Id.*

E. Subjectivity Test – "Good Faith Belief that Litigation will Ensue"

The second prong of the *Flores* test is subjective. The party invoking the privilege must have had "a good faith belief that litigation would ensue." *Flores*, 777 S.W.2d at 41. The subjective prong is properly satisfied if the party invoking the privilege believes in good faith that there is a substantial chance that litigation will ensue. *Brotherton*, 851 S.W.2d at 205. It does not further the policy goals of the privilege to require the investigating party to be absolutely convinced that litigation will occur. Furthermore, although not expressly stated in *Flores*, the subjective prong plainly requires that the investigation actually be conducted for the purpose of preparing for litigation. An investigation is not conducted "in anticipation of litigation" if it is in fact prepared for some other purpose. As with the objective prong, the court must examine the totality of the circumstances to determine whether the subjective prong is satisfied. *Id.*

Most courts in other jurisdictions construing "anticipation of litigation" under Federal Rule of Civil Procedure 26(b)(3) and its state counterparts likewise do not require that plaintiff have manifested an intent to sue to trigger the privilege. Rather, it is sufficient if the circumstances indicate that the materials were prepared because of the prospect of litigation. *See, e.g., Binks Mfg. Co. v. National Presto Indus., Inc*., 709 F.2d 1109, 1120 (7th Cir. 1983); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977); *Winter Panel Corp. v. Reichhold Chems., Inc*., 124 F.R.D. 511, 513-14 (D. Mass. 1989); *Anderson v. Torrington Co*., 120 F.R.D. 82, 86 (N.D. Ind. 1987); *Corbin v. Weaver*, 680 P.2d 833, 839 (Ariz. Ct. App. 1984); *Mullins v. Vakili*, 506 A.2d 192, 197-98 (Del. Super. Ct. 1986); *American Bldgs. Co. v. Kokomo Grain Co.*, 506 N.E.2d 56, 62-63 (Ind. Ct. App. 1987); *Ashmead v. Harris*, 336 N.W.2d 197, 200 (Iowa 1983); *Kaarup v. St. Paul Fire & Marine Ins. Co*., 436 N.W.2d 17, 21 (S.D. 1989).

Further, it is not necessary that litigation be threatened or imminent, as long as the prospect of litigation is identifiable because of claims that have already arisen. *See Hercules Inc. v. Exxon Corp*., 434 F. Supp. 136, 151 (D. Del. 1977); *United States v. Exxon Corp*., 87 F.R.D. 624, 638 (D.D.C. 1980); *Great Lakes Concrete Pole Corp. v. Eash*, 385 N.W.2d 296, 298 n.2 (Mich. Ct. App. 1986); *United States v. Bonnell*, 483 F. Supp. 1070, 1078 (D. Minn.), *modified on other grounds*, 483 F. Supp. 1091 (D. Minn. 1979).

Other jurisdictions have determined that internal communications which analyze potential claims in a lawsuit arising from events that have not yet occurred, but prepared primarily for business planning purposes, are nevertheless protected. For instance, in *United States Court of Appeals for the Second Circuit in the United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998), the Second Circuit rejected the limited interpretation of anticipation of litigation which holds that documents are work product only if they are created primarily to assist future litigation. Rather, the court adopted the more expansive interpretation that such documents are protected as work product when they are prepared "because of litigation." *Id.* at 1194.

The fundamental problem that has plagued other courts is determining whether a "routine" investigation is conducted in anticipation of litigation. The Advisory Committee Notes to the 1970 federal rules amendments provide that "materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes" are not protected. Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 485, 501 (1970). Accordingly, many courts have recognized a bright-line "ordinary course of business" exception.

However, Texas has failed to recognize a bright-line ordinary course of business

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exception. *Brotherton*, 851 S.W.2d at 206. It may very well be that a party routinely investigates serious accidents because such accidents routinely give rise to litigation. As with other investigations, an investigation performed in the ordinary course of business is conducted in anticipation of litigation if it passes both prongs of the *Flores* test. With regard to the subjective prong, the circumstances must indicate that the investigation was in fact conducted to prepare for potential litigation. The court therefore must consider the reasons that gave rise to the company's ordinary business practice. If a party routinely investigates accidents because of litigation and nonlitigation reasons, the court should determine the primary motivating purpose underlying the ordinary business practice. *See United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. Unit A 1981); *Schaffer v. Rogers*, 362 N.W.2d 552, 555 (Iowa 1985); *LaMonte v. Personnel Board of Jefferson County*, 581 So. 2d 866, 868 (Ala. App. 1991). *Cf. GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46 (1979).

IV. An Application of Texas Privilege Law to the Company P Explosion

A. The Facts

As previously articulated, in September of 1995, P sent four valves to D for routine repairs. D repaired the valves for a nominal sum and delivered the valves to P in September 1995. P installed these valves in the Cold Box unit at its facility where it manufactured acetic acid.

In April 1996, more than seven months after the valves were repaired and installed in P's Cold Box unit, there was an explosion at the facility. Shortly after the explosion, P conducted a private investigation into the cause(s) of the explosion and an investigation report was created. There was no independent investigation of the explosion conducted by federal, state or municipal agencies.

Within three months of the explosion P had conducted an internal investigation revealing many key causes of the explosion, had hired (and fired) an investigation firm, identified the valves as a potential cause of the explosion, and completely rebuilt the Cold Box.

Approximately one year after the explosion, and after the Cold Box had been rebuilt and the site of the explosion had been irrevocably altered, P sent a demand letter to D. In the demand letter, P, relying upon certain sections of its internal investigation report, claimed that the valves that D repaired caused the explosion.

In April 1998, two years after the explosion, P filed suit against D. In its Original Petition, P claimed that the valves were the sole cause of the explosion and sought to recover $58 million dollars from D as a result of P's alleged property damages and lost profits. On November 8, 1998, D served discovery requests upon P specifically seeking the investigation reports created by P and other investigative documents. In response to these requests, P asserted the investigative and attorney-client privileges in an attempt to shield these documents from production, and subsequently provided a privilege log.

B. Issue Presented

Why was D entitled to P's Investigative Reports?

C. Short Answer

D was entitled to the investigative documents because: (1) D had a substantial need for these documents; (2) the information contained in the documents was not available to D through any other source because the investigation conducted by P could not be retraced or recreated by D; and/or (3) P waived any privilege or protection of such documents through its disclosure of a significant part of the contents of the investigation report to D and through its offensive use of the investigation report.

D. Analysis

1. D Was Entitled To The Investigation Reports And Other Investigative Documents Because It Had A "Substantial Need" For The Documents And The Information Could Not Be

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Retraced Or Recreated Without "Undue Hardship"

In *State v. Lowry*, 802 S.W.2d 669 (Tex. 1991),[3] the Texas Supreme Court specifically addressed the good cause standard for disclosure of privileged documents. In *Lowry*, the Texas Supreme Court held that, where substantial need and undue hardship are shown, work product must be produced. In that case, after consumers made complaints about insurance practices, the Attorney General of Texas launched an investigation of insurance companies concerning possible violations of the Texas Free Enterprise and Antitrust Act. During his investigation, the Attorney General issued numerous civil investigative demands (CIDs) to obtain testimony and production of documents. Based on the information received, the State of Texas then brought suit against a number of insurance companies and related entities, asserting antitrust violations and seeking imposition of a constructive trust, damages, and civil penalties. *Id.* at 670.

During this litigation, the defendants did not have the identities of the authors of the complaint letters and were therefore unable to obtain consents or releases from the authors that would allow the defendants to examine the actual complaints made against them. Thus, they jointly sought the production of all documents within the control of the Attorney General related to the allegations in his pleadings or related to "the availability, affordability, or adequacy" of liability insurance. The Attorney General withheld this information, identifying it only in a privilege log which he tendered to the Court for inspection. *Id.* at 671. In seeking to protect the production of these materials, the Attorney General specifically invoked the investigative privilege contained in TEX. R. CIV. P. 166(b)(3)(d). *Lowry*, 802 S.W.2d at 670-673.

The Texas Supreme Court found that the defendant insurers had both a substantial need for the materials and that they were unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. *Id*. at 673. Specifically, with respect to "substantial need" the Court found that all of the information sought by the insurers was gathered by the State during the investigation that led to the filing of the lawsuit. The Court further found that the State was refusing to provide materials requested by the insurers that could lead to evidence supporting the insurers' defense to the lawsuit. *Id.* at 673. As noted by the Texas Supreme Court, "it is difficult for the insurers to make a more particularized showing of need for these documents, the contents of which are unknown to them. We determine that a sufficient showing was made to establish substantial need." *Id*. at 673.

In the D/P case, D also met the "substantial need" prong of the test. The requested materials were likely to lead to evidence that would create or support D's defenses because the investigation report was D's only means of obtaining information regarding the evidence that was available to P at the site immediately following the explosion. D therefore needed the report to prepare defenses to the suit. Additionally, with the joinder deadline rapidly approaching, D had a substantial need for this report so it could identify other possible parties to the suit.

In addressing the "undue hardship" requirement, the Supreme Court in *Lowry* held that the extreme difficulty of replicating the investigative materials amassed by the Attorney General constituted undue hardship. The Supreme Court noted "even if they [the defendant insurers] could somehow retrace their opponent's investigative path with any hope of finding all the information that had been assembled against them, the defendant should not be put to the expense and delay of that exercise." *Id*. at 673. Thus, the Supreme Court held that, because the investigative materials could lead to evidence supporting the opposing party's defense, and the investigation cannot reasonably be retraced or recreated, both the "substantial need" and "undue hardship" criteria had been met, and the trial judge properly ordered production of the documents. *Id*. at 673.

[3] The "substantial need" and "undue hardship" requirements of Rule 192.5 track the exception in the former Texas Rules of Civil Procedure for the discovery of party communications and witness statements (TEX. R. CIV. P. 166(b)(3)(e)). Accordingly, the prior case law interpreting the "substantial need" exception provides guidance when interpreting the new Rule 192.5.

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D also met the undue hardship prong of the test. As noted above, no investigation was conducted by any independent agency (federal, state, municipal, *etc*.) from whom D might obtain the information or materials that were available to P when it conducted its internal investigation. Further, D was prevented from participating in the internal P investigation because, before D was even notified that P held it responsible for the explosion, the site of the accident had been totally altered and a new Cold Box rebuilt. Under these circumstances, it was impossible for D to recreate P's investigation. Thus, D met the "undue hardship" requirement of Rule 192.5 that was addressed by the Texas Supreme Court in *Lowry*.

Based upon the facts and circumstances of the case, D had a substantial need for the investigation reports and related investigative documents, and it could not replicate and retrace P's investigation.

2. P Waived Any Investigative Privilege By Disclosure

Under Texas law, a party waives a privilege if there is a disclosure of any significant part of the privileged matter.[4] The burden of proof on a claim of waiver is on the party resisting discovery once there has been an initial showing of some type of disclosure. *Jordan v. Court of Appeals for Fourth Supreme Judicial District*, 701 S.W.2d 644, 649 (Tex. 1985) ("if the matter for which a privilege is sought has been disclosed to a third party . . . the party asserting the privilege has the burden of proving that no waiver has occurred."). In the present case, D was entitled to the withheld documents because P could not meet its burden of proving that no waiver occurred.

On April 7, 1997, P sent a multi-page letter to D disclosing a selected part of the findings of its investigation of the cause(s) of the Cold Box explosion. The letter stated that P is writing to D because "our investigation has revealed that an error made by D. . . was the precipitating cause of the incident [Cold Box explosion]." The letter continued, "[i]mmediately after the incident, P set out to identify its cause. An investigative team was constituted to examine all of the evidence concerning the explosion. The team's conclusion concerning the occurrence and regarding D's role in the explosion is as follows . . . ."

The letter then outlined specific investigative findings, including the finding that D had allegedly "reversed the identification tags" on the valves, and that D had allegedly "interchanged springs" on the valves. According to P, its investigation also revealed that D's alleged errors concerning the valves led to "excessive nitrogen flow" eventually causing "the internal process bypass pipe to fail . . . which caused the box wall to fail . . .. Once the box was breached, process gas was ignited as it jetted into the atmosphere causing the explosion and fire."

The obvious purpose of this disclosure to D of selected portions of the information and conclusions contained in P's investigation report was to substantiate P's claim against D. In so doing, P waived any privilege applicable to these materials based upon its disclosure of a significant part of the results of this report to D on April 7, 1997.

A similar set of facts is found in *Terrell State Hospital of Texas Department of Mental Health and Mental Retardation v. Ashworth*, 794 S.W.2d 937 (Tex. App.—Dallas 1990, orig. proceeding). *Terrell* involved a hospital's post-suicide investigation which the parties agreed was protected by the hospital committee privilege. *Id*. at 939-40. Prior to the lawsuit, a state senator had contacted the hospital

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[4] The Texas Rules of Evidence contain an explicit provision that governs waiver of privilege:

> A person upon whom these Rules confer a privilege against disclosure waives the privilege if:
>
> (1) The person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter . . .

TEX. R. EVID. 511. Texas Courts have applied Rule 511 to the work product privilege as well as to the attorney-client privilege. *See, e.g., Axelson v. McIlhany*, 798 S.W.2d 550, 553-54 (Tex. 1990).

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regarding the incident. The hospital's representative reviewed the investigation report before sending a written response to the senator that apparently revealed "information and conclusions" contained in the report. *Id*. at 940. As in the case at bar, the hospital representative did not release the actual report to the senator. *Id*.

The court of appeals held that "Rule 511 allows a *partial disclosure* of privileged information to result in an implied waiver of the privilege as to additional material that has not been disclosed." *Id*. (emphasis supplied). Based upon this conclusion, the court of appeals found no abuse of discretion in the trial court's finding that the hospital had released a "significant part" of the investigation report and had consequently waived its privilege. *Id*. at 941.

As in *Terrell*, P voluntarily chose to disclose significant portions of its report in order to aid its case against D. The result of such disclosure is that P waived any privilege that might have been asserted protecting the remainder of the investigation reports and other investigative documents and therefore the materials should be produced.

3. P Waived The Privilege By Its Offensive Use Of The Investigation Reports And Other Investigative Documents

P also waived the privilege through its offensive use of the investigation reports and other investigative documents. In 1993, the Texas Supreme Court set out the following test for waiver of a privilege under the offensive use doctrine: (1) the party resisting discovery must be seeking affirmative relief; (2) the privileged information must in all probability be outcome determinative of the claim asserted; and (3) the communication must be the only means of obtaining the information. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993).

The first prong of the *Davis* test was met in the D/P case because P sought affirmative relief from the court. P sought monetary compensation for damages resulting from alleged acts and omissions of D. *Texas Department of Public Safety Officers' Ass'n. v. Denton*, 897 S.W.2d 757, 761 (Tex. 1995) (claim for damages constitutes a claim for affirmative relief under *Davis*).

The second prong of the test was met because the private investigation report and related materials was likely to be outcome determinative of the claims asserted by P against D. Indeed, in its April 7, 1997 letter, P contended that the investigation report revealed that the alleged faulty repair of the valves was the sole cause of its damages. D was entitled to know all of the facts and evidence that P examined to arrive at those conclusions. D was also entitled to review the investigation reports and other investigative documents to determine if they contained information indicating that the explosion may have been caused, in whole or in part, by the acts and omissions of third parties other than D.

The third prong of the test set forth in *Davis* was also met. The only means of obtaining the information concerning the actual cause(s) of the explosion at P's facility was from P. P conducted a private investigation shortly after the explosion occurred. P, however, choose not to advise D of its claims against D until approximately one year later, after it had rebuilt the Cold Box unit and irrevocably altered the site. The investigation reports and other investigative documents were therefore the only means of obtaining information regarding the evidence that was available to P immediately following the explosion.

V. Conclusion

Hopefully, the foregoing discussion of the law of spoliation and the law of privileges (as applied to the D/P case) will assist the reader in avoiding problems when faced with a similar incident.

The issues addressed in this paper were instrumental in setting up the successful resolution of the D/P case. In fact, obtaining the P investigative reports helped D prepare defenses to the suit and helped counsel prepare for hard-hitting depositions of P's witnesses in which other causes of the explosion were identified. After concluding the deposition testimony of P's key fact witnesses (in which

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spoliation was explored), D was able to settle the case on favorable terms.

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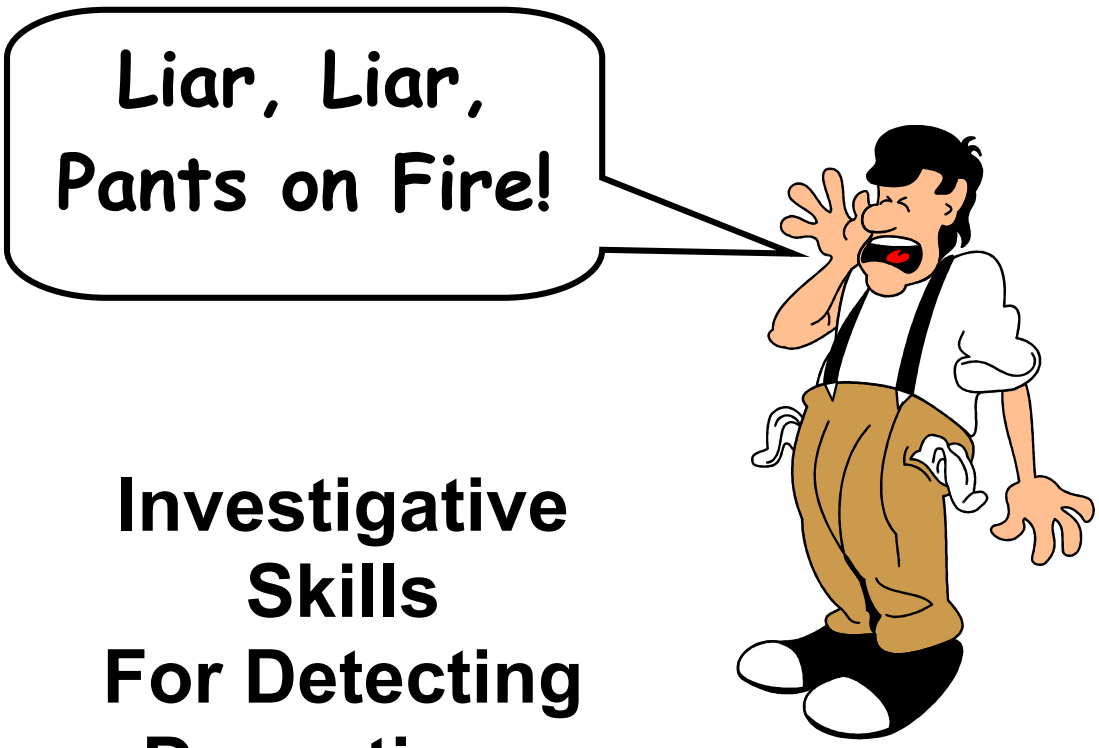

Investigative Skills For Detecting Deceptions

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LIAR, LIAR, PANTS ON FIRE!

Lies Have Serious Consequences For Your Life

- Which employee is telling you the truth about the sexual harassment complaint?
- Is your job applicant qualified and honest? Or is this your next "employee from hell?"
- Is your potential new boss being honest when he describes the position and tells you the reason that the person you will replace left the company? Or will this be your next "job from hell?"
- Does the customer to whom you are extending credit actually plan to pay you?
- Are your relatives being honest about the reason they want to borrow money from you?
- Did your child actually spend the evening out doing what she said she was doing?
- Can you really count on the Congressman's support for your proposal?
- Is the stranger offering to assist you with your packages a good Samaritan, or a criminal who is trying to get close enough to rob you?
- Is the waiter being honest when he says that the coffee is decaf?
- Is the sales representative giving you accurate information about the new product, or just pressuring you into a purchase you will regret?
- Is that magnificent creature on the barstool next to you in the airport lounge *really* the soul mate you've always longed for, or just another serial killer you've managed to stumble across?

Definitions

A "lie" is a deliberate attempt to mislead a target by presenting false information as if it was true, or by concealing or manipulating true information.

A "white lie" is a lie of insignificance, made with good intentions, and is meant to spare the target from psychological pain. If the lie were discovered, the target would readily understand it, forgive it, and even be grateful for it. The liar would feel the same way if they were the target of such a lie. This program is not concerned with white lies.

Lies can made directly or indirectly. "Direct deception" and similar terms indicate a direct attempt to mislead a listener by asserting that something is true when it is really false, or false when it is really true, in the hope that the listener will be deceived and take action accordingly. "Evasion" and similar terms indicate an indirect attempt to get a listener to reach a false conclusion by selectively filtering the flow of truthful information to the listener. It is indeed the truth, but not "the whole truth." If the listener knew the

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whole truth, they would have reached a different conclusion; instead they take the wrong action. Evasion is more difficult to catch because the facts doled out by the liar are actually true, thereby reducing the chance that the liar's non-verbal behavior will give them away.

Why the Techniques Presented in This Program Work

Telling the truth is relatively easy. It's like a movie right there in your mind. You just have to play back the tape and repeat what you see and hear, and describe what you think and feel.

Lying, on the other hand, is hard. It's not on tape for ready playback. It's like a movie you have to create, write, produce, direct, perform, edit, and distribute all by yourself. It also has to be consistent with every prequel movie you've made in the past, every sequel you will make in the future, and all the movies everyone else is making that will compete with your movie. You may not have time to write a good script or to rehearse. You will have to depend on the other characters in your movie to follow your script, even though they have never read it. And unlike a movie, you can't control the audience. Audience members can stand up and ask you questions about your movie while it is in progress and you will have to respond without screwing up the rest of the movie. To make matters worse, the audience is made up of critics. They are going to evaluate your movie and determine that it's either a hit (in which case you will be under pressure to produce a hit every time), or a bomb (in which case you may never work again). And all of this is going on in real time and has to be done at the same speed as people who only have to tell the truth. The stunt is difficult to pull off, but people are fooled by it daily.

Lying is hard. A liar has to keep several thoughts in their head at the same time while constantly analyzing what is happening in the current moment and all the possible paths where you might be leading with your next question. A liar has to remember what the truth actually was, what statements the liar has already made, and how to match the current lie to all previous lies. The liar also has to memorize the latest lie in order to remember it later when a further lie may be needed. At the same time, the liar has to monitor their own behavior so as not to give off signals of deception, while analyzing your reactions to see if you are picking up on their deception. The liar also has to anticipate what other witnesses know and might say. The liar has to guess what information you already know. At every moment, the liar has to evaluate the rewards and punishments of confessing or continuing to lie. All this while trying to have a "natural" conversation with you in real time! Sooner or later the liar's mind looses some control and they can no longer perfectly coordinate their speech and mannerisms.

The nervous system reacts to the mental overload caused lying by giving off signals, many of which are uncontrollable. The internal pressure that causes our nervous systems to react and make us feel uncomfortable goes by a name we are all familiar with: STRESS! Stress is not always an indication of lying. Grabbing a hot pan from the stove with your bare hands will create stress. Stress just means that we are consciously or subconsciously aware that our current circumstances are not what we would like and that we had best make changes in order to reduce our level of stress and enhance our well-being.

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Stress and lying are closely tied to our internal system of rewards and punishment. We all want to receive rewards, even when we don't deserve them, and escape punishment, even when we do deserve it. If I grab the hot pan by mistake, I will immediately grab for ice in an attempt to escape or reduce the burning consequences. When a person chooses to gain an unjust reward by theft, oppression, or deception, they are likely to lie in an attempt to escape the consequences.

Lying is just one of the many things in life that causes stress. That is why the polygraph is not really a "lie detector," but a machine that measures only five points of stress out of hundreds of possible points. In this program, you will learn to spot far more indicators of stress than the lowly polygraph is capable of measuring.

The mind does not like to lie. Lying takes incredible amounts of mental energy and creates stress and anxiety as the liar worries about how to produce a convincing story without being perceived as a fraud. The body tries to relieve the stress and anxiety through exercise, the movement of muscles in the body. The muscles control breathing, facial gestures, hands, arms, legs, vocal cords, and just about every other function of the body.

The purpose of this program is to learn how to analyze the stories that witnesses tell, and how to read the signals that liars give off while their minds are working overtime and their bodies are rebelling.

A few words of caution are in order. First, there are some liars that are so good, even highly skilled readers of human behavior can be deceived. Pathological liars, some psychopaths, or even just well-rehearsed cons fit into this category. Fortunately, they are few and far between. They are like truly professional car thieves; if they really want your car, they are going to get it. Most car thieves, however, are less accomplished and can be thwarted with alarm systems, door locks, steering wheel locks, and tracking devices. The purpose of this program is for you to learn how to use the equivalent of alarms, locks, and tracking devices to thwart common liars.

A second word of caution is that innocent persons can also experience stress for many reasons: (1) the trauma of being part of investigation, (2) fear of retaliation from the wrongdoer, (3) fear of seeming disloyal to coworkers, (4) fear that their own shortcomings—unrelated to the investigation—will be discovered, (5) fear that they will not be believed, or (6) they simply possess the type of personality that always feels guilty even when they have done nothing wrong. You will need to determine what type of person you are dealing with by finding their "base line" as discussed below.

Although other situations will be addressed, this program assumes that your primary goal is to enhance your skills for determining the credibility of witnesses so that you can conduct more effective internal investigations.

Setting the Stage

Before you can effectively interview a witness, you have to make sure you have created the proper setting. You want an investigation—not a prison interrogation! You should

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be in a relatively neutral environment and the witness should be physically free to get up and leave at any time (although at the risk of discipline for insubordination). You do not want to end up defending a lawsuit for false imprisonment. The room should be at normal temperature and should be free of distractions such as stunning window views, knick-knacks, food and beverages. The phone should be silently forwarded and the public address system to the room turned off. Your staff should be instructed that you are not to be disturbed. The witness's chair should not be on rollers and ideally should not have big comfortable arms. The witness should not be on the other side of a desk or table where you cannot observe their lower body.

You also need to be keenly aware that YOU are part of this environment! You want to make sure that the witness's behavior, reactions, and responses are to your questions and not to you personally. You need to be calm, reassuring, non-threatening and maintain a "poker face" so that they are not reacting to your reactions. A liar is going to be reading you for useful information at the same time you are reading them. The better prepared you are for the interview, and the better you are able to isolate yourself from interruptions and your other priority cares of the day, the better the results you will obtain from the interview. It is also best to abstain from coffee, tea, and cola for a few hours before the interview. Your adrenaline level will rise during the interview, and you want to make sure that it's you—and not the caffeine and adrenaline—that drives the pace of the interview.

Interviews in restaurants or other public places should only be used as a last resort because there are too many distractions. Telephone interviews are even worse because the witness controls the setting and you will not be able to observe their body language. You also don't know who else may be monitoring the conversation.

You should always have a second, well-prepared, interviewer or another member of your investigative team present as your witness for all interviews. It is impossible for one interviewer to refer to documents, lists of questions, and notes while at the same time asking questions, listening to answers, and observing the subject's entire body at all times. As soon as you look down at your papers or take a note, you are going to miss non-verbal signals that the witness is giving off. You need to focus on your communication while your second team member observes the subject at all times and serves as a checkpoint to ensure that you cover all the topics you planned.

Finding the Base Line

Surely you've noticed when a family member, friend, or coworker seemed preoccupied to the point that you asked, "Something's bothering you—what's wrong?" Even if they reply, "Oh, nothing," you can still tell there's something wrong, but you can't quite put your finger on it. You are actually picking up on slight changes in their energy level, posture, routine behavior, tone of voice, facial expression, body language, and subject or amount of conversation. Normal idiosyncrasies may be missing, and new behaviors may be present. Their personality is a bit "off."

The reason you know something is wrong is that you are familiar with their natural or "base line" behavior and can pick up on very subtle changes in that behavior—changes that indicate they are preoccupied and under stress. Our brains can handle only so

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much stress before the mental energy used for maintaining our normal behavior is diverted toward activities that are required to reduce our stress levels so that we can get back to our base line.

Therefore, when interviewing a witness with whom you are not familiar, you need to first discover and become familiar with that person's normal base line behavior when they are telling the truth, so that you can identify the subtle shifts and changes that indicate their stress level is rising and that they may be lying to you. This is the reason effective depositions—and good interviews—typically begin with the witness describing their background, work history, and normal work routine. You need to converse with the witness about matters that are not critical to your investigation. This allows the witness time to calm down so that you can establish rapport and get a reading on the witness's base line behaviors.

As an interviewer, you will gather as much useful, truthful information as the witness is willing to give to you. Your goal is to obtain as much accurate information as possible. But even false information is useful if you know that it is false. It's often easier to terminate an employee for lying during an investigation than it is to prove that they actually perpetrated the wrong that you are investigating. You will gain much more information from someone when you establish rapport with them by minimizing distractions, establishing areas of commonality, subtly adjusting your grammar to conform with theirs, and by "mirroring" their postures with your own. Once you have established rapport, you need to maintain it by showing interest, nodding your head, and repeating back what they say.

The one rare exception to this rule is the carefully chosen tactic of asking an obviously guilty and stressed out party straight off, "Do you know why we called you in here?"

The Language of Gestures

Everyone knows that people communicate with more than just their words. People also give off various signals that reveal additional information to the keen observer. We call these signals "body language" or "attitude" or "demeanor." Scientists who study human behavior call these signals "gestures."

All animals, including humans, communicate with gestures. There are two broad categories of gestures: physical and verbal. Humans have become more dependent on verbal gestures, even to the point of converting them into writing. In face-to-face communication, however, the percentage of information actually delivered by the words alone is less than 10%. The remainder is communicated through physical gestures and voice inflections. Physical and verbal gestures can either be subconscious or conscious. Subconscious gestures are more reliable because they are involuntary and harder to "stage," although the best professional actors are able to mimic them convincingly.

There are very few single gestures that will tell you when someone is lying. However, there are many gestures that can tell you that a person is experiencing stress—which may indicate that they are being deceptive. Isolated gestures are rarely dependable. They may mean something, but then again, they may be only tics, idiosyncrasies, and

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mannerisms of the individual. This is why you need to carefully establish the witness's base line before you can tell whether a particular gesture has any meaning for that witness.

More reliable than any single gesture, are "clusters" —contemporaneous groupings—of gestures. A verbal gesture may be coupled with a facial expression, for example. Sometimes the gestures will be consistent and reinforce each other in meaning. At other times, the contemporaneous gestures will contradict each other, a reliable sign that the accompanying statement by the witness is deceptive.

Another thing to keep in mind is that there are two intrinsic types of gestures: conscious and subconscious. Conscious gestures are those that we can intentionally use to communicate and express ourselves, such as waving, shrugging, and smiling. They are less reliable because they can be faked. On the other hand, subconscious gestures, such as blushing, cannot be controlled and are therefore more reliable at communicating a witness's true feelings or stress level. It is the rare actor who can force a blush.

In Appendix A, you will find a chart of many of the physical and verbal gestures you should look for when evaluating a witness's statement. Many more can be found in the suggested readings that appear in Appendix B. We will demonstrate some of the more significant gestures during this program.

Getting the Story Straight

The purpose of analyzing the witness's gestures is to determine their personal credibility as they tell their story. The story itself, however, can reveal a lot about its own veracity if you know what to look for. These are some the characteristics to look for as you evaluate the story:

- Truthful stories are logical. They are coherent, consistent, and don't contradict themselves, even when retold on different days.

- Truthful stories do not appear to be scripted. They are genuinely spontaneous and unstructured. They are rarely presented at the first telling as a perfect lineal recollection of all events. Unprepared, truthful witnesses are more likely to start with an emotional event, or with an attempt at a chronology, only to break their train of thought as they recall important additional events, emotions, and insights.

- Truthful statements are detailed in their presentation of the setting of an event—who was there, what was happening, what the witness was thinking, how the witness was feeling, how others were feeling. The story details are prominent both when they matter and when they don't. A liar will be detailed about insignificant events when telling the truth, but lacking in detail about the setting of the important event in question. Liars tend to avoid creating a lot of details when fabricating a story for two reasons: (1) they will be afraid of remembering all those details later if the have to repeat their story, and (2) they are afraid someone will check out the details they are fabricating.

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- Truthful persons explain the context of their story: what they were doing, when it happened, and why they were present at the time. Insignificant and/or unusual details may be part of the mix. Liars, on the other hand, usually forget to concoct this portion of their story, having put all their effort into coming up with a simple, direct story line that makes sense. It's like the difference between a top notch movie for theatrical release and a cheap made-for-TV movie.

- Truthful stories describe and try to explain the communications, actions, and emotions of all the characters in the story. Liars can concoct a story of actions and communications, but they usually fail to recount the mental and emotional states of themselves and others because they and the other players never experienced them.

- Truthful stories reproduce some of the actual conversations, character, and mannerisms of the key players in the story. Liars have a hard time writing good dialog.

- In telling their stories, truthful persons may spontaneously (i.e., not in response to a challenging question) correct themselves ("We got there about 11 o'clock—no wait—it must have been one o'clock because it was after lunch . . .") or call their memory into doubt ("We got there—oh, let's see, I can't remember—about one o'clock maybe . . ."). Liars will consciously try to avoid such remarks because they are afraid they will not sound credible and convincing.

Some Tips for Detecting Deception

Only bad liars readily reveal themselves. Good or even average liars have usually made some preparation for their performance. After all, if you are doing something you shouldn't, the thought has probably crossed your mind as to what you would do if you were caught. Usually, an amateur liar can get through a pre-concocted story a couple of times without problems. Your job is to get past the solo performance and enter in a probing dialogue. Here are some tips for tripping up a liar in various situations:

In General

- ✓ To a great extent, lying is a highly individualized activity. Gestures do not mean the same things for everyone. That is why you need to establish a person's natural, normal baseline for gestures. Some of the gestures described in Appendix A may merely be habits or tics that are picked up early in life (from copying a lying adult?) and do not really mean anything. Try to determine the liar's normal baseline of gestures when telling the truth. Talk about a topic where the liar doesn't have to lie, then jump to probing questions about the topic where you suspect the person is lying. Note the appearance of any new gestures or the sudden disappearance of any base line gestures. Switch the topic of your conversation back and forth to confirm your suspicions.

- ✓ You cannot depend on just one gesture, unless it's a doozie. Instead, look for changes in gestures and clusters of gestures. The more obvious a physical gesture, the more likely it is to be grouped with a verbal gesture to form a cluster.

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- ✓ If possible, don't allow distractions, such as phone calls, knocks at the door, or other interruptions. Interruptions provide an emotional break to a liar just when you want to keep the heat on. Interruptions allow the liar to react to the external stimulus and expend energy that would otherwise be released through gestures during their interview with you.

- ✓ If possible, avoid being at a table or desk that has knick-knacks, snacks, beverages, and other things the liar can use or move around to expend energy. For the same reason, don't use chairs that have wheels. Even better, use chairs without comfy arms, if possible. That way, the witness is forced to use their arms to communicate naturally or to relieve stress through deceptive gestures. If you have to meet at a restaurant, note when the person takes a bite, a sip, looks around, calls to the waiter, or straightens their napkin in relation to the timing of their responses. Normal movements and activities at the dinner table may be used to mask stalling.

- ✓ Ask questions—lots of probing questions—even if you have asked them already. Liars hate questions that require explanations because they have to think fast and come up with consistent answers that match their previous stories. This causes anxiety and is likely to lead to the display of deceptive gestures. Schedule another interview on a later day and ask the same questions to see if you get the same answers.

- ✓ Open-ended questions (beginning with "who, what, when, where, how, why") are best because they require the liar to explain things or tell a more detailed story. Closed-ended questions (that only require a "yes," "no," or short answer) are less likely to yield sufficient information on which you can judge credibility.

- ✓ Expand your universe of questions beyond the key event you are investigating. Ask each witness to describe their entire day or other relevant time period in which the event occurred. This is particularly useful in a "he said—she said" situation where only the two key parties were present and their stories are in conflict. Then, ask other witnesses about their days and how their memories of even ordinary events of the day cross-reference with the two key witnesses. Based on the corroborating witnesses' statements, you may discover that one of the key witnesses is more reliable than the other in their recollection of the entire day. You can then logically conclude that the party who most accurately remembered the entire day was also more reliable in their memory of the event in question.

- ✓ It's harder to lie about feelings and emotions than it is to describe events. So ask the liar to tell you about their feelings on the topic and events you are talking about. Ask them what their feelings and mental state were at the time of an event. Ask the same about their observations of other characters involved in the story.

- ✓ Liars rarely bring up the feelings of other characters in their stories. They are too focused on the mechanics of imaginary events. So if the story focuses only on events, and the other characters in their story appear only as stick figures, the story may be a fabrication.

- ✓ Silence is golden! So keep silent and wait for the gold! Liars want to get their answers out quickly and hope that you move on to your next question, change the

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topic, or end the interview. They might even ask you questions ("Why do you ask?") in hopes of finding out what you know. If you are silent, they become fearful that you don't believe them, and they will start to fill the silence with further unsolicited responses to your question just to end the tension. Deceptive clusters of gestures will become more evident as the anxiety increases.

- ✓ Lead a liar down the rosy path. Pretend that you are buying into the lie. Ask enthusiastic questions and encourage the liar to give you more information. The old saying is true: "Give him enough rope and he will hang himself!" The more imaginary details the liar creates, the more "facts" you have at your disposal that can be contradicted by other witnesses. You don't have to prove the liar is lying all the time. Some of the time is enough.

- ✓ First, get the witness to lock into their story by telling it twice. During the third telling, Interrupt the story and jump around between time frames with probing questions. Ask the witness what happened immediately before a particular event, and what happened before that, and before that. Jump to another part of the story and do the same. Liars concoct stories in one direction—beginning to end—and they have great difficulty discussing events out of order because they aren't actually remembering the events. It's like the actor who loses their place in a play and has to call to the stage manager, "Line, please?" There will be significant stalling as the liar tries to find their way around the script. Eventually, the script may unravel as the timing of events changes each time the story is retold.

- ✓ Never smarten up a liar. Do not call attention to the gestures you believe indicate a high level of stress or deception. Your only job is to determine credibility and discover the true facts so that you can make a business decision. You don't have to prove your credentials to the liar.

- ✓ Do not reveal too much information to a liar. It's their job to tell you what they know and not the other way around. The liar should not feel that they are on a level playing field with you. If you have been able to gather a lot of objective facts ahead of time, only reveal those few facts that are necessary to elicit a response from the witness. A liar will always be trying to guess what you know. This is just one more mental task the liar has to juggle. The more they juggle, the more likely they are to flub.

- ✓ If you know that the stories of two or more witnesses are ultimately going to be in conflict, and you suspect that one or more of them may lie, there is a useful tactic you can use toward the beginning of your interview of the alleged perpetrator: Take, for example, Mary's complaint that Joe has repeatedly been sexually harassing her. Her story is credible and you know from gossip or Joe's prior behavior that the complaint has a high probability of merit. When you call Joe in for his interview, do not tell him up front that he was summoned because Mary accused him of sexual harassment. Instead, tell him that you are investigating some recent incidents in the department and you thought he might have heard something about them that could be useful in your investigation. Then, ask Joe about his impressions of various people in the department, but do not start with Mary. For each person, ask whether and why Joe believes that person to be truthful and reliable. Eventually, ask Joe

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what he thinks about Mary. If Joe has been harassing Mary, he is unlikely to trash her because he does not want to confirm that there is any conflict between them. That would blow his defense that they are in fact good friends and just joke around a lot. Rather, Joe is likely to confirm Mary's credibility, like he did for the other employees, thus becoming a character witness for his accuser! Once you have revealed the charge of sexual harassment, Joe will have to contradict his prior story in order to defend himself. On the other hand, if your question about Mary elicits a negative response from Joe about Mary's character and behavior, you will then have other useful information at your disposal as you evaluate the bias and credibility of each witness.

Job Applicants

- ✓ More than one-third of all employment applications and resumes contain false information, usually about job history or academic credentials. The easiest reason to deny employment, or to fire an employee, is for lying in the application process. So use a very extensive job application, and require that all blanks be filled out. Give a liar many opportunities to lie. Don't accept responses such as "See Resume." Make them write the information on the application as well. You may see inconsistencies between the resume and the job history section on the application. Don't leave applications out in the open for applicants to pick up, fill out by committee, and return. Hand them out one-by-one. If the applicant makes a mistake, make them return the spoiled application in order to get a new one. Then compare the completed application with the spoiled one and pay very close attention to the areas that were "corrected."
- ✓ Conduct criminal background and reference checks on all applicants. If you use leased or temporary employees, require the payrolling company to perform the same checks that you do. If you convert temps to a regular employees, make them go through the same hiring process as if they never worked at your business. Have them fill out a fresh application and submit to a background check. Criminals "launder" themselves through temporary agencies. While temping for you and gaining your trust, a good con artist will have no problem performing as a model employee.
- ✓ Require candidates to produce verification of the degrees they purport to hold.
- ✓ Trick lying applicants into ratting on themselves. In screening interviews, say, "I'm most impressed with your qualifications and experience. It's just what we're looking for and I would personally like to recommend you for further consideration. But I have to warn you that when this is passed above for review, they will check out and verify each and every detail. If anything turns out to be incorrect, you will be dropped from ever being considered for any job at this company. So, between you and me, is there anything that we need an opportunity to correct before I send this on?" If there is, you do not have to consider the liar any further for employment.
- ✓ Conduct a simple test to see if the applicant has biases against minorities. Ask: "Do you have any prejudices against any other ethnic groups or do you feel uncomfortable working with (or serving) certain people or groups of people?" Most everyone will say no, and that's fine. What you are looking for is how long it takes for them to say no. If they hesitate, you should look for a better candidate.

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Strangers with Criminal Intent

- ✓ Your car breaks down, a stranger arrives to lend assistance, and announces "We sure have a problem here, don't we?" Note that "you" becomes "we." This is not a mutual problem; it's your problem. The liar is trying to create an artificial climate of teamwork, intimacy and trust where none in fact exists.
- ✓ Beware of nice, charming strangers. All con artists are nice, charming strangers and very accomplished liars.
- ✓ A lying stranger may give you lots of details about their background, what they are doing in town, about their experiences and interests that may be similar to your own, etc., etc., etc. The only problem is that you never asked. A criminal may hide evil intentions behind the disguise of being an open book.
- ✓ A liar will make unsolicited promises, such as "Just let me have five minutes of your time and if you don't like what I have to say, I'll leave. I promise."
- ✓ A stranger may claim to know you from the past, or have a friend in common. They seem to have remarkable details at hand about your past or your old friends. The only problem is, you can't remember the stranger. You might even feel guilty about not remembering. A con artist will do research on you before targeting you. So try making up a fact about a fictitious person, like, "Oh, then you must also know Mary Thompson! Tell me, did she ever finish going to school? It seems she was always taking some sort of class or another." A truthful person will say, "I don't know Mary Thompson." A con artist will make up additional information or make comments about Mary to show that Mary was a mutual friend.
- ✓ It's ok to let your kids talk to strangers—in your presence. It's the way they learn to evaluate the veracity of adults and the credibility of their communications. Later, you can discuss their conversations and point out things about the stranger's gestures and conversation that were notable to you. Children at an early age are quite apt at learning who may be a threat. Teach them about the ways that dangerous people may try to make fast friends when you are not around.

Embezzlers

- ✓ Someone who has been systematically stealing from your company has had a lot of time to think up a story in case they are caught. In other words, they wrote the script ahead of time, practiced it over and over in their head, and they are ready to perform it at a moment's notice. At first, the performance will be convincing. The problem with a script, though, is that it's written and memorized in one direction—from beginning to end. Once the suspect employee has told the story from beginning to end and has repeated it to lock it down, start jumping around to different parts of story and ask about what happened just before. Someone telling the truth will be able to jump around in the story because it actually happened. Liars will start to display stalling gestures as they mentally have to start the script over, fast forward to the point in question, and then back up to the moment you are asking about. As you keep asking questions that are not in sequence with the script, the script may unravel and the order of events in the story may start to change. Based on the inconsistencies, you will be able to discount the credibility of the witness.

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APPENDEX A
GLOSSERY OF GESTURES

C = Conscious (less reliable; possible to fake)
S = Subconscious (more reliable; difficult or impossible to fake)

Physical Gestures	TRUTHFUL	DECEPTIVE
Gestures in general	• Free • Flowing • Easy • Natural • Consistent with other behaviors	• Cramped • Jerky • Tight • Closed • Contradict other behaviors
Tilting of head (C/S)	• To the side, exposing the neck • Toward you demonstrating attention and involvement	• None / frozen • Backward • Jerking back in response to your statement or question
Nodding or shaking head (C/S)	• Fluent and natural with the conversation	• Dramatic • Timing is off from the words • Contradicts words • Changes from one motion to the other in the middle of the gesture (e.g., starts nodding yes, realizes what they are saying, and quickly slides into shaking no)
Eyebrows and forehead (C/S)	• Symmetrical • Consistent with expressions on the rest of the face • Some gestures are difficult to fake (e.g., forehead wrinkles)	• Asymmetrical (one eyebrow raised for effect) • Inconsistent with the rest of the face or with words spoken
Blushing / Blanching (S) Bubbles at corners of mouth (S) Bites, chews, and teeth-sucking (S) Swollen neck arteries(S) Sweat (S) Adams apple (S)	• Indicates embarrassment or sensitive subject	• Indicates high anxiety

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Physical Gestures	TRUTHFUL	DECEPTIVE
Smile (C/S)	• Genuine • The eyes also smile: lower eyelid raises / crows feet • The smile does not overstay its welcome	• False • Only the mouth moves • Inappropriate to the message • Ends too quickly • Lasts too long • Smirk or micro-smirk before answering
Eyes (C/S)	• Normal contact in a conversation is 30-60% (but be aware of cultural differences) • Attentive • Open • Unchallenging • Eye contact maintained after their communication so they can verify that you understood and believed them • Tears when accompanied with consistent behaviors such as rocking and chest heaves indicate high anxiety	• Cold stares • Eye contact lasting more than 30 seconds • Diverted, particularly after answering a question or making a statement • Inappropriate loss of eye contact while making a statement • Rapid or extended blinking • Tears can be faked and may lack consistent accompanied behaviors • Blink rate increases
Shoulders (C/S)	• Symmetrical • Square to your shoulders • Appropriately timed • Consistent with the message (“I don’t know)	• Asymmetrical (the one-shoulder shrug) • Angled from your shoulders • Timed too early, too late, too short, or too long • Micro-shrugs • Inconsistent with the message (saying “yes” or “no” while shrugging)

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Physical Gestures	TRUTHFUL	DECEPTIVE
Chest (S)	• Normal breathing	• Rapid breathing or sudden breath indicates anxiety • Chest heaves indicate high anxiety • Inappropriate yawning, laughing, or coughing
Elbows (S)	• Held away from the body	• Held close to the body indicates fear or defensiveness, could indicate deception
Arms (C/S)	• Loose, flowing, in harmony with the rest of the body, properly timed • Crossed loose and low	• Staged movements • Poor timing • Crossed high and tight may mean defiance or confidence • Inappropriate stretching
Hands (C/S)	• Relaxed • Open • Visible • Finger pointing • May touch you	• Tight • Clenched (white knuckles) • Hidden • The hand shrug (as in “Look, I have nothing to hide!”) • No finger pointing • Won’t touch you
Hand to Head Contact (S)	• Rubbing the chin while actually engaged in deep thought	• Most hand to head contact • Covering or partially covering the eyes, ears, or mouth (“Hear no evil, see no evil, speak no evil.”) • Covering or pinching the nose • Scratching the head • Resting the head in or on the hands for support • Putting objects in the mouth

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Physical Gestures	TRUTHFUL	DECEPTIVE
Hand to Body Contact (S)	• Nothing noteworthy	• Wiping hands on clothes • Smoothing wrinkles or picking lint while talking to you • Clutching the groin
Knees (S)	• Still	• Moving in and out • Bouncing
Feet (S)	• A woman slipping her foot out of her shoe	• Tapping or swinging that is out of character to the person
Spatial (S)	• Facing you or moving toward you	• Facing or turning away from you or moving away from you • Creating a symbolic barrier or wall by arranging objects between you and them on a table or desktop

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Verbal Gestures	TRUTHFUL	DECEPTIVE
Words	• Clear • Make sense	• Mumbles • Misuses or mispronounces common words • Avoids judgmental terms

Timing	• Spontaneous
	• Direct answers
	• Direct denials
		• Broken or incomplete sentences
		• Appears to forget what they were talking about
		• Stops and starts over
		• Stalls and micro-stalls:
		  • Repeats the question back to you
		  • Pretends they didn't hear or understand you ("Huh?")
		  • Clears the throat, coughs, or sighs
		  • Stutters or stammers
		  • Asks for a clarification
		  • Verbal pauses (Ah, Er, Um, Ya' know)
		  • Nervous laughing
		  • Inappropriate yawning

Pace of responses	• Normal / consistent timing	• Speeds up when telling lies • Slows down when telling the truth
Pitch and volume	• Normal	• Changes in pitch and volume that are inconsistent with normal conversation • Monotone
Manner	• Normal	• Overly friendly • Overly helpful or cooperative • Overly thankful • Flattery • Forgetful

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Verbal Gestures	TRUTHFUL	DECEPTIVE
Repeating your words back to you.	• Q: "Are you having an affair?" • A: "No." • A: "No, I'm not." (Use of contraction)	• A: "No, I am NOT having an affair." (Words repeated; no use of contraction)
Answers that sound like questions.	• Q: "Did you take the report from my desk?" • A: "No." (Definite)	• A: "No, I did not take the report from your desk (?) (Voice, head, and eyes lift at the end of the response)
Pronouns	• Use of pronouns • "My darn car broke down"	• Pronouns avoided • "The darn car broke down."
Silence	• Comfortable with silence after giving a truthful response	• Uncomfortable with silence after telling a lie. • Will continue to add bits of information, or will ask you a question, or will try to switch subjects in order to avoid the silence.
Smoke screens and noise	• Direct answers to your questions. No extraneous material.	• Tons of information and details surrounding the event you have asked about, but nothing on point. Good memory of insignificant details, but lack of memory about key facts. Gives the illusion of openness and full cooperation while actually engaging in concealment.
Tone of voice	• Direct or surprised. • "No, I don't know what happened to your file."	• Use of sarcasm • "Sure I know what happened to the file. I stole it. Then I blew it up onto 11" x 17" photocopies and mailed it to all our competitors. And just to make sure nobody else missed it, I also posted it on our Internet Web Site. Then, just so nobody could trace it back to me, I took the original home and fed it to my goat!"

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Verbal "Red Flags"	DECEPTIVE EXAMPLES
A pre-announcement that a liar is about to tell the truth. Truthful people never feel a need to tell you they are telling you truth—they assume their credibility is not an issue. Liars announce when they telling the truth. This really means that they are lying to you or are about to lie to you.	• "Honestly . . ." • "To be perfectly honest with you . . ." • "To tell you the truth . . ." • "Quite frankly . . ." • "Believe me when I say this . . ." • "I wouldn't lie to you . . ." • "[Why] Would I lie to you?" • "Really . . ." • "I swear to God!" [or on a stack of bibles, or on my mother's grave]" • "May God [or lightning] strike me [my children, my mother, my grandmother, etc.] dead!"
A pre-announcement, in legal-sounding formal language, that the liar has a qualified memory. This gives them room to change their story later. Truthful people "don't remember" or "don't know." Liars "don't recall."	• "As best as I can recall . . ." • "To the best of my recollection . . ." • "I have no recollection of that . . ."
Explosions of anger and threats of a lawsuit, etc. This is a great way for a liar to reduce anxiety by expending large volumes of energy. Plus, the liar hopes to bully you into dropping the subject so that they can stop lying.	• "What do you mean, 'Am I sure?'" Are you calling me a liar? Isn't that what you're really saying? Well, I've got an impeccable record, just ask anyone! And I'm not going to stand for it, not for one moment! I've got a lawyer and he's the meanest lawyer in town. And when he gets done with you, I'm going to own your company, your house, and maybe even your dog! So there!"
Responses that are meant to imply an answer when none has really been given.	• "Now why would I do something like that and risk my job, my family, and my reputation?" • "I'm not that kind of person."
Deflecting your question by hurling suspicion at someone else.	• "Instead of harassing me about my performance, you should really be spending your valuable time talking to Bob. He's the one who is screwing stuff up royally around here! I'm just doing my job."
Hijacking your question and substituting their own. This is a favorite of politicians in press conferences, on interview shows, or during debates.	• Q: "Senator, what did you do on your summer vacation?" • A: "I think what you're really trying to say is 'Senator, what do you want for Christmas?' And I'm going to be quite honest and tell you . . ."

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APPENDIX B

SUGGESTED READINGS

Ekman, Paul, Telling Lies, W.W. Norton & Company, 2001

Ford, Charles V., Lies! Lies!! Lies!!!, American Psychiatric Press, 1999

Vrij, Aldert, Detecting Lies and Deceit, John Wiley & Sons, Ltd., 2000

Lieberman, David J., Never Be Lied to Again, St. Martin's Press, 1999

Box, Sissela, Lying – Moral Choice in Public and Private Life, Vintage Books / Random House, 1999

De Becker, Gavin, The Gift of Fear, Bantam Doubleday Dell Publishing Group, 1999

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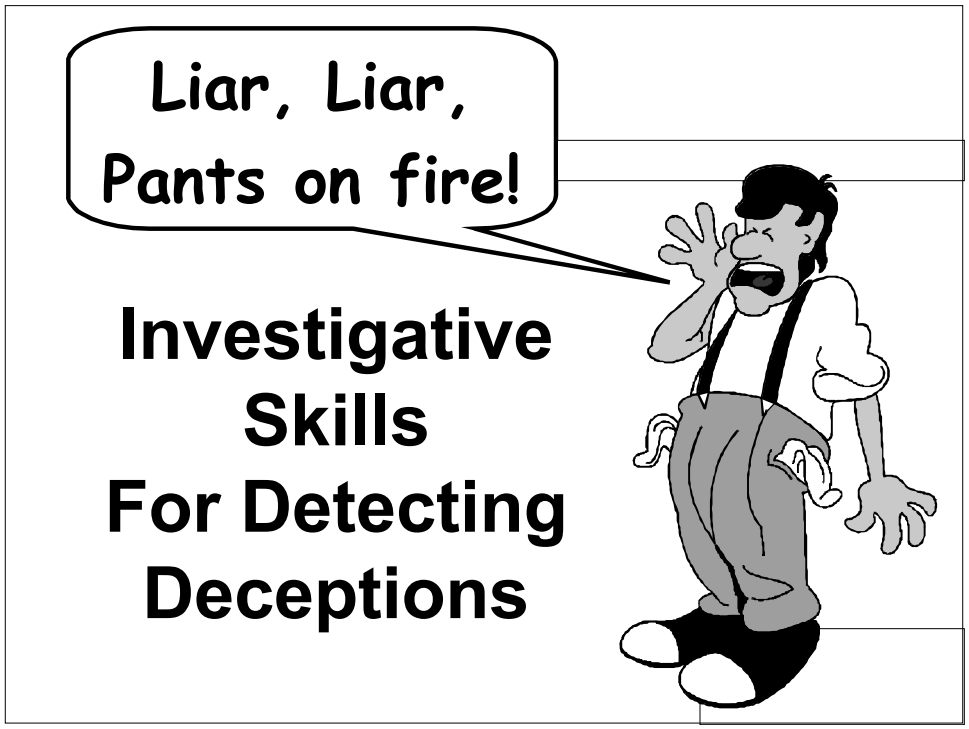

You will learn:

- Psychology of Lying
- How to evaluate stories
- How to evaluate witnesses
- Tips and tricks

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"Lie"

- Deliberate intent to mislead
- Deception
- Evasion

"White Lies"

- Insignificant
- Good intentions
- Meant to spare pain
- Understandable
- "Golden Rule"

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Why This Works

- Telling the truth is easy.
- Lying is hard.

Lies

- Creates stress
- Causes physical changes
- Exceptions
- Cautions

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Setting the Stage

- Witness is free to leave
- No distractions!
- Watch yourself
- 2 interviewers

Finding the Base Line

- Establish rapport:
- Be supportive
- Start with neutral topics
- "Mirror" the witness

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Gestures

- Body language
- "Attitude"
- Demeanor
- Communication without words

The "Meaning"

- 7% Word content
- 38% Voice inflections
- 55% Physical gesture

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Gestures

- All animals use gestures.
- Even the human type

Gestures

- Conscious
  - Can be controlled
- Subconscious
  - Not controlled

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- PHYSICAL GESTURES

Truthful Gestures

- Free flowing
- Easy
- Natural
- Consistent

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Deceptive Gestures

- Cramped
- Jerky
- Tight / closed
- Contradictory

Physical Examples

- Head
- Eyes
- Shoulders
- Chest

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Physical Examples

- Arms and elbows
- Hands
- Hand to head contact

Physical Examples

- Hand to body contact
- Legs and feet
- Use of space

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▪VERBAL GESTURES

Verbal Gestures

- Words
- Timing
- Pace
- Pitch and volume

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Verbal Gestures

- Overly friendly
- Overly cooperative
- Overly thankful
- Flattery
- Forgetful

Verbal Gestures

- Avoids contractions when repeating you
- Answers sound like questions
- Avoids pronouns

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Verbal Gestures

- Uncomfortable with silence
- "Smokescreens" and "noise" -- not answers
- Sarcastic

RED FLAGS

- Liars announce themselves
- Liars "don't recall"

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RED FLAGS

- Timing of exploding anger
- Inference instead of clarity

RED FLAGS

- Appeals to personal reputation
- Deflection instead of denial

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RED FLAGS

- Hijacking your question and substituting their own

Reading Gestures

- Don’t depend on isolated gestures.
- Look for “clusters.”

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Reading Gestures

- Watch the lower body.
- Don't call attention to gestures

Reading Gestures

- Prepare so that you control the pace.
- Take your time with a liar.

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Reading Gestures

- Switch back and forth between topics.
- Watch for changes in gestures.

Analyzing a Story

- Is it logical?
- Is it coherent?
- Is it consistent?
- Contradictions?

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Analyzing a Story

- Spontaneous or scripted?
- Richly detailed?
- Presented in a context?

Analyzing a Story

- Does it explain the actions and emotions of others?
- Does it reproduce dialogue well?

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Handling Liars

- Ask more questions.
- Ask open-ended questions.
- Ask about feelings.
- Expand the universe of questions.

PRACTICAL TIPS

- Get the subject to "project" about other witnesses to uncover biases and other incidents and events.

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PRACTICAL TIPS

- Ask questions AFTER making eye contact.
- Don’t read questions.
- “Clip” your endings.

PRACTICAL TIPS

- Positive feedback to liars will increase the lying.
- Appear supportive.

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PRACTICAL TIPS

- Negative feedback to truthful persons will increase truthfulness in order to prove themselves.

PRACTICAL TIPS

- Silence is golden.
- Keep silent and wait for the gold!

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PRACTICAL TIPS

- When dealing with an obviously guilty subject, consider the "We know all about it" approach.

PRACTICAL TIPS

- Increase a liar's anxiety by making them wait to start, or by excusing yourself to "talk to someone."

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