

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 2:27

## Greetings from Lane Farley



I am only just now getting out of the habit of writing 2017, and February is already upon us. With February comes my turn to write the introduction to our FFSS newsletter. I always welcome these introductions as a way to wax philosophical about something important like basketball. After all, February is the time of year that even basketball-challenged people like me start looking forward to the NCAA Tournament. The tournament, of course, is better known as March Madness. The madness may happen in March, but the last full month of regular season play happens in February. For the teams competing to make the tournament, it is the quality of their play leading into March that determines their fate. The visible payoff is in March, but if they do not focus and put in the work long before, they will miss the tournament altogether. Here comes the philosophical part - brace yourself. What is true of basketball is also true of life and law. In almost every endeavor, the visible success is the result of the less visible work. Preparation, diligence and determination are the key ingredients for good outcomes. It is with this spirit that we approach our work for you, our clients, year round. While certain of us at FFSS couldn't make a three pointer if our life depended on it, we approach all of our cases with preparation, diligence and determination, knowing that our clients do depend on it. We are honored to be so entrusted. Now, let's go win in 2018.

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Welcome to the latest edition of Fletcher Farley's Newsletter, which we hope you find interesting and helpful.

If you have any comments, questions or would like more information from us, please contact Doug or Joanna.

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### SAVE THE DATE



April 27, 2018

Save the date for the Texas Law

## Evidence Preservation and Why It Matters

Jeff Smith



One question that arises after many incidents is what evidence needs to be preserved. In Texas, a party has a duty to preserve evidence when: 1) it knows or reasonably should know that there is a substantial chance that a claim will be filed; and 2) the evidence in its possession or control has potential materiality and relevancy to that claim. A substantial chance of litigation means that litigation is more than merely an abstract possibility or unwarranted fear. To determine whether there was a substantial chance of litigation, courts look at several factors, including the conduct of the parties and communications between the parties. If a party made no reference to intending to assert a claim or indicates that he or she is not injured, courts generally hold that there was not a substantial chance a claim would be filed. However, if a party is injured or advises that he or she intends to assert a claim, there is a substantial chance that a claim will be filed thus triggering the duty to preserve evidence.

When the duty to preserve is triggered, all parties should preserve what it knows or reasonably should know is relevant to the claim, is reasonably calculated to lead to the discovery of admissible evidence, or is reasonably likely to be requested during discovery. Obviously, the type of evidence preserved depends on the type of claim. Some examples of items that should be preserved include, but are not limited to, products in a product defect case, driver service records, vehicle maintenance records, phone records, vehicle recorder data, electronically stored information such as emails, photographs, and video footage.

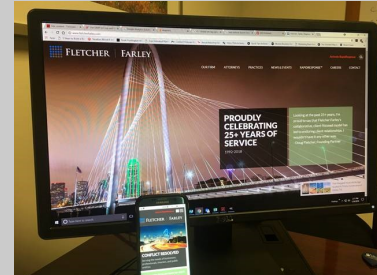
With an understanding as to when evidence should be preserved, why does this matter? Preserving evidence not only helps defend a claim, a party can be penalized if relevant evidence is not preserved. Spoliation is defined as "the improper destruction of evidence relevant to a case." In Texas, the court can penalize a party for not preserving relevant evidence if the party had a duty to preserve and failed to do so. In 2014, the Texas Supreme Court established a two-step spoliation framework. The court must first determine, as a matter of law, whether a party spoliated, or failed to preserve, evidence. The court must find that the party had a duty to reasonably preserve evidence, yet failed to do so. If a party failed to preserve evidence, the court can then assess an appropriate remedy. Remedies include awarding attorneys' fees or costs and excluding evidence. One of the most severe remedies is a spoliation instruction given to the jury that a party failed to preserve evidence that may have been relevant to a case. A spoliation instruction is among the harshest sanctions a court may use-its very purpose is to nudge the jury toward a finding adverse to the party that spoliated evidence.

While spoliation issues are fortunately infrequent, it is an issue that can substantially impact a case if you fail to preserve evidence when you had a duty to do so. You can avoid the risk of spoliation by taking steps to preserve any and all relevant evidence after an incident. Such steps include a document retention policy or a litigation hold program to help ensure relevant evidence is not destroyed.

More information coming soon!

**You Heard it First!**

**Introducing the NEW  
fletcherfarley.com**



Sleeker. Responsive. New features!

After months of hard work, we're excited to announce that our new and revitalized website is live.

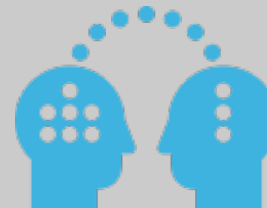
**VISIT OUR SITE**

3 reasons why we updated our site:

**Responsive**



**More Knowledge**



**New Features**



We hope you find the new website fresh and modern; we worked hard to make sure it contains valuable information.

If you ever have any questions following an incident regarding whether evidence needs to be preserved, please do not hesitate to contact our firm. We thank all of you for the opportunity to serve your legal needs.

## Conflicts Resolved

### **Fletcher Farley Successfully Defends Against Summary Judgment Challenge**

Joanna Salinas was successful in upholding a summary judgement for a Central Texas city that was sued for employment retaliation. The employee was disciplined and ultimately terminated as a result of her constant complaining to her subordinates about the city and upper management and about her personal and relationship problems, which continued even after multiple subordinates complained about it. Because the complaints included allegations about alleged harassment and disabilities, the employee claimed that the complaints were protected by the First Amendment and the state and federal employment discrimination/retaliation laws. The Court disagreed, finding that termination was the result of a supervisor's inappropriate communications with her subordinates, and could not serve as a basis for a claim for disability or harassment retaliation.

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