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The evidence is gone…now what?

OVERCOMING OBSTACLES CAUSED BY DEFENDANT'S DESTRUCTION OR FAILURE TO PRESERVE EVIDENCE

As a plaintiff's attorney, the burden of proof to present evidence to support your client's claim rests with you. However, what happens if a defendant destroys or fails to preserve crucial evidence that would permit you to meet that burden? The consequences of defendant's actions – or lack thereof – differ based on when you are seeking redress. During the trial phase, the remedy for spoliation is limited. CACI instruction 204 – Willful Suppression – provides for an adverse inference instruction against the party responsible for the intentional concealment or destruction of evidence. However, if you are seeking redress prior to trial, more options for recompense are available depending on the egregiousness of defendant's actions and the likelihood of prejudice to your client. As set forth below, the variety of sanctions available prior to trial allows you a higher likelihood of overcoming obstacles caused by defendant's destruction or failure to preserve evidence.

When the duty to preserve evidence arises

The most important aspect of a successful motion for an order sanctioning a defendant for spoliation of evidence is establishing the spoliation occurred after the duty to preserve evidence arose. The notion of a defendant's "duty to preserve evidence" constituted a pivotal aspect in the landmark case, *Williams v. Russ*. *Williams* was a legal malpractice action wherein the plaintiff requested his case files from defendant attorney. (*Williams v. Russ*, (2008) 167 Cal.App.4th, 1223.) The defendant provided the original file but did not retain a copy. Plaintiff placed these files in a storage facility, failed to pay the storage fees – despite warnings – and defaulted on the account. Consequently, the files were destroyed by the facility. Plaintiff never informed defendant of their destruction. Defendant requested the file three years later and was informed it was destroyed. (*Id*. at 1224.) The court in *Williams* held that defendant has a "duty to preserve evidence for another's use in pending or future litigation, even if that evidence has not been specifically requested in discovery." (*Id*. at 1223.) The court found that plaintiff's knowledge of the existence and relevance of the evidence and subsequent failure to preserve the evidence rose to the level of intentional destruction of evidence and imposed terminating sanctions. (*Ibid*.)

"The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." (*Victor Valley Union High School District v. Superior Court,* (2023) Cal.App.5th 940, 957-958.) Consequently, an essential aspect to comprehend when pursuing sanctions is that based on California law, prohibition against the destruction of evidence extends beyond situations where the plaintiff has explicitly requested its preservation. The law also recognizes the obligation to preserve evidence that may potentially be relevant in future litigation, even if it has not been previously requested through discovery. (*Stephen Schlesinger, Inc. v. Walt Disney Co*., (2007) 155 Cal.App.4th, 736.)

In addition to the general caselaw regarding the importance of complying with discovery requests and the potential consequences of failing to do so, there is also specific caselaw related to personal injury claims. In *Webb v. Special Electric Co., Inc*., the California Supreme Court held that a party has a duty to preserve evidence when "litigation is reasonably foreseeable." (*Webb v. Special Electric Co., Inc*., (2016) 63 Cal.App.4th, 167.) The court noted that the duty to preserve evidence is particularly important in personal injury cases, where evidence related to the injury may be lost or destroyed if not preserved.

Redress for spoliation as misuse of the discovery process

Code of Civil Procedure sections 2031.310 and 2031.320 provide for the imposition of an issue, evidence, or terminating sanction, *only if* a party fails to obey an order compelling further response, (§ 2031.310, subd. (e)), or if a party then fails to obey an order compelling inspection. (Code Civ. Proc., § 2031 et seq.) However, in cases where the evidence is no longer in defendant's possession, a motion to compel would be fruitless. Courts have recognized this futility and held that "when a prerequisite to imposing sanctions under a particular discovery method, such as filing a motion to compel, is impossible, futile, or an idle act, the court may excuse compliance with the requirement and fashion a remedy from the sanctions authorized by the discovery chapter." (*City of Los Angeles v. Pricewaterhouse Coopers LLC*, (2022) 84 Cal.App.5th, 466.)

Since spoliation is now viewed as a misuse of the discovery process rather than a tort cause of action, the accepted remedy is discovery sanctions under section 2023. (*R.S. Creative, Inc. v. Creative Cotton, Ltd*., (1999) 75 Cal.App.4th 486, 497.) To secure sanctions for discovery abuse, it is generally sufficient for a plaintiff to make an initial prima facie case showing that the defendant, in fact, withheld, destroyed, or failed to preserve evidence that had a substantial probability of damaging the moving party's ability to establish a crucial element of their claim or defense. (*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals*, (2003) 107 Cal.App.4th 1336, 1346-1347.) This showing establishes the foundation for requesting sanctions and demonstrates the adverse impact caused by the defendant's actions. The existence of mal intent is not a requisite to obtaining sanctions. The court in *Kohan v. Cohan* specifically found

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that "a misuse of the discovery process need not be willful to be sanctionable." (*Kohan v. Cohan*, (1991) 229 Cal.App.3d 967, 970.)

Roadmap for seeking sanctions for misuse of the discovery process

At the outset of any case, begin by sending a preservation of evidence letter. Include a statement notifying defendant that "Due to the pending investigation, there is an affirmative duty to preserve all pertinent evidence at this time. Failure to preserve requested and pertinent evidence could result in sanctions as well as adverse jury instructions." (*Johnson v. United Services Auto. Assn.* (1998) 67 Cal.App.4th 626.) A properly worded preservation of evidence letter may constitute the required notice of the relevancy to anticipated litigation that triggers a party to take affirmative steps to maintain and preserve the evidence or risk the imposition of sanctions. While not required, if there is any suspicion of spoliation, you should start the road to recovering sanctions by requesting inspection of the specific item or document sought pursuant to Code of Civil Procedure section 2031.010. If defendant claims the item or document is no longer in his possession, custody or control, you now have the support you need to bolster your motion for sanctions.

Draft your motion with precision

If the relevant evidence was destroyed or defendant failed to preserve it, begin preparing your motion for sanctions. Bear in mind, the duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation. Your motion should be as factually detailed as possible regarding the missing evidence and specify the reason this evidence is relevant to your client's case. Be certain to state the evidence was in defendant's possession, custody, or control and that it cannot be ascertained by any other means. Explain the procedural background, including the fact that you sent a preservation of evidence letter placing defendant on notice that the evidence should be retained. Also notify the court of your Code of Civil Procedure section 2031.010 inspection demand. Lay forth the court's inherent power to impose sanctions and be sure to note the prejudice to your client as a result of defendant's actions.

Explain that your client now faces a significant challenge in developing evidence that could be on par with the one that was discarded. "Destroying evidence can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both." (*Cedars-Sinai Medical Center v. Superior Court*, 18 (1998) Cal.App.4th 1, 8, 954 P.2d 511, 515.)

Be specific about the type of sanctions you seek

In seeking redress, request all applicable sanctions with specificity. Although in your eagerness to advocate for your client, you may believe terminating sanctions are applicable, remember that courts are often reluctant to grant this extreme measure. In fact, courts have regularly held that discovery sanctions must be tailored and not be used as punishment. (*Karlsson v. Ford Motor Co.*, (2006) 140 Cal.App.4th, 1202.) Accordingly, you should also request lesser sanctions including evidentiary sanctions, issue sanctions and/or monetary sanctions along with your request for terminating sanctions. Irrespective of the type of sanction sought, be detailed and explicit in exactly what sanction you want the court to impose. Simply asking for each category of sanction is not enough. Each sanction requested should be separately identified and its appropriateness as a form of redress explained.

If issue and/or evidentiary sanctions are sought, you should provide the court with the precise issue you want it to rule on and/or the exact evidence you want excluded. The court will not draft the sanction for you. If you fail to do so yourself, you'll miss an opportunity to rectify the harm done to your client's case.

Submit an ironclad order

Lastly, submit a detailed order which includes the factual and legal support for why the requested sanctions should be imposed as well as why the relief was requested. The order should possess a level of comprehensiveness regarding the facts and relevant legal principles, to the extent that it can function independently as a self-contained document.

Conclusion

When a defendant fails to preserve evidence or even destroys it, you may be down, but you are not out. There is an array of remedies for spoliation of evidence including terminating, evidentiary, issue and monetary sanctions. A comprehensive motion properly requesting all applicable sanctions in detail will likely get your case back on track.

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