

# **E-DISCOVERY**

# **PRESERVATION**

# **DUTY**

## **&**

# **SPOILIATION**

Increased interest in electronic evidence raises questions about the scope of the duty to preserve electronic evidence and the consequences of not doing so. When the duty to preserve evidence is violated, courts may impose appropriate sanctions for spoliation ranging from an adverse inference jury instruction to entry of judgment. In the spring of 2000, the report of a survey of the ABA Litigation Committee meeting in Seattle attracted much notoriety because it reported that

1. “83% of the lawyers surveyed--mostly outside counsel--said that their clients are unable to produce [electronic] data for civil discovery”,
2. “two-thirds of the respondents said that when notified of a suit, clients "rarely or never" took steps to preserve data” and

2. “60% said that clients had no idea electronic data could be subject to discovery in the first place.”<sup>1</sup>

The survey suggests that sophisticated clients of sophisticated lawyers might be allowing the destruction of evidence due to ignorance about the nature of electronic data or their duty to preserve. When confronted with the failure to preserve electronic data courts have imposed spoliation discovery sanctions. Although spoliation sanctions have been imposed by courts for many years<sup>2</sup>, the Price Waterhouse survey underscored the immense potential for spoliation claims from the destruction of electronic data<sup>3</sup>. Some have reacted to the danger of spoliation sanctions by saving everything as the costs of storage decline. Others focused on the need to adopt clear document retention policies based on sound business motives and reasons, to enforce those policies and, when necessary, to suspend those policies to avoid spoliation claims. Some have proposed rules to provide clear guidance and safe harbors from spoliation claims. Although some uncertainty exists and every situation is unique, a review of the facts and holding of cases places spoliation in the proper perspective.

Although the bench, bar and public should be aware and concerned about this subject, it should not cause panic or the adoption of unnecessary or extreme internal procedures. Nor should it result in the adoption of unnecessary court rules or statutes.<sup>4</sup> Destruction of evidence is wrong and strikes at the heart of a legal system. Courts must protect the system and provide a remedy for any injury. But, honest people acting reasonably and in good faith are not required to engage in unrealistic heroic efforts to search for, preserve and produce every bit and byte that ever existed in cyberspace. Any sanction imposed for spoliation should be appropriate to remedy the harm and protect the

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<sup>1</sup> David E. Rovella, E-DISCOVERY: THE NEW TECH THREAT, TRIAL LAWYERS SAY THEIR CLIENTS AREN'T READY FOR PRODUCTION OF E-DATA, *The National Law Journal*, Volume 22, Number 40, May 29, 2000.

<sup>2</sup> *The FORTUNA--Krause, et al. Claimants* (March 17, 1817) 15 U.S. 161, 4 L Ed. 209, 2 Wheat 161 [when documents were required to be maintained and presented, the absence or delay in production must be explained to avoid adverse inference or judgment].

<sup>3</sup> The mere operation of computers in the normal course of business alters and destroys data.

<sup>4</sup> For a reasonable corporate explanation of the problems and approach to the preservation duty see *THE SEDONA PRINCIPLES: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (March 2003) [http://www.thesedonaconference.org/publications\\_html](http://www.thesedonaconference.org/publications_html)

integrity of the judicial system; not to provide a windfall to a private litigant, though exemplary sanctions may be justified and required in some cases.

Other than the simplest cases, the formulation and imposition of discovery sanctions requires a close and careful examination of the facts and the application of general legal principles within the confines of the particular litigation<sup>5</sup>. Good lawyering and, in the case of electronic data, the effective use of experts, can make a big difference.

The concepts and objectives in all jurisdictions are similar. However, as a result of changing technology and improving knowledge of the bench and bar, cases dealing with electronic data are more illustrative of the issues and problems than controlling as to the law. Most are not controlling precedent and all can be distinguished on their facts. With rapidly changing technology, cases may be out of date before they are written. Sometimes they illustrate how a good expert familiar with the system makes a difference. Sometimes they illustrate how mistakes can be made by lawyers, experts and judges. Sometimes they illustrate one alternative approach to a problem, such as the appointment of a neutral. Lawyers and judges should guard against a tendency to blindly follow one procedure applied in one case as if it were the de facto standard.

When confronted with a spoliation issue outside of the normal discovery sanction context, lawyers and judges will have to read the cases in the relevant jurisdiction with great care to determine the precise parameters of the offense and the appropriate remedy, though the principles to be applied are similar in all jurisdictions. Such review should confirm that extreme and unreasonable preservation efforts are not required and that the destruction of bit or byte of data does not result in an adverse judgment.

California has based its case law on that of other jurisdictions and the following summary may serve as a starting point for analysis of spoliation issues in that and other jurisdictions<sup>6</sup>. The approach is similar to that of other state and federal courts and the objectives are the same<sup>7</sup>. See also the case outlines on Sanctions and Document

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<sup>5</sup> See for example *Trigon Ins. Co. v. United States* (E.D.Va. 2001), 204 F.R.D. 277

<sup>6</sup> California has looked to and based its case law on that of other jurisdictions. See e.g. *Willard v. Caterpillar* (1995), 40 Cal.App.4th 892.

<sup>7</sup> *West v. Goodyear Tire & Rubber Co.* (2d Cir. 1999), 167 F.3d 776 [Spoliation defined; Dismissal rev'd. as excessive sanction for spoliation and remanded for consideration of lesser appropriate sanction.]; *Beers v. General Motors* (N.D.N.Y.) 1999 WL 325378 [following *West* aff'd dismissal for spoliation when expert lost critical evidence after disassembling and irreparably altering it, without notice to defendant and without video or pictures; court orders to produce violated; no lesser sanction would suffice]

Production found at the California Civil Discovery Law web site, <http://californiadiscovery.findlaw.com>. and the Sedona Conference basic principles cited in footnote 4.

A review of the cases reveals that default judgments are not entered simply because someone destroyed a document that might have some relevance to the litigation or because someone continued to operate the business computers after a potential claim surfaced. Rather, traditional concepts are applied to the facts: e.g. intent, gross negligence, known or foreseeable harm, good faith, reasonableness, relevance, certainty of damages and prejudice, proximate cause, and remedies appropriate to the harm and culpability.

As a practical matter, the failure to produce potential evidence is addressed in the traditional discovery context of remedial sanctions: money, issues, evidence, and terminating sanctions for failure to comply with discovery obligations.<sup>8</sup> Spoliation as a broader concept can be applied to other situations<sup>9</sup> and possibly with other remedies.<sup>10</sup>

Generally, the independent tort of spoliation has been eliminated in California<sup>11</sup> in favor of resolving such issues within the case itself as a discovery sanction. Although *Cedars-Sinai Medical Ctr. v. Superior Court* (1998), 18 Cal.4th 1 recognized a discovery

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<sup>8</sup> California Code of Civil Procedure §§2031, 2023. In addition, adverse inferences are permissible due to failure to produce. California Evidence Code §413; *Cedars-Sinai Medical Ctr. v. Superior Court* (1998), 18 Cal.4th 1, 12; BAJI No.2.03 (8th Ed. 1994). Attorney discipline and criminal prosecution are possibilities. Bus. & Prof. Code §6106; Rules of Prof. Conduct rule 5-220.

<sup>9</sup> For example, discovery statutes or rules in some jurisdictions may not expressly cover the destruction of evidence prior to a discovery request or permit the imposition of exemplary damages.

<sup>10</sup> In *Sherman v. Kinetic Concepts* (1998), 67 Cal.App.4th 1152 the appellate court urged the trial court to find additional and appropriate remedies in addition to a new trial and full monetary compensation but short of terminating sanctions.

<sup>11</sup> *Cedars-Sinai Medical Center* (1998), 18 Cal.4th 1 [no separate tort for intentional spoliation by party; seek remedy within case by discovery sanctions or evidentiary inferences]; *Temple Community Hospital v. Superior Court* (1999), 20 Cal.4th 464 [No separate tort against 3rd party for intentional spoliation of evidence]; *Willard v. Caterpillar* (1995), 40 Cal.App.4th 892 [Def. spoliation issue. Case analysis relevant to sanctions in exiting action. Error to submit to jury intentional spoliation of design documents in products liability case when destruction occurred prior to injury and after 25 years with negligible accident history; theoretical analysis]; *Johnson v. United Service Automobile Assoc.*(1998), 67 Cal.App.4th 626 [No negligent spoliation against 3d party absent further element of agreement, request & offer to bear costs, or assumption of duty and justifiable reliance. ]; *Farmers Ins. Exch. v.* (2000), 79 Cal.App.4th 1400 [Negligent spoliation against 3rd part rejected as independent tort]; Cf. *Velasco v. Commer.Bldg. Maint* (1985),169 Cal.App.3rd 874 [neg. spoliation against 3rd party recognized though not reasonably foreseeable in this case]; *Smith v. Superior Court* (1984), 151 CA3d 491; *Reid v. State Farm Auto Ins. Co.*(1985), 173 Cal.App.3d 557; *Coprigh v. Superior Court*(2000), 80 Cal.App.4th 1081; *Velasco v. Commercial Bldg Maintenance* (1985), 169 Cal.App.3d 874

sanction for spoliation in California, the exact nature, findings and procedures of that remedy await further guidance. *Cedars-Sinai* established that the remedy must be found within existing litigation rather than in a separate cause of action. It did not determine whether or what the tort elements must be established, what if any findings would be required, or whether punitive sanctions could be included.

## CALIFORNIA SPOILIATION OF EVIDENCE

The following definition is based on the facts and holding of the cited California cases and is suggested as a summary or guide to existing California law on spoliation

**Unless justified by the responsible party<sup>12</sup>, the intentional<sup>13</sup> or negligent<sup>14</sup> destruction<sup>15</sup>, concealment<sup>16</sup>, alteration or failure to preserve documents<sup>17</sup>, data, information, or other evidence<sup>18</sup>, reasonably known<sup>19</sup>,<sup>20</sup> at the time when<sup>21</sup> it is**

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<sup>12</sup> Shifting of burden to party destroying documents to justify destruction; *Willard v. Caterpillar* (1995), 40 Cal.App.4<sup>th</sup> 892, 919 [reasonable document retention policy may justify destruction; existence of alternative sources of proof justified reversal of spoliation judgment;]; *The FORTUNA--Krause, et al. Claimants* (March 17, 1817) 15 U.S. 161, 4 L Ed. 209, 2 Wheat 161 [when documents were required to be maintained and presented, the absence or delay in production must be explained to avoid adverse inference or judgment]; See also *Lewy v. Remington Arms* (8<sup>th</sup> Cir. 1988), 836 F.2d 1104.

<sup>13</sup> *Smith v. Superior Court* (1984), 151 Cal.App.3d 491; *Willard v. Caterpillar* (1995), 40 CA4th 892, p.911[“willful destruction of evidence”]

<sup>14</sup> *Cedars-Sinai Medical Center v. Superior Court* (1998), 18 Cal.4<sup>th</sup> 1 [although intentional tort alleged, facts suggest “negligence” and failure to preserve]; *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874 [janitor disposed of broken bottle in unmarked bag on attorney’s desk; negligent spoliation tort recognized but demurrer sustained without leave on foreseeability issue]; *Residential Funding Corp. v. DeGeorge Home Alliance Inc.*(2d Cir.2002), 306 F.3d 99 [breach of a discovery obligation by ordinary negligence sufficient]

<sup>15</sup> *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874 [broken bottle disposed by janitor]

<sup>16</sup> *Sherman v. Kinetic Concepts* (1998), 67 Cal.App.4th 1152 [information concealed despite discovery requests]; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999), 75 Cal.App.4th 486 [hard drive not preserved and produced despite stipulation to do so]; *The Fortuna* (1817), 15 U.S. 161, 4 L Ed. 209, 2 Wheat 161 [concealment of docs giving rise to adverse inference or judgment]; *Residential Funding Corp. v. DeGeorge Home Alliance Inc.*(2d Cir.2002), 306 F.3d 99 [“purposeful sluggishness” in producing emails was evidence of bad faith giving rise to an inference of harm that could support appropriate sanctions; delay by promising without ability to produce, delay in hiring expert and making sure work would be done in timely fashion for trial]

<sup>17</sup> *Cedars-Sinai Medical Center v. Superior Court* (1998), 18 Cal.4<sup>th</sup> 1; *Willard v. Caterpillar* (1995), 40 Cal.App.4th 892 [bone fide, reasonable, consistent, routine document destruction not actionable]

<sup>18</sup> *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874 [broken bottle in unmarked bag]

<sup>19</sup> *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874 [not foreseeable as a matter of law; reasonable janitor not expected to know evidence that would adversely affect products liability case being destroyed when unmarked bag with broken bottle on attorney’s desk is disposed ]

<sup>20</sup> No duty of 3d party unless based upon a duty created by agreement, statute, specific request or undertaking with detrimental reliance or an offer to pay costs [ SEE Voluntary undertaking + detrimental reliance (*Johnson ; Williams*); Special relationship on which party can rely (*Williams; Johnson*); Request + offer to pay or other detriment/consideration (*Johnson, Dunham*); Statute, regulation (*Johnson*); Agreement (*Smith; Johnson; Velasco*); *Farmers Insurance Exchange v. Superior Court* (2000) 79 Cal. App.4<sup>th</sup> 1400; *Johnson v. United Service Automobile Assoc.* (1998) at p.635 [No 3<sup>rd</sup> party duty arises from constructive knowledge]; *Reid v. State Farm Mut.Auto Ins. Co.* (1985), 173 Cal.App.3d 557 [No duty of Ins.Co. to preserve absent a request; lack of notice and knowledge]; *Coprish v. Superior Court* (2000), 80 Cal.App4th 1081, 1083, rev.den 7/26/01 [Tire blowout on rental car; preservation of evidence requested.

**eliminated, to be relevant to the issues<sup>22</sup> or subject matter<sup>23</sup> of reasonably knowable<sup>24</sup>, pending or probable<sup>25</sup> litigation, shall be subject to appropriate<sup>26</sup> sanctions imposed against a party<sup>27</sup> in a pending action<sup>28</sup> if and to the extent such elimination of potential evidence is a reasonably certain<sup>29</sup> cause of the substantial**

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No c/a for 3d party “However, we direct the trial court to grant the plaintiffs leave to amend the complaint to allege a cause of action for breach of a contractual duty to preserve.” p.1083]; *Smith v. Superior Court* (1984), 151 CA3rd 491 [Duty based on express promise to preserve evidence; Tire flew off and blinded Plt; dealer express promise to preserve; Intentional destruction or loss of evidence; dealer knew it was essential evidence and Plt was relying on preservation agreement] ; *Dunham v. Condor Ins Co.* (1997), 57 Cal.App.4<sup>th</sup> 24 [Request for access not = request for preservation]; *Williams v. State of Calif.* (1983), 34 Cal.3<sup>rd</sup> 18 [No duty of highway patrolman to gather and preserve evidence]

<sup>21</sup> *Willard v. Caterpillar* (1995), 40 Cal.App.4<sup>th</sup> 892 [instructions 3 and 4]; *Smith v. Superior Court* (1984) [actual knowledge that it was essential evidence and an express agreement to preserve]; *Residential Funding Corp. v. DeGeorge Home Alliance Inc.* (2d Cir.2002), 306 F.3d 99

<sup>22</sup> *Willard v. Caterpillar* (1995), 40 CA4<sup>th</sup> 892; *Cedars-Sinai Medical Center v. Superior Court* (1998), 18 Cal.4<sup>th</sup> 1, pp. 4, 8, 17.

<sup>23</sup> *Cedars-Sinai* suggestion that spoliation be resolved by applicable discovery sanctions prior to the trial implies the more liberal relevancy standard. Federal cases have also applied this standard.

<sup>24</sup> Actually aware OR reasonably foreseeable *Willard v. Caterpillar* (1995), 40 CA4<sup>th</sup> 892; *Smith v. Superior Court* (1984), 151 Cal.App.3d 491; constructive knowledge insufficient re 3d party cases. See *Johnson v. United Service Automobile Assoc.* (1998), 67 Cal.App.4<sup>th</sup> 626; *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874v. *Dunham v. Condor Ins Co.* (1997), 57 Cal.App.4<sup>th</sup> 24

<sup>25</sup> See *Willard v. Caterpillar* (1995), 40 CA4<sup>th</sup> 892 summary of out of state cases re pending or probable litigation and instructions 3 and 4 re “reasonably foreseeable” litigation

<sup>26</sup> *Sherman v. Kinetic Concepts* (1998), 67 Cal.App.4<sup>th</sup> 1152; *Cedars-Sinai Medical Center v. Superior Court* (1998), 18 Cal.4<sup>th</sup> 1. The full panoply of discovery sanctions are available---money, issues, evidence, and termination. *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999), 75 Cal.App.4<sup>th</sup> 486 approved punitive sanctions and Sherman and Cedars-Sinai suggest an expansive and practical approach to fully remedy any abuse or harm resulting from spoliation. See also *Trigon Ins.Co. v. United States* (E.D.Vs 2001), 204 F.R.D. 277 [monetary sanctions covering full compensation for consequences on spoliation including paying computer forensic expert fees, preclusion of one expert due to inability to cross-examine as a result of spoliation, allowing adverse inferences as to other expert when spoliated documents recovered by computer forensic expert allowed cross examination]; *Residential Funding Corp. v. DeGeorge Home Alliance Inc.* (2d Cir.2002), 306 F.3d 99 [need some evidence of harm from loss of evidence relevant to proof of issue to fashion appropriate sanction]

<sup>27</sup> See *Temple Community Hospital v. Superior Court* (1999), 20 Cal.4<sup>th</sup> 464 and other cases eliminating the independent spoliation tort and suggesting there may be no remedy against 3<sup>rd</sup> parties and no need for one since there is little danger that any destruction would be culpable absent an agreement to preserve.

<sup>28</sup> *Cedars-Sinai Medical Center v. Superior Court* (1998), 18 Cal.4<sup>th</sup> 1; *Temple Community Hospital v. Superior Court* (1999), 20 Cal.4<sup>th</sup> 464; *Farmers Insurance Exchange v. Superior Court* (2000) 79 Cal. App.4<sup>th</sup> 1400; *Coprish v. Superior Court* (2000), 80 Cal.App.4<sup>th</sup> 1081, 1083; The FORTUNA--Krause, et al. Claimants (March 17, 1817) 15 U.S. 161 4 L Ed. 209 2 Wheat 161; *Penn v. Prestige Stations, Inc.* (2000), 83 Cal.App.4<sup>th</sup> 336, p. 343; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999), 75 Cal.App.4<sup>th</sup> 486

<sup>29</sup> *Smith v. Superior Court* (1984), 151 Cal.App.3d 491 [reasonable certainty of fact and amount of damages]; *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874, 878 [citing *J’Aire Corp.v. Gregory* (1979), 24 Cal.3d 799 case re interference with prospective economic advantage]

**impairment of or significant prejudice<sup>30</sup> to the ability to prove or disprove an element of the cause of action or defense<sup>31</sup>.**

**Intentional, grossly negligent or other culpable conduct<sup>32</sup>, done for the purpose of destroying or preventing the use of evidence<sup>33</sup> or without reasonable concern for preserving evidence, proximately causing the destruction, unavailability or lack of preservation of relevant evidence in known pending or reasonably imminent litigation, may result in exemplary or punitive sanctions in order to adequately<sup>34</sup> compensate the victim of such conduct or to deter future culpable conduct.<sup>35</sup>**

Although each jurisdiction will formulate its own approach on a case by case basis, the end result will be similar if not identical and each of the above concepts is likely to be considered. In the process, lawyers and courts should not over react but should remember the purpose and intent of spoliation to achieve just results consistent with the technology and practicalities of the time.

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<sup>30</sup> *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874; *Smith v. Superior Court ; Residential Funding Corp. v. DeGeorge Home Alliance Inc.* (2d Cir.2002), 306 F.3d 99 [need some evidence of harm from loss of evidence relevant to proof of issue to fashion appropriate sanction]

<sup>31</sup> *Willard v. Caterpillar* (1995), 40 CA4th 892, *Smith v. Superior Court* (1984), 151 Cal.App.3d 491

<sup>32</sup> *Smith* [breach of express promise; obstruction of justice] See *Willard* re discussion of culpability

<sup>33</sup> See *Willard v. Caterpillar* (1995), 40 CA4th 89p.911 discussion of out of state cases re wilful destruction of evidence with intent to interfere with proof in a lawsuit

<sup>34</sup> *Sherman v. Kinetic Concepts* (1998), 67 Cal.App.4th 1152 [Despite egregious conduct appellate court remanded for further sanctions but admonished that entry of default would be excessive sanction in keeping with strong California precedent of prohibiting windfalls and imposing sanctions appropriate to the delict.]

<sup>35</sup> *Willard* instruction 5; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999), 75 Cal.App.4th 486 [despite the elimination of the issue of fabrication of a document when sanctions were imposed, the trial court imposed and the appellate court affirmed the dismissal of the complaint and award of monetary sanctions as punishment]; *Sherman v. Kinetic Concepts* (1998), 67 Cal.App.4th 1152 [although not imposed or required on remand, the appellate court remanded for the imposition of sanctions less than entry of the default after requiring substantial compensatory sanctions and a new trial.