

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 party¹, the intentional² or negligent³ destruction⁴, concealment⁵, alteration or failure to preserve documents⁶, data, information, or other evidence⁷, reasonably known^{8,9} at the time when¹⁰ it is eliminated, to be relevant to the issues¹¹ or subject matter¹² of reasonably knowable¹³, pending or probable¹⁴ litigation, shall be subject to appropriate¹⁵ sanctions imposed against a

¹ Shifting of burden to party destroying documents to justify destruction; *Willard v. Caterpillar* (1995), 40 Cal.App.4th 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* (8th Cir. 1988), 836 F.2d 1104.

² *Smith v. Superior Court* (1984), 151 Cal.App.3d 491; *Willard v. Caterpillar* (1995), 40 CA4th 892, p.911[“willful destruction of evidence”] *Williams v. Russ* (2008), 167 Cal.App.4th 1215, 1224 [“Despite numerous and repeated warnings from the storage facility that the contents of his storage space would be sold, Williams did nothing to prevent their sale and concomitant destruction. We agree with the trial court that this is tantamount to intentionally destroying those files.”]

³ *Cedars-Sinai Medical Center v. Superior Court* (1998), 18 Cal.4th 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]

⁴ *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874 [broken bottle disposed by janitor]; *Williams v. Russ* (2008), 167 Cal.App.4th 1215,1223

⁵ *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]

⁶ *Cedars-Sinai Medical Center v. Superior Court* (1998), 18 Cal.4th 1; *Willard v. Caterpillar* (1995), 40 Cal.App.4th 892 [bone fide, reasonable, consistent, routine document destruction not actionable]; *Williams v. Russ* (2008), 167 Cal.App.4th 1215,1223 [failure to pay rent on storage of files causing sale/destruction]

⁷ *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874 [broken bottle in unmarked bag]

⁸ *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]

party¹⁶ in a pending action¹⁷ if and to the extent such elimination of potential evidence is a reasonably certain¹⁸ cause of the substantial impairment of or significant prejudice¹⁹ to the ability to prove or disprove an element of the cause of action or defense²⁰.

Intentional, grossly negligent or other culpable conduct²¹, done for the purpose of

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- ⁹ 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.4th 1400; *Johnson v. United Service Automobile Assoc.* (1998) at p.635 [No 3rd 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]; *Coprigh v. Superior Court* (2000), 80 Cal.App4th 1081, 1083, rev.den 7/26/01 [Tire blowout on rental car; preservation of evidence requested. 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.4th 24 [Request for access not = request for preservation]; *Williams v. State of Calif.* (1983), 34 Cal.3rd 18 [No duty of highway patrolman to gather and preserve evidence]
- ¹⁰ *Willard v. Caterpillar* (1995), 40 Cal.App.4th 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
- ¹¹ *Willard v. Caterpillar* (1995), 40 CA4th 892; *Cedars-Sinai Medical Center v. Superior Court* (1998), 18 Cal.4th 1, pp. 4, 8, 17.
- ¹² *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.
- ¹³ Actually aware OR reasonably foreseeable *Willard v. Caterpillar* (1995), 40 CA4th 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.4th 626; *Velasco v. Commercial Bldg. Maintenance Co.* (1985), 169 Cal.App.3d 874v. *Dunham v. Condor Ins Co.* (1997), 57 Cal.App.4th 24
- ¹⁴ See *Willard v. Caterpillar* (1995), 40 CA4th 892 summary of out of state cases re pending or probable litigation and instructions 3 and 4 re “reasonably foreseeable” litigation
- ¹⁵ *Williams v. Russ* (2008), 167 Cal.App.4th 1215,1223 [“A terminating sanction is appropriate in the first instance without a violation of prior court orders in egregious cases of intentional spoliation of evidence.” Prejudice to party affects degree of sanctions. Id p.1227] *Sherman v. Kinetic Concepts* (1998), 67 Cal.App.4th 1152; *Cedars-Sinai Medical Center v. Superior Court* (1998), 18 Cal.4th 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.4th 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

destroying or preventing the use of evidence²² 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 adequately²³ compensate the victim of such conduct or to deter future culpable conduct.²⁴

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]

¹⁶ See *Temple Community Hospital v. Superior Court* (1999), 20 Cal.4th 464 and other cases eliminating the independent spoliation tort and suggesting there may be no remedy against 3rd parties and no need for one since there is little danger that any destruction would be culpable absent an agreement to preserve.

¹⁷ *Cedars-Sinai Medical Center v. Superior Court*(1998), 18 Cal.4th 1; *Temple Community Hospital v. Superior Court* (1999), 20 Cal.4th 464; *Farmers Insurance Exchange v. Superior Court* (2000) 79 Cal. App.4th 1400; *Coprigh v. Superior Court* (2000), 80 Cal.App.4th 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.4th 336, p. 343; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999), 75 Cal.App.4th 486

¹⁸ *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]

¹⁹ *Williams v. Russ* (2008), 167 Cal.App.4th 1215,1227 [Shifting burden of proof from proponent of spoliation to show prima facie case to opponent to show lack of prejudice when opponents conduct makes it practically impossible to show prejudice e.g showing lack of potential evidence is harmful. "...we hold that a party moving for discovery sanctions based on the spoliation of evidence must make an initial, prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense."'] *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]

²⁰ *Willard v. Caterpillar* (1995), 40 CA4th 892, *Smith v. Superior Court* (1984), 151 Cal.App.3d 491

²¹ *Smith* [breach of express promise; obstruction of justice] See *Willard* re discussion of culpability

²² 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

²³ *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.]

²⁴ *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.