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Destruction or withholding of evidence by the defense may leave the defendant defenseless

When defendants withhold or destroy evidence, they destroy the truth and your ability to present it at trial

One maxim we all face, regardless of the case we're handling, is "it's not what you know; it's what you can prove." The entire discovery system and the months or years you spend in discovery are dedicated to uncovering and accumulating all of the proof – i.e. the truth. In order for this process to proceed as intended, the rules of discovery impose upon defendants an unequivocal duty to preserve all relevant evidence in anticipation of litigation. (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223.) In most cases, that duty arises the day of the injury-causing incident and is usually documented through the defendants' call to their insurance company.

When defendants abuse the discovery process, withhold evidence, or do the unthinkable and destroy relevant evidence, they have destroyed the truth and have destroyed your ability to present the truth at the time of trial. As the Court of Appeal has explained, "[w]ithout knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action. The jury could only speculate...." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1,14.) Therefore, while it is true there is a jury instruction, CACI 204, which can be read where there are allegations of the willful destruction of evidence; that is simply not enough. In California, the law provides a number of tools that can be utilized to turn these cases of discovery abuse from a disastrous situation and secure justice for your client.

When used properly these tools can enable you to obtain a variety of remedies ranging from terminating sanctions, where the court strikes the defendant's answer and defenses pertaining to liability, causation, and/or damages, to evidentiary and issue sanctions against a defendant for their conduct. The purpose of this article is to provide some background of the various sanctions available – evidentiary, issue and terminating sanctions – and some guidance on how to successfully convince the court to impose such sanctions when defendants destroy or withhold evidence.

When does a duty to preserve evidence begin?

Court imposed sanctions are at the forefront of the legal tools available to curb rampant discovery abuses, and they come in many forms. The most important thing to understand in seeking sanctions is that defendants in fact have a duty to *"to preserve evidence for another's use in pending or future litigation"* even if that evidence has not been specifically requested in discovery. (*Williams, supra,* 167 Cal.App.4th at p. 1223 [emphasis added].) The relevant legal authorities clearly establish that California law does not only prohibit the destruction of evidence specifically requested, but even contemplates the preservation of evidence that could be used in future litigation when it was never previously requested up through court-ordered discovery. (See *Williams*, *supra,* 167 Cal.App.4th 1215, *Stephen Slesinger, Inc. v. Walt Disney Co.,* (2007) 155 Cal.App.4th 736; *Vallbona v. Springer,* (1996) 43 Cal.App.4th 1525 and *Karz v. Karl,* (1982) 137 Cal.App.3d 637.)

When conduct is sanctionable

In order to obtain sanctions for discovery abuse, a plaintiff need only make an initial prima facie showing that the defendant in fact withheld, destroyed or failed to present evidence that had a *substantial probability of damaging* the moving party's ability to establish an essential element of his claim or defense. (*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal.App.4th 1336, 1346-1347; *Williams, supra,* 167 Cal.App.4th at p. 1227.) A wide variety of conduct by a defendant can therefore constitute discovery abuse that is sanctionable by the court ranging from failure to produce evidence, withholding evidence, intentionally destroying it or failing to preserve it. In addition, as discussed in greater detail below, sanctions can be imposed when a defendant fails to comply with court orders regarding discovery matters.

Spoliation of evidence is a situation in which a wide range of sanctions are available and occurs where there is "the destruction or significant alteration of evidence or the failure to preserve evidence for another's use in pending or future litigation." (*Williams*, *supra,* 167 Cal.App.4th at p. 1223.) The severity of the sanctions depends on the prejudice suffered by your client as a result of the discovery abuse and the mindset of the party accused of spoliation: (See *Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892, 907; and see also Evid. Code, § 413).

In examining the intent of the party who destroyed or withheld evidence, "intent" is not equivalent to premeditated or other nefarious motives. Rather, the court simply examines whether the party had knowledge of the duty to preserve such evidence. The seminal case which illustrates the low threshold for

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establishing intent is *Williams v. Russ, supra*. *Williams* involved a legal-malpractice action where the plaintiff requested and received his original case files from the defendant attorney and then used the file to amend his complaint to add new causes of action. Defendant attorney chose not to maintain a copy of the file before sending it to the plaintiff. The plaintiff placed the files in a storage facility, but throughout that same year, the plaintiff fell behind on his rental payments to the facility. (*Id.* at 1218-19.) Despite receiving warnings that default on the payments could lead to the sale of the items in storage, the plaintiff never did more than make partial payments, eventually defaulting on his account later that year – his files were finally destroyed after no one attempted to purchase them. (*Id.* at 1219.) Plaintiff never informed the defendant of the destruction of the file. For three years, defendant never asked for the file. However, after three years, defendant finally and for the first time, requested the file and learned of its destruction. (*Id.* at 1224.) A discovery referee evaluated the issue and found the actions of the plaintiff to amount to negligence, not intentional conduct. The trial court and the Court of Appeal disagreed. Despite the defendant not keeping a copy of the file produced, not requesting the file for three years, and despite the plaintiff not maliciously allowing the files to be destroyed, the trial court found that the 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 which was affirmed by the Court of Appeal. (*Ibid.*)

As the opinion in *Williams* illustrates, knowledge of the relevance of the documents at issue creates a duty to preserve long before a discovery request is even served and failure to do so can lead to the imposition of terminating sanctions.

Following the discovery process creates a record

While the Court of Appeal in *Williams* affirmed the imposition of terminating sanctions before a motion to compel was filed, you are better off being methodical and proceeding with the entire discovery process before seeking extraordinary sanctions. As a trial court once said at the hearing on a motion to compel when I stated that the motion was really form over substance and that a terminating sanctions motion was inevitable, "Well, maybe they are available and they made a mistake and they'll find it. Let's give them that leeway." The court's point was that [it] wanted to be thoughtful in confirming that the defendant had ample opportunity to comply with the discovery requests or confirm that the evidence was lost or destroyed. In other words, the goal of this process is to create a factually and legally sound record for the court so that the court will have sufficient foundation to provide you with the relief you seek. The roadmap for this process is as follows:

- Serve discovery
- File motion to compel discovery;
- File motion seeking specific sanctions;
- Prepare detailed order supporting sanctions;
- Be prepared for significant briefing.

Serve discovery and file a motion to compel

As discussed in *Williams,* regardless of whether discovery was pending when evidence was destroyed, the party who destroyed the evidence can still be held responsible. However, while not required, when there is evidence of spoliation, you should still make sure to serve discovery requesting the evidence at issue and file a motion to compel before seeking the extraordinary sanctions. Like every motion to compel, you should include a separate statement which you can then incorporate by reference into your motion for sanctions to ensure compliance with California Rule of Court 3.1345 to the extent necessary.

Obtaining a court order to compel discovery will provide you with another basis for the terminating sanctions sought should a defendant continue to act evasively and not produce discovery. While the imposition of extraordinary sanctions is reviewed by the Court of Appeal under an abuse-of-discretion standard, creating a record confirms the effort involved and thought considered so that the trial court can comfortably and correctly impose such sanctions without concern of reversal. So in filing any motion, it is helpful to be as factually detailed as possible regarding the evidence sought and to detail precisely the reason it is relevant to your client's case. This is the time in which you can explain to the court the factual and procedural history regarding the spoliation of the evidence you are seeking. This includes explaining that the evidence existed; that defendant was the party in possession, custody or control of the evidence; that the evidence has not been produced; why it was clear that this evidence would be relevant to the case; and the resulting prejudice to your client's case by its destruction. The factual foundation you lay in this motion to compel will be the building blocks for the court to ultimately impose the sanctions sought.

You can't get what you don't ask for

After the court has successfully granted your motion to compel and the defendant has failed to comply with the court's order, the next step is to submit a detailed motion requesting sanctions for defendant's conduct. While, as an advocate for your client, you may believe that terminating sanctions are in order, there is always a chance that the court may not impose terminating sanctions but may be willing to impose a lesser sanction (evidentiary sanctions, issue sanctions, or monetary sanctions). To that end, keep in mind that you don't get what you don't ask for. So it is important that your sanction motion seek terminating sanctions, or in the alternative issue or evidentiary sanctions. No matter what sanctions you seek, you need to be specific and explicit in exactly what sanctions you want the court to impose.

Next, once you have established that the court has the power to grant sanctions and the grounds for why it must grant them, you must specifically identify the sanctions you wish the court to levy against the defendant for spoliation of evidence and failure to comply with the

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court's order. The categories of sanctions available include: terminating sanctions; issue sanctions; evidentiary sanctions; and monetary sanctions.

Terminating sanctions

Terminating sanctions are the most severe available and for obvious reasons carry the greatest weight in obtaining leverage against a defendant that has engaged in discovery abuse. Terminating sanctions have been consistently found an appropriate remedy to address misuses of the discovery process – especially failure to comply with court discovery orders. (See *Kuhns v. California* (1992) 8 Cal.App.4th 982, 988-989; and *Johnson v. Pratt & Whitney Canada* (1994) 28 Cal.App.4th 613, 625-626.)

The Court of Appeal explained the purpose of discovery sanctions in *Deyo v. Kilbourne,* (1978) 84 Cal.App.3d 771

> [T]here is no question that a court is empowered to apply the ultimate sanction [of dismissal] against a litigant who persists in the outright refusal to comply with his discovery obligations.

(*Id.* at 793, citing *Fred Howland Co. v. Superior Court* (1966) 244 Cal.App.2d 605, 612.)

The *Deyo* court went on to explain:

> The most severe in the spectrum of sanctions must be available in appropriate cases not only to penalize those whose conduct may be deemed to warrant such a sanction, but also to deter those who might be tempted to flaunt discovery orders. [citations]. The judicial system cannot tolerate litigants who flagrantly refuse to comply with orders of the court and who refuse to permit discovery. For delay and evasion are added burdens on time, are unfair to the litigants, and offend the administration of justice. [citations].

(*Ibid.* at fn. 26 [citations omitted].)

For example, as set forth in a past article, "Dealing with the state of California's first line of defense – stonewalling any meaningful discovery" published in the February 2009 issue of Advocate, the trial court imposed terminating sanctions against the State of California for failing to timely comply with a court-ordered discovery *despite the State taking a writ on the ruling which was still pending before the Court of Appeal.* Recently, a trial court tentatively imposed terminating sanctions when a supermarket failed to preserve video surveillance and accident reports (the settlement offer moved from low five figures before the tentative ruling to settling for policy limits before the order was signed.) In that case, the supermarket owner testified that the supermarket was demolished to build a three-story market, resulting in the loss of the evidence – something completely unrelated to the incident giving rise to the lawsuit. In other words, while the destruction of evidence was not malicious in nature, the market knew of the evidence and did not take the appropriate steps to preserve it, thereby warranting terminating sanctions.

Should evidence be withheld, destroyed or not preserved while there is a court order directing it to be produced, then a defendant is clearly demonstrating a willful and conscious disregard of the discovery process. In these situations a court has broad discretion to impose sanctions for failure to comply with court-ordered discovery. (See *Parker v. Wolters Kluwer U.S., Inc.* (2007) 149 Cal.App.4th 285, *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381; *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913; *American Home Assurance Co. v. Societe Commerciale Toutelectric* (2002) 104 Cal.App.4th 406; *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525.)

Be specific delineating requested evidentiary or issue sanctions

Even though the court has the ability to enter sanctions from a wide spectrum of severity, the common theme in seeking any of these sanctions is that, simply asking for each category of sanction is insufficient in order for the court to grant your request, as each sanction sought must be separately identified and briefed.

In seeking issue and evidentiary sanctions you should provide the court with the exact issues you wish it to rule on and/or the exact evidence you seek excluded by your motion. This is where you will incorporate the separate statement you prepared pursuant to California Rules of Court, rule 3.1345 in your motion to compel in support of the specific sanctions you are seeking. As a practical matter, the need for the specific issue and evidentiary sanctions you seek should be readily apparent and supported by the factual record and the prejudice caused your client by the spoliation of evidence.

For example, suppose your case involves personal injuries suffered due to a dangerous condition of a defendant's property. The defendant claims they had in place warning signs providing notice of the condition, but that the signs have all been lost and destroyed. Now there is no evidence as to the content of the sign or that they were actually in place during the incident. It would be appropriate in this case to seek evidentiary sanction preventing the defendant from admitting evidence or arguing that the sign existed and provided notice. Similarly, assume a case where a plaintiff was injured in a slip and fall. There are no witnesses and defendant had surveillance tapes of the entire incident which it did not preserve and which were destroyed. In this case you should request sanctions that defendant be precluded from offering any evidence that plaintiff was comparatively at fault for the subject incident or that the burden is shifted to defendant to prove that it was not negligent, and its negligence was not a substantial factor in causing plaintiff's injuries.

Additionally, in seeking issue sanctions from the examples discussed above, it would be appropriate, for example, to request that the court determine that the defendant in fact never had any warning signs in place or that the defendant destroyed video it knew would establish it was liable for the plaintiff's injuries. These sanctions will vary in every case based on the facts and prejudice caused

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your client, but one thing is constant: if you do not provide these to the court, it will not on its own accord, draft them from you and you will have precluded yourself from obtaining remedies that could be vital to the success of your client's case.

Draft a bullet-proof proposed order

The final step in this process is to submit a detailed order for the court which contains both the factual and legal support for why it should grant your requested sanctions in addition to detailing the relief requested. When completed, this order should act on its own as a single, self-contained document which provides the facts and law justifying the remedies the court is granting. While the discovery statutes do not require the court to specify reasons justifying the imposition of sanctions, "Indeed, the trial court is not required to make findings at all," a more thoughtful or reasoned record and order may be helpful should the Court of Appeal get involved. (See *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 261 citing *Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1603.)

Conclusion

Terminating, evidentiary, and issue sanctions are not urban legends or ancient mythology. Rather, they are real tools that are imposed by the courts when the appropriate record is made. When utilized properly, these discovery sanctions are significant weapons to wield when advocating on your clients behalf, and can mean the difference between a substantial recovery or none at all.

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