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# Publications

## PROTECTING THE EVIDENCE

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### House Counsel

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#### Publication

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A decade and a half after an intermediate appellate court in California created a new tort called spoliation of evidence, only a few jurisdictions have embraced the innovative cause of action. Even California took a step back a year ago, when the state Supreme Court severely limited the circumstances under which the loss or destruction of evidence can give rise to a separate lawsuit. *Cedars-Sinai Medical Center v Superior Court* (1998) 18 C4th 1.

But the extent to which the spoliation tort has proven to be a nonstarter should not give anyone the idea that it's okay to shred or discard unfavorable evidence. On the contrary, the California Supreme Court's opinion in *Cedars-Sinai* includes an "unqualified condemnation" of such conduct and suggests that courts should impose heavy sanctions on parties who are guilty of it. The court also left unclear whether and when a third party, unconnected to a lawsuit, might be liable for mishandling evidence that would have been important to one of the litigants. However, the court may confirm or deny a third-party spoliation cause of action in a pending case. *Temple Community Hosp. v Superior Court*, No. S049103 (argued Mar. 4, 1999).

Accordingly, corporate counsel should make sure they are familiar with the legal principles that give rise to a duty to preserve evidence, and they should also ensure that their clients establish - and follow - policies and procedures that will protect them from spoliation claims.

#### **The Law of Spoliation Then and Now**

In a 1984 case involving the disappearance of some auto parts that might have helped prove the cause of an accident, a California appellate court allowed the plaintiff to sue the dealer for not preserving the parts as agreed. *Smith v Superior Court*, 151 CA3d 491. Abiding by the old adage that "one person's trash is another's treasure," the court crafted a civil counterpart to the crime of willful destruction of evidence. The court noted that a similar tort, intentional interference with prospective economic advantage, was already on the books.

The principles outlined in *Smith* were soon expanded, as some California courts allowed suits for

negligent spoliation, which depended on a court's recognizing that the spoliator had a legal duty to preserve evidence. See, for example, *Velasco v Commercial Bldg. Maintenance Co.* (1985) 169 CA3d 874. Courts had long sanctioned parties who destroyed evidence by assessing fines, by allowing otherwise inadmissible evidence to be introduced by the victim, by preventing the spoliator from introducing contrary evidence, or even by granting summary judgment against the offender.

The separate cause of action for spoliation of evidence did more, however, than simply create new sanctions for misconduct in the form of damages: It put the decision about whether to impose those sanctions in the hands of a jury. Indeed, some attorneys quickly learned that it might be easier to prove the spoliation case than to prove the underlying action.

Although every court that has considered the issue has agreed that spoliators should not be allowed to profit from their misdeeds, most have declined to hand the other party the windfall of a separate action for tort damages. Moreover, the *Cedars-Sinai* decision has restored some balance by holding that when a party to litigation is guilty of spoliation, courts should use their long-standing discretionary powers to punish that party under existing statutes - at least if the spoliation is discovered before the trial is over. However, the state Supreme Court chose not to address three questions in *Cedars-Sinai*: first, whether negligent spoliation is still actionable; second, what remedy, if any, there is if the underlying case is decided on the merits before the spoliation victim could have learned of the missing evidence; and third, whether a tort cause of action is still available in third-party spoliation cases.

These questions undoubtedly will make their way through the lower courts for a while. One California appellate court already has confirmed that a claim against a third party for negligent spoliation survives *Cedars-Sinai*, and another expressly assumed but did not determine that this claim still exists. See *Johnson v United Services Automobile Ass'n* (1998) 67 CA4th 626; *Hernandez v Garcetti* (1998) 68 CA4th 675, 680. In *Johnson* the court of appeal pointed to three ways a third party could be saddled with a duty to preserve evidence: (1) by agreeing to do so, including the acceptance of payment in response to a specific request to preserve the evidence; (2) by voluntarily undertaking to preserve evidence in a way that induces reasonable and detrimental reliance; or (3) by regulation, contract, statute, or "some analogous special relationship." 67 CA4th at 635.

### **An Ounce of Prevention**

Whether or not counsel practices in jurisdictions where there is an independent tort for spoliation, the consequences of being found to have tampered with, destroyed, or lost evidence can be severe.

The threat remains real as long as it is possible that some discarded item eventually will become relevant to litigation. Even if your company's conduct has been completely innocent and the evidence is not a key item, the company can be liable as long as it controls evidence that might have helped a party prove an element of its case. See *Allstate Ins. Co. v Sunbeam Corp.* (7th Cir 1995) 53 F3d 804; *West v Goodyear Tire & Rubber Co.* (2d Cir 1999) 167 F3d 776. In short, since the law is still in a state of flux, the specter of a spoliation claim persists. The key to avoiding liability is to be aware of the circumstances that create a duty to preserve evidence and to establish policies and procedures that ensure this duty is fulfilled.

One of the most important defenses to a spoliation claim proposes that the defendant has no duty to preserve the evidence. The three bases for determining evidentiary responsibility listed in the Johnson case provide a reasonable guide for corporate behavior. Thus, employees should be trained not to agree to preserve documents or objects unless the company already has a policy of doing so. If an outside party asks your company's employee to keep something safe, the employee should refuse or suggest that the outside party take the item for safekeeping. In addition, when circumstances or company policy dictate that your employees should preserve an item, a written agreement should define the limits of any duty that your company is assuming.

The most common basis for finding a duty to preserve is the law itself - a statute or regulation, such as one requiring a business to maintain records or even used parts. Corporate counsel must be thoroughly familiar with such rules and must take responsibility for educating employees about them. Counsel should also be aware that employees might misplace or alter evidence because they simply do not understand the consequences of doing so. Therefore, employees should be made particularly aware of the necessity of preserving all documents and other items that might be evidence in a potential or pending civil action. A policy that requires anyone seeking to destroy or alter an item to contact the legal department is advisable.

In addition, anything that is being preserved should be physically secure, especially if it is something counsel knows might be evidence. These items should not be made part of a normal file but should be in a separate evidence locker. Access to the items should be limited and documented by a sign-out sheet that will establish a chain of custody. The items should be clearly and distinctly marked in a way that indicates that they are evidence and should not be thrown away, altered, or destroyed.

Everything that is kept or discarded should be subject to a written policy. The policy should define retention periods for documents and other items, and these periods should be observed uniformly throughout the company. The written policy should also explain why the prescribed retention period was selected, since such an explanation will help a jury understand that the item was not discarded until a reasonable and appropriate time had passed.

Any retention policy must also include "suspension procedures" that allow some documents to be retained beyond the normal time. Additionally, before altering or destroying any documents pursuant to a policy, or for any other reason, counsel should determine whether anyone might be interested in the items and notify those parties in writing that the items are going to be destroyed. If the party requests preservation, special precautions must be taken, or better yet, the party requesting preservation should be asked to take possession of the item. Again, all such agreements should be carefully set out in writing. Alternatively, an agreement with an independent third party to reserve an item might be considered.

Another method of retaining evidence is to copy it, following procedures analogous to backing up computer files. Even when evidence is lost inadvertently, a claim exists only if the other party has suffered damage, which can be minimized if there is a reasonable substitute for the evidence, such as duplicate documents or photographs of an object. For example, if one party in a product liability case performs destructive testing on the allegedly defective product, a spoliation claim might fail if the other side's expert is able to formulate an opinion based on a videotape of the test.

Finally, keep in mind that court rulings in this area of the law, whether analyzing the spoliation tort or applying discretionary sanctions for lost evidence, are grounded in principles of fairness and oriented toward rectifying a wrong (the loss or destruction of evidence) with the goal of putting the parties back on an equal footing. They are not oriented toward granting a windfall to one party at the expense of another. Thus, if a company can demonstrate that a uniform policy governing the handling of evidence led to the inadvertent loss of something that turned out to be necessary for litigation, that company may be able to avoid, or at least minimize, liability for the loss.

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