CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
ADVANCING ETHICS, COOPERATION AND EDUCATION

CLM 2016 Boston Conference
July 14-15, 2016 in Boston, MA

Preservation Letters Gone Wild! Handling Ridiculous Pre-Suit Preservation Requests

How do you respond to a letter of representation the day after an event demanding that all “evidence” in your possession be preserved? What is “evidence?” What is in your “possession?” How long must it be preserved? Can we fight back? This session will address these topics and more by providing potential strategies risk managers and insurance partners may utilize to meet their preservation obligations.

I. What is a preservation letter?

It is a request from a potential adversary that certain evidence be preserved in anticipation of litigation. The preservation requirement may also apply regardless of a preservation request. What is Spoliation of Evidence?

a. Why evidence must be preserved?

i. Defining spoliation of evidence.

It is “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *United States v. Kitsap Physicians Service*, 314 F.3d 995, 1001 (9th Cir. 2002). A party commits spoliation “as a matter of law only if they had some notice that the documents were ‘potentially relevant’ to the litigation before they were destroyed.” *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991). Notice and relevance are usually vigorously disputed. When spoliation occurs, courts presently have broad discretion to fashion spoliation remedies, including jury instructions. “A district court’s adverse inference sanction should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party’s right to produce other relevant evidence.” *Dzung Chu v. Oracle Corp. (In re Oracle Corp. Sec. Litig.)*, 627 F.3d 376, 386-87 (9th Cir. 2010).

ii. Why does spoliation of evidence matter?

"Because a spoliation instruction has the propensity to tilt a trial in favor of a nonspoliating party, it can, in some sense, be tantamount to a death-penalty sanction." *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 23 (Tex. 2014). "The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may infer that the party who destroyed potentially relevant evidence did so out of a realization that the evidence was unfavorable, the party suffering this instruction will be hard-pressed to prevail on the merits." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 219-20 (S.D.N.Y. 2003) (internal edits and quotations omitted).

In some jurisdictions, spoliation is a cause of action itself. *Smith v. Superior Court for County of L.A.*, 151 Cal. App. 3d 491 (1984) started this trend in California, although it was eventually overruled. Other states may still allow it. *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986) (recognizing a cause of action in tort based upon spoliation of evidence); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. 1998) (recognizing the right to recover in tort for spoliation of evidence); *Smith v. Howard Johnson Co., Inc.*, 615 N.E.2d 1037, 1038 (Ohio 1993) (holding that "[a] cause of action exists in tort for interference with or destruction of evidence"). Others have expressly forbidden it, such as Florida. *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005).

When spoliation is not a cause of action, most jurisdictions instead permit one of two alternative jury instructions to address it. One is a rebuttable presumption. "[W]illful or intentional spoliation of evidence requires the intent to harm another party through the destruction and not simply the intent to destroy evidence." *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006). If this intent is established it is the spoliator's burden to establish the destroyed evidence was not unfavorable.

The other instruction is a permissible inference. "[A] permissible inference that missing evidence would be adverse applies when evidence is negligently lost or destroyed." "An inference is permissible, not required, and it does not shift the burden of proof."

The potential remedies are not restricted only to jury instructions. Courts may fashion alternative sanctions to tailor the remedy to the harm. For instance, a spoliating party may be prohibited from introducing evidence and testimony concerning what the missing evidence would have shown unless the opposing party opens the door.

II. What evidence should be preserved?

a. Who handles the preservation requirements?

There are advantages and disadvantages to different people with different job requirements handling the response. A frequent conflict point is addressing who pays for it.

b. How can evidence worthy of preservation be preserved?

i. Duty to suspend routine document destruction policies & video self-looping.

The duty to preserve attaches once a defendant is on notice of the potential litigation. The defendant must then preserve evidence. This includes suspending routine document destruction policies for accident reports and other data that is relevant to the event. It also includes locating and preserving video that may be relevant before the video is lost due to self-looping.

c. The video is irrelevant because it shows "nothing."

In *Bass-Davis v. Davis*, 122 Nev. 442, 446, 134 P.3d 103, 105 (2006) a convenience store lost video of a slip and fall but argued the lost video would have showed "nothing" and was irrelevant. This argument failed. "[E]ven if the videotape would not have shown the location where [the customer] fell, it would have shown whether or not a warning sign was placed near the front door." An adverse inference was permitted.

In *LaJocies v. City of N. Las Vegas*, 2011 U.S. Dist. LEXIS 49046, 2011 WL 1630331 (D. Nev. Apr. 28, 2011) video and photographs existed but were lost. "Moreover, because the relevance of ... [destroyed] documents cannot be clearly ascertained because the documents no longer exist, a party can hardly assert any presumption of irrelevance as to the destroyed documents." The court also rejected argument that the video's viewing limitations meant it showed no relevant evidence.

> Despite the limited viewing angle of the videotape which may have captured only the threshold of the door but not inside the cell, it is likely that it did still capture at least some of the altercation (whether sights or sounds) and could have potentially assisted the jury to understand the tenor of the event and to evaluate the credibility of the witnesses who are providing conflicting descriptions. Likewise, the missing photographs of the injuries possibly could have assisted experts in determining how the injury was more likely to have been caused. At the very least, even if Defendants are correct in their analysis that the photographs and videotapes are now no longer relevant to the ultimate issues which will be presented to the jury, the Defendants still had an initial and continuing duty to preserve the videotape and photographs because they still could likely have led to the discovery of other relevant evidence.

Patton v. Wal-Mart Stores, Inc., 2013 U.S. Dist. LEXIS 165617, 2013 WL 6158461 (D. Nev. Nov. 20, 2013) also reached this conclusion.

> The initial problem with Walmart's argument, and its document preservation directive, is that Walmart made a conclusion—(viz. that "nothing" was caught on film)—that was not Walmart's to make. Whether "nothing" or "something" was caught on film is an evidentiary question of relevance. This determination is the court's, and not Walmart's, to make. See Fed. R. Evid. 401.
>
> The overarching problem with Walmart's argument and its document preservation directive, however, is that "nothing" is something. Even if "nothing" was caught on film, camera five's video footage is probative because it tends to make the fact that Walmart maintained safe premises more probable than not. See Fed. R. Evid. 401. "Nothing" would show: (1) an empty and unobstructed east entrance; (2) rows of barbeque sauce and other liquids that had not fallen or leaked; and (3) a ceiling that kept water from dripping down and pudding on the floor. "Nothing," therefore, would be central to Patton's negligence claim because nothing would tend to show that Walmart did not breach its duty of care.
>
> Something rather than "nothing," however, was caught on film. The video footage from the time before Patton's fall was reported must have recorded Burton either pushing or pulling his cart. If Burton was pushing the cart, then camera five's video footage would tend to make Patton's allegation that Walmart failed to properly inspected aisle four more probable than not because Burton could not have seen obstructions, like a puddle of liquid, as he entered aisle four. *Id*. But, because Walmart's document preservation directive purportedly instructed employees to only preserve video footage after the incident was reported, Walmart's policy prevented Patton from discovering relevant evidence. In fact, assuming—as Walmart represents—that its employees implemented the document preservation directive correctly, then the policy itself demonstrates that Walmart destroyed relevant and probative evidence.

d. How much video should be preserved?

No matter how much video is preserved, the claimant will argue it is insufficient. In *Maxim v. FP Holdings, LP*, 2014 U.S. Dist. LEXIS 439, 2014 WL 200545 (D. Nev. Jan. 2, 2014) a casino customer slipped and fell on a liquid. A surveillance camera captured the fall and the casino preserved it from a period beginning 10 seconds before the fall through the time the customer was removed by emergency medical technicians. 10 seconds was insufficient.

In *Demena v. Smith's Food & Drug Ctrs., Inc.*, 2012 U.S. Dist. LEXIS 129024, 2012 WL 3962381 (D. Nev. Sept. 10, 2012) a customer asserted she slipped and fell on a jalapeno pepper. She completed an incident report before leaving via ambulance. The store "preserved approximately forty minutes of video - consisting of sixty-five seconds prior to the incident and about thirty-nine minutes after the incident - based on when Plaintiff entered and exited the camera range." This was sufficient.

e. Spoliation for not <u>creating</u> evidence?

Maxim v. FP Holdings, LP, 2014 U.S. Dist. LEXIS 439, 2014 WL 200545 (D. Nev. Jan. 2, 2014). Video of more than 10 seconds before the fall was not preserved because the employees involved "were allegedly unaware that such evidence could be relevant to determining liability for the accident." The casino "also did not identify or obtain statements from employees who were or may have been in the area prior to the accident and may have had knowledge as to how or when the liquid came to be present on the floor."

> Defendant's security officers or other employees who are charged with investigating accidents that occur on its premises should be instructed and should know that it is important to obtain and preserve evidence in Defendant's possession, custody or control that may reasonably show how, when and by whom a foreign substance came to be present on the floor of its premises.

III. Fighting Back!

a. Does the plaintiff have an obligation to preserve evidence?

Yes! The pre-suit evidence preservation obligation applies equally to all parties. If a preservation letter is received, a potential defendant can include a request that the claimant preserve certain evidence.

b. What items could be requested?

Every claim is different, however in motor vehicle collisions, typically there is a plethora of information available. This could include cell phones, GPS units, automatic event recorders (AER), the vehicle itself until it can be scanned and its ECM downloaded. The goal is to locate any evidence that might bear upon the case.

Social media can also be a fertile ground not only for valuable information, but for spoliation claims. In *Painter v. Atwood*, 2014 U.S. Dist. LEXIS 35060 (D. Nev. Mar. 18, 2014) the female plaintiff filed a constructive discharge claim alleged unwelcome sexual advances. During her employment she published Facebook posts concerning her employer. Plaintiff conceded these posts once existed and that she deleted them after retaining counsel. There was no allegation counsel had any role in deleting the posts.

Plaintiff first argued the posts were not relevant. She admitted enjoying her work prior to the single encounter that gave rise to the constructive discharge claim. Her counsel also argued "Plaintiff is a 22-year old girl who would not have known better than to delete her Facebook comments." Both arguments failed.

> First, Plaintiff's Facebook comments discussing her opinion on working and interacting with Defendant Dr. Atwood are directly relevant to this litigation. Plaintiff's entire lawsuit centers around her assertion that the work environment at Defendant Dr. Atwood's dental practice was sexual in nature. Indeed, as Plaintiff's counsel discussed extensively during the hearing, Plaintiff believes that Defendant Dr. Atwood is a "sexual predator" who requires his employees to accept his sexual advances or be fired. Thus, there is no question that Plaintiff's Facebook comments relating to Defendant Dr. Atwood are relevant.
>
> Second, as the Court stated at the hearing, it is of no consequence that Plaintiff is young or that she is female and, therefore, according to her counsel, would not have known better than to delete her Facebook comments. Once Plaintiff retained counsel, her counsel should have informed her of her duty to preserve evidence and, further, explained to Plaintiff the full extent of that obligation.

The court granted an adverse inference because the messages were destroyed with culpable intent.

> Plaintiff had an obligation to preserve her Facebook comments; she deleted the comments with a culpable state of mind, and the comments were relevant to Defendants' claim. Although Plaintiff's counsel may have failed to advise Plaintiff that she needed to save her Facebook posts and of the possible consequences for failing to do so, the deletion of a Facebook comment is an intentional act, not an accident, and the Court cannot infer that Plaintiff deleted Facebook comments which stated that she enjoyed working for Defendant Dr. Atwood, after she contemplated the instant litigation, for an innocent reason.