

Evidence preservation

An update to your evidence preservation demands and how to advise your clients of their own preservation obligations

By Andrew Owen

Evidence preservation is a critically important issue for attorneys and their clients. Failing to preserve evidence can result in monetary, evidentiary, and issues sanctions, up to case-killing terminating sanctions with a judge's order imposing such sanctions reviewed and reversed only for "manifest abuse exceeding the bounds of reason." (*Sabetian v. Exxon Mobil Corp.* (2020) 57 Cal.App.5th 1054, 1084; *Tucker v. Pac. Bell Mobile Servs.* (2010) 186 Cal.App.4th 1548, 1560 [sanction orders only reversable when "arbitrary, capricious, or whimsical"].)

Legal clarity on the details of the what, how and when of evidence preservation was unsettled. The Discovery Act contains no provision that expressly forbids evidence destruction or spoliation before a lawsuit is filed and California courts disagreed on whether sanctions could result from failing to preserve evidence before an affirmative act like filing a lawsuit or serving discovery occurs. (Compare *Cedars-Sinai Med. Ctr. v. Superior Ct.* (1998) 18 Cal.4th 1, 12 ["Destroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery…as would such destruction in anticipation of a discovery request"] with *New Albertsons, Inc. v. Superior Ct.* (2008) 168 Cal.App.4th 1403, 1430-31 [describing *Cedars*' pre-discovery destruction statement as dicta and holding that the "discovery statutes regulate the court's power to impose sanctions…[and that] those statutory restrictions on the exercise of the court's inherent sanctioning power are binding unless they materially impair the court's ability to ensure the orderly administration of justice"].)

In an attempt to end this conflict and uncertainty, and set clearer standards on when the duty to preserve evidence arises, the court in *Victor Valley Union High School Dist. v. Superior Court* (2023) 91 Cal.App.5th 1121, reviewed a trial court's imposition of sanctions resulting from a school's failure to preserve video evidence of an alleged student-on-student sexual assault.

Plaintiffs in *Victor Valley* alleged the school failed to properly supervise a minor student, who the school agreed needed constant adult supervision because of his susceptibility to others and his propensity to wander. During the school day, plaintiffs alleged other students lured the minor student into the restroom where he was then sexually assaulted. At the time of the alleged assault, there was no adult supervising the student. Plaintiffs contended that a security camera captured the involved students entering the bathroom together without any adult supervision.

When teachers learned of the alleged assault they informed the assistant principal who, along with a school security guard, reviewed the video footage, confirmed it showed the involved students entering the bathroom, and wrote an incident report that was sent to the district's risk manager. The assistant principal did not preserve the video evidence because he believed the security guard did. After 14 days, the video recording was automatically erased.

When plaintiffs learned of the video's destruction, they sought monetary and terminating sanctions for what they argued was the intentional destruction of critical evidence that severely prejudiced their ability to work up their case. Defendant argued the video's destruction was unintentional and protected by the safe-harbor provisions of Code of Civil Procedures section 2023.030, subdivision (f), which prevents sanctions when the destruction of electronic evidence is the result of "the routine, good faith operation of an electronic information system." Defendant further argued it had no duty to preserve the evidence because, at the

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time the video was reviewed, a potential lawsuit was a mere possibility.

The trial court denied plaintiffs' request for terminating sanction because it found the video's destruction was negligent and not willful. That court, however, did order monetary, issue, and evidentiary sanctions that defendant argued amounted to terminating sanctions. The Court of Appeal granted defendant's writ of mandate.

The *Victor Valley* court began with well-understood principles of how impactful evidence destruction could be on "fairness and justice." The court then teed up the primary issue by addressing *when* the duty to preserve evidence should arise as no discovery statute provided clear direction. The court began with a detailed analysis of section 2023.030's legislative history and concluded the *when* was when litigation was "reasonably anticipated." (*Id*., at pp. 1141-43.) But *when* is that? The court found no answer in either the legislative history or California caselaw.

So, the Court of Appeal turned to federal courts for guidance and, after a thorough analysis, concluded that the duty to preserve evidence arises when "litigation is reasonably foreseeable," which means litigation is "'probable' or 'likely' to arise from a dispute or incident [citation], but not when there is no more than the 'mere existence of a potential claim or the distant possibility of litigation." (*Id*. at p. 1149.) The court further held that the "reasonably foreseeable" standard "does not require that future litigation be 'imminent [or] probable *without significant contingencies*,' or even 'certain.'" (*Ibid.*, emphasis in original.)

Made clear was that the duty to preserve evidence could arise before filing suit or serving discovery. But what should trial courts consider when faced with a sanctions motions alleging pre-lawsuit evidence destruction?

Since the duty to preserve evidence begins "'somewhere between knowledge of the dispute and direct, specific threats of litigation,'" (*id.* at p. 1153), the court should consider (1) the injury type and severity; (2) how often similar kinds of incidents lead to litigation; (3) the course of conduct between the parties, including past litigation or threatened litigation; and (4) what steps both parties took after the incident and before the loss of the evidence, including whether the defendant initiated an investigation into the incident. (*Ibid*., citing *Bistrian v. Levi* (E.D. Pa. 2020) 448 F.Supp.3d 454, 468.)

The court then analyzed specific types of cases and discussed when the duty to preserve evidence would likely arise. In addressing slip-and-fall and prison incidents, such cases "predictably result in litigation," but emphasized that fact, alone, would not be enough. Rather, it would be that type of case "*combined with other circumstances*" that could be enough for a defendant to reasonably anticipate litigation. (*Id*. at p. 1153, emphasis in original.)

Turning to cases involving school districts and their heightened duty towards students, the court found that the reporting of student-on-student sexual assault, alone, "weighs heavily in favor of finding litigation is reasonably foreseeable…." (*Id*. at p. 1154 and fn.18.)

Then, more broadly, the court addressed the reasonable foreseeability of litigation arising upon the creation of an incident report coupled with an internal evidence preservation policy, which demonstrates that a party is actually preparing for litigation.

After considering the specific facts, and thoroughly reviewing federal caselaw, the court held that, because litigation relating to the alleged sexual assault was reasonably foreseeable, the school district had a duty to preserve the at-issue video evidence. The matter was then remanded to trial court to consider a lesser form of sanctions.

The duty to preserve evidence is reciprocal

Keep in mind the rules of evidence preservation are reciprocal and know that it is your duty to advise your clients of their preservation obligations. (*Victor Valley*, 91 Cal.App.5th at p. 1144 ["When a party is aware of an accident that it knows is likely to cause litigation, it triggers the party's duty to preserve evidence"].)

This means that part of your intake process with new cases and clients must include asking where their involved vehicle is (or bike, or skateboard, or scooter, etc.). Is it at the tow yard or body shop? If so, take the same action you take when you learn who the defendant driver is: Immediately reach out to that location via email and/or overnight letter informing them that the vehicle is critical evidence in a pending or future case, that it must be preserved, and that you will be contact them in the very near future to discuss the vehicle's continued preservation.

If it is too late – i.e., your potential client first called you six months after the crash and, by that time, their insurance company had already totaled the car and had it scrapped or sold for parts – at least you documented your attempt to preserve the evidence on their behalf. Considering your lay client was likely not aware the crash would ultimately lead to litigation until they called you and/or that their vehicle could actually be evidence in a future lawsuit, it seems unlikely a court would punish them for not taking adequate steps to preserve it before you were retained.

Also remember that there are accident-reconstruction experts who specialize in locating vehicles *after* they have been totaled by an insurance company and sold or transferred for parts or scraps. If the value of your case calls for it, it could be worth retaining an expert very early in the case just to track down that vehicle, considering the potential wealth of evidence it may have.

Examples of evidence that you should demand be preserved

So, you have learned who the offending driver is, you learned who the registered owner is, you learned who the insurer is, and you learned where the car

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was towed. Now what? Well, like Oprah handing out cars to her studio audience back in 2004, *everyone should be getting an evidence preservation letter*. The broader the net, the better. Assuming the offending driver is unrepresented, you should not hesitate to communicate directly with that driver by email and/or letter detailing their preservation obligations.

Of course, there are countless ways to write an evidence preservation letter and the purpose of this article is not to endorse any particular format or style (beyond citing and describing the duties laid out by current caselaw). The focus here is to highlight certain items of evidence that are most common and important to preserve in motor vehicle cases including the following:

1. The vehicle, itself, and all component parts in their current form, before and without any repairs, modifications, alterations, or adjustments, and before it is totaled, scrapped or otherwise disposed of;
2. All data collected in any electronic data recorder, airbag control module, or any other electronic control module capable of recording and storing data;
3. All media from any dashcam or on-board camera recording system from the entire date of the subject collision, including all video and audio recordings;
4. All GPS data, including geographic locations and speeds, gathered or collected from any device;
5. All photographs, videos, and any other digital images of the involved vehicles and/or the involved drivers taken at the scene of the subject collision or at any other time thereafter;
6. All communications relating to the subject collision, including all texts, emails, and social media posts.

A best practice is to respectfully demand that the recipient advise you immediately of the status of the identified evidence and of their intentions to comply with the demand. If the case warrants it, offering at your cost to transport and store the vehicle to a secured storage facility can help ensure critical evidence is maintained.

Again, evidence preservation is reciprocal, so go through the same itemized list with your clients and take affirmative steps to preserve it in the same way you are demanding of defendants and their insurers.

A note about Lytx dashcam systems in commercial vehicles

Beyond the traditional auto v. auto collisions, there are certain specialized vehicles that may generate exceptionally important evidence for your case. Those vehicles include commercial delivery vehicles from entities like FedEx and Amazon, as well as national commercial motor carriers like CRST and J.B. Hunt. Fortunately, with the ubiquity and affordability of technology, many smaller delivery companies are starting to incorporate these advanced camera systems into their fleet, including most notably, Lytx dashcam systems.

Lytx's suite of technology has the ability to capture and record the following critical evidence:

- Simultaneously recorded dash and driver cams with accompanying audio;
- Full 360 degree perspective recordings;
- Real-time GPS tracking including location data by the second and corresponding speed, with steering and braking input;
- Risky driving detection and reports, including reports of distracted driving, speeding, distance management, and hard braking; and
- Maintenance alerts and maintenance compliance.

You must act immediately if you learn (or suspect) the involved commercial or delivery vehicle was equipped with a Lytx dashcam system because the company's claims retention periods are brief. Lytx has communicated two different time periods for preservation: 30 days or 1 year, depending on several factors, including what specific records you are requesting and the specific dashcam system and/or package the customer purchased. Lytx's explanations about which retention period applies are largely opaque, so unless it actually produces documents and records responsive to your subpoena, it is imperative that you depose a corporate representative to fully understand the true retention period for your involved defendant *and* what, exactly, Lytx recorded and kept track of at your defendant's request.

Keep in mind that the defendant has equal access to whatever data and other information Lytx has, so when you send your evidence preservation letter, be sure to specifically include all of the items detailed above. But also be aware that unless the company pays for Lytx cloud storage – or has saved and stored the sought-after evidence to their own system – then the defendant can only access this evidence for the same duration that Lytx maintains it. In other words, time is truly of the essence when dealing with Lytx dashcam systems.

Conclusion

Time is not on your side, so be diligent and thorough when preparing your evidence preservation demands for both defendants and your own clients.

The practical takeaway from *Victor Valley* is that, depending on several factors, the duty to preserve evidence can arise well in advance of a lawsuit. To ensure that this duty is honored we should immediately send detailed evidence preservation letters to all potential adverse parties and simultaneously advise our clients of their preservation obligations so as to ensure that fairness and justice prevail.


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