



Spoliation of Evidence

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- › Destruction of evidence so that evidence is permanently unavailable to the court and opposing party
- › Destroyed evidence may be:
 - Medical records (written or EHR)
 - Billing records
 - Email correspondence
 - Medical device documentation
- › May involve:
 - Physical destruction (e.g., shredding)
 - Concealment of medical records
 - Relocation of evidence to a permanently inaccessible location
 - Alteration of medical records (most common)

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- › Alterations may include:
 - Adding to the record after the initial entry
 - Deleting entries from the record
 - Obliterating items in the record
 - Substituting a fabricated record
 - Destroying the record
 - “Losing” the record
- › May be intentional (willful) or unintentional (negligent)
- › Includes attempts to prevent or alter testimony of witnesses
- › Requirements to prove spoliation varies across states

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› Effects of spoliation

- Destroys fairness and justice; offends notion of fair play
- Undermines adversarial system
- Increases litigation costs
- Increases risk of erroneous decisions

Reasons Not to Alter Medical Records

- › Medical records are relied on by:
 - Other health care providers
 - Health insurance providers
 - Attorneys
 - Claims representatives
 - Judges and juries
- › Unaltered records are your best defense
 - Medical record notes are often exculpatory
 - Falsified medical records virtually assure plaintiff victory
- › Electronic Medical Records
 - Easy to falsify but all changes are recorded

Example - Electronic Medical Records

› Day One

- Surgeon performs gallbladder resection
- Writes his operative report using “cut and paste” technique
- Patient is discharged home with dull ache

› Day Two

- Patient readmitted with severe jaundice
- Bile duct has been transected
- Surgeon logs onto EMR and changes operative report

› Medical Malpractice litigation

- Plaintiff’s attorney deposes surgeon
- Plaintiff’s attorney subpoenas electronic medical records including meta data



Judge Learned Hand wrote in 1939,

“[w]hen a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt.”

Elements of Spoliation

Five elements of spoliation are:

- 1) The intentional
- 2) Destruction of evidence
- 3) Carried out by a party to the litigation or its agent
- 4) That is relevant to the dispute and
- 5) Was destroyed at a time when legal proceedings are pending or reasonably foreseeable

Federal & State Laws

- › No federal laws address spoliation of evidence
- › State laws generally rely on case law (common law)
- › California Law
 - No separate tort for either intentional spoliation of evidence or negligent spoliation of evidence by a party to the underlying action
 - There are non-tort remedies but only for intentional spoliation of evidence

Remedies for Intentional Spoliation of Evidence-1

› Court must have concrete evidence of willful suppression of evidence:

1) Instruct jury on evidentiary inference

- Courts are permitted to instruct juries under Evidence Code § 413
- California Civil Jury Instruction reads:

“You [the jury] may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.”

Remedies for Intentional Spoliation of Evidence-2

2) Discovery Sanctions

- Court can levy sanctions for destruction or suppression of relevant evidence on a case-by-case basis, depending on:
 - › Degree of fault of party altering or destroying evidence;
 - › Degree of prejudice suffered by opposing party; and
 - › Whether sanction will deter such conduct by others in the future
- May include:
 - › Monetary sanctions
 - › Contempt sanctions
 - › Issues sanctions
 - › Evidence sanctions
 - › Termination sanctions

Remedies for Intentional Spoliation of Evidence-3

3) Disciplinary Action against Attorneys

- See Cal. Rules Prof. Conduct, rule 5-220
- See Cal. Bus. & Prof. Code § 6077, 6106

4) Penalties for Destruction of Evidence

- California Penal Code § 135
 - › Criminalizes spoliation of evidence to deter such conduct
- California Penal Code § 471.5
 - › “[a]ny person who alters or modifies the medical record of any person, with fraudulent intent ... is guilty of a misdemeanor.”
- Cal. Bus. Prof. Code § 2262
 - › “Altering or modifying the medical record of any person, with fraudulent intent, or creating any false medical record, with fraudulent intent, constitutes unprofessional conduct.”

Other Consequences of Spoliation

- › State medical licensing board discipline
 - Range: reprimand, fine, license suspension, loss of license
- › Professional liability insurance coverage cancellation
 - Legal bills won't be covered in medical malpractice case

