Leveraging AB 251 in Spoliation Cases: A Roadmap to a Lowered Burden of Proof

By Karman Guadagni

I. Long-Term Care's Dirty Secret: Spoliation in Elder Abuse Cases

Plaintiffs' attorneys pursuing Elder and Dependent Adult Civil Protection Act (EADACPA) cases against California long-term care facilities have long lamented the pervasive challenges involved in holding defendants and their counsel responsible for the spoliation of key evidence at trial. Key evidence sources, including not only those reflecting the care provided (or in many cases not provided) to a specific elderly resident (i.e. medical records, logs, surveillance footage), but also evidence of the overall operations of the facility (e.g., evidence of staffing levels, staff training, internal memoranda, budgets, emails and other financial documents), are often in the exclusive control of the defendants.

Frequently, obtaining a complete production of documents or even a clear response in discovery as to whether the evidence exists or was destroyed often only comes after toiling through countless depositions and discovery motions. Moreover, despite statutory mandates[1] requiring the maintenance of certain categories of employee hours and other information, facilities and their owners often feign ignorance or hide behind clever document retention and destruction policies to excuse away their tactics. Exposing these hide-the-ball tactics is yet another hurdle for plaintiffs and their counsel faced with establishing liability against the defendants' officers, directors and/or managing agents under EADACPA's high "clear and convincing"[2] standard.

However, beginning January 1, 2026, game-changing legislation went into effect in the form of AB 251, sponsored by Ash Kalra and backed by CAOC, which provides a powerful tool for plaintiffs seeking justice when crucial evidence against bad actors is destroyed in elder abuse cases. This article will provide a deeper understanding of the new legislation, its implications, and practical strategies for leveraging it for the benefit of your own clients.

Karman Guadagni is the managing partner of Stebner Gertler & Guadagni, in San Francisco. She represents California's most vulnerable and dependent and holds corporations and operators accountable at trial.
www.sgg-lawfirm.com

II. AB 251: Analysis of the 2025 Legislation

Essentially, AB 251 (which is codified as an amendment to Welfare & Institutions Code § 15657 along with the addition of section 15657.02) grants California judges the discretion to lower the burden of proof from "clear and convincing" to "preponderance of the evidence" on an underlying EADACPA claim against a skilled nursing facility, residential care facility for the elderly or community care facility, as long as the judge or arbitrator finds that the defendant facility spoliated material evidence[3] under three specific circumstances. Specifically, the judge "shall consider" whether evidence has been destroyed:[4] (1) prior to the expiration of legal time requirements; (2) outside of the party's written records retention policy; or (3) after receipt of a written demand or request to preserve relevant records, documents or other evidence. As one other limiting factor, the spoliation mechanism provided by AB 251 only applies to "records, documents or other evidence" which is "*material to*" establishing the claim.[5]

Although the practical application of this change remains to be seen in litigation, it is clear that elder abuse practitioners should take note and make changes to their case preparation strategy immediately in order to potentially benefit from this new legislation. Below are some practice pointers to consider at every stage in your case.

III. The "Roadmap": Making the Showing Early in Litigation

Step 1: Immediate and Comprehensive Preservation of Evidence Letters

If you practice in this area, first on your list of immediate action items is to prepare a comprehensive preservation of evidence letter to send to the attention of the facility's licensed administrator, the licensee, and the parent corporation. You should send such a preservation letter in

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any case your firm is even considering in order to trigger the spoliation rules. Be sure to include specific requests for each type of relevant record, including a request to preserve not only your client's chart and the underlying audit data related to the chart (assuming the facility uses electronic medical records), but also other electronically stored data, staffing records, surveillance videos, text messages, internal memoranda, instant messages, emails and anything else you think is material to proving your client's claims of elder abuse and/or neglect.

Once your initial preservation letter has been sent, be sure to send out additional follow up letters to the facility and other entities as you become aware of new sources of evidence. Send these letters by certified mail, and maintain the receipt in a file along with any other documentation so that, down the road, you are prepared to declare and provide proof of exactly when your preservation letter was sent by your office and received by the key defendant entities, thus triggering their responsibility to maintain your client's evidence.

As a practice pointer, although you may in some instances have an idea who may represent a specific facility or entity defendant, it is important that your initial preservation letter be sent directly to the defendants (as opposed to the defense lawyer). This will avoid a situation where any discussions surrounding the defendants' obligation to preserve evidence and what was done in response will fall under the veil of attorney client privilege.

As your case unfolds, keep a running list of evidence indicative of spoliation and keep track of anything that seems incomplete, is lacking entirely, or that shows evidence of alteration.

Step 2: Focus on Document Retention and Evidence Handling Procedures in Discovery

At this stage, you will have a sense of the different categories of information you will need. Be sure to ask outright for document retention policies (including informal protocols and best practices) through requests for production of documents as well as through special interrogatories. Make sure you are crafting discovery requests focusing on record keeping, video retention policies, and data backup practices.

As you start to receive document productions and verified responses, you can follow up with a set of targeted requests for admissions to each entity (and the administrator if they are named as a defendant in your case) to establish: (1) that they received and had knowledge of the preservation of evidence letter; (2) that they understood they had an obligation to preserve the specific evidence requested in your case; and (3) that in applicable instances they did not maintain it despite their knowledge of the preservation demand. You could also use the same vehicle to establish their noncompliance with document retention policies or applicable regulations.

Going a step further, in depositions of facility management, regional and corporate leadership, medical records and IT staff, you should explore exactly when they became aware of their obligation to preserve evidence, what steps were or were not taken to preserve evidence in response to your requests and their independent obligations, and why certain evidence was subsequently altered, destroyed, deleted or changed.

Again, be sure to keep a running list of any potential indicia of spoliation to highlight as you prepare for mediation, settlement negotiations and/or trial, and have a copy of the applicable statute handy to educate defense counsel, your mediator and anyone else who is navigating these changes and their impact on case values.

Step 3: The Motion for Sanctions and the Lowered Burden

As you accumulate evidence of the defendants' knowledge of their duty to preserve evidence based on your letter(s), the facility's policies and protocols, and the eventual confirmation that evidence is missing, you can begin to prepare your motion for sanctions and establish a foundation with

the court (or your arbitrator) to lower your burden of proof.

Many years of experience has taught that obtaining an admission by a long-term care defendant that they deliberately destroyed or changed evidence may be a hard-fought or even fruitless battle, but remember that intent can also be inferred from a defendant's failure to preserve all of your specifically outlined evidence despite receiving an early and explicit preservation letter.

Thus, your next step is to file a motion seeking sanctions pursuant to Code of Civil Procedure § 2023.030(b) due to the defendants' spoliation of material evidence. Note that based on the language of the statute, this can be done in the form of a discovery motion or as a motion in limine, so you must examine when filing might most benefit your client considering your case posture, judge, settlement negotiations and other factors.[6] Be detailed and specific in your recitation of the facts, the law and the remedy you seek. Lay out for the court or your arbitrator by declaration and exhibits specifically who was on notice of the duty to preserve, when the notice was given, and what was or was not done in response. It is also crucial here to include in your papers a clear explanation about how the spoliated evidence was material to you proving your client's EADACPA claims and how your client was prejudiced because of the spoliation.

In addition to requesting the lower standard of proof as a remedy, you may also be able to seek monetary, evidentiary or other sanctions to benefit your client, and can request that your jury be specifically instructed with regard to spoliation.[7]

IV. A New Era of Accountability

AB 251 provides powerful new leverage to even the playing field and help to ensure that plaintiffs in long-term care EADACPA cases are able to overcome a longstanding spoliation problem in these cases. Practitioners in this area have a duty to be proactive, careful and focused in establishing the duty to preserve evidence and holding defendants accountable when they fail to do so.

Use the roadmap outlined above as a starting point while working up your elder abuse cases to create a fair fight and to make a difference not only to your client, but to all elderly and vulnerable plaintiffs in long-term care cases going forward. ■

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[1] See, e.g., 22 C.C.R. § 72329.1(h) (outlining requirements for skilled nursing facilities); 22 C.C.R. § 87412 (outlining requirements for residential care facilities for the elderly); Labor Code § 1198.5.

[2] See CACI No. 3102B. Employer Liability for Enhanced Remedies - Employer Defendant Only (Welf. & Inst. Code, §§ 15657, 15657.05; Civ. Code, § 3294(b).

[3] Pursuant to Welf. & Inst. Code § 15657.02(c), "spoliation of evidence" is defined as "the intentional improper alteration of evidence or the intentional concealment or destruction of records, documents or other evidence that is done by a party, with the intent of preventing the evidence from being produced, and that has materially prejudiced the other party."

[4] See Welf. & Inst. Code § 15657.02(c)(2).

[5] See Welf. & Inst. Code § 15657.02(d).

[6] See Welf. & Inst. Code § 15657.02(a).

[7] See CACI 204.

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