

SEXUAL ABUSE LITIGATION & COVERAGE CONFERENCE

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ETHICAL CHALLENGES WITH DISCOVERY AND SPOILIATION OF EVIDENCE



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BENEFITS OF EARLY INVESTIGATION

Establish contact and rapport with the client.

Obtain the client's entire file regarding the claim.

Attorney-client privilege attaches.

Schedule in-person meeting with the client and those closely connected to the case.
* Particularly important in foster care cases due to the transient nature of case workers.

Potential for joinder of additional parties to minimize liability.

Monitor criminal trials related to civil suit.

Navigating The Tripartite Relationship

“The insured wants the best defense possible. The insurance company, always looking at the bottom line, wants to provide a defense at the lowest possible cost. The lawyer the insurer retains to defend the insured is caught in the middle.

There is a lot of wisdom in the old proverb: He who pays the piper calls the tune. The lawyer wants to provide a competent defense yet knows who pays the bills and who is most likely to send new business.

This so-called tripartite relationship has been well documented as a source of unending ethical, legal, and economic tension.”

Supreme Court of Texas, State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (1998)



Considerations

Where are we? –How is the tripartite relationship viewed in different jurisdictions?

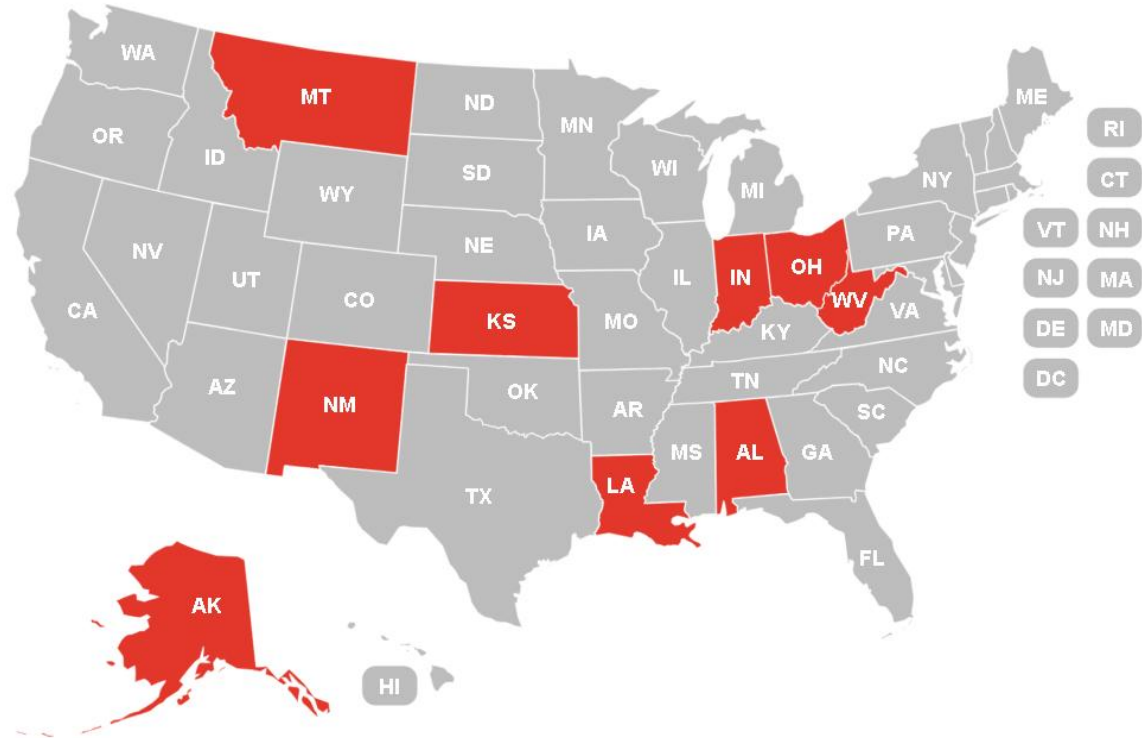
Wait a minute, do I have a conflict?
Recognition and disclosure

Am I creating a coverage issue?
Investigation and discovery

Particular Issues: Counter/Cross-Complaints, Punitive Damages, Eroding Policies, Reservations of Rights

SPOLIATION

- IN ALABAMA, ALASKA, FLORIDA, INDIANA, KANSAS, LOUISIANA, MONTANA, NEW MEXICO, OHIO, AND WEST VIRGINIA HAVE EXPLICITLY RECOGNIZED SOME FORM OF AN **INDEPENDENT TORT ACTION** FOR SPOILIATION.
- IN OTHER STATES, NO INDEPENDENT CAUSE OF ACTION.



SCOPE OF DUTY TO PRESERVE EVIDENCE IN PA

A PARTY HAS A DUTY TO PRESERVE EVIDENCE WHEN BOTH OF THE FOLLOWING ARE TRUE:

- THE PARTY KNOWS THAT LITIGATION IS PENDING OR LIKELY.
- IT IS FORESEEABLE THAT DISCARDING THE EVIDENCE WOULD BE PREJUDICIAL TO THE OTHER PARTY.

PTSI, INC. V. HALEY, 71 A.3D 304, 315–16 (PA. SUPER. CT. 2013).

THIRD PARTIES IN LITIGATION DO NOT OWE A GENERAL DUTY TO PRESERVE EVIDENCE, ABSENT A SPECIAL RELATIONSHIP OR OBLIGATION, SUCH AS A CONTRACT OR SUBPOENA. *PYERITZ V. COMMONWEALTH*, 613 PA. 80 (PA. 2011) (AFFIRMING THAT PENNSYLVANIA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR NEGLIGENT SPOILIATION OF EVIDENCE AGAINST A THIRD-PARTY WHO WAS NOT THE ORIGINAL TORTFEASOR).

SCOPE OF DUTY TO PRESERVE EVIDENCE IN PA

The duty to preserve does not attach until litigation is **reasonably foreseeable**, which is a very fact-specific determination. In Pennsylvania, the awareness of pending litigation by a party will suffice. See *Creazzo v. Medtronic, Inc.*, 903 A.2d 24, 29–30 (Pa. Super. 2006).

No Pennsylvania case has yet to address circumstances that would give rise to a duty where litigation is likely.

Pennsylvania state courts commonly turn to federal law in the absence of developed Pennsylvania state precedent. See, e.g., *PECO Energy Co. v. Ins. Co. of N. Am.*, 852 A.2d 1230, 1234 (Pa. Super. Ct. 2004) (recognizing that federal case law is persuasive considering the similarities between the federal and state discovery rules).

SANCTIONS

To determine the appropriate sanction for spoliation, the court must weigh the following three factors:

- The degree of fault of the party who altered or destroyed the evidence;
- The degree of prejudice suffered by the opposing party;
- Whether there is a lesser sanction that would avoid substantial unfairness to the opposing party, and, if, the offending party is seriously at fault, what will serve to deter such conduct by others in the future.

See *Pyeritz v. Commonwealth*, 88, 32 A.3d 687, 692 (Pa. Sup. Ct. 2011).

SANCTIONS

In evaluating the **degree of fault**, the court considers both the offending party's duty to preserve evidence and the presence of bad faith. *PTSI, Inc. v. Haley*, 71 A.3d 304, 316 (Pa. Super. Ct. 2013).

The party's **intention** in destroying evidence is crucial.

- Where there was "innocent clean up of personal electronic devices to allow them to function" that resulted in deleted text messages, the court found no spoliation. *PTSI, Inc. v. Haley*, 71 A.3d 304, 317 (Pa. Super. Ct. 2013).
- But, where a party fails to take active steps to preserve critical evidence, sanctions, including dismissal, may be appropriate. See, e.g., *Creazzo v. Medtronic, Inc.*, 903 A.2d 24, 28–30 (Pa. Super. Ct. 2006).