

Summer 2020

CALIFORNIA NETWORK FOR LICENSED INVESTIGATORS



EVIDENCE RETENTION

SPOILATION REMEDIES

Published article authored by
Kristen M. Bush, Esq.

CNLI & Find Your Investigator Directory Partnership

P.I. SPOTLIGHT

In this issue, Licensed Investigator Randy Torgeson is our featured investigator

BOOK REVIEW

Path of the Devil:
Camino del Diablo

P.I. EVIDENCE RETENTION

Recommended retention rates for Criminal, Civil, Family Law Investigations & Corporate Investigations.

SEO Optimization By Ken Childs

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Spoliation Remedies

By: Kristen M. Bush
Schwartz Semerdjian Cauley &
Evans, LLP

Five years into contentious litigation that has been up on appeal twice on pretrial issues, your client is served with special interrogatories from the new counsel brought in by the opposition seeking to discover the steps your client took to preserve its evidence four years and two law firms prior to your representation. Were the computer hard drives preserved? Was a litigation hold letter ever distributed to the key employees? What steps were taken by your client's previous counsel to ensure adherence with electronic discovery requests? If there were some missteps with document preservation, what are the potential consequences?

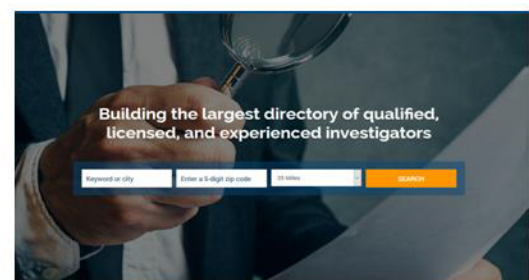
These are just a handful of questions that might arise when the notion of evidence destruction, commonly referred to as spoliation, is raised in litigation.

(continued on page 2)

New CNLI Partnership

As most of you know, CNLI was created with the intent of offering FREE networking for licensed investigators almost a year ago. The intent was to offer a FREE member online network with the hopes of eventually developing ancillary services like a newsletter, a directory, online education, etc. To date we have a great, unmonitored List Serve thanks to the professionalism of our members. We are slowly developing an improved newsletter.

Today, I'm proud to announce that we are merging our efforts with Ken Childs of [Find Your Investigator](#), a FREE online directory. I have found our startup networking group, CNLI and [Find Your Investigator](#) complement each other's efforts in providing an improved networking resource. (Continued on P.7)





Kristen Bush specializes in commercial litigation representing individuals and businesses in contract disputes, professional liability, insurance coverage, construction defect, and other business torts. As an experienced litigator representing both plaintiffs and defendants, Kristen focuses on efficient and effective resolution of legal disputes to achieve clients' goals.

Prior to joining Schwartz Seмерджян, Kristen gained experience as a Judicial Extern for the Honorable Anthony J. Battaglia, United States District Judge of the Southern District of California. During law school, Kristen was an Executive Editor of the San Diego Law Review and a Law School Councilor on the Graduate Student Council. Kristen is a graduate of the University of San Diego School of Law and the University of California, Merced.

"Spoilation" continued ...

These are just a handful of questions that might arise when the notion of evidence destruction, commonly referred to as spoliation, is raised in litigation. Under California law, "spoliation of evidence" is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or future litigation. *Kearney v. Foley & Lardner, LLP* (9th Cir. 2009) 590 F.3d 638 (applying California law).

Spoliation is not a new problem in civil litigation. The destruction may be negligent, willful, or reckless. It could occur under the watch and care of a party, non-party or counsel. From shredding documents to deleting electronic files, the manner of spoliation can vary. However, the effect of destruction of evidence is that it can destroy fairness and justice, increasing the risk of erroneous decisions and possibly increasing litigation costs as parties attempt to reconstruct what is no longer readily available. Further, spoliation offends the notion of fair play and undermines the adversarial system by violating the spirit of liberal discovery. In response to spoliation, courts have developed several remedies against spoliators including adverse inference jury instructions, monetary or evidentiary sanctions, criminal penalties and possibly a separate spoliation tort.

The availability of these remedies varies across jurisdictions and is often discretionary. This article discusses the potential ...

... remedies available in California when spoliation occurs.

Spoliation As An Independent Tort?

California was the first state to recognize the independent tort of spoliation. In *Smith v. Superior Court* (2d Dist. 1984) 151 Cal.App.3d 491 (disapproved of by *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, the court for the first time acknowledged that a cause of action may be stated for intentional destruction of evidence by a defendant in an underlying action.

The identified elements of intentional spoliation include: (1) pending or probable litigation involving the plaintiff; (2) knowledge by the defendant of the existence or likelihood of litigation; (3) intentional "acts of spoliation" on the part of defendant designed to disrupt plaintiff's case; (4) disruption of plaintiff's case; and (5) damages proximately resulting therefrom.

Shortly after *Smith*, in *Velasco v. Commercial Bldg. Maintenance Co.* (2d Dist. 1985) 169 Cal.App.3d 874, the court recognized that negligent spoliation by a third party could be actionable under appropriate circumstances relying upon *Smith* and earlier dicta in *Williams v. State of California* (1983) 34 Cal.3d 18. Although not finding the facts of the particular case actionable, the *Velasco* court analogized negligent spoliation to the recognized tort of negligent interference with prospective economic advantage.

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CONFIDENTIALITY

California Business and Professions Code 7539 (a)

(a) A licensee or officer, director, partner, or qualified manager of a licensee may divulge to any law enforcement officer or district attorney, or his or her representative, any information he or she may acquire as to any criminal offense, but he or she shall not divulge to any other person, except as otherwise required by law, any information acquired by him or her except at the direction of the employer or client for whom the information was obtained.

Spoilation continued ...

In 1998, the California Supreme Court overruled *Smith* and specifically held that an independent tort of intentional spoliation is not cognizable against a party-defendant in the underlying case where the spoliation is or reasonably should have been discovered before the trial or other decision on the merits of the underlying cause of action. *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal. 4th 1.

In *Cedars-Sinai*, the court offered detailed policy reasons for its refusal to recognize an action against a defendant in the primary action, including: strong policy favoring the use of nontort remedies to punish and correct litigation misconduct; prohibition against attacking adjudication on the ground that evidence was falsified or destroyed; uncertainty of harm in spoliation cases and difficulty of proof; direct and indirect costs of risks or erroneous determinations of spoliation harm to private parties and cost to defendants and courts litigating meritless actions; significant potential for jury confusion and inconsistency where underlying and spoliation claims are tried jointly; and duplicative proceedings without avoidance of the potential for inconsistent results where the actions are pursued separately with requirement of a "retrial within a trial" burdensome both to parties and courts. Just as there is no tort for intentional spoliation committed by a party to underlying litigation, likewise, there is no separate tort cause of action for negligent spoliation of evidence.

Given California's non-recognition of spoliation as an independent tort, practitioners should look traditional nontort litigation remedies for spoliation. *Hernandez v. Garcetti* (1998) 68 Cal. App. 4th 675.

Adverse Inference Jury Instructions

The doctrine of spoliation conceptually encompasses both negligent and deliberate destruction of relevant evidence by a party to litigation. However, California appears to have limited the adverse presumption jury instruction that follows destruction or spoliation of evidence only to situations involving willful destruction or suppression. California trial courts are permitted to instruct juries with a "spoliation inference" that may be used where a litigant is found to have willfully destroyed or concealed evidence during the underlying litigation. See *Cedars-Sinai Center*, 18 Cal.4th at 12. Evidence Code section 413 provides in pertinent part: In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

The Judicial Council of California Advisory Committee on Civil Jury Instructions provides under ...

(continued on page 4)



Spoilation continued ...

...instruction 204 that the jury may consider whether one party intentionally concealed or destroyed evidence. If the jury decides that a party did so, the jury may decide that the evidence would have been unfavorable to that party. It is prejudicial error to instruct the jury on wilful suppression of evidence when there is no evidence to support the instruction. *County of Contra Costa v. Nulty* (1965) 237 Cal.App.2d 593, 598.

The policy of limiting the adverse inference instruction to intentional acts of destruction flows from the rationale that only intentional destruction supports the inference that the destruction amounts to an admission by conduct of the weaknesses of the case. The implication is that there is a consciousness of guilt that has the potential to saturate the entire case. While some jurisdictions hold that the negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference, California only permits the instruction with wilful destruction or suppression.

Sanctions

Courts determine the proper sanction for destruction or suppression of relevant evidence on a case-by-case basis. *Unigard Security Ins. Co. v. Lakewood Eng. & Mfg. Corp.* (9th Cir. 1992) 982 F.2d 363, 368.

The following factors are generally considered in choosing an appropriate sanction: the degree of fault of the party who altered or ...

... destroyed the evidence; the degree of prejudice suffered by the opposing party; and whether a lesser sanction will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *Prac. Guide Fed. Civ. Proc. Before Trial* (Nat Ed.) Ch. 11(l)-C.

The California Supreme Court instructs that spoliation constitutes a misuse of the discovery process that is subject to a comprehensive range of punishment, including monetary, issue, evidentiary, and terminating sanctions. See e.g., *Cal Code Civ. Proc* §§ 2023.010(3), 2023.030(a) to (d); *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 12. A terminating sanction may be appropriate in the first instance without a violation of prior court orders in egregious cases of intentional spoliation of evidence. *R.S. Creative, Inc. v. Creative Cotton Ltd.* (1999) 75 Cal.App.4th 486, 497.

Some jurisdictions have found that once the duty to preserve evidence has attached, counsel's failure to issue a written litigation hold letter to a client constitutes gross negligence for sanctions purposes, "because it is likely to result in destruction of relevant information."

Pension Committee of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC (S.D. NY 2010) 685 F.Supp.2d 456, 466.

(continued on page 5)

THE CALIFORNIA PRIVATE INVESTIGATOR'S LEGAL MANUAL

(Third Edition)

DAVID D. QUEEN

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""A common misconception is that spouses are exceptions to the broad prohibitions against wiretapping, use of hidden cameras and similar intrusions. No such exceptions exist under California law.

Therefore, a private investigator hired by one spouse to spy on the other does not gain any special protection from prosecution or civil suits for wiretapping or invasion of privacy. In short, one spouse has no authority to waive the other spouse's rights.""



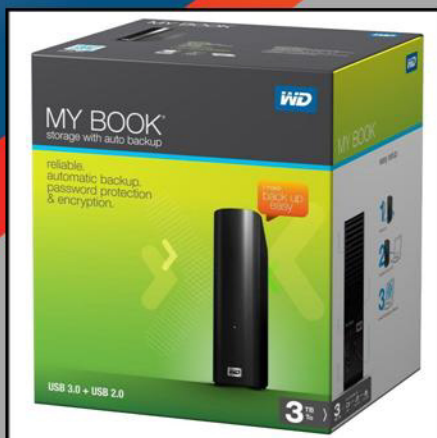
Spoilation continued

The court may exclude related or derivative evidence offered by a party who has destroyed evidence while under a duty to preserve it. *Uniguard Security Ins. C.*, 982 F.2d 363, 368.

CONCLUSION

If placed in the situation where evidence may have been destroyed, it is a good idea to get ahead of the situation as soon as possible. Recognizing that the implications of spoliation in California litigation could range from various sanctions (including terminating sanctions) to adverse jury instructions is important in advising clients about the significance of document preservation in the first place. If brought on as new counsel on a pending matter, consider issuing a litigation hold letter to your client to be sure that these issues are addressed. It may not be too late to exercise these cautions to preserve documents and it could mean avoiding steep consequences.

Our sincerest thanks and appreciation to Attorney Bush for giving us permission to use her article in this issue of the CNLI Quarterly.



A useful tool for investigators requiring extensive memory for photo / video driven cases, I have found the external storage drive, "My Book" by Western Digital as a viable storage option that prevents your computer from being slowed by overwhelming storage data. Another feature is it's mobile and can be taken with you while on the road while using laptop.

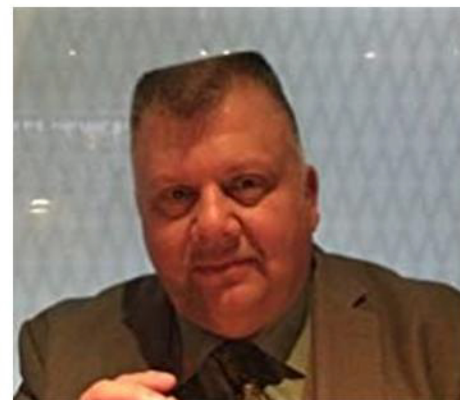
Equipped with WD Backup software for Windows and Apple Time Machine compatibility for Mac. My Book desktop storage is ready to use out of the box so you can start transferring files, and backing up right away.

The My Book drive's built-in 256-bit AES hardware encryption with WD Security™ tools helps keep your content private and safe. Just activate password protection and set your own personalized password.



P.I. SPOTLIGHT

Randy Torgerson served in the United States Army in the early 1980's serving under the US Army European Command conducting security for the Pershing II Nuclear Missiles. He then worked in law enforcement for several years in Kansas before becoming a private investigator with Pearce Corporation from 1992 until 2000.



He continues to work as a self-employed private investigator. Mr. Torgerson operates 2 investigative businesses. Somatic Global Corporation which is headquartered in Montana. SGC operates as the overseas investigative business for all cases outside of California. RANDY G. TORGERSON, P.I. operates inside California for all cases requiring a physical presence in this state.

Mr. Torgerson has been licensed as a Private Investigator for just over 21 years. He has co-authored a true crime book that was one of the biggest drug and corruption cases he ever worked called "Path of the Devil". He resides and alternates between California and Montana, while 80% of his business involves foreign jurisdictions.



Path of the Devil: Camino del Diablo

Book Synopsis

Path of the Devil: Camino del Diablo is a true story that occurred twenty-six years ago, 1991-1996. DEA Agent Larry Hardin and two private investigators, Jeff Pearce and Randy Torgerson were determined to bring down a notorious drug cartel operating along the southwestern border of the United States and Mexico.

For five years the three men spearheaded two separate, but simultaneous investigations in different locations in the United States that eventually merged. Larry's case hit one roadblock after another when presented to five different Arizona US Attorney's over the years. DEA headquarters in Washington, DC prepared the case, and after several attempts to prosecute, it was never resolved. Larry eventually transferred to Bogota Colombia.

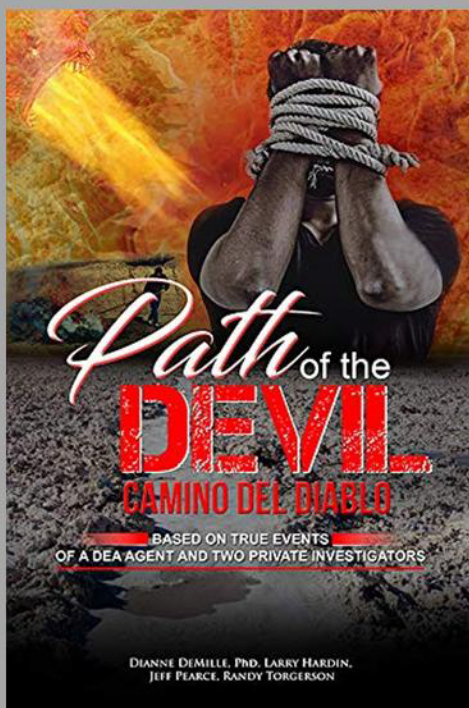
Jeff and Randy provided information and intelligence to Larry to build his case because they found the Meraz Cartel were doing business with their clients in California. The Meraz Cartel attempted to murder two DEA agents in the '70s and were connected with the murders of Kiki Camarena, George Montoya, Paul Seema, Jose Montoya, Dan Elkins, and Michael Crowe. Larry was determined to indict the Meraz's.

Larry started seeing people he knew, personally, who were killed on the job. He became devastated because of the corruption he saw related to his work and because of his inability to get an indictment for the Meraz's, except one mule. The private investigators were young and innocent, and just out of the service. Jeff became a target of FBI because of his actions and his many connections while living in Yuma, AZ.

Larry explains the burr in the saddle of his whole case was that the Private Investigators (PIs) could not be controlled. DEA, FBI, and CIA couldn't tell the PI's to stop, but they could control Larry by not allowing him to go on. The PIs were not cops or agents and Larry knew he could trust them as they continued to provide information about the Meraz. He had to be very careful not to give the PIs any DOJ/DEA documents on the Meraz. That's why Jeff was searched by FBI when they wanted to go after Larry.

FBI also questioned Randy about documents and NCIC reports he obtained from trying to put undercover drug deals together with the Los Angeles Sheriff's office. FBI knew they were shaking the bushes for corruption real hard.

Experiences from the investigation, surveillance, and collection of intelligence present a compelling story leading to what became of the Meraz family, their organization, and the three young men.

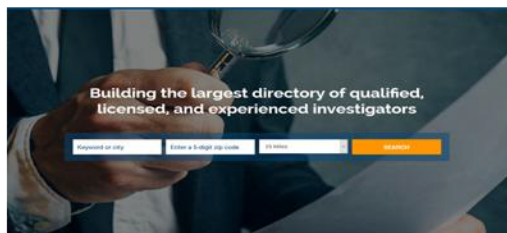


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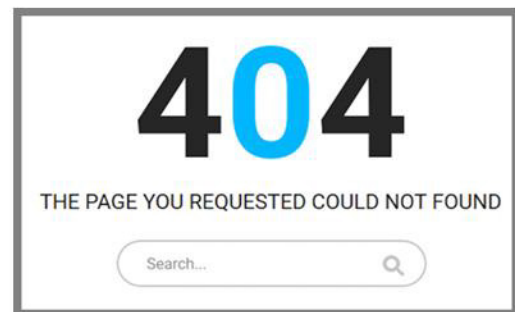
Ken Childs, the host of Find Your Investigator is a licensed private investigator who started out in the industry at an early age. Once in the industry, he was sought out by other firms for his surveillance abilities and reputation as an investigator who gets results. After gaining the proper experience and hours, he opened his own office. Over the years, he has experienced success in his industry, as his clients know him to be forward-thinking, persistent, and honest in his communication about cases. He built Find Your Investigator to help others in his field grow their businesses and skill sets. If you're an expert in your field and would like to add to our library of videos for investigators, please contact admin@findyourinvestigator.com



Must do SEO for Investigators By: Ken Childs

SEO is short for Search Engine Optimization. At its basic level, it's your "on page text" and the value of writing. However, in reality, it's everything on page, off page, and how your site functions. Keep in mind, Google measures everything! From keywords to how often you use them along with their synonyms. How long people stay on page to where they go from that page to another or if they simply "bounce," etc. Let's keep it basic and follow the below advice for a great foundation to your website and to build real traffic.

Let's start with Google deal breakers!



BROKEN site!

Got broken links? How about functions that don't operate? One should check his or her site periodically to make sure it's working properly and to make sure everything is status quo.

NO Mobile!

If you don't have a mobile version, this is an opportunity to dump your site and "rebrand."

(continued P8)



FALSE REPORTS

California Business and Professions Code 7539

(b) A licensee or officer, director, partner, qualified manager, or employee of a licensee shall not knowingly make any false report to his or her employer or client for whom information was being obtained.

(c) A written report shall not be submitted to a client except by the licensee, qualified manager, or a person authorized by one or either of them, and the person submitting the report shall exercise diligence in ascertaining whether or not the facts and information in the report are true and correct.



BROKEN site!

Got broken links? How about functions that don't operate? One should check his or her site periodically to make sure it's working properly and to make sure everything is status quo.

NO Mobile!

If you don't have a mobile version, this is an opportunity to dump your site and "rebrand."

If you're not sure if you have a mobile version, jump on a phone and take a look at your site. If your site is wonky and doesn't look as you intended, you don't have a mobile version. FYI in September of 2020, Google will be ported over to the MOBILE first index. In other words, your desktop no longer holds the value it once did.

KEYWORD STUFFING:

Google is far smarter than you'd image. Just a simple well-written page will actually help those that find your site read it and stick with it. I also suggest including 2-3 images that add to your page. A clean well written page will do more than a keyword stuffed backlinked out page any day.

NO text on home page or a single page parallax design:

I can't tell you how often I've seen dumb clandestine wannabes include images with "enter here" or something equally clever. Sadly, those sites definitely won't rank well with Google. Avoid wild and hard to read text and color combos.

I think you all get the point. If the page reads well, people spend time "on page;" therefore, Google will grow to like your site.

NOW FOR SOME SEO FUN!

Google gobbles up text like Pac-Man gobbles up a ball on screen. Google simply wants well-written text and lots of it. With that, the search engine can measure one's "on page time" to indicate that people are reading your text. This tells Google that you are providing "value" to those that are coming across your site. Value equals better rankings. Makes sense, right?

META INFORMATION:

Meta info is the behind the scenes title tag, meta description, meta location, your "NAP" [name, address, phone], etc.

Even though "experts" will tell you that meta descriptions and tags have no value, do them up! Notice in the Google search results that you see your domain, title tag, and meta "description" So you tell me if you think it's important or not! We use 'em.

GOOGLE RELEVANCE:

This is on page and off page SEO. "Relevance" (in our words) is measured by everything outside of your domain that's pointing into your domain. For example, Youtube videos, quality backlinks from similar sites, text, directories, and referral sites! A listing with Findyourinvestigator.com is a wonderful example of this.

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"Pls are subject to three categories of risk for the same actions: criminal prosecution, civil damages and administrative action or any combination of those three risks."
David Queen, Esq.





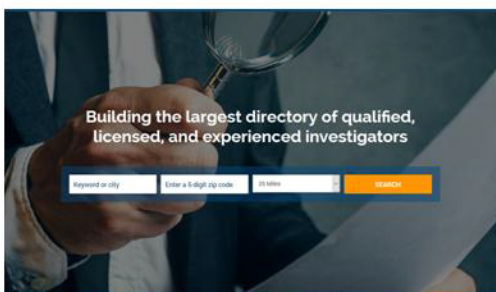
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It gives you a powerful backlink and NAP, and also includes a well written description that will show up in Google. Furthermore, your unique text in FYI aligns with your website. Google will show you some love because it is all relevant unique content.

Citations are simply directories that are "no follow". An example of a no follow directory is Angie's List. You need to be a member to enter the site to then cruise their listings.

We at FYI are excited to have partnered up with CNLI and look forward to complimenting one another. A free list serve and a free directory; it can't get any better than that. We look forward to giving you continued value. Please keep on the lookout for FYI's video and blog coming soon. If you are an expert in your field and you'd like to post an article on our blog or perhaps a video, please contact us

admin@findyourinvestigator.com.



EVIDENCE RETENTION

A common question in the investigative industry is, "How long do I keep or retain records and evidence?"



The Private Investigators Act, as well as BSIS - the Bureau of Security & Investigative Services, DO NOT specifically address, nor have a codified section regarding record retention.

It therefore falls upon the investigator to create a policy or *Best Practice* that fits your particular business model and type of investigative work.

What is Best Practice? The definition can be vague and broad, OR it can be tailored to specific industry practices. *Best Practice* is an industry accepted and recommended approach or methodology, through experience and research, that has been proven to reliably lead to a standard way of doing things, e.g., a standard way of complying with legal or ethical requirements.

(Continued on P10)



G-Technology 2TB G-DRIVE Mobile USB-C

Provides 2TB of Portable Storage

Carry Your Favorite Videos/

Photos/Music/Documents

Compatible With USB-C & USB 3.0 Computers

Allows You to Back Up/Transfer Your Files

Transfer Rates Up to 140MB/s

Necessary Cables Included





(Cont. from P9)

There are several factors to consider when establishing your records retention policy.

- (1) Type of Investigation
- (2) Case Duration
- (3) Appellate Considerations
- (4) Torts / Civil Repercussions

I have worked insurance defense, civil litigation and specialized in Family Law Litigation for 21 years.

In Family Law Litigation, the average life of a case from investigation to the courtroom or settlement can range from a few months to several years. Custody and support issues can be revisited in the form of a Modification Order over a decade after the initial disposition.

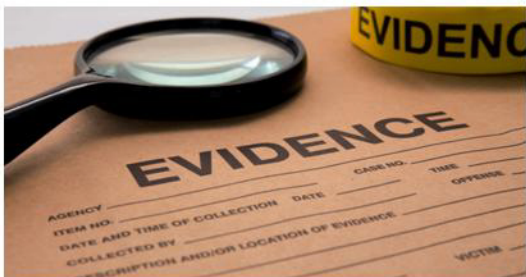
I recently spoke with an attorney that's a Family Law Specialist for over two decades. She stated that it's an area of contention with the state bar as there is no guideline, just varying recommendations and opinions. She concluded her general case retention practice is seven years.

Appellate issues vary depending on the area of law.

And finally what if a client or opposing party decides to sue you personally for an alleged tort? The statutes of limitations for a wrongful act by the investigator such as breach of contract, libel/slander, tortious acts, etc. vary considerably.

Libel / slander has a 1 year SOL while breach of a written contract extends to 4 years. Usually, the SOL clock starts running from the time of the discovery

At this point you're wondering, "Ok. So what's the answer?" Well, there isn't one. Going back to Best Practices, you need to create a reasonable consistent policy, that also serves to protect you and your client.



I contacted several long term P.I.s with decades of experience, in various areas of expertise. One investigator stated he never keeps files after the conclusion of the case. Most stated they keep their files 5 to 7 years.

The general consensus is to make certain your client / law firm has copies, digital and/or hard copy of all video, photographs, reports, and evidence generated, etc. during the course of the investigation. Then give the law firm or client one last opportunity (preferably in writing) to decide if there may be anything they need before you destroy your files and evidence.

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JOIN

If you are not a member of CNLI, our FREE licensed Investigator networking group, don't forget to go to our website and join.



ALSO!!! Don't forget to join the FREE FYI - Find Your Investigator Directory.

