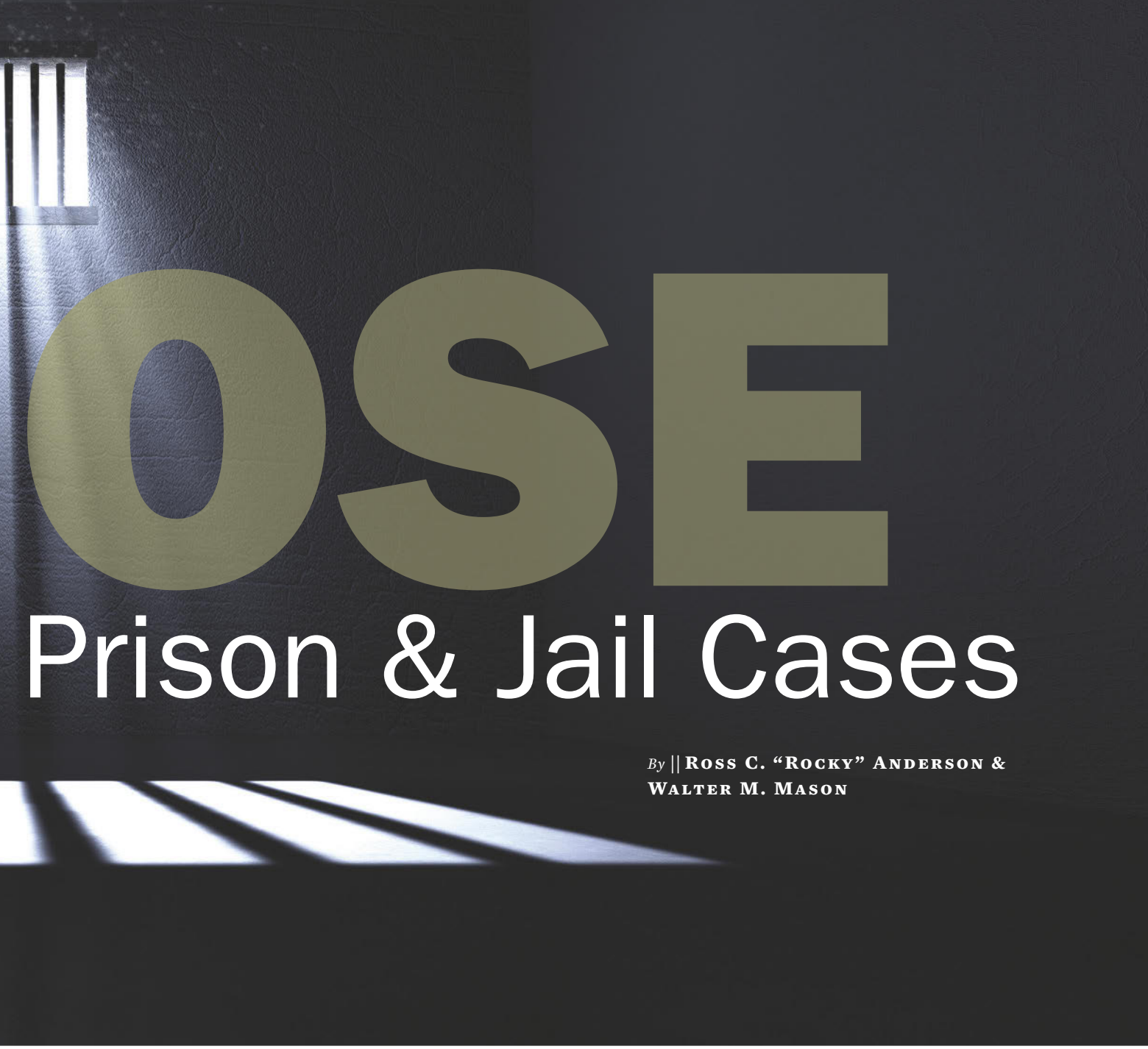
5 Tips to EXP Spoliation in

When a prisoner has been hurt or killed due to the actions—or inaction—of correctional facility staff and officials, here are some ways to uncover the evidence and hold defendants accountable when evidence has been destroyed.

A day after she was booked and held as a pretrial detainee in the Salt Lake County Jail, Lisa Ostler, a 37-year-old mother of three young children, began screaming out in pain. Alone in a cell for many hours, she pleaded for medical help and repeatedly hit the "emergency" button. Other inmates called out to guards and nurses, demanding they attend to Lisa. These calls for help were ignored.

After only three days in jail, Lisa died from peritonitis after an ulcer



OSE Prison & Jail Cases

By || **Ross C. "Rocky" Anderson & Walter M. Mason**

perforated her intestinal wall. Few people in the United States die from peritonitis when it is timely diagnosed and treated.[1] Had her vital signs been monitored, had she received assessments required by written jail policies and medical orders, and had nurses responded to her calls for help, Lisa would have lived.

We pursued claims for violations of Lisa's right to adequate medical treatment under the Fourteenth Amendment and under the Utah Constitution.[2] During the two years of litigation prior to settlement, we learned of the jail's gross incompetence and indifference in the provision of medical care to Lisa and other detainees. We discovered a widespread pattern of failing to provide mandatory medical assessments, a culture of disregarding written policies requiring nurses to notify a physician of abnormal vital signs, the inclusion of obviously false entries in Lisa's medical records that concealed her medical emergency, and instructions to "ignore" requests for help from Lisa and other detainees.

Even worse, after Lisa's death, evidence critical to determining the truth—emails, medical records, video recordings, and radio recordings—were destroyed or rendered inaccessible.

That destruction of highly relevant evidence and repeated discovery abuses culminated in five motions for sanctions against the defendants.[3] To anyone litigating civil rights claims against a jail or prison, this case offers several lessons about how to expose the destruction of evidence and to counter discovery abuses.

1 Send a preservation letter.

At the outset of a case, send a preservation letter to all defendants and their counsel. Put them on notice of the possible claims against them *before* any of the evidence is lost or destroyed through routine data destruction practices or otherwise. To be entitled to sanctions for spoliation, the defendant must have had a duty to preserve evidence before that evidence was destroyed.[4] That duty arises when a party reasonably believes the evidence may be relevant to anticipated litigation.

To ensure the broadest duty to preserve evidence will be imposed, describe the evidence defendants must preserve in both broad and specific terms, including each category of evidence that may exist, as well as any specific documents you believe might have been created. Describe the documents that might otherwise be deleted routinely under the defendant's document retention and destruction policies. In jails and prisons, this likely includes large data files, such as video and radio recordings, as well as emails, text messages, voicemails, handwritten notes made in connection with meetings or investigations, and handwritten medical records created before information is entered into an electronic medical record.

Insist defense counsel send a litigation hold letter to everyone who might have access to potential evidence and, if possible, obtain a copy of that letter. Emphasize that defense counsel's duty does not come to an end by simply sending a litigation hold letter—they must also follow up and make sure all evidence will be retained in the event of litigation.

Through written discovery or requests for government records, you should be able to quickly determine what document retention policies apply to any evidence relating to the claims. These policies specify how long various types of documents must be retained before being deleted. Such policies may help establish that defendants possessed evidence *after* they received notice of the possible claims and thus had a duty to preserve it under Federal Rule of Civil Procedure 37(e).

In Lisa's case, we learned through document retention policies and practices that emails, videos, and radio recordings—which ultimately were destroyed—must have been in Salt Lake County's possession long after it received the notice to preserve all records relating to her death and long after the district attorney sent a litigation hold letter to jail staff.

2 Request government records.

Soon after you are retained, request records, and consider additional requests after a complaint has been filed when defendants stonewall a plaintiff's discovery requests. Although government defendants may be able to withhold certain information in response to a discovery request, they may be required by statute to provide the information.[5] While discovery will be limited to records that are proportional to the needs of the case and relevant to a claim or defense,[6] a request for public records may be far broader. Further, documents produced in civil discovery are likely to be subject to higher scrutiny by defense counsel than documents produced in response to a government records request.

In Lisa's case, before discovery we made a request under Utah's Governmental Records Access and Management Act (GRAMA).[7] In response, Salt Lake County produced a litigation hold letter that the district attorney's office had issued to jail officials. That letter contained explicit instructions to preserve all evidence relating to Lisa and her death, as well as a representation that the district attorney's office would obtain and retain all potentially relevant evidence. This allowed us to persuasively argue that the defendants were on notice of their duty to preserve records within a few days after Lisa's death.

During litigation, the defendants argued that the hold letter was protected under attorney-client privilege, which would have prevented us from using it as support for our notice-and-duty argument. But the federal court found that the county had waived any purported privilege because it disclosed the communication in response to the GRAMA request.

3 Use depositions to elicit information about recordkeeping.

In your Rule 30(b)(6) deposition notice, specifically state that the deponent will be examined about document retention policies and the steps taken to preserve evidence. Then use open-ended questions to elicit unknown information and closed-ended questions to clarify and tie down the testimony, particularly when the witness has been evasive.

In Lisa's case, we asked a guard open-ended questions about his normal practices when an inmate misses a meal. This led to testimony regarding the jail's custom that guards email nursing staff and supervisors each time an incarcerated person does not eat. That important information was previously unknown to us because the defendants failed to disclose it in written discovery.

Our other open-ended questions included: "Who was responsible to ensure that all emails sent by employees at the jail relating to Lisa Ostler were preserved?" and "What was done by anyone at Salt Lake County to ensure

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that all video relating to Lisa Ostler was preserved?" Our questioning also led to the following revelatory exchange with the jail's responsible health authority:[8]

> **Q.** So if the purpose of the mortality and morbidity review meeting is to review the death and identify any problems and any remedial measures that might be taken so it doesn't happen again in the future, why haven't you held another meeting with regard to Lisa Ostler since finding out the cause of her death?
>
> **A.** Yeah . . . I can't think of a reason.

By asking the county's designated witness closed-ended questions, we established that nothing was done to retain emails about Lisa not eating her meals, even though, according to the county's document retention policies, the emails should have been available for months after Lisa's death.

> **Q.** So, despite an instruction from the district attorney's office to preserve all emails, it was the custom at the jail in April 2016 to deliberately not retain transitory emails; is that correct?
>
> **A.** That's correct.
>
> **Q.** And transitory emails included emails reflecting that an inmate missed a meal?
>
> **A.** Yes.

4 Identify gaps in the record.

Whether or not bad faith is involved, it is not unusual that documents produced by a jail or prison are incomplete, especially when sent in response to broad discovery requests. We carefully reviewed documents produced by the defendants in Lisa's case and found that medical records for dozens of detainees who died in custody appeared to be incomplete. This, in part, led to our discovery that records maintained by a third-party contractor were missing because the county had subsequently substituted that contractor with another and failed to preserve the medical records. Records from a backchannel messaging system used to communicate about Lisa's death were destroyed long after the legal duty to preserve the records had arisen and after the litigation hold letter was issued.

While video cameras are ubiquitous in jails, Lisa's cell was in a "blind spot." Through careful review of the produced recordings, we learned that the most relevant video recording reflecting Lisa's condition—from a hallway camera that recorded her being escorted from one unit of the jail to another after the onset of peritonitis—was omitted.

When we pointed out that crucial video evidence was not produced, the court instructed defendants to produce a sworn statement from a jail employee explaining whether the video was available and, if not, what happened to it. After a sworn statement was produced, we deposed the jail employee who admitted that several paragraphs of the statement were untrue. We then filed a motion for sanctions based on the appalling destruction of the video evidence.

5 Know what sanctions are available.

Rule 37(e) provides for sanctions when a party fails to preserve electronically stored information, while sanctions for violations of a court's orders, including striking pleadings and rendering default judgment, are available under Rule 37(b).[9]

Ensure that all disclosures and discovery responses comply with the rules. Defense counsel must sign discovery disclosures, requests, and responses.[10] Under Rule 26(g)(3), if counsel improperly certifies a discovery document, parties may seek "an appropriate sanction" against opposing counsel, the opposing party, or both. The rules give parties and their counsel comprehensive tools to address a party's evasive gamesmanship during discovery and mandate sanctions.[11]

The availability of sanctions will depend in part on whether the defendant acted with intent when it destroyed evidence.[12] Quickly identify what actions were taken, and by whom, to preserve relevant evidence. This allows you to conduct the additional discovery needed to establish the state of mind associated with the failure to preserve evidence.

In attempting to ascertain the truth of what happened to Lisa, we faced constant barriers of missing evidence, evasive and false discovery responses, and violations of the court's discovery orders. Knowing what sanctions are available under the rules gave us the flexibility necessary to seek accountability for the defendants' misconduct.


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Notes

1. James T. Ross et. al, *Secondary Peritonitis: Principles of Diagnosis and Intervention*, 361 Brit. Med. J. 1407 (2018).
2. Claims were brought under article 1, sections 7 and 9 of the Utah Constitution. State claims for negligence could not be pursued because of a state statute precluding negligence claims if an injury or death arises out of incarceration.
3. Motions in Lisa Ostler's case, *Ostler v. Salt Lake Cty.*, No. 2:18-cv-00254-BSJ (D. Utah), can be found at http://rockyanderson.org/law-practice/ostler/.
4. *See* Fed. R. Civ. P. 37(e).
5. California Public Records Act, Cal. Gov. Code §§6250–6276.48 (West 2020); Florida Public Records Law, Fla. Stat. §§119.01–.19 (West 2020); Utah Governmental Records Access and Management Act, Utah Code §§63G-2-101 to -901 (West 2020); Texas Public Information Act, Tex. Gov't Code §§552.001–.376 (West 2020). *See also* Adam J. Blank & Zachary J. Phillipps, *Make the Most of FOIA*, Trial 45 (March 2019).
6. *See* Fed. R. Civ. P. 26(b)(1).
7. Utah Code §§63G-2-101 to -901.
8. The ABA calls for correctional authorities to ensure "a qualified health care professional is designated the responsible health authority for each facility, to oversee and direct the provision of health care in that facility." *ABA Standards for Criminal Justice: Treatment of Prisoners*, 3d ed., Am. Bar Ass'n, Standard 23-6.1(a)(1) (2011).
9. Fed. R. Civ. P. 37(c) describes penalties that can be imposed for failures to disclose information, supplement responses, or provide admissions.
10. *See* Fed. R. Civ. P. 26(g). This is certification that counsel has undertaken a reasonable inquiry and that the disclosure is complete and correct as of the time it is made, to the best of the signer's knowledge, information, and belief.
11. *See* Fed. R. Civ. P. 26(g)(3) ("If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both.").
12. *See* Fed. R. Civ. P. 37(e)(2) (certain sanctions available only "upon finding that the party acted with the intent to deprive another party of the information's use in the litigation").