

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

AB 2773 (Kalra)  
Version: April 11, 2024  
Hearing Date: June 25, 2024  
Fiscal: No  
Urgency: No  
AWM

**SUBJECT**

Elders and dependent adults: abuse or neglect

**DIGEST**

This bill modifies the private right of action under the Elder Abuse and Dependent Adult Civil Protection Act, in a case against a skilled nursing facility or residential care facility, to lower the burden of proof to recover compensatory damages and attorney's fees and costs to a preponderance of the evidence when the defendant is found to have intentionally committed spoliation of evidence, as defined.

**EXECUTIVE SUMMARY**

Current law, the Elder Abuse and Dependent Adult Civil Protection Act (Act), establishes a number of standards and protections for elder and dependent adults who, as a result of their reliance on third parties, are left uniquely vulnerable to abuse. One provision of the Act permits a party who brings a claim of abuse of an elder or dependent adult on behalf of the victim to recover attorney's fees and costs, as well as compensatory damages for the elder or dependent adult's pain and suffering (subject to statutory limits), and punitive damages, if the party can show, by clear and convincing evidence, that the defendant was guilty of recklessness, oppression, fraud, or malice in committing the abuse. The clear and convincing evidence standard of proof established in this case is a higher burden than the "preponderance of the evidence" standard in most civil actions.

According to the author and supporters of this bill, claims under the Act's private right of action frequently face another hurdle: deliberate spoliation of evidence by the defendant. Spoliation – the deliberate destruction, alteration, or concealment of evidence – effectively prevents a party from having their fair day in court, by depriving them of the evidence they need to make their case. According to the author and supporters, spoliation is especially harmful in cases brought against facilities under the

Act, because the facilities' records are often necessary to establish that the abuse occurred (particularly in cases where the elder or dependent adult has passed away).

This bill imposes an evidentiary sanction for deliberate spoliation in abuse claims brought under the Act against a skilled nursing facility or residential care facility. Specifically, this bill reduces the burden of proof in elder abuse cases under the Act against a skilled nursing facility or residential care facility, as defined, if the court or arbitrator determines that the defendant committed spoliation of evidence. The bill's definition of "spoliation" incorporates three elements, all of which must be satisfied: the defendant must have (1) intentionally concealed or destroyed evidence, (2) with the intent of preventing the evidence being produced, (3) in a way that materially prejudiced the other party. Additionally, the evidence must have been material to the claim brought under the Act, and have been material that the defendant was specifically required to maintain under applicable law or regulation. If all of these elements are met, the plaintiff's burden of proof will be lowered to the "preponderance of the evidence" standard for the compensatory damages and attorney's fees portions of the claim. A finding of spoliation does not lower the burden of proof for a claim of punitive damages. The author has agreed to amendments to clarify the scope of the bill and require the court to set forth its findings in a written order.

This bill is sponsored by California Advocates for Nursing Home Reform (CANHR) and the Consumer Attorneys of California, and is supported by California Geriatric Circle, the California Nurses Association, Elderly Care Everywhere, the Office of the Long-Term Care Ombudsmen, and one individual. This bill is opposed by Californians Allied for Patient Protection and The Doctors Company.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes the Elder Abuse and Dependent Adult Civil Protection Act, which is intended, among other things, to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults. (Welf. & Inst. Code, div. 9, pt. 3, ch. 11, §§ 15600 et seq.)
- 2) Defines the following relevant terms:
  - a) "Abandonment" means the desertion or willful forsaking of an elder or a dependent adult by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody. (Welf. & Inst. Code, § 15610.5.)
  - b) "Dependent adult" means a person, regardless of whether the person lives independently, between the ages of 18 and 64 who resides in this state and who has physical or mental limitations that restrict their ability to carry out normal activities or to protect their rights, including, but not limited to,

persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age; and includes a person who is admitted as an inpatient to a 24-hour health facility, as defined. (Welf. & Inst. Code, § 15610.23.)

- c) "Elder" means any person residing in this state who is 65 years of age or older. (Welf. & Inst. Code, § 15610.27.)
- d) "Neglect" means either the negligent failure of any person having the care or custody of an elder or dependent adult to exercise that degree of care that a reasonable person in a like position would exercise, or the negligent failure of an elder or dependent adult to exercise that degree of self-care that a reasonable person in a like position would exercise, and includes:
  - i. Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
  - ii. Failure to provide medical care for physical and mental health needs, though a person shall not be deemed abused or neglected for the sole reason that the person voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
  - iii. Failure to protect from health and safety hazards.
  - iv. Failure to prevent malnutrition or dehydration.
  - v. Substantial inability or failure of an elder or dependent adult to manage their own finances.
  - vi. Failure of an elder or dependent adult to satisfy any of the needs specified in (i)-(v) for themselves as a result of poor cognitive function, mental limitation, substance abuse, or chronic poor health.
  - vii. Homelessness, if the elder or dependent adult is also unable to meet any of the needs specified in (i)-(v). (Welf. & Inst. Code, § 15610.57.)
- e) "Physical abuse" means any of the following:
  - i. Assault, as defined in Penal Code section 240.
  - ii. Battery, as defined in Penal Code section 242.
  - iii. Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Penal Code section 245.
  - iv. Unreasonable physical constraint or prolonged or continual deprivation of food or water.
  - v. Sexual assault, which includes specified crimes defined in the Penal Code.
  - vi. Use of a physical or chemical restraint or psychotropic medication for punishment, for a period beyond that for which the medication was ordered by a licensed professional, as specified, or for any purpose not authorized by the licensed professional. (Welf. & Inst. Code, § 15610.63.)

- 3) Provides that, where it is proven by clear and convincing evidence that a defendant is liable for physical abuse, neglect, or abandonment, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this

abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

- a) The court shall award to the plaintiff reasonable attorney fees and costs; "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim, as specified.
  - b) The limitations imposed on recovering damages for a decedent under Code of Civil Procedure section 337.34 do not apply in the action; however, the damages recovered shall not exceed the damages permitted to be recovered under 4).
  - c) The standards set forth in Civil Code section 3294(b) regarding the imposition of punitive damages on an employer based on the acts of an employee shall be satisfied before any damages or attorney fees permitted under 3)(a) shall be imposed against an employer. (Welf. & Inst. Code, § 15657.)
- 4) Provides that an award of attorney fees under 3) shall be based on all factors relevant to the value of the services rendered, including:
- a) The factors set forth in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California.
  - b) The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained.
  - c) Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability.
  - d) The reasonableness and timeliness of any written offer in compromise made by a party to the action. (Welf. & Inst. Code, § 15657.1)
- 5) Provides that, notwithstanding 3), any cause of action for injury or damage against a health care provider, as defined, based on the health care provider's alleged professional negligence shall be governed by those laws which specifically apply to those professional negligence causes of action. (Welf. & Inst. Code, § 15657.2.)
- 6) Provides that a plaintiff may recover punitive damages, in an action for the breach of an obligation not arising under a contract, when it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. (Civ. Code, § 3294.)
- 7) Provides that the damages limits in an action under 3) are subject to the following damages caps set forth in the Medical Injury Compensation Reform Act of 1975 (MICRA):
- a) Civil liability for damages for noneconomic losses against one or more health care providers, collectively, shall not exceed \$390,000, regardless of the number of health care providers.
  - b) Civil liability for damages for noneconomic losses against one or more health care institutions, collectively, shall not exceed \$390,000, regardless of the number of health care institutions.

- c) Civil liability for damages for noneconomic losses against one or more health care providers or health care institutions that are unaffiliated with an entity in (a) or (b) based on separate acts of professional negligence and that occurred at, or in relation to medical transport to, an unaffiliated health care institution, collectively, shall not exceed \$390,000, regardless of the number of defendants who satisfy these criteria. (Civ. Code, § 3333.2(b), (g).)
- 8) Provides that the dollar amounts in 4) shall increase by \$40,000 each January 1st for 10 years up to \$750,000, and shall be adjusted for inflation on January 1 of each year by 2 percent beginning on January 1, 2034. (Civ. Code, § 3333.2(g), (h).)
- 9) Provides that misuses of the civil discovery process include:
  - a) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.
  - b) Using a discovery method in a manner that does not comply with its specified procedures.
  - c) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.
  - d) Failing to respond or to submit to an authorized method of discovery.
  - e) Making, without substantial justification, an unmeritorious objection to discovery.
  - f) Making an evasive response to discovery.
  - g) Disobeying a court order to provide discovery. (Code Civ. Proc., § 2023.010.)
- 10) Permits a court, after notice and an opportunity for hearing, to impose sanctions against anyone engaging in conduct that is a misuse of the discovery process:
  - a) The court may impose a monetary sanction against the party misusing the discovery process or unsuccessfully alleging that a party misused the discovery process, or an attorney advising that conduct, to pay the reasonable expenses, including attorney fees, incurred by the conduct.
  - b) The court may impose an issue sanction ordering that designated facts shall be taken as established in accordance with the claim of the party adversely affected by the misuse of the discovery process, or by prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses.
  - c) The court may impose an evidence sanction prohibiting any party misusing the discovery process from introducing designated matters in evidence.
  - d) The court may impose a terminating sanction by striking out parts of the pleadings of the party misusing the discovery process; staying further proceedings by that party until a discovery order is obeyed; dismissing the action, or part of the action, of that party; or rendering a judgment by default against that party.

- e) The court may impose a contempt sanction by treating the misuse of the discovery process as a contempt of court.
- f) Absent exceptional circumstances, the court shall not impose sanctions on a party or attorney for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system. (Welf. & Inst. Code, § 2023.030.)

11) Permits a finder of fact to draw a negative inference against a party's willful suppression of evidence. (Evid. Code, § 413.)

This bill:

- 1) Provides that, in an action making a claim for remedies alleging abuse, neglect, or abandonment under the Act, the burden of proof shall be a preponderance of the evidence under either of the following circumstances:
  - a) The plaintiff prevails on a discovery motion pursuant to Code of Civil Procedure section 2023.030 due to spoliation of evidence by the defendant.
  - b) A judge or arbitrator determines at any point during litigation or arbitration that spoliation of evidence has been committed by the defendant.
- 2) Provides that 1) applies only to claims brought against a residential care facility licensed pursuant to the California Residential Care Facilities for the Elderly Act, or a skilled nursing facility, as defined, except that 1) does not apply to:
  - a) A facility owned or operated by a general acute care hospital, an acute psychiatric hospital, or a special hospital, as defined.
  - b) A facility that holds a valid license pursuant to Health and Safety Code section 1254(b) or (c).
- 3) Defines "spoliation of evidence" as the intentional concealment or destruction of 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) Provides that the evidence that is the subject of the spoliation under 1) shall be material to the claim brought under 1) and specifically required to be maintained or preserved by the defendant under applicable law or regulation.
- 5) Provides that nothing in 1)-4) modifies the standard of evidence for obtaining a protective order under the Act.

## COMMENTS

### 1. Author's comment

According to the author:

Unfortunately, some nursing homes intentionally destroy legal evidence after the abused person files a civil suit under the Elder Abuse & Dependent Adult Civil Protection Act. Even after such an illicit act by the facility, the elder or their family is still forced to prove abuse at the higher standard, but often cannot as the needed evidence was intentionally destroyed by the defendant facility. AB 2773 gives abused elderly victims and their families a chance at justice after a skilled nursing facility or RCFE unscrupulously destroys evidence by establishing the *preponderance of the evidence* standard as the burden of proof when a judge finds spoliation of evidence by a defendant. The bill is narrowly focused and only applies when a judge determines that a nursing facility defendant intentionally and willfully destroys evidence that is material to the claim.

The civil justice system is often the only avenue to hold nursing facility operators directly accountable for elder abuse and to ensure these facilities are safer for all. California law, however, is weak in its treatment of spoliation, and a party may not be sued under a separate cause of action for the intentional destruction of evidence. The only remedy the court typically uses is a discretionary sanction or an instruction by the judge to the jury that it may consider whether one party intentionally concealed or destroyed evidence. AB 2773 is needed to address this limited deterrence against spoliation of evidence and is fair to the victims of elder abuse.

### 2. Background on the problem of elder and dependent adult abuse

California has a significant population of elder and dependent adults: the Office of the Attorney General estimates that about 110,000 Californians live in licensed nursing homes, 150,000 live in licensed residential care facilities for the elderly, and another 150,000 or more Californians live in unlicensed assisted living facilities that may or may not be able to provide adequate care.<sup>1</sup> California's population is also rapidly aging: the Department of Finance estimated that the number of Californians aged 65 and older would double between 2010 and 2030.<sup>2</sup> The number of adults who will rely on nursing homes or other long-term care will almost certainly increase as well.

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<sup>1</sup> Office of the Attorney General, Elder Abuse, <https://oag.ca.gov/dmfea/elder>. All links in this analysis are current as of June 20, 2024.

<sup>2</sup> *Ibid.*

According to the California Department of Aging, “more than 200,000 older and dependent adult abuse cases are reported in California each year, and it’s believed that abuse of older adults is significantly under[-]reported.”<sup>3</sup> The Office of the State Long-Term Care Ombudsman, writing in support of this bill, writes that in 2023 it received 12,172 reports of elder and dependent adult abuse, of which over 5,800 reported physical abuse; however, they face a challenge when it comes to substantiating these complaints because “[f]acility staff are often abusers in these cases and falsify their own records, draft after-the-fact amendments to care plans, or revise incident reports to hide or eliminate evidence of their crimes.”

### 3. Background on the Act and its private right of action

The Legislature enacted the Act in 1982 in recognition of the fact that “ ‘dependent adults may be subjected to abuse, neglect, or abandonment and that this state has a responsibility to protect such persons.’ ”<sup>4</sup> The Act has since been amended many times in response to the ongoing prevalence of elder and dependent adult abuse,<sup>5</sup> including adding an enhanced private right of action for damages against a person who physically abuses, neglects, or abandons an elder or dependent adult.<sup>6</sup> The rationale behind this enhanced cause of action was that:

...infirm elderly persons and dependent adults are a disadvantaged class, that causes of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.<sup>7</sup>

The private right of action in the Act does a few key things:

- It removes the general prohibition on recovery of a decedent’s pain and suffering damages, thereby allowing a decedent’s personal representative or successor to recover damages for the pain and suffering suffered by an elder or dependent adult before they passed away.
- It caps the pain and suffering damages that can be recovered, tying the limitation on damages under the private right of action to the pain and suffering limitations in MICRA.
- It requires the court to award a prevailing plaintiff attorney’s fees and costs.
- It makes recovery under this private right of action contingent on a heightened showing: the defendant must have acted with recklessness, oppression, fraud, or malice in the commission of the physical abuse, neglect, or abandonment of the

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<sup>3</sup> California Department of Aging, Elder Abuse and Neglect,

[https://aging.ca.gov/Aging\\_Resources/Elder\\_Abuse\\_How\\_to\\_Spot\\_and\\_Help/](https://aging.ca.gov/Aging_Resources/Elder_Abuse_How_to_Spot_and_Help/).

<sup>4</sup> *ARA Living Centers – Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1559.

<sup>5</sup> *Ibid.*

<sup>6</sup> See Welf. & Inst. Code, § 15657.

<sup>7</sup> *Id.*, § 15600(h).



elder dependent adult, and the plaintiff must prove their case by clear and convincing evidence.<sup>8</sup>

The clear and convincing burden of proof requires a plaintiff to prove that it is “highly probable” that the facts of the case are true.<sup>9</sup> This is a higher burden of proof than the burden in most civil cases – the preponderance of the evidence standard – which requires the plaintiff show that the facts are “more likely to be true than not true.”<sup>10</sup> The Act’s award of attorney’s fees for financial abuse of an elder or dependent adult requires only a preponderance of the evidence.<sup>11</sup>

#### 4. The problem of, and existing sanctions for, spoliation of evidence

“One serious form of discovery abuse is the spoliation of evidence, which is defined as the destruction or alteration of relevant evidence or the failure to preserve evidence for another party’s use in pending or future litigation.”<sup>12</sup> Spoliation of evidence “can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action.”<sup>13</sup> Spoliation “can also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.”<sup>14</sup>

The Civil Discovery Act<sup>15</sup> authorizes a range of penalties for a party’s refusal to obey a discovery order, including monetary sanctions, evidentiary sanctions, issue sanctions, and terminating sanctions.<sup>16</sup> Spoliation of evidence is a misuse of evidence under the Civil Discovery Act that may result in sanctions against the offending party.<sup>17</sup> At the low end, discovery sanctions can be purely monetary.<sup>18</sup> Middle-range sanctions include preventing the offending party from introducing certain pieces of evidence, or declaring facts in the case that were affected by the misconduct established.<sup>19</sup> And for the most extreme discovery violations, the judge may impose terminating sanctions on the offending party, by either dismissing the case or declaring a default judgment for the defendant.<sup>20</sup>

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<sup>8</sup> *Id.*, § 15657.

<sup>9</sup> *In re Angelia P.* (1981) 28 Cal.3d 908, 919; *see also* CACI No. 201 (Obligation to Prove – Clear and Convincing Proof).

<sup>10</sup> CACI No. 200 (Obligation to Prove – More Likely True Than Not); *see Angelia, supra*, at p. 908.

<sup>11</sup> *Welf. & Inst. Code*, § 15657.5.

<sup>12</sup> *Victor Valley Union High School Dist. v. Superior Court* (2023) 91 Cal.App.5th 1121, 1139.

<sup>13</sup> *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 8.

<sup>14</sup> *Id.* at pp. 1559-1560.

<sup>15</sup> *Code Civ. Proc.*, div. 4, §§ 2016.010 et seq.

<sup>16</sup> *Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.566, 604.

<sup>17</sup> *See Code Civ. Proc.*, §§ 2030.010, 2030.030; *Cedars-Sinai Medical Center, supra*, at p. 12.

<sup>18</sup> *Code Civ. Proc.*, § 2023.030(a).

<sup>19</sup> *Id.*, § 2023.030(b), (c).

<sup>20</sup> *Id.*, § 2023.030(d).

“The discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination.”<sup>21</sup>

“Although in extreme cases a court has the authority to order a terminating sanction as a first measure, a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective.”<sup>22</sup>

In addition to discovery sanctions, the Evidence Code establishes potential consequences for spoliation of evidence. Specifically, Evidence Code section 413 permits the trier of fact to consider a party’s “willful suppression of evidence” in determining what inferences to draw from the facts of the case at trial.<sup>23</sup>

5. This bill lowers the burden of proof in an elder abuse private right of action against a skilled nursing facility or residential care facility when the facility is shown to have committed spoliation of evidence

As discussed above in Part 3, the Act’s private right of action for elder or dependent adult abuse requires a plaintiff to satisfy a high burden of proof in order to prevail. The author and sponsor report, however, that efforts in these cases can be thwarted when a facility alleged to have committed the abuse destroys or conceals evidence. In many cases, a defendant-facility is likely to be in possession or control over much of the relevant evidence needed to prove that abuse occurred, so spoliation can effectively frustrate a plaintiff’s ability to prove their case – especially given the higher burden of proof.

This bill reduces the burden of proof in elder abuse cases under the Act against a skilled nursing facility or residential care facility, as defined, if the court or arbitrator determines that the defendant committed spoliation of evidence. The bill’s definition of “spoliation” incorporates three elements, all of which must be satisfied: the defendant must have (1) intentionally concealed or destroyed evidence, (2) with the intent of preventing the evidence from being produced, (3) in a way that materially prejudiced the other party. The bill also adds two more elements that must be established: (4) the evidence that is the subject of the spoliation must be material to the claim brought under the Act, and (5) the evidence must be of a type that the defendant is specifically required to maintain under applicable law or regulation.

If a court or arbitrator finds that all five elements are met, through a discovery motion or another point in the litigation, the plaintiff’s burden of proof will be lowered to the “preponderance of the evidence” standard for the compensatory damages and attorney’s fees portions of the claim. A finding of spoliation does not lower the burden of proof for a claim of punitive damages.

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<sup>21</sup> *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 993.

<sup>22</sup> *Lopez, supra*, at p. 604 (cleaned up).

<sup>23</sup> Evid. Code, § 413; see also CACI No. 204 (Willful Suppression of Evidence).

Opponents of the bill argue that existing statutory mechanisms for spoliation are sufficient to address spoliation when it occurs. It's worth noting, however, that – other than monetary sanctions – existing discovery sanctions appear similarly tailored, or more severe, than the solution posed by this bill.<sup>24</sup> In particular, lowering the burden of proof seems less severe than deeming certain facts in the case as established – which prevents the defendant from introducing evidence contrary to those facts – and is certainly less severe than terminating the entire case.

The author has agreed to amendments that: (1) clarify the scope of the bill; and (2) require a court to set forth, in a written order, its findings and the basis for its order granting or denying the motion, in order to ensure that the parties have an adequate record. The amendments are set forth in Part 7 of this analysis.

#### 6. AB 859 and the Governor's veto

In 2017, the Legislature passed AB 859 (Eggman, 2017), which was virtually identical to this bill.<sup>25</sup> Governor Brown vetoed AB 859, stating in his veto message:

I am returning Assembly Bill 859 without my signature.

This bill lowers the standard of proof for claims of elder physical abuse or neglect made against a skilled nursing facility or residential care facility for the elderly when a judge has found intentional destruction of evidence.

Intentional destruction or concealment of evidence, known as spoliation, is illegal. Currently when judges find spoliation, they have numerous sanctions at their disposal which they can impose against an offending party. In appropriate circumstances, this will facilitate establishing a claim of abuse. Accordingly, I don't believe changing the standard of proof is warranted.<sup>26</sup>

The author and sponsor argue that there are several reasons to revisit this measure. They note that, as discussed in Part 2, California has a rapidly aging population that demands heightened scrutiny of nursing and residential facilities. They also point out that the COVID-19 pandemic revealed significant quality problems with these facilities, and that complaints filed against nursing homes and assisted living facilities have increased significantly since 2017. Finally, they state that the shift from paper records to electronic records makes it easier for a defendant to conceal or delete evidence, so heightened sanctions are needed to deter spoliation.

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<sup>24</sup> See Code Civ. Proc., § 2023.030.

<sup>25</sup> AB 859 did not include an action for abandonment in its ambit because abandonment had not, at that time, been added to the conduct that could establish a civil claim for abuse under the Act.

<sup>26</sup> Governor's veto message to Assem. on Assem. Bill No. 859 (Oct. 2, 2017) Assem. Recess Journal No. 9 (2017-2018 Reg. Sess.) p. 3590.

7. Amendments

As noted above, the author has agreed to amendments to clarify the scope of the bill and require the court to issue a written order setting forth its findings when deciding to grant or deny a motion to lower the burden of proof due to a defendant's spoliation. The amendments are as follows, subject to any nonsubstantive amendments the Office of Legislative Counsel may make.

Amendment 1

At page 3, between lines 23 and 24, add a new subdivision (c) that reads "The court shall set forth its findings pursuant to subdivision (a) in writing."

Amendment 2

At page 3, after line 33, add a new subdivision (g) that reads "The remedy provided in this section is cumulative with any other remedies available under any law."

8. Arguments in support

According to the Consumer Attorneys of California, one of the bill's co-sponsors:

AB 2773 (Kalra) will protect seniors abused in skilled nursing facilities (SNF's) and residential care facilities for the elderly (RCFE's) and discourage facilities from intentionally destroying legal evidence in violation of the law. Normally, to show elder abuse, the victim must show reckless neglect, abuse, or abandonment by clear and convincing evidence. However, to deprive victims of exactly that evidence, some facilities intentionally destroy the very evidence a plaintiff needs to prove their case. AB 2773 will address this narrow issue by stating that when a judge has found that a nursing home has intentionally destroyed legal evidence, the victim's burden of proving the case is by a preponderance-of-evidence, and not the higher clear-and-convincing standard.

AB 2773 is a narrow but extremely important bill. It reforms the standard of proof in physical abuse, neglect, and abandonment cases where a judge had found intentional destruction of material evidence that is required to be maintained under the law. This will provide our seniors with a greater level of protection, will help hold their abusers accountable, and will encourage facilities to prevent the intentional destruction of evidence.

9. Arguments in opposition

According to Californians Allied for Patient Protection (CAPP):

CAPP feels it necessary to respectfully express opposition to AB 2773 because the bill would negatively impact elder and dependent adults' access to health care. AB 2773 lowers the standard of proof from "clear and convincing" to a "preponderance of the evidence" under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) in cases where a judge finds intentional destruction of evidence. However, destruction of evidence is already illegal, and judges have numerous sanctions at their disposal to impose against a party who is found to have destroyed evidence.

While we support protecting elderly and dependent adults, lowering the standard of proof in these limited cases is unnecessary and will only hinder the ability of elderly and dependent adults to access health care.

**SUPPORT**

CANHR (co-sponsor)  
Consumer Attorneys of California (co-sponsor)  
California Geriatric Circle  
California Nurses Association  
Elderly Care Everywhere  
Office of the Long-Term Care Ombudsmen  
One individual

**OPPOSITION**

Californians Allied for Patient Protection  
The Doctors Company

**RELATED LEGISLATION**

Pending Legislation: AB 2800 (Kalra, 2024) expands the definitions of "neglect" and "physical abuse" under the Act, and lowers the burden of proof for an award of attorney fees, costs, and damages under the Act to when it is proved that the defendant has been guilty of recklessness, oppression, fraud, or malice by a preponderance of the evidence. AB 2800 is pending before the Assembly Aging and Long-Term Care Committee.

Prior Legislation:

SB 314 (Dodd, Ch. 21, Stats. 2019) extended the remedies of attorney fees, costs, and damages to a plaintiff under the Act when it is proven by clear and convincing evidence that the defendant was liable for abandonment and has also been guilty of recklessness, oppression, fraud, or malice.

AB 859 (Eggman, 2017) was virtually identical to this bill except that the lowered burden of proof would not have applied in a case alleging abandonment (which was not added to the statute until the passage of SB 314). AB 859 was vetoed by Governor Edmund G. Brown, Jr; the Governor's veto message and a further discussion of this bill are set forth in Part 3 of this analysis.

**PRIOR VOTES:**

Assembly Floor (Ayes 49, Noes 15)  
Assembly Appropriations Committee (Ayes 11, Noes 4)  
Assembly Judiciary Committee (Ayes 9, Noes 2)

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