



Preservation Time

Steps To Avoid Spoliation

By David L. Brown and Craig Freeberg

Everyone involved in litigation is subject to potential spoliation issues. Regardless of what role you play, there are key issues to be considered when dealing with evidence that could eventually be involved in litigation. Often the issues regarding spoliation arise long before a lawsuit is filed or even contemplated.

Spoliation is intentional destruction of evidence and, when it is established, the fact finder may draw inference that evidence destroyed was unfavorable to the party responsible for its spoliation. In some states, the destruction of evidence does not need to be intentional. Those states will hold an entity or individual liable for spoliation if they only negligently destroy or lose the evidence. The growing trend is moving away from the intentional destruction requirement and towards determining whether the actor was negligent in handling the evidence.

The courts and states vary as to whether a party can maintain an independent first party cause of action for spoliation or whether spoliation is only a separate claim that can be brought against a party in a civil action. While some states allow an independent cause of action to allow for the recovery of damages, others only allow a separate spoliation claim in a pending lawsuit. Many jurisdictions require a separate lawsuit to be filed when evidence has been destroyed or materially altered before there could be a recovery for that evidence.

What Evidence?

Any and all physical evidence could be subject to a claim for spoliation. This includes vehicles involved in accidents, computer data including emails or software, employment files, blood/tissue samples, food subject to food poisoning claims, and items damaged in property fire situations. The accident

vehicle scenario commonly occurs when a vehicle is totaled and then sold for scrap after an accident. Subsequently, the vehicle then becomes necessary for one of the individuals involved in the accident to prosecute or defend their claim. The party would contend that if they had the remains of the vehicle then they would be able to examine the vehicle and assess the speeds of the vehicles, locations of the vehicles and, therefore, assess the fault of the drivers.

Are You on Notice?

Notice in litigation occurs when a party becomes aware through discovery requests that the opposing party seeks to examine certain documents, items or products. The producing party is put on notice that a spoliation issue could arise should the requested evidence be modified, destroyed or lost. In other less obvious situations, courts have espoused different views on what should be considered when determining if a party has been put on notice of potential spoliation issues. One court has found that in the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices.

What happens when a party has not actually been notified of possible litigation? In these other, more tenuous, situations, a court may look to the totality of the circumstances to determine whether destruction of evidence warrants sanctions. A Texas court has said that a party should be found to be on notice of potential litigation when, after viewing the totality of the circumstances, the party either actually anticipated litigation or a reasonable person in the party's position would have anticipated litigation. There are also specific standards that have been applied to third-party spoliation claims. Several jurisdictions follow the rule that a third party must have actual notice of the litigation in order for the complaining party to make a claim of spoliation.

Avoiding Spoliation

Generally, whenever there is a piece of evidence that could possibly be involved in litigation, make sure that it is not destroyed or substantially altered. Then, make sure that all potential parties are on notice about the evidence and allow inspections. In addition to notifying all potential parties, the evidence needs to be thoroughly documented before it is handled by anyone.

For example, Driver A is an over the road truck driver from California. While driving his truck in Alabama, he is involved in an accident with Driver B. Driver A's fuel tank catches fire and he dies in the fire. Driver B sustains personal injury and damage to his vehicle. Driver A's employer is in possession of the remains of the truck. The truck is being stored at a storage yard in Alabama incurring storage fees daily. Driver A's employer would like to move the remains of the truck back to the home facility in California.

Since there is a chance that the condition of the truck could be altered in the move, there could be a spoliation issue in the future. Notification should be sent to Driver B and his insurance carrier and they should be allowed to inspect the truck before it is moved. Typically, a letter is sent to Driver B and his insurance carrier and they are notified that the truck is going to be moved within a certain number of days and that it can be made available for inspection before the move.

Because of the fire that occurred to the truck, there could also be the potential for a product liability claim against the vehicle manufacturer. As such, it is also common to notify the truck manufacturer of the accident and the impending cross-country move of the truck. They should be allowed to inspect the truck before the move.

IS IT SPOLIATION?

There are a variety of factors the courts look at when determining whether a party has committed spoliation. These include:

- ◆ Whether a party was prejudiced as a result of the destruction of evidence.
- ◆ Whether the prejudice can be cured.
- ◆ The practical importance of the evidence
- ◆ Whether the party acted in good or bad faith.
- ◆ The potential for abuse if expert testimony about the evidence provided by the spoliator was not excluded.

All potentially involved insurance carriers should also be notified, including the carrier who insured the load, the workers' compensation carrier and any potential underinsured motorist carriers.

The truck should be photographed in its current condition before it is moved. The truck should also be photographed and videotaped as it is being loaded for the transport. Even after the truck has been moved, all the potential parties should be notified before any parts of the truck are destroyed or actually placed back into service.

While it may seem like an onerous undertaking to follow the proper steps necessary to preserve evidence, due diligence can help to avoid costly litigation sanctions. It is important to remember the three keys in avoiding a spoliation claim or lawsuit: take the steps necessary to ensure proper preservation of the evidence; notify all potentially involved parties; and thoroughly document the evidence in its current condition. [LM](#)

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