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# So You Think You Will Sue or be Sued – The Litigation Perspective, Part 2: Preserving Evidence to Strengthen Your Hand at Trial

By Tyler Weidlich

Events such as equipment failures, well control incidents, personal injuries, and environmental releases raise particular concerns regarding the collection and preservation of physical evidence. While safety should remain the highest priority in this context, operations and other involved personnel need to also be aware of the obligation to preserve physical evidence with the prospect of an investigation and ensuing litigation in mind. A failure to preserve evidence may impact an investigation and drastically increase risk and exposure in a subsequent lawsuit. As a result, companies should involve counsel immediately following an accident to ensure compliance with preservation obligations.

The first article in this series addressed the duty to preserve electronic and documentary evidence, with a particular focus on the issuance of a litigation hold letter. This article addresses the unique situation of collecting and preserving other types of physical evidence more directly involved in an accident or related incident.

## Preservation Basics

Collecting and preserving evidence can be challenging depending on the accident conditions and measures taken to immediately control the situation. Each chain of events is unique (from simple human error, to defective equipment, to well conditions several thousand feet underground), and the collection and preservation of evidence generally needs to be tailored to the circumstances. Operations personnel, contractors, and consultants, however, usually can assist with identifying potentially relevant evidence for future examination. For example, if an accident involves well or pipeline equipment, on-site personnel can be tasked (with appropriate instructions) to document valve positions or gauge measurements in their logs or daily activity reports. Prior to altering or moving the equipment, all evidence involved in an accident should be fully documented and photographed, either by appropriate field personnel or an expert.

Additional care must be taken when transferring custody of evidence, such as portions of failed equipment or water/soil samples, to a lab or other consultant for analysis or storage. Many labs will automatically discard testing samples after their analysis is complete (commonly upon the expiration of 30 or more days). Therefore, it is critical to instruct the lab in writing that all testing samples be preserved and made available to other interested parties, and all interested

parties should be notified of and given the opportunity to participate in destructive testing or sampling of evidence.

Companies should also create a chain of custody starting from removal of the physical evidence from the site to either a storage unit or delivery for examination by a third-party consultant. In a litigation context, a party must usually be able to demonstrate to a court that any evidence taken from the site, including any material relied upon by a forensic expert rendering an opinion, is in the same or substantially similar condition as at the time of the event. Companies can establish a chain of custody using readily available forms that document the custodian, location, and condition of the evidence. Putting simple procedures in place to ensure proper documentation can alleviate the risk of having evidence excluded in a later proceeding (whether civil, criminal or administrative) for alteration or destruction of evidence.

Sanctions for Failure to Preserve Evidence

The failure to preserve evidence may significantly impact its admissibility and probity at trial. Most jurisdictions recognize theories of spoliation whereby a court may exclude evidence that has not been preserved properly or, alternatively, apply an adverse presumption that the party with custody modified or destroyed the evidence because it established unfavorable facts. In assessing spoliation sanctions, courts will typically focus on two elements: (1) whether litigation was reasonably foreseeable at the time the evidence was allegedly destroyed or altered, and (2) the culpability or behavior of both the party who allegedly spoliated the evidence and the party moving for sanctions.

A Colorado court, for example, assessed sanctions in the form of an instruction to the jury that a piece of equipment was presumed to be defective upon a finding that the defendant "recklessly" failed to preserve the evidence. *See Pfantz v. K-Mart Corp.*, 85 P.3d 564 (Colo. App. 2003). In fact, the same court held that this adverse inference could be imposed on a defendant who was "merely negligent" in failing to preserve evidence. In assessing the sanctions in that case, the court emphasized that the defendant admittedly knew the evidence needed to be preserved for a lawsuit but took no preservation steps. The defendant was ultimately found to be 100% liable for the plaintiff's injuries after the jury received the adverse instruction.

Spoliation sanctions, in contrast, are typically not assessed if evidence is preserved for a reasonable time and the adversary is given a reasonable chance for inspection. *See Castillo v. Chief Alternative, LLC*, 140 P.3d 234 (Colo. App. 2006) (sanctions denied where defendant preserved evidence for a year and a half and plaintiff did not request to view or retain it). However, irrespective of how long evidence is preserved, it is highly advisable to notify all interested parties in writing before any evidence is discarded.

Lost samples and/or testing results are commonly subject to exclusion in court and other spoliation sanctions after a party, or even a lab hired by a party, destroys the evidence often pursuant to standard protocol. In one federal case, a court barred a plaintiff from using certain soil samples in an environmental contamination lawsuit after its consultant disposed of the evidence and deprived other interested parties of the ability to conduct their own testing. *See Innis Arden Golf Club v. Pitney Bowes, Inc*., 257 F.R.D. 334 (D. Conn. 2009). At the same time, if a party properly instructs a lab or consultant to preserve the samples, a court is less likely to

impose sanctions even if the instructions are not followed. *See Tucker v. Terminix Int'l Co., L.P.*, 975 S.W.2d 797 (Tex. App. 1998) (no spoliation sanctions assessed after counsel specifically instructed a consultant to retain soil samples and the instructions were not followed).

Again, it is critical to discuss preservation obligations with counsel both before moving or removing evidence from an accident site and before transferring it to a third-party for examination or storage. If a party fails to appropriately preserve physical evidence, the ability to determine causation at a later date to defend against potential liability, prosecute an action for recovery of expenses, or determine what happened for future prevention could be compromised.

For more information regarding the preservation of physical evidence, please contact a member of our litigation team.