Evidentiary Issues: Preservation, Testing and Spoliation

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Knowing the condition of evidence, how it has been handled, and whether any testing has been performed on it can be crucial to fully understanding what the evidence has to tell us. The condition of the filament in a lamp, for example, can tell the reconstructionist whether or not the light was on at the time of the collision. However, the simple act of turning the lights on or off at the scene before photographing the condition of the filament can destroy and/or alter the evidence.

As forensic specialists, we must assume that any physical object has the potential to become evidence and must be treated as such. There are standards put forth by the American Society for Testing and Materials (hereinafter referred to as ASTM) setting guidelines for collecting and preserving information and physical items, and for the inspection and testing of evidence. It is important that both the attorney and the forensic specialist be aware of these guidelines.

Documentation

ASTM standard 1492 describes the procedures and techniques for documenting the integrity of physical evidence and aims to ensure that evidence is provided with a traceable paper trail documenting the chain of custody and processes. This will create a foundation as to: how evidence was collected, who collected the evidence, where it was collected, and who has custody of the evidence.

The physical condition of evidence should be documented through photography, videography and/or written description. It is especially important to thoroughly and immediately document evidence that is perishable. Tire marks fade with time, some more quickly than others due to weather conditions and traffic volume. In a crash involving a tractor-trailer, valuable load configuration and weight information can be lost if the trailer is off-loaded prior to proper documentation.

Evidence that is being removed from the scene must be thoroughly documented before any such removal. Where was it located? What condition was it in? It is the job of the forensic specialist to identify, analyze and correlate all data with respect to the incident and ultimately provide a meaningful explanation. Therefore, every piece of the puzzle, no matter how small, can be essential and instrumental to the case.

Preservation

Also encompassed within ASTM 1492 are procedures related to protecting the integrity of physical evidence. Evidence should always be kept in an environment that does not contribute to its deterioration. For example: leaving a vehicle out in the rain will cause newly damaged areas to rust; if unable to store indoors, then the vehicle should at least be protected from the elements by using a tarp.

Ideally, the evidence should be kept in an access-controlled environment.

Testing

Pursuant to ASTM 860 and prior to performing any testing, the forensic specialist must notify the client that testing has the potential to alter the nature, state or condition of the evidence. ASTM 860 further requires the forensic specialist to recommend that its client notify other interested parties and provide them with the opportunity to participate, witness and record any such testing.

As previously discussed, the condition of the evidence must be properly documented before any testing begins.

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A written test protocol is often developed for any testing that will change or alter the evidence. Such testing protocol should outline the testing procedure, as well as the method for documenting the testing and results.

Documenting the physical condition of evidence without changing its condition can be challenging. The investigator must fully understand the evidence he or she is working with. A lack of knowledge can be disastrous.

In one instance, an investigator wanted to preserve the condition of a semi-trailer brake system for later inspection. Rather than using a non-destructive method to preserve the brake evidence such as caging the brakes, this investigator opted to remove the brake chambers and slack adjusters from the vehicle. In removing them, all evidence of the adjustment of the slack adjusters, and thus the functioning capability of the brakes, was lost and could never be regained. The investigator's lack of knowledge caused crucial evidence to be lost. In fact, the expert, the lawyer and the underlying case can be seriously hurt by claims of spoliation.

Spoliation

What is spoliation? Willfully destroying evidence and performing destructive testing on a piece of evidence are two of the more obvious examples of spoliation. Failure to preserve the evidence so an opposing expert can examine it may also be deemed spoliation. It is very important that any test performed not preclude others from performing the same test. Few recognize that even where no litigation has arisen, the failure to notify all potential interested parties prior to performing tests on evidence may give rise to a claim of spoliation.

The term "spoliation," from the Latin *spolium* or *spoliatus* has been used to describe the destruction, alteration or concealment of something that deprives the court or litigants of evidence. The law recognizes a duty not to spoliate any such evidence and has created remedies for those parties damaged by spoliation. Sometimes, the consequences apply even where something is altered or destroyed before a lawsuit was filed, without any intent to affect the resolution of a dispute. Indeed, courts have imposed sanctions where the party knew or reasonably should have known that litigation would be commenced. In fact, a majority of jurisdictions have ruled that spoliation gives rise to an evidentiary inference against the spoliator, and such an inference can operate as an admission by the spoliator that the evidence was unfavorable to the spoliator's position.

Notice provisions contained within ASTM 860 go hand in hand with case law trends. The bottom line is that all potentially interested parties should be given notice and the opportunity to participate in, witness and record any testing activities. Following this, it is imperative that attorneys and experts alike understand the obligation to preserve evidence which is or may become relevant to a case.

For further information on this topic, please contact Laura Louise Ruhl at (800) 235-2808 or via e-mail at llruhl@ruhl.com.

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