

CAPTURING EVIDENCE & INVESTIGATING INCIDENTS

Peter C. Middleton, Esq.
Hall & Evans, LLC (Denver)

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY

Learning Objectives

- Appreciate the importance of identifying and preserving evidence
- Appreciate the basics of investigation
- Understand “**duty to preserve**” and “**spoliation**”
- Learn best practices to identify, capture and store evidence
- Craft policies and procedures for evidence capture and investigation
- Become professional-grade evidence hunters and gatherers

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY

Investigation 101

- An “investigator” should possess professional proficiency
 - Comes from education (or training), experience and character
 - Comes from general understanding of factual and legal issues
- Investigator needs to be objective, aware of his/her own biases
- Investigator must document his/her investigative efforts, steps
- Investigator should strive to be efficient as well as thorough

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY

Investigation 101 (cont'd)

- Investigation may consist of:
 - Taking interviews or collecting, gathering statements
 - Collecting data, such as weather conditions, equipment specifications, names and contact information for guests, timelines, etc.
 - Assembling documentation, such as releases, purchase documents, evidence of training, river logs, personnel files, policies and procedures, marketing documents, emails/texts
 - Writing, submitting report(s)
 - Whatever else might be legally required or might help to ascertain the truth

Duty to Preserve

- A duty to preserve evidence arises when a party has notice that the evidence might be relevant to a reasonably-defined future litigation.
BNSF v. Grant, 505 F.3d 1013, 1032 (10th Cir. 2007)
- Duty arises or exists not only *during* litigation, but *before* litigation even arises, if litigation is “imminent” or “reasonably foreseeable”
- If there is an incident or situation in which somebody might make a claim or file a lawsuit, an arguable “duty to preserve” arises

“Reasonably Foreseeable”

- A litigant is under no duty to keep everything, but even before litigation, it is under a duty to preserve what it knows, or should know, will likely be requested in “reasonably foreseeable” litigation. *Scott v. IBM Corp.*, 196 F.R.D. 233 (D.N.J. 2000)
- When litigation is “reasonably foreseeable” is a “flexible fact-specific standard that allows a court to exercise discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry.” *Id.*
 - What does this mean exactly?

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY

When is litigation reasonably foreseeable?

- When you suspect or think somebody might sue your company
- How major is the injury? Death, major injury makes a lawsuit more likely
- What is claimant saying? Doing? Angry, litigious people make a lawsuit more likely
- Has lawyer been hired? "Letter of representation" sent? Assume a lawsuit
- Has lawyer sent a "preservation notice" letter? Assume a lawsuit
- What does your insurance broker, insurance adjuster or lawyer think?
- Err on the side of caution, assume the worst, better to capture less than more
- "We did nothing wrong" is not predictive of whether there is going to be a lawsuit

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY

“Spoliation”

- Means the failure to preserve evidence – lost or destroyed
- Means you have failed at your “duty to preserve” evidence
- Spoliation may be intentional **or unintentional/accidental**
- Courts may sanction or penalize a party if the party fails to preserve evidence that could have and should have been preserved
- Concept of a “litigation hold” (e.g., emails, texts, etc.)

Sanctions for Spoliation

- Trial courts have broad discretion to impose different sanctions for spoliation of evidence, even if the evidence was not subject to a discovery order. *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1002 (Colo. 2006)
- Court need not find evidence was destroyed in bad faith. If a party *knew or should have known that the destroyed evidence was relevant to pending, imminent, or “reasonably foreseeable” litigation*, the court may sanction a party for spoliation. *Warembourg v. Excel Elec., Inc.*, 471 P.3d 1213 (Colo. App. 2020)
- Some states recognize “spoliation” as a cause of action in and of itself

Examples of Sanctions

- Common examples of sanctions for spoliation include:
 1. **Adverse inference instruction** – the most common sanction
 2. Award of costs, reasonable attorneys' fees to other side
 3. Preclude the "spoliating" party from raising an issue, a defense or a claim
 4. Additional discovery awarded to the other side
- In addition to the actual sanction, the party loses credibility, loses a piece of evidence that perhaps could have been helpful, or at the very least, was not hurtful

Adverse Inference Instruction

- Means jury is instructed that (a) the party failed to preserve evidence and (2) the jury should assume (i.e., “infer”) that the evidence would have been “adverse” to the spoliating party. Instruction may be rebuttable or irrebuttable
- Adverse inference instructions serve both a punitive and remedial purposes. The punitive function serves to deter parties from destroying evidence or allowing evidence to be destroyed. The remedial function serves to restore the prejudiced party to the position it would have held had there been no spoliation
- Can range in degrees of “harshness” depending on the conduct, state of mind

Hypothetical #1

- Assume an incident where a rafter drowns after being ejected from a raft, and the rafter's attorney claims that the PFD was inadequate and poorly-fitted, which contributed to the rafter's inability to self-rescue, his drowning and death
- Assume the outfitter never recovered the PFD after the incident. The PFD was lost or went back in the "bin" with other PFDs after the incident
 - Did the duty to preserve arise?
 - Did spoliation occur? Should there be a sanction?
 - If so, what might the sanction be?

How to avoid “spoliation”

- Collect, preserve, secure all evidence
- Document your attempts to collect and preserve and document
- Document why you were unable to collect or preserve certain evidence
- Create a protected “silo” (get evidence collected “in the can”)
- Understand your systems and electronic systems
- Communicate with authorities, your attorneys, your insurer, etc.
- Preserve communications!

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY

Types of Evidence to Preserve

1. Video, e.g., surveillance video, GoPro, professional or bystander video
2. Photographs – native format
3. Equipment, e.g., boat, med-kit, PFD, helmet, etc.
4. Documentation, e.g., releases, trip reports, checklists, receipts, rosters, etc.
5. Communications, e.g., texts, emails, social media posts, etc. (pre- and post-incident)
6. Website pages – representations made to the public
7. Policies, procedures, manuals, guidebooks, training records, logs, etc.
8. Post-incident statements, reports, data/information from investigation

Preserving Communications

- Limit text, email chatter – shrink the universe of communications
- Hire the experts (attorneys, investigators, data experts)
- For DIYers, software is available to preserve texts, photos, etc. from phones
 - TouchCopy16
 - Droid
- Goal is to save native versions of communications (and the metadata that may go along with it)

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY

Investigation and Evidence Collecting

Before an Incident

1. Plan ahead, have policies, procedures...assume incidents will occur
2. Train people who will be involved in investigation and evidence gathering
3. Have a chain of command for incident investigation

After an Incident

1. Plan ahead, assess what you need to do
2. Delegate tasks, consult, ask questions, get answers, ask more questions
3. Follow up and investigate to completion

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY

Before an Incident

Have a game plan to follow before the incident occurs (i.e., have policies and procedures)

1. Who to contact? (owner, lawyer, insurance broker/carrier, governing authority)
2. Delegate and train those responsible for investigation and evidence collecting
3. Where and how will you save and preserve (and keep secure) documents, video, etc.?
4. Consider a checklist of all you need to save and attempt to gather?
5. Consider a written policy for handling emails, texts – implementing a “litigation hold”
6. Informing lower-level staff what to do, not do
7. Know that “touching” evidence can “create” evidence or change evidence

After an Incident

Implement the game plan (i.e., follow your policies and procedures)

1. Make the appropriate contacts
2. The delegated person(s) will conduct the investigation and gather the evidence
3. “Dump” the gathered evidence into documents, video, on your system
 - Ensure security or encryption – only accessible to those who “need to know”
4. Check off your to-do list, create summary or list of what you did, what you collected
5. Implement the “litigation hold”, inform staff of do’s and don’t’s and FOLLOW UP
6. Delegate tasks, consult, ask questions, get answers, ask more questions

Storing and Protecting the Evidence

1. Create the folder on your computer
 - Only management or “need to know” eyes can access
 - Password-protect?
2. Understand that anytime you access, you change/add metadata
3. Have one or more back-ups (e.g., a flash drive)
4. Your attorney (and insurer) should be given the same stuff – but don’t rely on them
5. Physical evidence – label it, ensure it does not get tossed or tainted or lost

Reasons to preserve evidence

1. It is a duty. Avoid sanctions for “spoliation”
2. Bad or good, it is helpful for you, your attorney(s) and insurer(s) to have information
Even if “bad” evidence is preserved, can help mitigate the fallout
3. Optics – makes you look good to the authorities, to opposing counsel, to your insurance carrier, etc.; “nothing to hide”
4. Quality improvement – information learned can help improve operations, potentially prevent or mitigate later incidents

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY

Thank you!

Please complete the session evaluation for
this presentation in the *America Outdoors*
CVENT Events mobile app.

AMERICA OUTDOORS
Conference and
Outfitter Expo

 **ELEVATE**
THE OUTDOOR INDUSTRY