PRESERVATION, SPOLIATION, & COLLECTING EVIDENCE BEFORE LITIGATION: HOW COUNSEL CAN PROTECT CLIENTS & ADVOCATE FOR THEIR INTERESTS WITH THE DUTY TO PRESERVE

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I. Law on Preservation of Evidence

Upholding the duty to preserve evidence is of the utmost importance to a defense attorney in the early stages of litigation. The duty begins as soon as litigation is reasonably foreseeable, can last through the lifetime of the claim, and brings with it serious consequences should either party fail to meet this obligation. While this duty has long existed in some form in Virginia and is based largely on federal law, it was not codified by the General Assembly until 2019 and is still evolving. To protect clients from the consequences of inadvertently failing to meet the duty to preserve evidence and to advance clients' interests by holding the opposition accountable, defense attorneys should follow developments in this area of law from all state and federal courts in Virginia.

a. virginia state law

In 2019, the General Assembly passed legislation codifying a duty to preserve evidence.[1] Virginia Code section 8.01-379.1:1 burdens any "party or potential litigant" with "a duty to preserve evidence that may be relevant to reasonably foreseeable litigation."[2] Failing to preserve evidence that is relevant to litigation may be considered spoliation and lead to significant sanctions of a party should litigation arise. However, the point at which this duty arises is not cut and dried.

To determine the point at which a party becomes burdened with preserving evidence, a court will consider "the totality of the circumstances."[3] This consideration

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[1] *See* Va. Code Ann. § 8.01-379.2:1 (spoliation of evidence).

[2] *Id.*

[3] *Id.*

will focus primarily on "the extent to which the party … was on notice that specific and identifiable litigation was likely and that the evidence would be relevant."[4] Failure to meet this burden can occur either when a party does not take reasonable steps to preserve evidence or when it has been "otherwise disposed of, altered, concealed, destroyed, or not preserved."[5]

When a party fails to meet the burden and the evidence cannot be restored or replaced through additional discovery, Virginia courts must determine the failing party's level of culpability. If the court determines that another party was prejudiced by the lack of evidence, but there was no finding of recklessness or intent to deprive by the failing party, the court "may order [only] measures no greater than necessary to cure the prejudice."[6] However, if the court finds both prejudice and that the failing party acted recklessly or with bad intent,[7] the court has discretion to address the failure in one of three ways. The court can either "presume that the evidence was unfavorable to the party," instruct the jurors that they may or shall make that presumption, or dismiss or enter default judgment on the action.[8]

The Code provision does not create a private right of action for spoliation and there is no right of action for spoliation in Virginia common law. Instead, Virginia law addresses spoliation only in the context of its effect on pending litigation. The Code borrows much of its language from existingVirginia common law and is essentially a codification of the Supreme Court of Virginia's rulings from the seminal case, *Emerald Point, LLC. v Hawkins*.[9] The Court's ruling in *Emerald Point* provides further insight into when this duty arises and how courts determine the method for addressing a litigant's failure to meet it. In *Emerald Point*, the court held that "[s]poliation of evidence occurs when a party is aware that there is pending or probable litigation involving evidence in the party's custody or under its control, and such evidence if destroyed or otherwise not preserved will interfere with the ability of the adverse party to establish some element of its claim."[10] As stated above, courts will consider the totality of the circumstances in determining when the duty to preserve evidence applied to a party. Likewise, a court will determine a party's culpability in failing to meet this duty based on a "highly fact specific" inquiry into the whether the party "intentionally failed to preserve evidence in order to prevent its use in litigation."[11] If a party is found to have "acted in bad faith or with intentional conduct calculated to suppress the truth," Virginia courts will give an adverse inference instruction, or, as it is stated

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[4] *Id.*

[5] *Id.*

[6] *Id*.

[7] *See* Va. Code Ann. § 8.01-379.2:1(B) (specifying bad intent as "the intent to deprive another party of the evidence's use in the litigation").

[8] *Id.*

[9] 292 Va. 494 (2017).

[10] *Id*. at 556.

[11] *Id*. at 559.

in the code, "presume that the evidence was unfavorable to the party."[12] However, without a finding of intent or recklessness, there can be no such presumption. If a party was merely "[n]egligent or even grossly negligent," Virginia courts hold that the information "may have been favorable to either party, including the party that lost it."[13] Thus, the court may cure the loss only with "measures no greater than necessary to cure the prejudice."[14] Finally, it is important to note that the duty to preserve and a Virginia court's analysis of spoliation will "be guided by the same standard and applicable to all forms of spoliation evidence."[15]

Virginia case law on the duty to preserve and the measures taken to cure the loss of evidence is still developing. However, Fourth Circuit decisions from federal courts in Virginia are instructive, since the decision in *Emerald Point*—which was the basis for Virginia's code provision on spoliation—was based largely on the federal rules of civil procedure.[16] In *Whitmore v. Kroger*, a recent case from the Western District of Virginia, the court found that the defense had failed to preserve video evidence from the time of the contested events.[17] However, the court held that Kroger had not lost this video evidence with the requisite intent to impose an adverse inference. Instead, the court cured the defect by requiring Kroger to hand over the work-product-protected portions of its claim file that contained witness statements obtained by a third party agency that investigated the incident on Kroger's behalf. The court reasoned that witness statements taken years or even just months after an incident are far less reliable than those taken mere weeks after an incident, and the plaintiff did not have the opportunity to make statements until long after the incident occurred. Since the video evidence could not be replaced, and any statements taken long after the incident were objectively weaker evidence, the court held that the best solution was to force the defendant to hand over any witness statements taken as part of Kroger's investigation. Thus, even when evidence was not lost due to recklessness or bad intent, "other measures" can include forcing a party to turn over materials that would normally be protected.

B. RECENT DECISIONS FROM FEDERAL COURTS IN VIRGINIA

As noted above, Virginia's law on the duty to preserve evidence and spoliation has been based largely on federal law, and many Virginia defendants may find themselves in one of Virginia's federal district courts. Moreover, the Eastern and

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[12] *Id.* at 558; Va. Code Ann. § 8.01-379.2:1(B).

[13] Emerald Point, LLC. v. Hawkins, 292 Va. 494, 558 (2017).

[14] Va. Code Ann. § 8.01-379.2:1(B).

[15] Emerald Point, LLC. v Hawkins, 292 Va. 494, 558 (2017).

[16] *See id.* at 557–59 (using Fed. R. Civ. P. 37(e)(2)(B)) and the notes of the advisory committee on the amendment as a basis for its ruling on the duty to preserve and spoliation).

[17] *See* Whitmore v. Kroger Ltd. P'ship I, 2024 U.S. Dist. Lexis 221514, (finding that Kroger had failed to preserve video evidence that it had the duty to preserve, but that failure was not due to bad intent or recklessness); *see also* Whitmore v. Kroger Ltd. P'ship I, 2024 U.S. Dist. Lexis 207839 (curing the failure to preserve by impelling Kroger to hand over witness statements protected by the work-product doctrine).

Western Districts of Virginia have far more case law on the issue of preservation and spoliation. For these reasons federal law on the issue from these jurisdictions is especially instructive.

1. *Le Doux v. Western Express*

In 2023, the Lynchburg Division of the Western District of Virginia ruled in *Le Doux v. Western Express* that spoliation had occurred when a driver for Western Express failed to preserve electronically stored information (ESI) from a tablet that was mounted on the tractor's windshield during a crash.[18] The parties were involved in a multivehicle accident on August 11, 2018. Less than a month later, plaintiff's counsel sent a "preservation letter" to the defendants, requesting that they preserve specific items and data from the tractor. Notably, the letter omitted any request that data from tablets, cell phones, or any similar devices be preserved. The letter did, however, request that if the defendant had "any questions regarding the relevance of a document, data or other item" it should "err on the side of caution and preserve it."[19]

Over two years later, in December 2020, the plaintiff's counsel emailed defense counsel to ask about an "ipad/tablet/personal handheld computer device" that they noticed mounted on the windshield of the defendant's truck in photographs the defendant had disclosed in discovery.[20] Plaintiff's counsel asked to inspect data from the device that they "assumed was preserved pursuant to the letter of preservation dated on Sept. 4, 2018."[21] Following this request there was a series of emails between December 2020 and August 2021 in which plaintiff's counsel insisted on access to the device and defendants' counsel denied its existence.

During that time, defense counsel showed the driver the photograph in which plaintiff's counsel had seen the tablet. The driver told his counsel that the tablet was a Rand McNally GPS, and it had been turned off during the crash. Defendant's counsel later stated that the device was a Rand McNally GPS tablet and had been sold. However, in a deposition nearly a year after this, the driver stated—after making misleading comments—that the tablet in question was actually his personal Samsung Galaxy tablet. The driver also stated that he still had the tablet but claimed that it was not in use in any way, except to play music, and had no cellular service during the crash. He also stated that the data in the device had been deleted some time in 2021. After this, plaintiff's counsel obtained access to the device, but a forensic examination was unable to recover any data from it.

The court held that the defendants had a duty to preserve the data on the tablet for two reasons. First, the original preservation letters sent by plaintiff's counsel created the reasonable anticipation of litigation. Second, the driver should have known that data on his personal tablet, which was mounted to the windshield,

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[18] *See* Le Doux v. Western Express, Inc., 2023 U.S. Dist. Lexis 61677 (W.D. Va.).

[19] *Id*. at *3.

[20] *Id.* at *4.

[21] *Id.*

might be relevant. The court found that despite no inquiry about the personal tablet being made until March 2022, the defendant was put on notice that the tablet should be preserved when plaintiff's counsel asked about the "ipad/tablet/personal handheld computer device" in December 2020. This was the case because, although defense counsel may not have known about the tablet until March 2020, the driver reasonably should have known that it might be relevant since he received several preservation letters and was told that plaintiff's counsel asked about the tablet mounted on his windshield. Since the duty applied, the data were lost, the driver failed to take reasonable steps to preserve the data, and the data could be neither restored nor replaced (since the tablet contents were unknown), the court found that spoliation had occurred.

The court then discussed whether the spoliation prejudiced the plaintiff or was done with bad intent. The court held that the driver's actions of misleading his counsel, making misleading comments at the deposition, and deleting the data on the tablet, sufficiently supported the defendant's intent to deprive. Thus, the court ruled that "a permissive adverse inference instruction against [defendant was] proportionate to the prejudice and harm experienced by Plaintiff."[22]

There are some key conclusions to draw from this case. First, the court never considered testimony about what information the tablet actually contained and whether its loss created real prejudice to the plaintiff. The court seemed to deem this unnecessary—essentially assuming that the loss of information was prejudicial once it was determined that the driver acted with bad intent. Second, while the adverse inference was specifically against the driver for his actions, such an inference certainly harms Western Express as well. However, their attempts to fulfill the duty to preserve, through their counsel, were not considered in determining intent. Lastly, the court's determination that the defendant was put on notice of the need to preserve the information in the tablet hinged largely on the plaintiff's counsel having specifically asked for it, despite not knowing exactly what it was. Based on the court's analysis, spoliation may never have been found if plaintiff's counsel had not pressed this issue.

2. *Paul v. Western Express*

The Western District of Virginia handed down another notable decision on spoliation in a companion case to *Le Doux*. In *Paul v. Western Express*, the same district court held that spoliation had occurred and imposed an adverse inference when relevant text messages were not preserved by Le Doux, a driver involved in the same crash.[23] A month after the crash, in September 2018, defense counsel sent a preservation letter to Le Doux, requesting generally the preservation of "all documents, tangible things, electronically stored information, communications, recordings, videos, photographs, diagrams, sketches, and all other materials,

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[22] *Id.* at *18.

[23] *See generally* Paul v. Western Express, Inc., 2023 U.S. Dist. Lexis 50293.

whether electronic or otherwise, related in any way to the accident, including the vehicle he was operating."[24]

A month later, a more specific letter was sent, requesting preservation of "all records, data, and other information from [the driver's] cellular provider from August 18, 2018, to September 9, 2018, including but not limited to, voice mails, text messages, other electronic messages, app usage information, data usage information, data logs and call logs."[25] In response to this letter, Le Doux sent his counsel the cell phone that was in his possession during the crash, and it was preserved. Notably, text messages were found on the first phone in which Le Doux discussed the case and his injuries. In one such message, Le Doux stated "I feel fine no real pain," to which his son responded, "[d]on't get into that, your lawyer isn't happy that [Kenneth Murphy, the passenger in Le Doux's car at the time of the accident,] says he had no pain and doesn't want to go to another Doctor."[26]

However, Le Doux began using a second phone after sending the first to his counsel. Defense counsel downloaded the data from the first phone three years later, in 2021. A few months after this, defense counsel requested data from the second phone as well. Le Doux's counsel objected to this request, but in April 2022, they were ordered to produce all relevant and nonprivileged texts and emails from the date of the accident to the filing of the claims in August 2020. Le Doux's counsel then sent the cell phone to a third party forensic analyst who determined that there were no text messages or emails from the date of the accident to the filing date; however there were such data from late 2021 to April 2022. Le Doux's counsel then informed defense counsel there were no messages from the relevant period and that Le Doux would regularly delete messages after review. In October 2022, Le Doux's counsel also had a deletion analysis performed. A month later, defense counsel asked to have their own expert analyze the cell phone for deleted information, alleging that Le Doux's expert had used a "less capable version" of analysis software.[27] Le Doux's counsel was instructed to submit the second phone for analysis; however, they soon learned that Le Doux had discarded the phone apparently believing it was no longer needed after the initial analysis.

The court found that Le Doux reasonably anticipated litigation long before receiving the second phone since he had obtained counsel and previously received two preservation letters.[28] He also should have reasonably known that data on the phone were relevant since he discussed the case in text messages found on the first phone. Messages were deleted and the phone data were irretrievable. Thus, the court determined that no reasonable steps had been taken to preserve the lost data and the data could be neither restored nor replaced. Notably, the court ruled that even though Le Doux's counsel had a deletion analysis performed and defense counsel did not request to perform their own analysis until a month later,

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[24] *Id.* at *2.

[25] *Id.* at *3.

[26] *Id.* at *12.

[27] *Id.* at *7.

[28] *See id.* at *11–12.

Le Doux's counsel should still have preserved the phone rather than returning it to Le Doux without instructions.

Finally, the court ruled that Le Doux deleted the data with the intent to deprive the defense counsel of the information.[29] His claim of routinely deleting messages after reviewing them was directly contradicted by the first phone having no deleted messages at all. The evidence supported a conclusion that he had deleted the messages on the second phone only after the judge ordered the production of messages from the date of the accident to the filing of the claim. Based on these considerations, the court ruled that a permissive adverse inference instruction would be given against Le Doux.[30]

There are some conclusions to draw in this case as well. First, the court did not consider testimony on what information the cell phone actually contained and whether its loss created real prejudice to the plaintiff. However, unlike *Le Doux v. Western Express*, the court did note that the first phone contained relevant evidence that would be prejudicial to the opposing party if lost.[31]

Secondly, the lost evidence for which Le Doux was found liable for spoliation was all evidence that was created in the two years between the date of the accident and the filing of the case. This highlights both the importance of preservation requests before litigation and of properly counseling clients on preservation and protecting their interests.

Finally, while preservation requests are often considered to be a plaintiff's tool, this case highlights that preservation requests and insistent pursuit of evidence can be a tool for defense counsel as well. The defendants in this case received an adverse inference ruling in large part because they promptly and insistently requested the preservation of, and access to, evidence that was mishandled.

II. Types of Evidence & Methods of Collecting It

As a defense attorney, the duty of preservation means that as soon as litigation is reasonably foreseeable, it is crucial first to identify all possible evidence that the defendants and/or their agents have under their control. After this has been done, the next step is to ensure that all evidence that could be relevant in any way to the possible litigation is preserved. As technology for gathering and preserving evidence grows, so does the duty to preserve it. As the above case law illustrates, broad requests for all relevant data can impose the duty of preservation on a party even if the party's counsel is unaware of the information's existence or what it might contain. Furthermore, defense counsel can use the duty to preserve as a tool to advocate for their client's interests, as well as merely protecting him from spoliation penalties.

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[29] *See id.* at *19–20.

[30] *Id.* at *21.

[31] *See id.* at *11–12 (noting that Le Doux "reasonably should have known that the text messages and emails … on the second cell phone might be relevant" because "on text messages produced from the first cell phone, Le Doux discussed the extent of his injuries and damages with his son").

A. VEHICLE DATA

In any accident, there will be several sources of information that could yield a wealth of relevant information. This is especially true in trucking cases, as the vehicles involved usually contain more comprehensive data collection systems, are much larger, and can have more intricate systems than a noncommercial vehicle. These cases also more often involve the representation of both an individual driver and the company that employed him during the incident. This presents additional challenges as there are multiple parties that an attorney must work with to preserve evidence, and the company party often has internal systems that produce and collect evidence that could be relevant to litigation. While it is important to collect and preserve all available information in the context of a "duty to preserve," defense counsel should focus on identifying what information is in the control of each separate party, corporate or individual.

Perhaps the most important data for defense counsel to promptly preserve are any data taken from the vehicle itself. The vehicle must be secured and every item that was inside the vehicle should remain there if at all possible. As we have seen in the cases discussed above, personal items of the drivers are also crucial to preserve. Counsel may even be required to keep track of new information and items that were created long after the accident had occurred.

Next, a vehicle inspection should be performed to preserve all the information that the vehicle contains. This includes an inspection of the following physical parts of the vehicle: inspection decals, headlamps, taillights, turn signals, marker lights, windshield wipers, wheel rims, hubs, tires, fuel tank, exhaust system, air and electrical lines, fifth wheel, frame and body, hoses, trailer bodies, sliding tandem, cargo securement, and brakes. Along with the physical components, many heavy trucks also have electronically stored information in an electronic control module (ECM) that may contain relevant accident data. The type of information stored on an ECM depends on the type of engine in the heavy truck. The engines that may contain accident data include Caterpillar, Cummins, Detroit Diesel, International, Mack, Mercedes Benz, Paccar, and Volvo.

In addition to the ECM, there are often additional components that may also contain accident data such as GPS like Qualcomm or PeopleNet; crash avoidance systems, such as Bendix Wingman or VORAD; and other similar devices. Sometimes during vehicle inspections, there are physical issues that need to be documented in greater detail, due to the characteristics of the accident. Alongside retrieving digital information, inspectors may want to document the vehicle weight, headlight activity, or purported vehicle defects. They may document evidence of alleged defects such as a malfunctioning brake system or steering system resulting in the loss of vehicle control. It is critical that details relating to unique characteristics of an accident are communicated to the accident reconstructionist to ensure that nothing is missed during a general mechanical inspection. In certain instances where the defect may be related to a design issue, it is likely that several vehicles of the same type in a fleet would also need to be inspected.

Many passenger vehicles contain an event data recorder (EDR). In fact, it is estimated that about sixty-four percent of the 2005 model year passenger

vehicles have some EDR capability. An EDR is a function or device installed in a vehicle to record technical vehicle and occupant information for a brief period of time (seconds, not minutes) before, during, and after a crash for the purpose of monitoring and assessing vehicle safety system performance. EDRs may record (1) pre-crash vehicle dynamics and system status, (2) driver inputs, (3) vehicle crash signature, (4) restraint usage/deployment status, and (5) post-crash data such as the activation of an automatic collision notification (ACN) system. Data collected from EDRs can provide valuable information on the severity of the crash, operation of the air bag, and which deployment decision strategies were used during the event. Also, the data can be used to demonstrate that the vehicle was operating properly at the time of the event.

Aside from these data collection components, there is a wealth of other vehicle technologies that yield information that should be preserved. Some examples include antilock braking systems, advanced driver assistance systems such as forward collision warning systems, and lane keep assists. Infotainment systems can also reveal any calls or texts that were made, when they were made, and who participated in them. Vehicles also store data on navigation, emergency assistance, hard braking or acceleration, and even the vehicle's speed. These data can be stored for much longer than EDR data.

Forensic inspectors are often used—and are expected to be used—to preserve all this information. For inspections of heavy trucks, these inspectors will follow a mechanical inspection protocol that often includes elements from the Commercial Vehicle Safety Alliance North American Standard inspection procedure. These inspections can include everything from taking hand and survey measurements, scanning the vehicle with laser scanners or "total stations," performing tests on mechanical components such as the air brakes, and downloading and imaging internal digital data from the vehicle. Passenger vehicles are also subject to general mechanical inspections focusing on damage, lights, brakes, wheel rims, tires, hoses, belts, seat belts, and other mechanical components. Damage is also documented via hand or survey measurements, and digital data are imaged and downloaded from the various systems described above. As shown in *Paul v. Western Express*, there can be different standards for analyzing and retrieving data, so it is important to ensure that the inspection methods meet industry standards and are approved by opposing counsel.

Dash cameras from both heavy trucks and passenger vehicles have become more common and are crucial tools in accident reconstruction. These cameras often capture real-time footage of the road ahead, lighting, weather, vehicle movements, and even interior views, providing key visual evidence of events leading up to, during, and after a collision. Some dash cameras store footage on removable memory cards, allowing for quick video extraction. Others require being powered up in a lab, where the video is accessed remotely via a satellite connection to the trucking company's home office, which is typically managed by the company's safety director. Many dash cameras continually record for days or even weeks, making it advisable to limit access to the footage relevant to the accident. When combined with footage from passenger vehicles, dash cameras

help accident reconstruction experts establish a time line, determine fault, and analyze impact with enhanced accuracy that was impossible a decade ago.[32]

B. INSPECTING THE SCENE

While the vehicles involved in an accident are often the main focus, the scene of the accident itself contains valuable information. It is very important to gather this information as soon as possible because it tends to deteriorate quickly. While the duty to preserve applies only to evidence "in the party's custody or under its control,"[33] and accident scenes are most often in public spaces, there are times when an accident occurs on private property under the control of a party litigant. In cases such as these, it is important to preserve evidence of the scene as quickly as possible if it is under your client's control or to promptly request that other parties do so if they have control of the scene. Even when the scene is in a public space, evidence taken of the scene by either party, such as photographs, video, or statements, must be preserved by counsel.

Once an accident has occurred, any evidence that has been left on the roadway immediately begins to deteriorate. It is ideal to get to the accident scene as soon as possible to begin the inspection and document the roadway layout and markings. Since roadways are not typically closed during an inspection, most scene inspections are conducted during the day so that the reconstructionist can clearly see all the evidence and so the risk of causing another accident is reduced. During a scene inspection, it is important that the roadway layout is preserved, including the road names, roadway or intersection configuration, number of lanes, pedestrian walkways, traffic signals, lighting condition, road surface, posted speed limit signs, stop signs, and other non-accident-related markings.

In addition to documenting the roadway layout, the location and size of the witness marks should also be preserved. *Witness marks* is the term used by forensic experts to describe any and all marks that were caused by the accident. They include gouges and grooves on the roadway, tire marks, fluid stains, debris, such as a struck pedestrian's shoe, damaged objects from the accident, and any markings made by the investigating agency.

There are several methods of documentation that can be used depending on the access to the accident scene. The most popular method uses photographs to preserve the way a marking looks, but this method is generally less reliable for documenting size and location. A physical survey can also be performed using hand tools; but this is often impractical. The most comprehensive way to survey an accident scene is by using a total station scanner, a 3D laser scanner, or a GPS-controlled drone to produce a detailed drone map and accurate survey data through photogrammetry. There are times when the accident occurs over a bridge or highway where no area exists to safely document roadway markings. In this case, scene markings may be captured using aerial photographs.

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[32] For a list of resources on available EDR data from various types of vehicles, please see https://blackboxhelp.com/.

[33] Emerald Point, LLC. v. Hawkins, 292 Va. 494 (2017).

C. OTHER COMMON TYPES OF EVIDENCE

While the focus of this article is the preservation of vehicle and physical crash evidence through inspections and the downloading and imaging of data, there is much more evidence that counsel must be diligent to preserve. As was demonstrated in *Le Doux v. Western Express* and *Paul v. Western Express*, all evidence that could be relevant to reasonably foreseeable litigation that is in the custody or control of your client must be preserved. This includes evidence created long after the accident and the personal items of the driver. Also included are any employment materials, handbooks and guidelines, communications between the driver and agents of the trucking company, performance reviews and training materials/qualifications, drug and alcohol tests, cell phone data from before, during, and even years after the accident, witness statements, vehicle inspection reports, driver's direction and routing information, the driver's accident history, the driver's log, pre-trip inspection records, scale tickets, bills of lading, vehicle maintenance records, and much more.

III. Using Preservation to Protect and Advocate for Your Client

Failing to preserve evidence can have significant consequences for a party in litigation. As shown in *Le Doux v. Western Express*, an adverse inference can be applied even when there is no evidence regarding which information was lost, so long as the court determines it was lost due to recklessness or bad intent. The duty to preserve can be imposed with nothing more than a letter from another party following an incident. The letter does not even need to specifically request preservation of the lost material so long as it creates reasonable anticipation of litigation and there is evidence to support that a party knew or should have known that the lost information could be relevant. Even when the evidence was not lost recklessly or due to bad intent, a court may elect to cure the loss of the information with methods such s ordering the failing party to surrender otherwise protected or privileged materials. Ensuring that this duty is met is essential to protect a client's interests.

While meeting this duty is of paramount concern, imposing this duty on opposing parties can be an effective tool when defending litigation. Promptly requesting preservation from parties that are very likely to bring litigation, especially once they have retained counsel, and persistently requesting access to discoverable evidence can result in favorable evidentiary rulings for the defense. This was perhaps best illustrated in *Paul v. Western Express,* where a plaintiff was on the receiving end of an adverse inference against him for failing to preserve data from his cell phone.

Once litigation is foreseeable, the first objective must be to ensure that all evidence under your client's control or within his custody is preserved. This can become more difficult when there is both a client company and an individual—such as a driver—who is represented in the defense. As was demonstrated in both *Paul v. Western Express* and *Le Doux v. Western Express*, the most difficult part of this can be to ensure that any personal belongings of the individual driver that

may have relevant information are all accounted for and preserved. Due to this, action must be taken as soon after an incident as possible. The individual defendant involved in the incident should be contacted immediately and informed that all personal belongings that were in the vehicle during the accident must remain there. If any of those belongings are removed, they should be sent to counsel as soon as possible and should not be altered in any way.

The defendant may be concerned about data these items contain, so it is important to emphasize that altering anything or moving evidence will likely have worse repercussions than allowing the data to be discovered. It is also important to advise the client that any statements he makes about the accident—other than to his attorney—may be discoverable evidence in potential litigation. Lastly, he should be advised about what is discoverable—such as personal text messages.

A defense attorney should also promptly acquire as many details as possible about where the accident occurred, which evidence could be left at the scene, and perhaps most important, the exact whereabouts of the defendant's vehicle. Once the vehicle is located, efforts should be made to gain control of the vehicle and preserve it for a probable future inspection. The same should be done for all other items that may contain relevant information, including items from the vehicle, the driver, and company records.

The second action should be to send a preservation request to opposing parties. Even if the request is broad, it can still impose the duty to preserve items not specifically requested.[34] Once another party retains counsel, or it seems likely for any reason that litigation is imminent, a preservation request can be a tool for defendants. This is especially true in multiparty incidents or when liability is at issue. Ensuring that your opposing parties are on notice that they must preserve anything that could contain relevant information is the first step.

After this, it is important to diligently pursue access to discoverable evidence and gain as much information as possible about which evidence the opposing parties may have in their custody or control. As investigation develops, it is important to remain persistent and promptly request the preservation of, and access to, any evidence that comes to light. Look closely at photographs and records already received to determine if there is any evidence that may still need to be preserved. In *Le Doux*, the court's finding of spoliation related back to the plaintiff's counsel requesting access to what appeared to be a tablet that was barely distinguishable in a grainy photograph of the tractor at the crash scene.

The fourth step should be to coordinate with opposing counsel regarding the inspection and analysis of evidence for information. In *Paul v. Western Express*, Le Doux's counsel individually hired their own expert to perform an analysis of their client's cell phone, but the analysis was below the standards defense counsel required. When they were ordered to hand the cell phone over to defense counsel for an inspection and analysis, the client had already discarded the cell phone,

[34] Le Doux v. Western Express, 2023 U.S. Dist. Lexis 61677 at *11 (finding that the defendants were on notice that they should preserve the driver's personal tablet when they received broad preservation letters because the driver "reasonably should have known that the data on his personal tablet … might be relevant to the foreseeable litigation").

which led to a spoliation penalty. This could have been avoided if counsel had coordinated with opposing counsel to ensure that they were on the same page and that the inspection met the expected standards. They could even have simply coordinated a joint inspection/analysis. Instead, the evidence was lost before the defense counsel could analyze it in the way that they intended, and Le Doux was found culpable for spoliation.

Finally, counsel must consistently stay on top of any evidence that may be created even long after the incident. Defense counsel can wait a long time between an incident and the filing of litigation. As we saw in *Paul v. Western Express*, evidence created during this time can still be relevant and is important to preserve. Counsel should instruct their client on preservation as well as to check in with him periodically to ascertain if any new evidence has been created or come to light. This step requires thorough communication and documentation between client and counsel.

IV. Conclusion

The duty to preserve evidence is still a developing area of law that can have severe adverse consequences for even unintentional and harmless mistakes in the early stages of litigation. It is increasingly important to ensure that proper steps are taken to prevent spoliation from the moment that an accident occurs and to place counterpressure on opposing counsel to meet the same standards of preserving evidence. Staying up-to-date with the law on the duty to preserve and the consequences of spoliation will be important assets to litigators, particularly as it applies to increasingly technical types of evidence and collection methods following a vehicular accident.