

HANDLING SPOILIATION OF EVIDENCE IN AVIATION CASES

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WHAT IS SPOILIATION?

- Spoliation is defined as the intentional destruction, mutilation, alteration, or concealment of evidence
 - However, in practice, spoliation may expand to include the unintentional and negligent destruction of evidence
- A finding of spoliation generally requires the court find the existence of a duty to preserve the information, a culpable breach of that duty, and resulting prejudice to the innocent party
 - The evidence spoliated must be *material evidence*, which is evidence that could be a substantial factor in evaluating a claim or defense

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WHAT IS A LITIGATION HOLD?

- A litigation hold is a commonly used term that refers to the duty to preserve evidence that is likely to be relevant to anticipated future litigation
- In practice, a litigation hold suspends an individual's or entity's routine retention and destruction policies and implements a requirement to maintain certain evidence

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WHAT TRIGGERS THE DUTY TO PRESERVE RELEVANT EVIDENCE?

- The duty to preserve relevant evidence attaches when litigation is *reasonably anticipated or probable*
 - **Reasonably Anticipated:** when a party knows, or should have known, that evidence is relevant to future or current litigation based on a good faith evaluation of the facts and circumstances of the case known at the time
 - **Probable:** more than a mere possibility
- The duty to preserve relevant evidence can also be triggered by a litigation or legal hold letter, which is typically a written directive from an adversary advising of the possibility of future litigation, identifying relevant records and electronically-stored information ("ESI"), and requesting that the custodian preserve the records identified

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WHAT TRIGGERS THE DUTY TO PRESERVE RELEVANT EVIDENCE?

- **Examples:**
 - Demand letter
 - Summons or complaint
 - Notice of an administrative complaint
 - An inquiry from the government
 - Initiation of a government or third-party subpoena for documents

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WHAT TRIGGERS THE DUTY TO PRESERVE RELEVANT EVIDENCE?

- The duty can, and often does, *precede* the filing of a complaint or commencement of an official investigation
- **Examples of when the duty *may* be triggered:**
 - Internal grievances
 - Compliance questions
 - Pre-litigation communications with opposing party involving non-specific threats of litigation
 - Litigation involving similar products

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WHAT SHOULD YOU DO IF YOU HAVE REASON TO ANTICIPATE LITIGATION?

- Immediately implement a litigation hold plan
- Draft a written memorandum outlining the scope of the litigation hold and the obligations of the entity and employees
- Circulate the written memorandum
 - We recommend that all employees read and sign a verification, confirming their understanding, and agreeing to comply
- Identify where the documents and data are stored, including all active, backup, and archival systems, and assure the documents and data are maintained
 - If no electronic backup systems, consider implementing one

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WHAT ARE THE CONSEQUENCES IF YOU DO NOT PRESERVE THE EVIDENCE?

- The sanction of an adverse inference
 - In litigation, the spoliation of evidence relevant to proof of an issue in a trial can support an inference that the evidence would have been detrimental to the offending party
- Other sanctions by the court, which may include:
 - Exclusion of witnesses or other evidence
 - Having the pleadings stricken
 - Dismissal or Default Judgment
 - Monetary sanctions
 - Independent causes of action: Tort of negligent/intentional Spoliation
 - Criminal/Bar sanctions

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WHAT EVIDENCE IN AVIATION CASES NEEDS TO BE PRESERVED?

- Fact specific – what is the claimant alleging?
- Generally – categories of evidence to preserve:
 - Aircraft records: Logbooks (airframe, engine, propeller)
 - Airman records (medical, pilot certificate and logbook)
 - Aviation weather, radar data, ATC and NOTAMs
 - Squawk Sheets (discrepancies)
 - Correspondence (emails/texts included)
 - Policies/Procedures (especially if updates are made)
 - Employee personnel records
 - Contracts with relevant parties

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OTHER STANDARDS FOR PRESERVATION OF EVIDENCE

- **ASTM E860-07 Examination and Preparing Items That Are or May Become Involved in Criminal or Civil Litigation**
 - ASTM International – American Society for Testing and Material - One of the world's largest international standards-developing organizations. Globally recognized in development and delivery of voluntary consensus standards.
 - ASTM E860-07 Describes specific actions that are required if planned testing, examination, disassembly, or other actions are likely to alter the nature, state or condition of the evidence so as to preclude or adversely limit additional examination or testing.

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OTHER STANDARDS FOR PRESERVATION OF EVIDENCE

- **ASTM Standard includes:** Document evidence; determine if changes to evidence subsequent to incident; conduct non-destructive testing first; and, if destructive testing give notice and opportunity to participate, and document and label to preserve identity and integrity of evidence.
- **Other related ASTM Standards include E1188 – Practice for Collection and Preservation of Information and Physical Items by a Technical Investigator.**

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**LET'S PLAY!
SPOILIATION OR
NO SPOILIATION?**

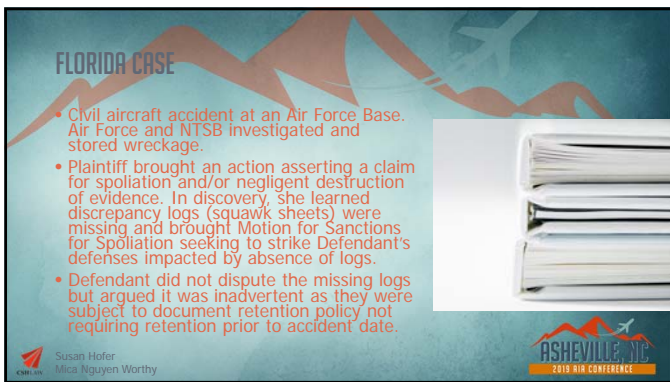
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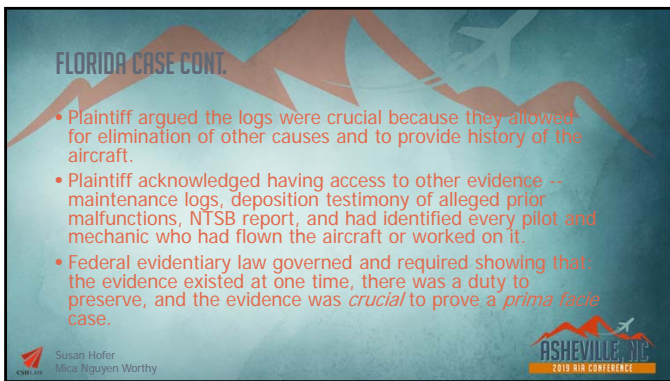
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FLORIDA CASE CONT. – SPOILIATION OR NO?

No Spoliation.

- No proof that the evidence (the logbooks) actually existed, that such evidence was crucial to the Plaintiff's case, or that there was any bad faith. Although bad faith can be shown by circumstantial evidence, it requires a showing that the spoliating party engaged in an affirmative act. In this jurisdiction (Florida) mere negligence and even gross negligence is not enough.
- Miles v U.S. 2016 WL 3556845

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Boston, MA case – Spoliation or No?

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BOSTON, MA CASE

- Plaintiff Passenger required wheelchair assistance from an aircraft carrier and alleged she was injured during boarding.
- Plaintiff's attorney filed a Motion for Sanctions for Spoliation of Evidence alleging the carrier destroyed or lost evidence that would have identified the workers assisting Plaintiff and whether they were employees of the carrier or a third-party vendor. Plaintiff claimed to be irreparably harmed by this.
- Plaintiff requested that judgment be entered against the air carrier or that the carrier be barred from introducing evidence or defending the case as a result of the spoliation.

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BOSTON, MA CASE CONT.

- 7 days later, Plaintiff sent a letter to air carrier claiming the injury was "the result of faulty equipment, untrained staff and a general lack of concern for the handicapped."
 - "It is no wonder our society has become so litigious...it reflects upon the lack of caring on the part of people such as your flight crew..."
- Air carrier contacted in-flight offices upon receipt of the letter and inquired as to the workers and any incident reporting, and there was none. Attempted to contact one of the flight attendants, who did not recall any such incident.

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BOSTON MA CASE CONT.

- **Air carrier later found a flight attendant report:**
 - "Lady was being brought on board when she felled (sic) out of the chair."
 - It was found one year after litigation was instituted. All other records regarding the transportation workers had been destroyed in accordance with air carrier's document retention policy.

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BOSTON, MA CASE- SPOILIATION OR NO?

- **YES: Spoliation of evidence**
 - MA court: There was no bad faith by the air carrier, even though they knew a claim was being asserted by Plaintiff at the time of destruction of records per normal business policy.
 - Due to the letter: Reasonable likelihood that there would be litigation. It was "negligent" not to have searched for the relevant documents and preserved them.
 - Lesser sanction? Adverse inference was allowed. Plaintiff would be allowed to lay foundation to entitle them to instruction against the air carrier regarding destruction of evidence.
 - Kelley v. United Airlines, 176 F.R.D. 422 (1997).

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S.D.N.Y. case – Spoliation or No?


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S.D.N.Y. CASE

- Passenger was removed from a flight. He sued under state law claims, which the court held was preempted by the FAA.
- Flight attendant reported Plaintiff was shouting “free booze, free booze, free booze!” Other passengers voiced concerns to the flight attendants.
- Plaintiff included a Motion for Sanctions for Spoliation of Evidence- Contemporaneous reports concerning the incident prepared by the Captain (the person who decided to have the Plaintiff removed).
- Plaintiff requested to preclude testimony from the air carrier’s witnesses regarding Plaintiff’s behavior on the flight, which would result in automatic judgment in her favor.



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S.D.N.Y. CASE

- Air carrier was on notice, one month after the incident, that litigation was likely to ensue. Plaintiff’s counsel sent a letter to that effect with a demand. Air carrier had a duty to preserve evidence.
- Captain indisputably prepared the report concerning the incident, and he then sent it to his counsel in anticipation of litigation.
- Magistrate judge had already determined this report was work product and not discoverable.

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S.D.N.Y. CASE CONT.- SPOILIATION OR NO?

- **NO- The production of a properly privileged document cannot be the basis for spoliation**
- Further, any "missing report" by the Captain would not substitute his live testimony (at best, it could have been used to impeach his testimony); It "barely qualifies as evidence."
- Lesser "sanction" considered- Court allowed further inquiry into the Captain's preparation of reports at the time of the incident, such that if there was another report not protected by the work product doctrine, the court could then determine whether to allow the production of the work product.
- *Ruta v. Delta Air Lines, Inc.*, 324 F.Supp.2d 524 (2004)

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Illinois case – Spoliation or No?

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ILLINOIS (5TH CIR.) CASE

- Plaintiff was injured in an airplane crash, and died from "sudden and unexpected loss of left engine power." (Cessna 340A) NTSB recovered the aircraft and its two engines were sent to the engine manufacturer for testing under NTSB supervision.
- Plaintiff alleged products liability and negligence against Cessna based on a defect in the exhaust system for the left engine, exhaust turbo wye.
- Plaintiff alleged the wye was in the aircraft when NTSB recovered it and sent to the manufacturer, and that it was missing when Plaintiff's expert went to inspect the aircraft.

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ILLINOIS CASE CONT.

- Plaintiff included a Negligent Spoliation of Evidence claim in the Complaint against the engine manufacturer only (not Cessna).
- Cessna had argued the maintenance logs were complete and did not include replacement of the wye (and it was Plaintiff's burden to prove it had been replaced)- MSJ granted.
- Plaintiff alleged that had Defendant manufacturer not lost the specific part, one would be able to tell the age of the wye. Without it, Plaintiff "lost the case" against Cessna.
- Trial court allowed the claim to go forward against the manufacturer.

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ILLINOIS CASE CONT.- SPOILIATION OR NO?

- **MAYBE- if Plaintiff can prove causation.**
- Specifically, as to the causation element of the claim: Plaintiff is required to allege that defendant's loss of evidence *caused* him to be unable to prove his case.
- Under IL law, the Defendant manufacturer had to prove with affirmative evidence that Plaintiff's claim of spoliation failed, but it was only able to argue that Plaintiff had not met his burden of proving the wye was over 18 years old.
- Willett v Cessna Aircraft Co., 366 Ill.App.3d 360 (2006)

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Iowa case – Spoliation or No?


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IOWA CASE

- Police officer was seriously injured after helicopter he was piloting failed in mid-air and crashed. He sued three co-employees for negligence and gross negligence.
- Jury found the employees negligent, but not grossly negligent. The court granted JNOV based on Iowa Code disallowing a right of action against a municipality while receiving disability/pension benefits, as Plaintiff had here. (Upheld)
- Plaintiff also claimed the court erred in presenting a jury instruction on the spoliation of evidence, which frustrated his ability to prove gross negligence.



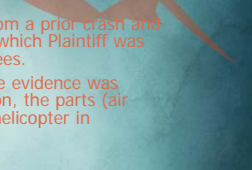
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IOWA CASE CONT.

- Plaintiff alleged that parts of a helicopter from a prior crash and the replacement parts on the helicopter, in which Plaintiff was the pilot, were destroyed by the co-employees.
- Not clear which employee had the parts, the evidence was destroyed after the NTSB did its investigation, the parts (air filter) from the prior crash was not for the helicopter in question.
- Requested- Adverse inference instruction:
 - If a party intentionally spoils or disposes of evidence to prevent its use against them, a strong presumption arises that if the evidence had not been destroyed or altered the information which could have been obtained from the destroyed or altered evidence would have been adverse to the party or parties destroying or altering it.



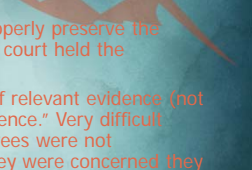
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IOWA CASE CONT.- SPOILIATION OR NO?

- **No.** Court found that Plaintiff did not properly preserve the objection for appeal. Even if he had, the court held the spoliation argument still failed.
- Iowa requires "intentional destruction" of relevant evidence (not just negligence) and "control of the evidence." Very difficult burden- Court here held that the employees were not destroying the air filter parts because they were concerned they would be used against them to prove liability for the unrelated 1st crash.
- Lynch v Saddler, 656 N.W.2d 104 (2003)



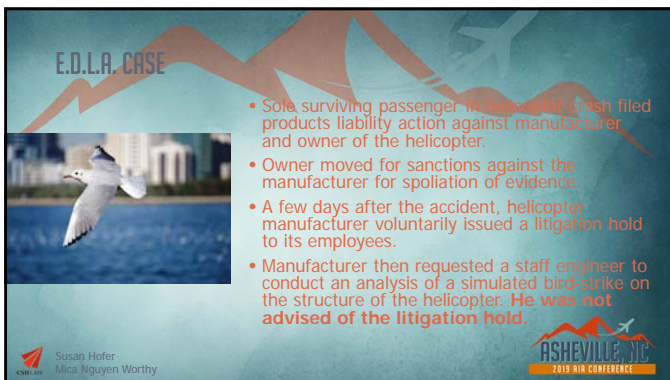
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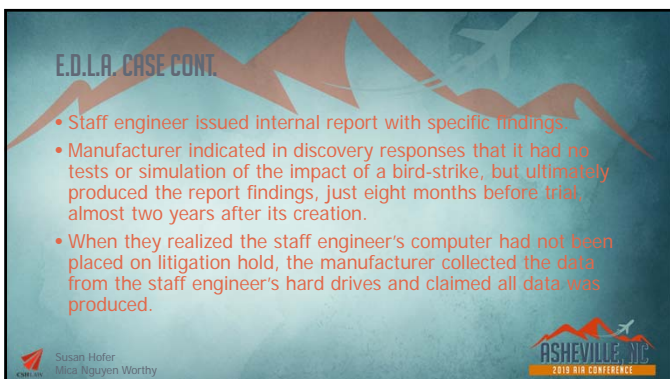
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E.D.L.A. CASE CONT.

- Staff engineer testified that some data had been discarded but later said it was all preserved on the "shared drive."
- He testified he relied on a prior bird strike project, but that his boss told him not to reference the analysis from the previous bird strike project in his report.
- He testified that he had received a new computer and the files he stored locally on the old one were "cleaned out."
- Court concluded that some of the files/data used to support the staff engineer's report had been deleted.

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E.D.L.A. CASE CONT.- SPOILIATION OR NO?

- **YES- Bad faith was required.**
- Court considered the failure of the manufacturer to put the staff engineer on a litigation hold, who was hired for the express purpose of conducting the bird-strike simulation. Court also raised the issue that the manufacturer did not want the findings made readily available to the NTSB or in litigation, which was why the staff engineer was instructed to alter and delete certain information.
- Sanctions: Adverse inference- Court allowed the jury to hear the evidence of the manufacturer's deletion of the data files, its continued denial of the existence of the files and report.
- *Yelton v. PHI, Inc.*, 279 F.R.D. 377 (2011)

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S.D. FL case – Spoliation or No?

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S.D. FL CASE


- Collision between Jetport's aircraft and a Southwest jet. After incident, the FBO manager had employees write statements which he asked they revise for grammar and inconsistencies. Later, FBO objected to their production based on Work Product privilege including prepared "in anticipation of litigation".
- Management at the FBO reviewed CCTV footage and concluded "you couldn't see anything". SW's rep asked if video existed and was told that the collision was "not captured". After 30 days, the footage automatically was wiped from system. Later, in discovery, the FBO said it was not in possession of video from the evening of the accident.
- Jetport filed a Motion seeking to preclude the FBO from introducing any evidence whatsoever concerning liability or alternatively to instruct the jury that the FBO destroyed video evidence and to presume video was harmful to FBO's defense.

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S.D. FL CASE CONT.- SPOILIATION OR NO?



- **No spoliation.** Jetport failed to show there was a duty to preserve the video, it was not crucial to case and there was no bad faith.
- **No duty -** The FBO could not reasonably foresee litigation even though written statements were made. Court discounted written statements as mere awareness of potential liability and not enough to trigger a duty to preserve.
- **What about their argument that it was "in anticipation of litigation?"**

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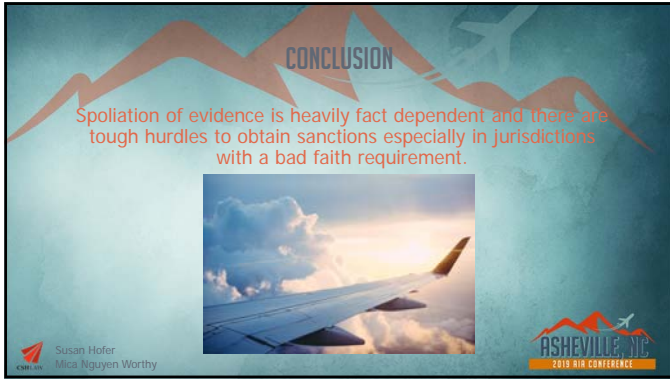
S.D. FL CASE CONT.- SPOILIATION OR NO?

- Was the CCTV crucial? Plaintiff must show significant impairment to the case. If he can still prove the case by other evidence, then the spoliated evidence is not crucial.
 - Jetport had substantial body of other evidence: 24 witnesses, expert testimony, photos and satellite images of collision area.
- Jetport relied on circumstantial bad faith. The FBO said the event was not captured. At worst, the FBO was negligent, misguided or irresponsible. The court also noted that the missing video may have helped the FBO and so there was no motive to purposefully destroy it.
- Jetport, Inc. v Landmark Aviation Miami, LLC
2017 WL 7732869

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