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PRESERVATION OF EVIDENCE

By Andrew Tarvin

Issues that frequently need to be addressed early on in legal representation include whether and when a client's duty to preserve evidence arises, what evidence should be preserved, and the consequences of a client's failure to preserve it. Attorneys and clients alike should be familiar with these obligations to avoid potentially serious consequences.

1. When does the duty to preserve evidence arise?

A party's obligation to preserve evidence can arise even before litigation is commenced if the party knows or should know litigation is likely.¹ To determine whether a party should know litigation regarding an incident is likely, the Eastern District of Arkansas has considered whether the party is frequently involved in lawsuits regarding that type of incident.² For example, in *Harrison*, defendant Union Pacific Railroad Company had "frequently been a party to litigation involving highway crossing accidents..." and had the experience necessary to know "what evidence [was] relevant, what evidence [was] likely to be requested in discovery, and what evidence [was] likely to be found

discoverable by the courts."³ Therefore, the court concluded Union Pacific knew litigation was likely after a fatal highway crossing accident occurred.⁴

A party should know litigation is likely when it has frequently been a party to litigation regarding a particular type of incident, or otherwise knows the potential for litigation regarding that type of incident is high. Thus, a party should begin to preserve evidence as soon as it knows or should know litigation regarding an incident is likely.

2. If a duty to preserve evidence exists, what should be preserved?

Where an obligation to preserve evidence exists, it runs from the time of the incident and requires a party to preserve all evidence it knows or should know is relevant to the incident.⁵ Generally, evidence is relevant if it is logically relevant and tending to prove or disprove a matter in issue.⁶ Arkansas law has not specifically defined the scope of evidence to be preserved when the obligation to preserve arises. In order to determine whether a party should know evidence is relevant, a court might consider the party's familiarity with the type of incident involved, much like the court in *Harrison* above.

¹ *Harrison v. Union Pac. R.R. Co.*, 2002 U.S. Dist. LEXIS 29004, *4 (E.D. Ark. 2002).

² *Id.* at *9.

³ *Id.*

⁴ *Id.* at *11.

⁵ *Id.* at *11.

⁶ Black's Law Dictionary (8th Ed.).

3. What are the consequences of failure to preserve evidence?

In Arkansas, spoliation is defined as the intentional destruction of evidence.⁷ A failure to preserve evidence may be considered spoliation where it is intentional. There is no independent cause of action in Arkansas for claims of first-⁸ or third-party spoliation.⁹ There are, however, other means by which a party may be reprimanded for engaging in spoliation, such as special jury instructions, discovery sanctions, and criminal liability, as discussed in further detail below.¹⁰

a. Evidentiary Inferences

Where spoliation has been established, the court may read an instruction permitting the jury to “draw [an] inference that [the] evidence destroyed was unfavorable to [the] party responsible for its spoliation.”¹¹ The adverse inference instruction may be used where evidence is destroyed by a party after the party knew the incident to which the evidence pertained was likely to lead to litigation. For example, where a railroad intentionally failed to preserve voice tapes and track inspection

records relevant to a highway crossing accident, the jury was allowed to infer that the contents of the tapes and records would have been unfavorable to the railroad.¹²

It is important to note that while the Eighth Circuit requires a showing of intentional destruction “indicating a desire to suppress the truth”¹³ before this instruction may be given, Arkansas requires only that the evidence was intentionally destroyed.¹⁴ Thus, courts in Arkansas may give this instruction even when a party destroyed evidence without the desire to suppress the truth.

A court may decline to give this instruction, however, where there is no proof the evidence was destroyed outside of the manner in which it is routinely destroyed.¹⁵ In *Tomlin v. Wal-Mart*, a spoliation instruction was requested because surveillance video allegedly showing the plaintiff’s slip-and-fall had been erased during Wal-Mart’s periodic video deletion.¹⁶ Noting Wal-Mart’s policy of preserving video only in instances of internal theft, and the lack of evidence anyone at Wal-Mart knew the video would reveal the condition that caused plaintiff to fall, the court declined to give the spoliation instruction.¹⁷

⁷ *Bunn Builders, Inc. v. Womack*, 2011 Ark. 231, *7, citing *Goff v. Harold Ives Trucking, Inc.*, 342 Ark. 143, 146 (2000).

⁸ *Goff v. Harold Ives Trucking, Inc.*, 342 Ark. 143, 150 (2000).

⁹ *Downen v. Redd*, 367 Ark. 551, 555 (2006).

¹⁰ *Id.* at 554.

¹¹ *Bunn Builders* at *7, citing *Goff* at 146.

¹² *Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 303 (2004).

¹³ *Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004).

¹⁴ *Bunn Builders* at *14.

¹⁵ *Tomlin v. Wal-Mart Stores, Inc.*, 81 Ark. App. 198, 209 (2003).

¹⁶ *Id.* at 208.

¹⁷ *Id.* at 208-209.

Moreover, when relevant evidence is in the control of a party who fails to produce it without a satisfactory explanation, a jury may be permitted to draw an inference against the party who fails to produce it.¹⁸ Thus, even inadvertent loss or destruction of relevant evidence may present serious consequences for the party who has an obligation to preserve it.

b. Discovery Sanctions

In addition to an adverse inference instruction, a court may also issue discovery sanctions against a party under Arkansas Rule of Civil Procedure 37(b) if spoliation leads to the violation of a discovery order.¹⁹ These sanctions may include an order establishing certain facts against the spoliating party; precluding the spoliating party from supporting or opposing certain claims or defenses; striking pleadings or parts of pleadings; dismissing the action or rendering a judgment by default against the spoliating party; or treating the failure to comply with a discovery order as contempt of court.²⁰

c. Criminal Liability

Destruction or concealment of any record or document for the purpose of impairing its availability in litigation may subject a party to criminal liability.²¹ Unlike the spoliation instruction and discovery

sanctions, neither of which requires a showing of bad faith on the part of the spoliator, criminal liability may be imposed only where it can be shown the evidence was destroyed with the purpose of preventing its use in litigation. If this can be shown, however, the spoliation may be punished as a Class B misdemeanor.²²

Ultimately, once a party knows or should know litigation regarding an incident is likely, it is obligated to preserve all evidence it knows or should know will be relevant to the litigation. Special jury instructions or discovery sanctions may be issued by the court for failure to meet this obligation, and criminal liability may apply where evidence was destroyed to prevent its use in litigation.

The thanks of the AADC go out to Andrew Tarvin of Kutak Rock for writing this article.



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¹⁸ Arkansas Model Jury Instruction 106A (2014 Ed.).

¹⁹ *Downen* at 554.

²⁰ Arkansas Rule of Civil Procedure 37(b)(2)(A-D).

²¹ Ark. Code Ann. § 5-53-111(a).

²² Ark. Code Ann. § 5-53-111(b)(2).