Preserving Your Own Evidence

(Or, People Who Live In Glass Houses ...)

Part four of a six part series on airport tenant relations and aviation legal matters

Paul A Lange, *Esq., Law Offices of Paul A. Lange, LLC*

In the first three articles in this series, we discussed some of the more common grant assurances that are disputed. This article takes a slightly different direction, discussing how to begin preparing for litigation or settlement discussions in advance of commencing litigation.

The first step to ensuring success in litigation is to make sure that your own house is in order — your defensive strategy. This article discusses how to avoid claims that you destroyed evidence, especially given that you may need to make those same claims against your opponent in potential litigation.

Spoliation Claims

You may have heard about a growing trend in the law which uses terms like "spoliation" and "litigation holds". Spoliation is the negligent or intentional destruction, mutilation, alteration or concealment of evidence, usually of a document or electronic file.

While state laws vary on what remedies are available for spoliation, and whether spoliation must be intentional for your adversary to recover, the fact remains that destroying evidence is the wrong thing to do. As with many things in life, however, the devil is in the details. What actually constitutes spoliation? Can the routine overwriting of the last backup tape in your cycle constitute spoliation? Can tossing out, or even failing to keep, organized records on a particular issue result in a claim of spoliation? You bet. Read on.

Litigators today often only half-jokingly lament that they now end up litigating spoliation claims more often than the underlying issues in dispute. Spoliation claims are attractive because they sound dramatic. Who wouldn't want to take an otherwise boring contract dispute and, instead of comparing contract clauses and testimony about them in front of a jury, animatedly tell the jury about a nefarious plan by one of the key players to permanently hide the ball?

In addition to adding spice to a jury trial in an otherwise boring case, the non-spoliating party may seek an adverse inference against its opponent at trial. If granted, the judge tells the jury that the destroyed or missing record is *deemed* to have been harmful to you and helpful to your opponent.

You're then put in a position of defensively trying to explain away why you couldn't come up with the record, lamely asserting that (in your view) it wasn't important, and that your opponent is creating a smoke screen. Not a good spot to be in.

The Litigation Hold

Since you're now worried about spoliation claims as you contemplate litigation in your airport/tenant dispute, how do you avoid a spoliation claim being brought against *you*? Start by getting your own house in order with a litigation hold. "Identifying the boundaries of the duty to preserve [evidence] involves two related inquiries: when does the duty to preserve attach, and what evidence must be preserved."

> "The first step to ensuring success in litigation is to make sure that your own house is in order — your defensive strategy. How do you avoid claims that you destroyed evidence, especially given that you may need to make those same claims against your opponent in potential litigation?"

- **a. When does the duty to preserve attach?**

"It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents."

Acknowledging the difficulty in determining when the obligation attaches, courts have stated that "The exact moment of when the duty to impose a 'litigation hold' arises is vague."

The standard developed is whether litigation should be "reasonably anticipated." Examples: retaining counsel; receiving a Notice of Claim; when a party knows it will be filing suit; the filing of a lawsuit; sending a demand letter; and an employee's related termination.

b. What evidence must be preserved?

The Federal Rules of Civil Procedure state: "Evidence that must be preserved includes documents, electronically stored information, and physical evidence that the party knows or reasonably should know is relevant to claims or defenses in the action, is reasonably calculated to lead to the discovery of admissible evidence, or is reasonably likely to be requested during discovery."

Those rules also make parties responsible not only for evidence in their immediate possession, but also evidence within their "control" [think text messages on employer-issued smart phones or documents generated by engineering consultants for new construction or infrastructure projects].

> "Litigators today often only half-jokingly lament that they now end up litigating spoliation claims more often than the underlying issues in dispute. Spoliation claims are attractive because they sound dramatic."

The case law on what must be preserved is inconsistent. What must be preserved is guided by principles of "reasonableness and proportionality." Courts acknowledge the difficulty in deciding what files may be deleted or backup tapes that may be recycled. Until a more precise definition is created by rule, a party is well-advised by courts to "retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches."

Even if you previously considered the issue of records preservation, did you think about the *format* in which the records must be saved? The careful approach is to preserve all evidence *in its native format* to avoid cost-shifting and fines — original voice mail recordings and software that is not commonly used by the general public.

Courts are split on whether preserved evidence can be "downgraded." One federal magistrate found that the

printing of relevant electronically stored data (and destroying the electronic file) was insufficient preservation.

c. What steps should be taken to preserve evidence?

Although it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant documents and electronically stored information, the unpredictability of how a court will rule years later on a company's preservation efforts suggests taking proactive conservative preservation measures.

These include: (1) preserving all relevant records (both paper and electronic); (2) implementing procedures for the preservation of evidence, commonly referred to as instituting a "Litigation Hold"; (3) suspending your routine document retention policy and preserving all documents; (4) collecting relevant records so that they may be searched by counsel; and (5) notifying all employees and agents likely to have relevant evidence of the issuance of a litigation hold, the suspension of routine document retention policies, the request that relevant materials be gathered, and that those materials be provided to a designated person within the company or to counsel.

> "Although it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant documents and electronically stored information, the unpredictability of how a court will rule years later on a company's preservation efforts suggests taking proactive conservative preservation measures."

The law is very clear that failure to implement a litigation hold at the outset of litigation amount[s] to gross negligence.

How do you properly implement a litigation hold? You need to identify: (1) how your organization stores materials and information; (2) identify the source of materials that are most likely to be relevant and identify the individuals who are most likely to have possession of relevant materials and information; (3) identify the "key players" within the organization that may have relevant information; and (4) identify organizations and individuals over whom the organization exercises control such that the duty to preserve would be extended to them as well.

Don't forget that a party may be held responsible for the spoliation of relevant evidence done by its agents — think engineers and various consultants helping you with construction permitting, work on fire suppression systems, surveys for upgrading drainage systems, etc.

You must also monitor compliance with the litigation hold. Consider reviewing your internal document retention policies and updating those policies so that you can demonstrate compliance when you need to.

Conclusion

The decision to initiate litigation is not something to be taken lightly. As you consider whether to litigate, take steps to ensure that your own house is in order.

Thoroughly preparing for litigation as you investigate potential claims will go a long way toward maximizing your chances of success in the shortest period of time. ab

EXCLUSIVE RIGHTS AT SINGLE FBO AIRPORTS

Looking back, in the November issue of *airport business*, Alison McKay addressed how to identify whether a single FBO airport is an Exclusive Right, or simply a situation where there is an allowable Proprietary Exclusive Right ... or a situation where there is legitimately no qualified competition.

The existence of only a single FBO at a federally funded airport is not, in and of itself, evidence of an Exclusive Right in violation of Grant Assurance 23. A single FBO is permissible when you have an airport owner exercising its right to a Proprietary Exclusive Right or a lack of qualified competition.

If, however, you have a situation in which the airport sponsor is not engaged in a Proprietary Exclusive Right and is imposing unreasonable restrictions on a potential second FBO (that are not likewise imposed on the sole existing FBO), there may be a violation of Grant Assurance 23. If you believe that there is an Exclusive Right in violation of Grant Assurance 23, you should retain legal counsel to (1) evaluate your remedies under Federal and State Law; and (2) guide you in gathering and preserving evidence to support your claims.