

## ARTICLES

### THE IMPORTANCE OF PHYSICAL EVIDENCE IN TORT CLAIMS

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#### Introduction

Last year, I found myself three months out from trial in a general negligence maritime claim. The firm I was with at the time represented two clients against a large and well known cruise line for injuries sustained when the grab bar in their handicap accessible stateroom came detached from the wall. This sudden and unexpected event brought about permanent injuries and a lawsuit approximately one year after the incident. The crux of our lawsuit was the cruise line's negligence in failing to maintain grab bars ship wide, and especially, in its handicap accessible staterooms.

Three months from trial – while discussing the case with my managing partner – a lightbulb went off over both of our heads. We did not possess the grab bar. While we had requested hundreds of documents, a myriad of depositions, and countless interrogatories and admissions, we had not requested the *actual* grab bar. Luckily for us, we were only three months out from trial and still within the discovery cut-off. The next three months would be a race to compel the grab bar's production, track down an "exemplar" bar from manufactures in California and Italy, and deliver the grab bars to our expert for analysis and testing. It was a stressful process; one which would have been a lot less stressful had the grab bar been requested when the lawsuit was filed. Consequently, I learned a valuable lesson: the importance of physical evidence in tort claims.

#### Step One: Identify the Physical Evidence Early On

The first step in assessing the importance of physical evidence in tort claims is identifying what that physical evidence is. Examples of physical evidence include clothing and footwear, the (defective) product that may have caused the injury, and the automobile in an automobile accident. In my case, this should have been the easy part: a shower grab bar. However, as the case unfolded and trial neared, we went down a long and intricate rabbit hole to identify the grab bar and its manufacturer. Identifying the grab bar took us to corporate representative depositions for the cruise line and the alleged manufacturer in California, international phone calls to Italy, hearings in Brevard County, and countless hours of internet research before we finally identified the correct grab bar and its manufacturer. I use this to illustrate why it is important to identify the physical evidence early in your case.

Identifying the physical evidence begins with client intake. Take the time to ask your client what caused his or her injury, and just as important, what *could* have caused or contributed to his or her injury, including what he or she was wearing and carrying at the time of the incident. In a premise liability action – for example – where a person slips and falls on a foreign substance left

on the ground, the banana peel is just as important as the shoes your client was wearing at the time of the incident.

### **Step Two: Preserve the Physical Evidence**

Spoliation of evidence is a powerful weapon in any tort claim. American Bar Association Rule 3.4 states:

A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act...

American Bar Association, Center for Professional Responsibility. (2016). Model Rules of Professional Conduct 3.4; see also 18 U.S.C. §1519.

In the case of physical evidence, spoliation occurs when that evidence is required for discovery but is subsequently destroyed or altered significantly. Depending on your jurisdiction, you may be entitled to an inference against the offending party. C.f. Fed.R.Civ.P. 37 (Failure to preserve electronically stored information may lead to, *inter alia*, the presumption that the lost information was unfavorable to the party). In Florida for example, “the spoliation can actually benefit that party through the imposition of sanctions, evidentiary presumptions, or even a separate cause of action for spoliation of evidence against the spoliator.” *Spoliated Evidence: Better than the Real Thing?* James T. Sparkman and John W. Reis, The Fla. Bar Journal, July/August, 1997.

In order to preserve your client's spoliation claim you should first put the parties on notice by requesting they preserve the physical evidence. It is a two-way street. Either party can put the other party on notice by sending an evidence preservation letter after the claim is initiated; the sooner, the better. At the same time, once you have met with the client and identified the physical evidence, you should immediately take the requisite steps to identify that evidence and preserve it from day one.

### **Step Three: Request and Inspect the Physical Evidence**

Once you have identified the physical evidence and taken the necessary steps to ensure the evidence is preserved, you should arrange for an inspection of the physical evidence. Usually, this requires placing the evidence in the hands of your expert. This can be arranged with opposing counsel informally or formally. Giving your expert time to inspect the physical evidence – and if necessary, prepare a report about your expert's inspection – will give you one more weapon to use during settlement negotiations, and eventually, trial. Lastly, taking these steps early on will ensure that the *actual* evidence will be available at trial.

## Conclusion

Failing to timely evaluate the import of physical evidence in tort claims could prove detrimental to your client's case. As such, physical evidence should be identified at the outset of any tort claim. After identification, steps should be taken to preserve and request that physical evidence for inspection and presentation at trial. The failure to preserve such evidence may lead to an adverse inference; yet another reason to appreciate physical evidence from the outset of any tort claim.

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