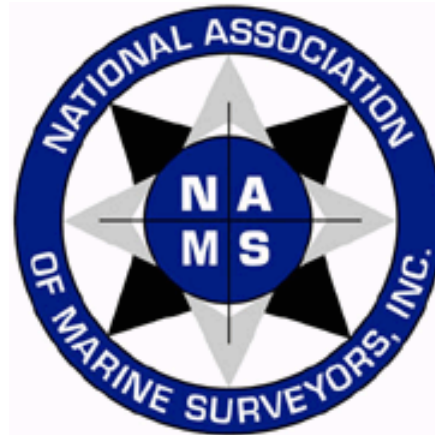




Spoliation of Evidence

- Prepared for:





Spoliation



- Nationwide anti-spoliation trend
 - Cases can be thrown out of court
 - Insurers can be denied subrogation claims
 - An insured who destroys evidence of a claim can have his claim denied due to the insurers inability to subrogate
 - Marine surveyors and engineers may be liable to insurers that employ them for spoliation that results in the insurers inability to defend claims



Spoliation



- Expert witnesses can be prevented from testifying, which may effectively prevent their employer's recovery
- Product liability defendants are put at severe disadvantage when they are forced to defend suits without access to the product which is basis for the litigation



Spoliation

- *Spoliation*: the loss, destruction or material alteration of evidence or potential evidence, so that it is no longer available to other parties in pending or future litigation
- *Spoliator*: the individual or entity that cause spoliation. He or she may be liable to the other parties for intentional or unintentional spoliation



Spoliation - Examples

- One of the parties to a lawsuit or his agent causes spoliation of evidence and the opposing party seeks sanctions
 - Spoliation by an insurer
 - Spoliation by an expert witness
 - Spoliation by a property owner
 - Independent. disinterested, third party



Spoliation- Types

- Intentional

- Courts have determined that more serious sanctions should be applied to cases where spoliation has resulted from fault or intentional actions of the spoliator

- Negligent spoliation

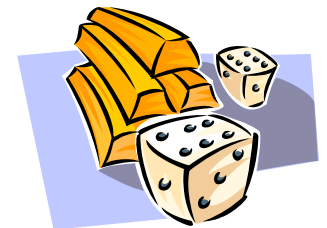
- Where the court finds no evidence of fault or intent to cause spoliation of evidence, a finding of negligent spoliation may still provide a basis for application of sanctions against the spoliator





Spoliation

- Clearly those who intentionally destroy evidence are placing themselves at risk.
- Inadvertent or unintentional destruction of evidence may also present ramifications.
- The critical question is: “should the litigant have known the evidence represented relevant information in pending, imminent, or reasonably foreseeable litigation.”





Spoliation - Ramifications



- In order to prevent a spoliator from benefiting from his or her actions, the courts impose a variety of sanctions against the spoliator and provide various remedies for the injured party.
- Product liability cases are especially sensitive to the damaging effects of spoliation. Demonstrating the condition of the product at the time of sale and at the time of accident is crucial to the plaintiff's proof in such actions.



Spoliation - Ramifications



- Adverse evidentiary inferences
 - The court may instruct the jury that they may infer the spoliated evidence was adverse to the spoliator or
 - The jury must infer the spoliated evidence was adverse to the spoliator unless the spoliator proves otherwise



Spoliation - Ramifications



- When sanction is applied.
 - Relevant evidence has been destroyed.
 - Legal proceedings were pending, and.
 - The destruction was an intentional act of the party or party's agents indicative of fraud or intent to suppress the truth.
- Inference is rebuttable.
 - Evidence explaining the tampering, or facts contrary to those inferred by the tampering.



Spoliation - Ramifications



- Civil discovery sanctions
 - Reimbursement of attorney's fees
 - Recovery of discovery costs
 - Striking an answer
 - Precluding introduction of expert testimony related to the destroyed evidence; And
 - Entry of summary judgment, default, dismissal, or directed verdict



Spoliation - Ramifications

- Exclusion of experts and evidence
 - When
 - Why
- Summary judgment
- Dismissal
 - Fault or intent necessary
- Directed verdict
 - Violation of court order

Spoliation – an Example?





Spoliation - Avoidance

- ASTM e1188
 - “Standard practice for collection and preservation of information and physical items by a technical investigator”
 - Covers guidelines for the collection and preservation of information and physical items by **ANY** technical investigator pertaining to an incident that **CAN** be reasonably expected to be the subject of litigation



Spoliation - Avoidance

- E1188-significance and use
 - Obtain sufficient information and physical items to discover evidence associated with the incident and to preserve it for later analysis
 - The quality of evidence may change with time, therefore special effort should be made to preserve it
 - The collected and preserve evidence shall be identified with and traceable to the incident





Spoliation - Avoidance

■ Procedure

- Collect information related to events and conditions occurring before, during, or after the incident
- Obtain and preserve physical items as early as possible. Plan the investigation to protect physical evidence significant to the incident
- Commence photographic documentation as soon as possible after the incident





Spoliation - Avoidance

- Procedure...
 - Evidence and information gathered by investigators must be admissible in the event of litigation. Validity and authenticity must be established and the chain of custody traceable.
 - Initial collection information.
 - Identity of the evidence and any unique labeling.
 - Location where evidence was found.
 - Date and time the evidence was found or obtained, and.
 - Name and address of individual who initially removed the evidence from the incident scene.



Spoliation - Avoidance

- Subsequent custody transfer info...
 - Names and addresses of the previous custodian and the new custodian
 - Modification, handling, testing, and examination to which an item was subjected, while controlled by the previous custodian, and
 - Configuration and condition when transferred to the new custodian



Spoliation - Avoidance

- ASTM e860.
 - **“Standard practice for examining and testing items that are or may become involved in products liability litigation.”**
 - This practice sets forth guidelines for the examination and testing of actual items or systems that may have been involved in a specific incident that is or is reasonably expected to be the subject of products liability litigation.



Spoliation - Avoidance

- Significance and use
 - Outlines the procedure to be followed in documenting the nature, state, or condition of evidence; Describes specific actions that are required if any planned testing, examination, disassembly, or other action is likely to alter the nature, state, or condition of the evidence so as to preclude or adversely limit similar, or further meaningful examination and testing



Spoliation - Avoidance

- Procedure
 - Document the nature, state, and condition of the evidence by descriptive, photographic, or other suitable methods prior to any test examination, disassembly, or alteration. Also attempt to determine and document whether the evidence has changed or been altered, since the incident



Spoliation - Avoidance

- Procedure....
 - If the test, examination or other action to be performed is likely to alter the nature, state, or condition of the evidence.....The do the following.
 - Notify the client that the planned test, examination, disassembly, or other action is likely to alter the state, condition, etc.
 - Recommend that the client notify the other parties in interest o the planned test, examination, disassembly...



Spoliation - Avoidance

■ Procedure....

- Recommend to the client that the other parties in interest be given the opportunity to undertake the procedure in 4.1 and to witness or record such test, examination, disassembly, or other action.
- If compelling reasons exist for the performance of unilateral testing, examination, disassembly...as defined in 4.2 without the notification required in 4.2 then such compelling reason must be documented.





Spoliation - Avoidance

- Procedure....
 - On completion of the testing, examination, disassembly or other actions all parts and pieces of the evidence not returned to service must be preserved in such a manner as to protect and maintain their identity and integrity.
- Documentation.
 - The methods used and the results obtained in all tests, examination....Must be documented and preserved.



Spoliation - Avoidance

- Practical suggestions.
 - Upon arrival at the scene photographically document the condition/s BEFORE you enter or examine, alter the scene.
 - If you retain an item, photo it 'in situ', identify it and photo again 'in situ.'
 - Log all items and identify the storage location.
 - Log removals and get a receipt to maintain the chain of custody.
 - Do not disassemble or test components unless you have followed E860.



Spoliation - Avoidance

- Practical suggestions..
 - Be prepared to store items indefinitely, or prepare a storage policy and stick to it.
 - Be prepared to store files indefinitely, or prepare a storage policy and stick to it.
 - Do not allow anyone to inspect items, without your clients permission, court order, etc. Keep a record of when, where, who, inspected.



Spoliation

- Finally.....
 - Consider purchasing forensic expert insurance coverage.