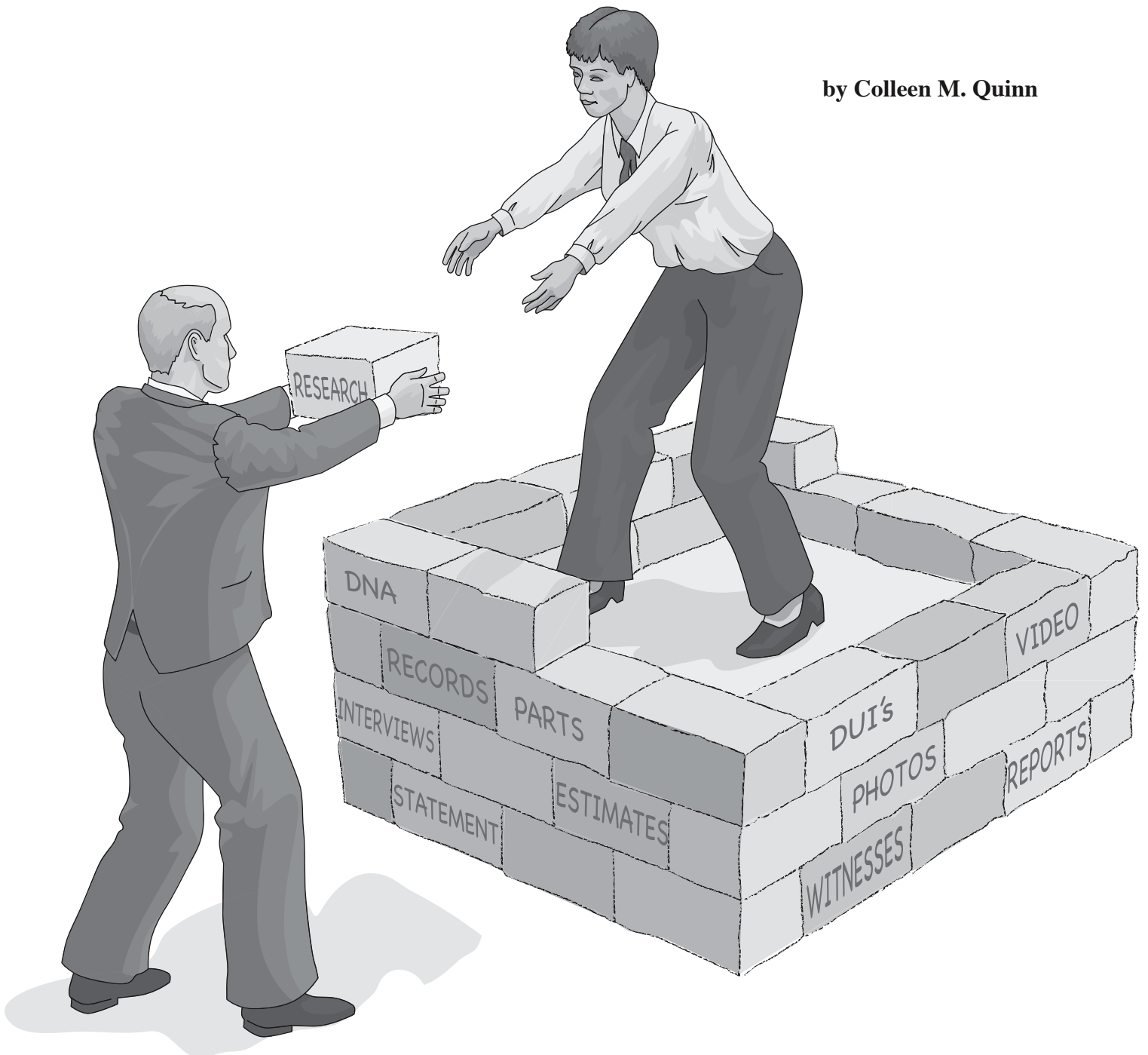


Evidence

Injury case intake

a primer on preserving and gathering the evidence

by Colleen M. Quinn



Collecting and preserving the evidence upon initially signing up a potential injury case is absolutely essential to a successful outcome. Simply put, without the evidence, there is no case. Proper case evaluation also can be almost impossible without adequate evidence. Moreover, when a potential client brings the case to an attorney's attention many months or even years after the incident, then even more diligence is necessary to gather the critical evidence and evaluate the case.

General evidence applicable to all cases

In most cases, whether products liability, motor vehicle accident, premises liability, assault, medical malpractice or otherwise, the following evidence generally should be collected and preserved:

- 1. Pictures and video footage of the accident or incident scene.** It is critical that the attorney – or a top notch investigator – personally go out and inspect the scene upon first notice of the accident or incident. Many times there are clues contained at the accident scene. Given changes to the scene, pictures taken as close in time to the accident as possible are essential. Bring the client along to point out any changes to the scene and the exact locations pertinent to the accident.
 - Pictures and video footage should be taken from all angles and with both close up and long shots. Do not spare the film. Panoramic shots also can be helpful. Take photographs and measurements from witness perspectives.
 - Compare the pros and cons of digital vs. conventional film photography. Digital photos can be altered and can lose clarity over time through compression if not preserved in an original format. On the other hand, conventional film always can be scanned into digital format. The pictures can then easily be incorporated into PowerPoint or other programs and transmitted via e-mail.
 - In premises cases, be certain to conduct your investigation and get photographs before notifying the defendants! Once the defendant is on notice, it will be much more difficult to obtain photographs or inspect the scene. If necessary, consider the use of pictures taken from a cell phone to be inconspicuous.
- 2. Diagram of the accident scene.** This should be prepared upon the initial visit to the accident scene and reviewed by the client.
- 3. Certified copies of building or land records, real estate plats, etc.** It is amazing how many potential exhibits are matters of public record. For example, a parking lot diagram in a slip and fall case (obtained from the local land records or building inspector's office) can be useful from intake through trial.
- 4. Pictures and videotape of the client's injuries.**
 - Hire a professional photographer in serious cases. High quality photographs are ideal.
 - Often the jury only sees a fairly normal looking client at trial since most injuries have healed over time. Capturing the client's injuries over time is essential. Schedule intervals upon which to take pictures/video of the client.
 - Again, take close-up and long shot pictures as well as pictures from many angles. Do not spare the film.
- 5. Accident or incident reports.** Seek to obtain these from:
 - State or local police.
 - Most police officers now carry cameras and may have taken pictures of the accident scene and the vehicles at issue. Police officers usually have their own notes used to prepare the accident report – including witness statements and contact information. It is critical to personally interview – or have a good investigator interview – the police officer as soon as possible. Video or audio tape the interview if the officer agrees (but note this may impede the free flow of information). Skid mark measurements usually are not included in the accident report. They will be in the officer's notes.
 - Workers' Compensation Notice of First Accident to Employer (have client obtain or obtain with release from client).
 - OSHA (prepare a Freedom of information Act "FOIA" request).
 - Division of Motor Vehicles (obtain with DMV release from client).
 - Customer Accident Report from store (have client request a copy if client does not have a copy). Note the seminal case of *State Farm v. Perrigan*, 102 F.R.D. 235 (W.D. Va 1984) distinguishes between permissible discovery of material prepared in the ordinary course of business vs. prepared in anticipation of litigation.
 - 911 records, tapes and/or call logs (send letter immediately requesting the preservation of these items which often are destroyed within 30 to 90 days; make a FOIA request).
 - EMT or ambulance report (obtain with medical record release from client).
 - Fire and Rescue report and/or records (obtain with medical record release from client or via FOIA request).
- 6. Client's recorded statement from insurance carrier (if one was made).** Under Virginia Code §8.01-417, any recorded statement must be pro-

vided within 30 days if requested by the injured person or his/her attorney.

7. **Surveillance videos or any video footage.** Send notice as soon as possible to the store to preserve any videos. These usually are erased and reused within months, sometimes even weeks or days. Accordingly, give notice as soon as you know about the incident.
8. **Pertinent weather reports.** These can be found on-line at <http://lwf.ncdc.noaa.gov/oa/ncdc.html> but be sure to obtain certified copies to introduce as evidence. Available moonlight can be obtained from the Naval Observatory.

Evidence specific to motor vehicle accidents

In motor vehicle accident cases, in addition to obtaining the items set forth above, do the following:

1. **Take photographs of the vehicles involved in the crash.** Photos of the vehicles not only are pieces of critical evidence but can help you, the attorney, to better evaluate the case. All too often, only the defendant has photographs and the plaintiff has to file suit just to get copies of the photographs that are in the defendant's possession (unless they are produced voluntarily which isn't often) in order to find out the real extent of the damage involved.

If photographs of the vehicles are not obtained, in relying upon pictures taken by the defense, note the following:

- The pictures may be taken at such angles that they really don't show the damage to the vehicles.
 - Don't always assume that all of the defendant's pictures have been produced (Tip: Be certain to ask for the "mounting sheet" utilized by insurance companies in addition to the photographs.) Ask to inspect the mounting sheet even if the information on the sheet is claimed as protected by work product privilege. Viewing the mounting sheet can sometimes establish that more photographs were taken than were actually produced in the case.
 - All too often the photographs taken by the defendant may be either lost or of poor quality.
 - It is essential to obtain pictures of all the vehicles involved in the collision. Some cars withstand damage better than others (e.g., a small Hyundai vs. a Ford F-150 pick-up truck). Sometimes the only pictures taken by the defense are those of the less damaged vehicle.
2. **Inspect and photograph/videotape the interior and exterior of the vehicle.** Do this carefully with a qualified inspector. Photograph speedometers, broken seats, items thrown out of place

during the crash, items that may have distracted the defendant driver.

3. **Salvage relevant auto parts.** Should parts of the automobile be preserved/ salvaged as evidence? Consider this, especially if the car was totaled or if the parts are going to be discarded. Ensure accounting of chain of custody.
4. **Take photographs of your client in the vehicle.** Such photos can show alignment and how an injury might have occurred. For example, in a head injury case, it may be useful to show the position of the client's head relative to the area where his head hit. Use of such a photograph can lay the foundation for a doctor to support a medical illustration showing the mechanism of injury.
5. **Acquire similar automobile parts.** Consider purchasing or obtaining from a salvage yard an identical automobile part to help prove your case (for example, showing construction of a head rest with an interior metal plate).
6. **Obtain all costs and estimates of cost of repair for all vehicles involved.** Also obtain damage pictures and repair/replacement cost for any items hit in the accident (e.g., fence, wall, mailbox, etc.).
7. **Drunk driving.** Note special issues with drunk driving cases that go beyond the scope of this outline. Watch out for special chain of custody and evidentiary procedures regarding proof of intoxication needed to prove these cases.
8. **Tractor-trailer cases.** Note special evidence to gather in tractor-trailer accident cases. While a whole book can be dedicated to this topic, basic evidence to obtain includes the following:
 - Tractor-trailer trucks have data accumulation systems ("black boxes") on them that record crash/impact information (note also that many cars now have black boxes installed).
 - Many tractor-trailers have Qualcomm or satellite systems whereby speed and other data, as well as communications from the driver, are sent to a home office via satellite.
 - Sometimes the tractor and the trailer are owned and/or hired by different companies. It is very important to obtain the make, model and identification number to clarify owners/employers.
 - Look for bills of lading and other documents that establish the goods on board (this can make a big difference in the weight of the rig).
 - Obtain driver or trip log.
 - Obtain inspection and repair records that show tractor-trailer was in good condition.

Evidence to gather specific to product liability cases

1. Be certain to collect and preserve the following:
 - The product (or the remains thereof);
 - At least one exemplar product (quickly purchase, or have the client purchase, an exact copy or model of the same product);
 - Any and all labels, warning, instructions;
 - The product's packaging and/or shipping container; and
 - Any invoice, receipt or any other evidence of the purchase, date of purchase and location of purchase of the product.
 - Take pictures of the product, again, with close-ups and long shots.
 - Ensure accounting of chain of custody.
2. Understand the ramifications of spoiled evidence

It is imperative to not only preserve the evidence in a product liability case but to preserve the product in the exact condition in which it existed post-accident.

In the case *Austin v. Consolidation Coal Company*, 256 Va. 78, 501 F.E.2d 161 (1998), the Virginia Supreme Court refused to recognize a cause of action by an employee against an employer for the intentional or negligent spoliation of evidence arising from the employer's destruction of a hose before the defendant miner's experts could examine it. Consequently, in Virginia, there is no cause of action for spoliation of evidence.

On the other hand, where there is the willful destruction of evidence or the failure to preserve potential evidence between the parties in a case, discovery sanctions, case dismissal, and/or summary judgment may be the appropriate remedies.

- See, e.g. *Trigon Insurance Company vs. United States*, 204 F.R.D. 277 (E.D. Va. 2001) (holding that once spoliation by one party has been established, the court must attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation. In determining spoliation, the court noted that it must first find that there was a duty to preserve the evidence, and then that the evidence was intentionally destroyed. *Id.*)
- See also *Cole v. Keller Industries, Inc.*, 132 F.3d. 1044 (4th Cir. 1998) (holding that spoliation of evidence by the plaintiff's expert did not warrant dismissal of the plaintiff's case. In conducting his destructive testing, the plaintiff's expert did not act in bad faith or intentionally destroy the evidence. Moreover, the defense experts have been able to inspect and test the ladder at issue).
- Compare *Hebron v. American Isuzu Motors, Inc.*, 60 F.3d 1095, 1097 (4th Cir. 1995),

summary judgment granted in favor of manufacturer in product liability suit alleging that Isuzu Trooper was defective where the vehicle had been destroyed), and *Belton v. Ridge Tool Co.*, 911 F.2d 720 (Table) 4th Cir. Va., 1990 (unpublished) (plaintiff case dismissed where plaintiff did not notify the manufacturer until 19 months after his injury from defect in a pipe and bolt dividing machine that caused him to suffer amputation of his thumb).

Collecting medical records

Obtaining medical records early on is absolutely essential, and most especially when evaluating a medical malpractice claim.

- Be aware that medical records oftentimes can be lost, destroyed, or not produced in their entirety. When requesting records, as opposed to having them produced under a subpoena *duces tecum*, often medical providers do not produce the entire file, including critical information such as notations on the file jacket, or the client intake form/questionnaire. Be certain to coordinate with the medical providers to ensure that **all** of the file has been produced.
- Sometimes medical records are spread among different departments accordingly, be certain to check with the medical providers to determine if records are kept in multiple locations. Quite often medical providers have separate billing departments.
- Review medical records as they come in to determine what other medical records exist on your client. Medical records usually contain referrals from or to other medical providers. Many times, clients forget to provide the names of all medical providers.
- Obtain not just the medical records from the incident or accident, but **all** of the client's medical records. All too often, the contents of pre-morbid records can make or break the case.
- Obtain copies of actual X-rays, MRIs, CT scans, and pictures or video footage from surgery.
- Obtain and/or take pictures of orthopedic appliances, braces, casts, and any medical devices and/or implants.
- In fatality cases, obtain all reports from the Medical Examiner's office (medical examiner report, autopsy, and toxicology report).

Obtain Witness Interviews

1. **Interview the police officer.** Note that sometimes the first officer on the scene and the investigating officer are two different people. If the accident was recent, then the police officer

generally will have much more information than what is contained in the accident report or even his notes. The sooner he is interviewed in reference to the accident, the more he may be able to remember (his memory will fade with time given the number of accidents most police officers handle over the years). Also, it is not unusual for the police officer to die, disappear, or become injured. Police officers also can advise as to whether pictures were taken, where they are located in the accident file, and how to obtain copies.

2. Interview any and all eyewitnesses.

Even if eyewitnesses are unknown, sending an investigator out to canvas the area of the scene can produce useful information and unknown eyewitnesses. Canvass the scene at the same time of day as the accident or incident if possible, the investigator should videotape or audiotape the interview. This accomplishes several objectives:

- Videotapes and/or audiotapes are much more effective impeachment tools if the witness changes his or her story.
- Videotape can better enable the attorney to evaluate the witness and how he/she will present before the jury
- If it is not possible to videotape the witness, the investigator should at least try to obtain a picture of the witness.
- Note that many witnesses will not be as forthcoming if they are being taped.
- Does the witness wear corrective lenses? When did they last have their eyes examined?

3. Interview non-management, non-control group, or ex-employees of the corporate defendant.

4. Interview all rescue squad and emergency personnel before they forget the incident.

5. Obtain any and all media copy, whether newspaper, television, radio, internet, or otherwise.

These often can help in identifying and locating witnesses.

6. Interview witnesses that know your client.

This can reveal both helpful and hurtful information that you will want to know in advance. A thorough investigation is necessary to flush out a case you may not want to take. Gather information regarding your client by actually visiting the client's house, and finding out any and all information about the client's activities before and after the accident. Interview witnesses who live with your client at the residence.

Research the Defendant(s).

Thoroughly research and investigate the defendant(s). It is important to investigate any and

all information on the defendant(s) via:

- State Corporation Commission search
- Court records (especially records of other lawsuits).
- Online searches (for example, IQ Data Systems);
- Asset searches
- Land records
- Surveillance
- Assumed fictitious name certificates on file with local courts
- Business licenses on file with local governments

Summary

The investigation stage is where a practitioner should be able to determine if the case is a winner or a loser. To further assist in that regard, attached is a master checklist that can be used with every case file to properly gather and pursue the evidence.



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Evidentiary Checklist

General evidence applicable to all cases

- _____ Pictures and video footage of the accident or incident scene
- _____ Diagram of accident scene
- _____ Certified copies of building or land records
- _____ Pictures and video of the client's injuries
- _____ Accident or incident report
- _____ Workers' Compensation Notice of First Accident to Employer
- _____ OSHA report
- _____ DMV records
- _____ 911 records/tapes/call logs
- _____ EMT/Ambulance Report
- _____ Fire and rescue report
- _____ Client's recorded statement
- _____ Surveillance videos or video footage
- _____ Weather reports
- _____ Media article and/or news reports.

Evidence specific to motor vehicle accidents

- _____ Photographs of vehicles involved in crash
- _____ Inspection of vehicle
- _____ Salvaged parts of original vehicle
- _____ Photographs of client inside the vehicle
- _____ Costs and estimates of repairs

Tractor-trailer accidents

- _____ Black box/data systems information
- _____ Qualcom/satellite systems information
- _____ Make, model, ownership of tractor and trailer
- _____ Bills of lading to establish cargo
- _____ Driver or trip log
- _____ Pre-accident and inspection or repair records

Evidence specific to product liability cases

- _____ The actual product
- _____ At least one exemplar product
- _____ Warnings, labels and instructions
- _____ Packaging/shipping container
- _____ Invoice, receipt, or evidence of purchase
- _____ Photographs of product

Medical records

- _____ Records related to accident
- _____ Pre-morbid medical records
- _____ X-rays, MRIs, CT scans
- _____ Orthopedic appliances, braces, casts, medical devices, implants
- _____ Photographs of orthopedic appliances, braces, casts, medical devices, implants, etc.

Witness interviews

- _____ Police officer
- _____ Eyewitnesses (taped interviews; photos of witnesses)
- _____ All non-management or non-control group employees
- _____ Rescue squad and emergency personnel
- _____ Witnesses who know client
- _____ Visit client's home

Research defendant(s)

- _____ State Corporation Commission search
- _____ Court records
- _____ Online searches
- _____ Asset searches
- _____ Land records
- _____ Surveillance
- _____ Assumed and/or fictitious name certificates
- _____ Business licenses
- _____ UCC Records – Financing Statements