AVIATION PROTECTIVE ORDERS AND INSPECTION PROTOCOLS: INSPECTION PROTOCOL DEADLOCK AND WHAT TO DO ABOUT IT

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Some aviation manufacturers have begun to attempt to win their cases in the component part inspection stage of litigation. Rather than participate in the normal "disassemble and photograph" routine, they propose experiments early on known as "litigation tests" involving the function of the part. These are invariably tests that would alter the state of the evidence or even wash evidence away, making the plaintiff's case difficult to prove. Two competing test protocols are then born. The manufacturer asks the court to order the testing/experimentation. The plaintiff responds that the testing would destroy evidence. The plaintiff asks the court to order disassembly and photo-documentation or other worthwhile discovery. The other party responds that disassembly would affect the reliability and outcome of the experiment.

Even if you do not encounter the situation described above, from time to time you will request the opportunity to conduct a teardown or relevant test and the other party will allege that this amounts to destructive testing. You will be accused of proposing a protocol that would result in spoliation. Deadlock is defined as a situation wherein two or more competing actions make further progress impossible.

I. Avoid Inspection Protocol Deadlock

Use your best efforts to work out a compromise as to how testing will be conducted and the conditions under which it will occur. Avoiding testing deadlock is good litigation strategy for three main reasons. First, the typical judge cannot appreciate the complexity of the issues at this early stage. The stakes are quite high. Evidence of a failure mode can be as small as dust, and if you lose on this issue, the evidence may be forever lost. If the defendant manufacturer gets its way, this is spoliation without recourse. Third, in order to engage in the motion practice necessary to allow the judge to render a decision, you will be required to set forth your theories of causation. Your theories will likely be very primitive and uninformed because it is so early in the game and you have not been allowed to engage in the necessary discovery. After flushing out your causation theories while these theories are arguably in their weakest stage, the defendant manufacturer will use these theories against you later in litigation and at trial.

II. Draft a Winning Inspection Protocol

If protocol deadlock cannot be avoided, draft the inspection protocol very carefully, with your motion in mind. The inspection protocol that you propose should on its face contain all of the elements necessary to win the right to follow that protocol. Your winning inspection protocol should contain the following information.

- Describe in detail the planned testing procedures
- Set forth opportunities for the defendants to photograph or otherwise record the condition of the part prior to the testing or teardown
- Provide for the defendants and their experts to observe and record the procedures involved in the testing
- If possible, allow the defendants to conduct or participate in similar tests with a portion of the sample to be tested
- In your protocol, explain why testing is expected to lead to evidence crucial to the case
- Describe why there are no other adequate means of obtaining the evidence
- Wherever and whenever possible, set forth every condition or safeguard that will reduce or eliminate prejudice to the other party
- Allow the other party to videotape and/or audiotape the testing

III. Bring a Motion to Preserve Evidence and Be the First to Do So

Strategically, you are in a better position if you are moving to engage in a particular type of discovery rather than opposing some sort of discovery. The discovery rules are construed liberally to effectuate the full extent of their truth-seeking purpose. *See Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1959). In close cases, the balance must be struck in favor of allowing discovery. *Cameron v. District Court in and for First Judicial Dist.*, 193 Colo. 286, 565 P.2d 925 (1977). Under the court rules of most states, the party opposing discovery bears the burden of showing "good cause" that he or she is entitled to a protective order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *See, e.g.*, WASH. R. CIV. P. 36(c); OR. R. CIV. P. 36(c).

IV. Defeat Efforts by the Other Party to Engage in Litigation Testing

Litigation testing is an out-of-court experiment done to counter a claim made by a plaintiff. For instance, where a plaintiff alleges that the engine on the accident aircraft quit, the defendant may seek to install the allegedly defective part on an exemplar aircraft and then go ahead and take it for a spin to prove that the aircraft must have been under power. Litigation testing rarely meets the substantially similar requirement. Manufacturers' attempts to use "litigation testing" to provide their defenses is often excluded because of the variation between the test circumstances and the accident scenario. *Weaver v. Ford Motor Co.*, 382 F. Supp. 1068 (E.D. Pa. 1974) (manufacturer's test to disprove defect in stabilizer link bar assembly not substantially similar to facts of accident); *Carr v. Suzuki Motor Co.*, 280 Ark. 1, 655 S.W.2d 364 (1983) (manufacturer's test to disprove alleged defect in shock absorber found not substantially similar to facts of accident); *Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993); *Swajian v. General Motors Corp.*, 916 F.2d 31 (1st Cir. 1990); *Hall v. General Motors*, 647 F.2d 174 (1980) (test done to counter plaintiff's claim that defective drive shaft caused vehicle to careen out of control was not substantially similar).

Set forth the differences between the accident conditions and the litigation testing conditions. Here is an example:

Conditions For Experimental Flow Tests Proposed By Defendants	Real Life Crash Conditions
The engine will be bolted horizontally with no facility for altering its attitude.	The engine was subject to pitch (fore and aft tilt) and roll (side to side tilt).
The engine will be static.	The engine was subject to dynamic forces, turbulence, vertical acceleration induced by air conditions, and acceleration and deceleration.
The tests will be run at ambient temperature and ground level.	Defendants cannot replicate the density attitude (combination of temperature and air pressure).
There will be no ram air.	Air was forced into the engine, resulting in higher air pressure.
The engine will be bare.	The engine is encased in cowlings, i.e. higher air pressure.
The engine, fuel pumps, fuel delivery system, including filters, are not from the accident aircraft.	Notwithstanding the fact that all aircraft of similar make and model have the same engine and fuel delivery system, they are all different. It is well known that each carburetor must be adjusted to deal with these differences.

V. As Plaintiff, You Have the Burden of Proof and You Should Be Permitted to Preserve the Evidence to Put on Your Case

The plaintiff claiming injury has the burden of proof. Once a plaintiff has established a prima facie case, the burden shifts to the defendant to establish a defense. When balancing the factors to determine testing to allow, a court must take this into

consideration. Where there is no good reason for a test and where the test would result in hardship to a plaintiff's ability to put on his or her case, a court will not permit it. *See State ex rel. Remington Arms Co. v. Powers*, 552 P.2d 1150 (Okla. 1976).