

THE FUTURE IS NOW: USING TECHNOLOGY TO AVOID SPOILATION OF EVIDENCE AND ENHANCE TRIAL PRESENTATION



What is Spoliation?

- Derives from Latin: “*Omnia praesumuntur contra spoliatorem*”.
- Translation: “All things are presumed against the destroyer or wrongdoer”
- Legal Definition: “The destruction of evidence, which is relevant and may benefit a party in a lawsuit, done by another party in an intentional, willful or negligent manner”.
- VIDEO CLIP FROM OFFICE SPACE (NO AUDIO)
 - <https://www.bing.com/videos/search?q=movie+clip+of+office+space+smashing+printer&view=detail&mid=A721AFABDBADD50DB41DA721AFABDBADD50DB41D&FORM=VIRE>

Fire Scene Spoliation

- Kirk's Fire Investigation (6th ed):
- Spoliation of evidence is the destruction or material alteration of, or failure to save, evidence that could have been used by another in future litigation.
- It is the responsibility, however, of anyone who handles or examines evidence to see that evidence or documents are not lost, destroyed or changed in such a way that they cannot be analyzed or interpreted by someone else, whether the evidence is in a criminal or civil case.



Origins of Spoliation of Evidence in the Law

- **Armory v. Delamirie, 93 Eng Rep. 664 (1722)**
 - Plaintiff took a gemstone to a jeweler who refused to return the stone
 - Plaintiff sues but cannot prove his damages since the stone could not be appraised
 - Ruling: “The jury may infer the stone was of the finest quality possible, and award damages accordingly, because the stone was unavailable due to the defendants wrongful conduct”



Allstate Ins. Co. v. Sunbeam Corp., 865 F.Supp. 1267 (N.D. Ill. 1994) aff'd 53 F.3d 804 (7th Cir. 1995)

- Fire allegedly caused by a Sunbeam Gas grill
- Sunbeam was never placed on notice and offered opportunity to inspect the fire scene
- Investigator did not retain the grill or any parts for Sunbeam's evaluation
- Court dismissed case because Sunbeam was irreparably prejudiced because it was deprived of opportunity to inspect the evidence and its defense was materially weakened

Cumberland Ins. v. Delmarva Power

2016 WL 385209 (Md. App. 2016)

- Fire at an electrical meter
- Subrogating carrier sends notice letter to utility offering opportunity to inspect the fire scene but does not say the scene will be demolished
- House is demolished without utility inspecting. Meter panel and other evidence is preserved
- Case dismissed by court because defendant was not provided with the opportunity to inspect the fire scene – court found that fire scene was evidence which was intentionally destroyed even though destruction was not improperly motivated
- Utility's defense was so severely prejudice by the lack of opportunity to inspect the scene that the appropriate remedy was dismissal of a claim

Why Avoid Spoliation

- Sanctions
 - Dismissal of case
 - Preclusion of Expert Testimony or Evidence
 - Adverse Inference
- Weakens case
- Creates issues/defenses that could otherwise be avoided

How to avoid spoliation – Minimize Prejudice

- Avoiding spoliation is all about minimizing potential prejudice to other parties
- That should be the guiding principle for all decisions made regarding disturbance of the fire scene or evidence removal

How to avoid spoliation (cont...)

- Put interested parties on notice and invite them to inspect the fire scene
 - Evidence should remain in place if site is secure and there is no risk of additional damage.
 - Evidence should be removed and safeguarded if site cannot be properly secured, there is a possibility that the evidence will disappear, or there is a risk of additional damage.
- Document the fire scene
 - Photographs
 - Videotape
 - Diagrams
- Preserve relevant evidence for future inspection

Notice to Interested Parties

- Why put people on notice
- Who should you put on notice
- When should you put parties on notice
- How do you provide notice

Why Put Other Parties on Notice

- Provide opportunity to inspect the scene
- Provide opportunity to have input into evidence removed and method of collection
- Gather relevant information
- Get liability carriers involved and avoid potential coverage issues
- Minimize potential prejudice to other parties

Who to Put on Notice

- Potentially responsible third parties
- Other parties who have sustained damages and might be pursuing a claim
- Other interested parties

When to Put People on Notice

- As soon as possible under the specific circumstances
- Shotgun approach – put everyone who has ever touched the place on notice right off the bat
- Notice to select parties that you reasonably believe may have potential liability based on investigation to date
 - may require you to do an investigation that includes some minor disturbance of the fire scene depending on the degree of damage
 - Selective demo and dig out of collapsed building
 - Dig out of debris
 - Allows you to proceed faster and avoids having unnecessary parties bog down the inspection

How to Provide Notice

- Always in writing in some manner that allows confirmation of receipt, ie. Fed Ex, certified mail, fax
- Does not hurt to send it in multiple different ways
- Background of what occurred
 - Date and Loss Location
 - What happened – fire flood
 - Why might you be responsible
 - Fire starts in area of product manufactured by you
 - Fire starts in an area where

Mandatory Elements of Notice Letter

- A threat
 - We may pursue a claim against you if ...
 - We may sue you . . .
 - We believe you are responsible for damages
- Consequences of ignoring
 - Time period for responding or notice of date an inspection will occur and invitation to participate
 - Fire scene will be cleaned up (Cumberland Insurance Case)
 - Last opportunity to inspect the scene before clean up

VIA FACSIMILE (555-555-5555)
VIA FEDEX

Direct Fax 216-701-2368
dluccaro@cozen.com

Potential Defendant
100 Fully Liable Road
Negligence, PA

Re: Insured: Jason Karasinski
Loss Location: 7317 Sodus Point, NY
Date of Loss: 4/26/18
Claim No.: 123456

To Whom it May Concern:

Please be advised that this firm has been retained by Property Insurance Company, the insurer for Jason Karasinski, to represent its subrogation interests arising out of the above matter. On April 26, 2018, a fire erupted in a Mr. Karasinski's home in the area of an electrical panel. Our investigation has revealed that your company recently installed that electrical panel. Our investigation into the specific cause of the fire is still ongoing. Should it be determined that the fire was the result of your work, my client will be seeking reimbursement from you and/or your liability insurance carrier for any amount that it ultimately pays its insured for damage arising out of this matter. The total damage are expected to be in excess of \$1 million.

You should forward this letter to your liability insurance carrier as soon as possible and request that your carrier contact me to discuss this matter. Failure to promptly notify your liability insurance carrier of a potential legal claim could jeopardize your coverage under your liability policy.

The fire scene is presently preserved and available for inspection by you or your liability carrier. If you or your liability carrier is interested in inspecting the fire scene in its current condition, you must contact me within the next week to make arrangements to inspect the scene. If I do not hear from you, your liability insurance carrier or other representative within that period of time, I will assume that you are not interested in inspecting the fire scene and full remediation of the scene will commence. The panel box and any other evidence deemed pertinent by my client's representatives will be removed and preserved for future inspection.

Thank you for your attention to this letter.

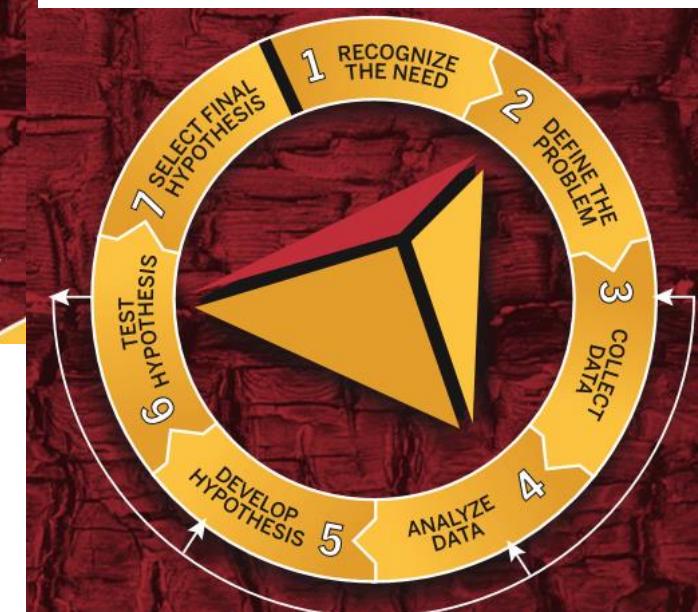
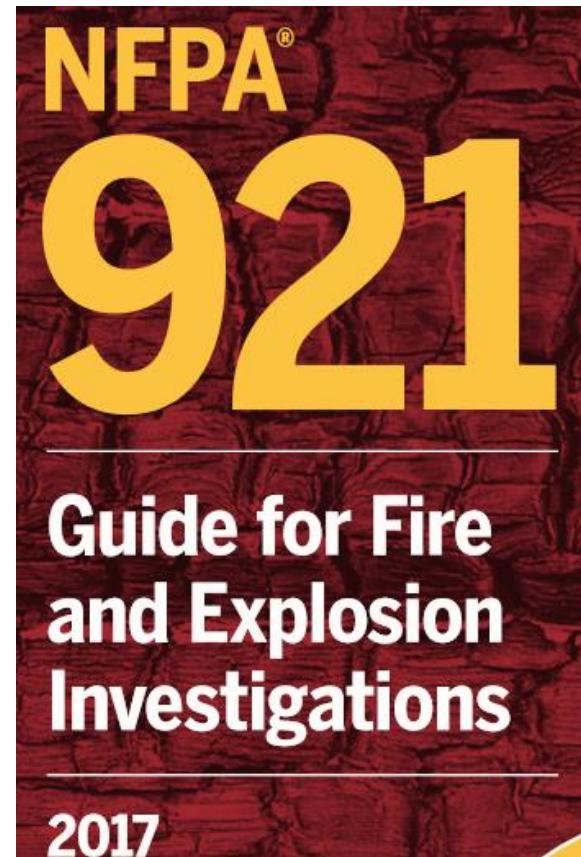
Very truly yours,

Evidence Collection and Preservation

- What evidence should be saved
- Why save the evidence
- Documenting removal
- Who decides what to save
- Storage of evidence

NFPA 921 Definition of Evidence

- NFPA 921 Sec 17.2.1 provides:
Physical evidence is any evidence physical or tangible item that tends to prove or disprove a particular fact or issue. Physical evidence at the fire scene may be relevant to issues of the origin, cause, spread, or the responsibility for the fire.



What Evidence Should be Saved

- Evidence of cause
- Alternative ignition sources in area of origin
- Exemplars or examples of other poor workmanship by defendant
- Other relevant evidence
- If interested parties are not there, you should err on the side of taking more evidence
- **NO MATTER HOW CONFIDENT YOUR EXPERT IS IN THE CAUSE,
WHATEVER YOU DON'T SAVE WILL BECOME AN ISSUE**

Why Save Evidence

- Avoid Spoliation Sanctions
- Additional laboratory testing
- Presentation at Trial
- **NO MATTER HOW CONFIDENT YOUR EXPERT IS IN THE CAUSE,
WHATEVER YOU DON'T SAVE WILL BECOME AN ISSUE**

Documenting Evidence Removal

- Photograph or videotape
- Evidence diagrams – note where is came from
- Document all stages of the process
- Properly tag and identify evidence
- Create proper chain of custody

Other Evidence Considerations

- Who decides what is saved
- Who decides how evidence is removed
- Who stores the evidence
- Who pays for evidence storage

NEW Technology for Documenting Fire Scene and Evidence Removal

- Traditional Technology
 - Photographs, videotape, sketches
- New Technology
 - 3d Imaging
 - Drone Imaging
 - On Scene xray equipment
 - Automated evidence location documentation programs – Magicplan
 - Chimney Cameras

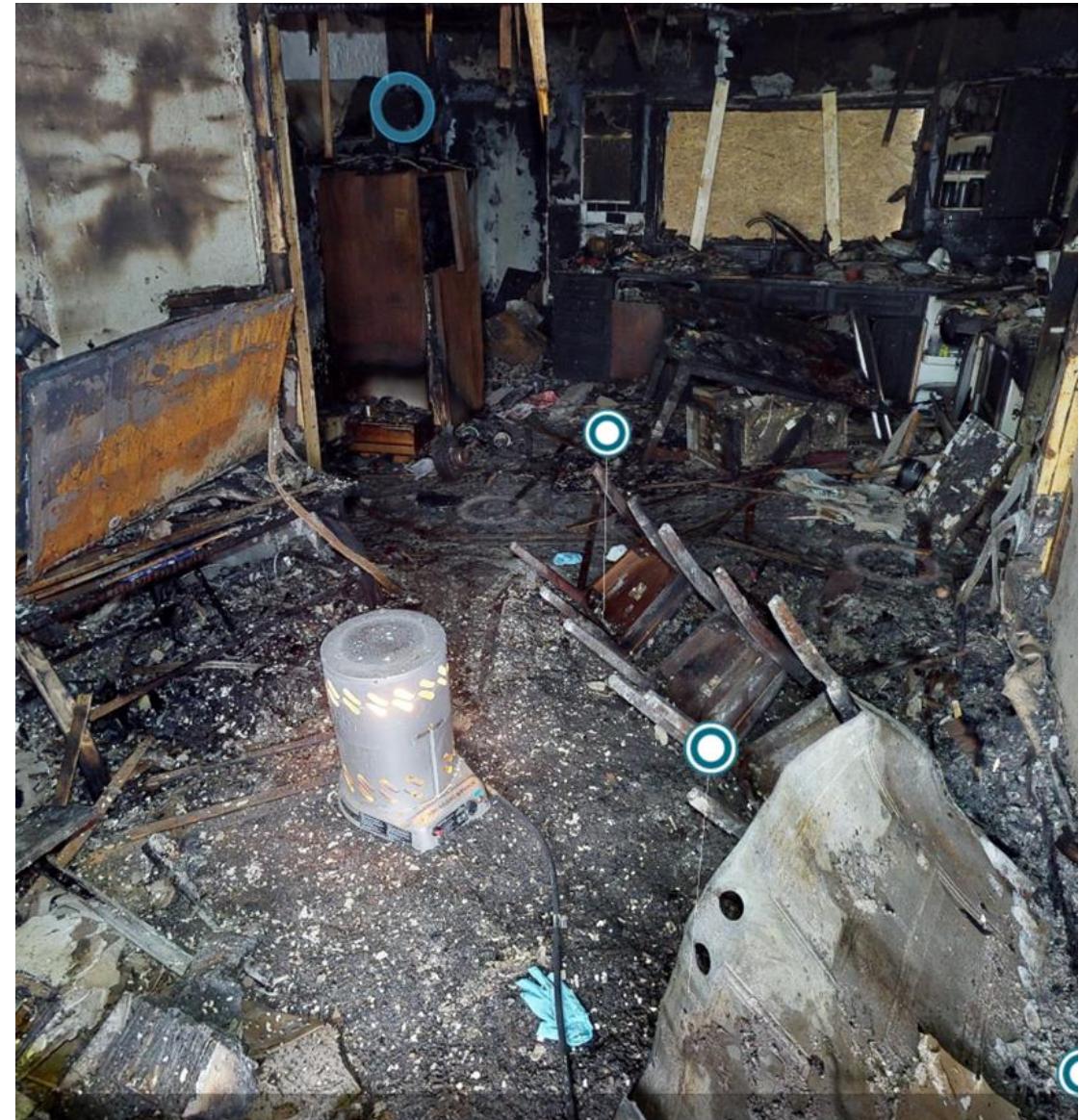
How can this technology help

- Assist in cause and origin determination
- Avoid spoliation
- Reduce potential prejudice to parties not present
- Trial Exhibits and Presentation
- Reduce Costs

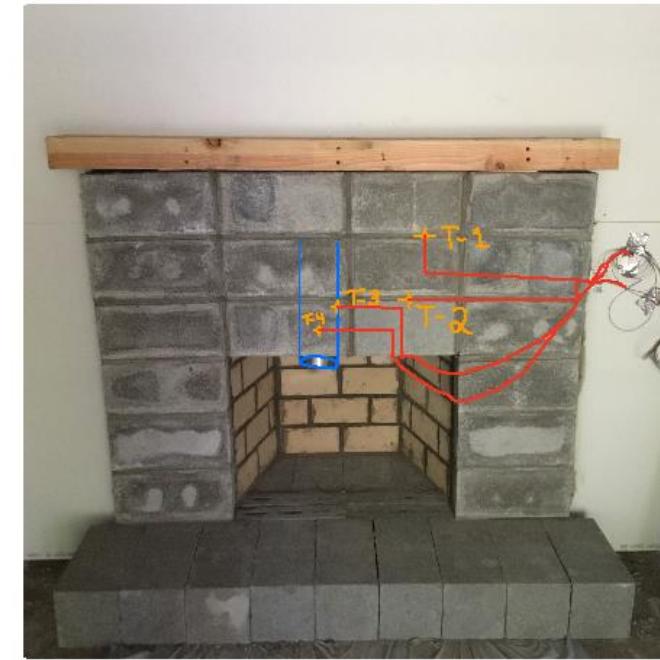
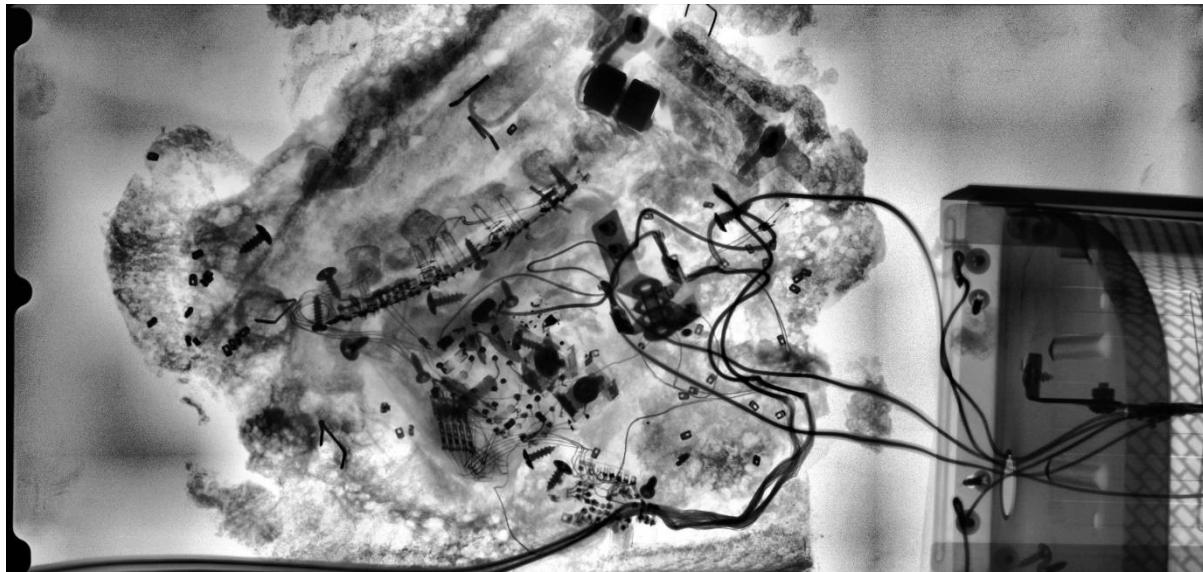
Drone Usage(Large Scene Documentation)



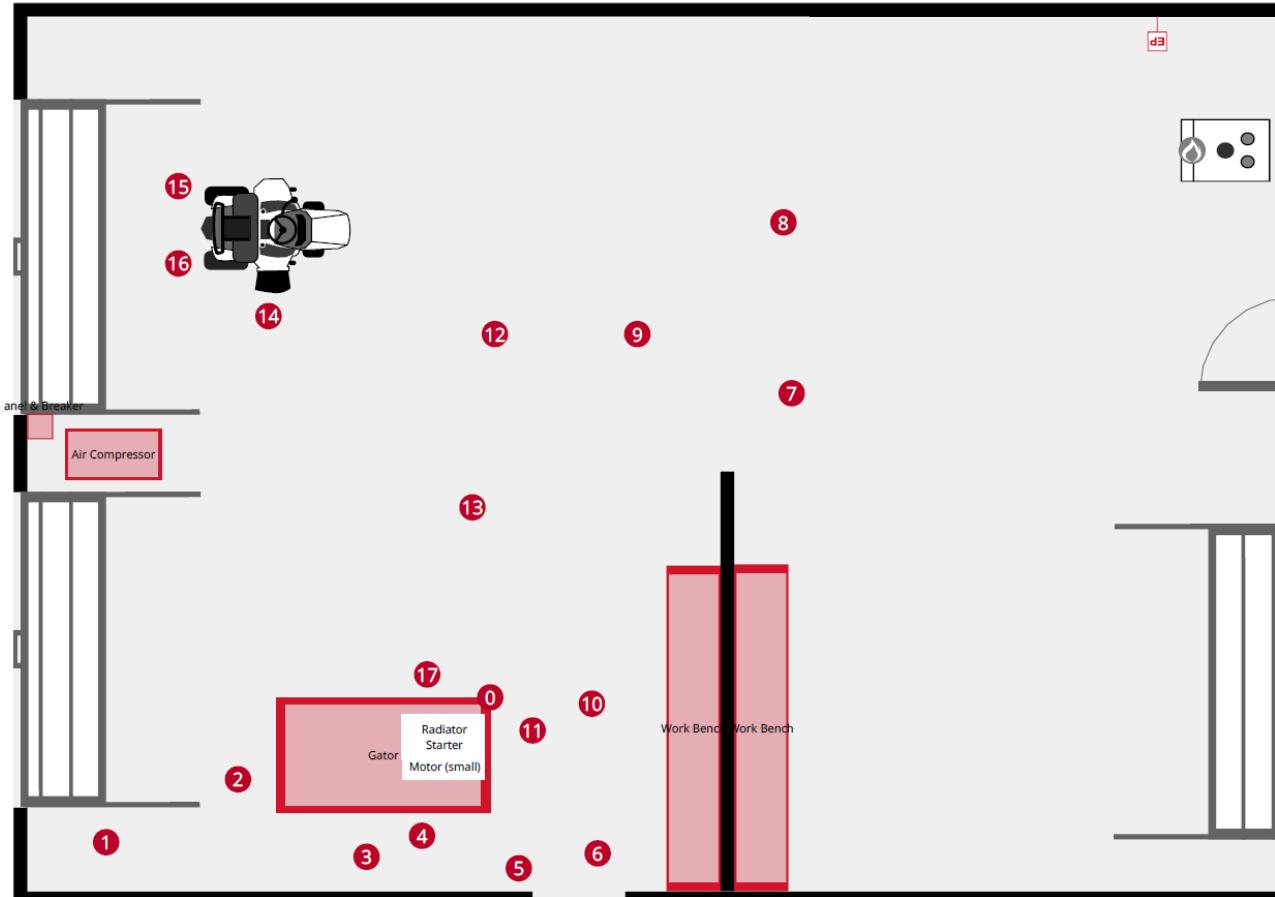
3D Video Imaging



Real Time X-Ray & Testing



Automated Evidence Location Documentation and Diagramming - Magicpoint





Gator



1



1



2



2



Chimney Inspections with Chim Scan



Considerations for Evidence Storage

- Security of Facility
- Access to Facility
- Examination Space and Equipment
- Specialized Evidence Facilities
- Remember that evidence spoliation can occur even after it is preserved from the fire scene
 - Damage to evidence
 - Alteration of evidence with proper notice & documentation
 - Disappearance or inadvertent disposal of evidence.

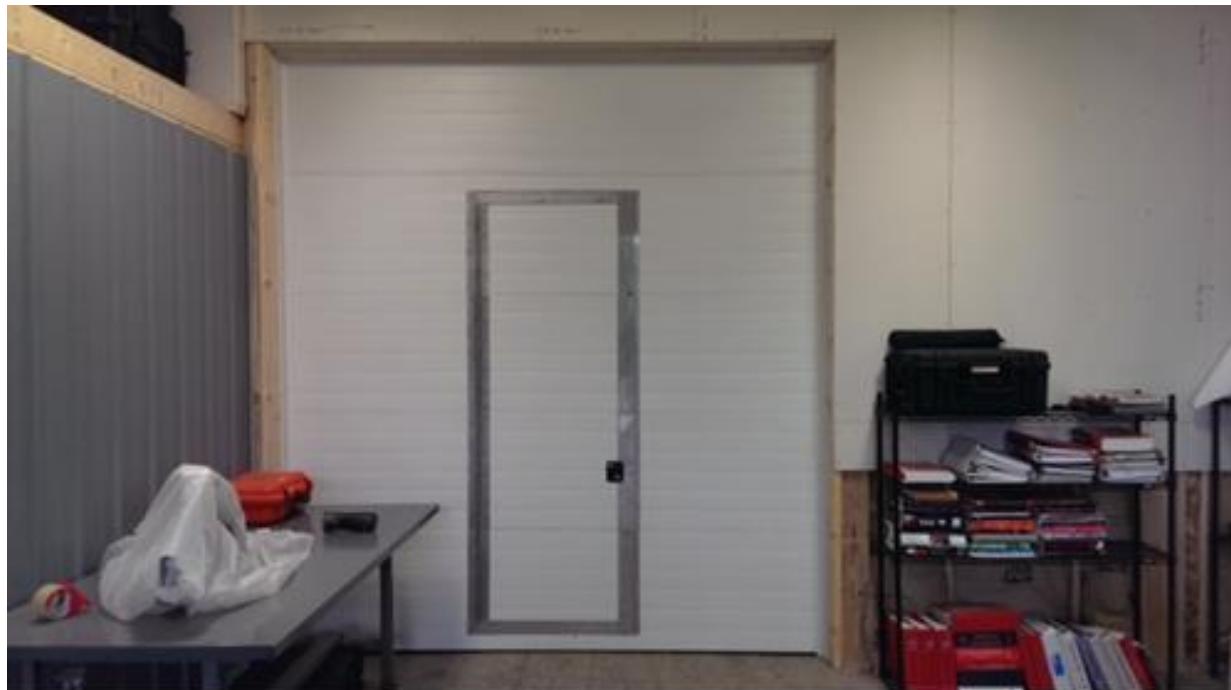
Specialty Evidence Storage Facilities

- Growth area in recent years is specialized evidence storage
- Benefits
 - Full time evidence technician
 - Secure facilities with restricted access to evidence
 - Examination space and equipment to facilitate evidence exams without going to other facilities
 - Assistance in recovery and transportation of evidence – may be cheaper than having your expert do it
- Additional costs up front may save you money in the long run

Use of Technology for Evidence Exams

- Real time cameras to watch exams remotely
 - Insert video of Mock Exam
- Real time xray equipment
- 3d Imaging Stereo microscope

24hr Secure Evidence Storage & Transportation



3D Imaging Stereo Microscope



Evidence Disposition

- Evidence disposal authorization should be in writing
- When to dispose of evidence
 - When case is settled and money has been received
 - When investigation is closed and no subrogation claims to pursue or liability claims to defend
 - As agreed by all interested parties
- Who to notify
 - Other interested parties
 - Insureds
- May need to offer other parties the opportunity to take possession of evidence or take financial responsibility for continued storage

Questions?



Contact Information

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