ISSUE THREE TOPIC:

FORENSICS

I'm currently working with a law firm investigating the failure of a large tree, which resulted in a loss of life. There are several areas of interest in both the stump and lower trunk of the tree. I would like to retain these sections for examination and possibly exhibits if the issue is litigated. My problem is these pieces are big! I also understand the SPP states I may have to keep these pieces for up to five years. How can I do this? How do I not run the risk of becoming responsible for storage costs years after my investigation is over?

It seems that you have chosen to make this your problem. Have the attorney store the pieces. The attorney should also pay for moving the pieces to the storage location. That said, do you really need to keep these? Did the attorney tell you to keep them? Won't pictures be satisfactory? The opposing side will probably like to see these pieces on the site. If you go to trial, how will you get these big pieces into court?

—Gary Mullane, RCA #241

Let's separate the issues. First, what does SPP really say? §4.1(F) says copies of written reports and other records of your assignments. It does not say evidence or particularly large and bulky evidence. In my opinion SPP creates no duty for you to incur un-reimbursed "space" costs for warehousing bulky evidence. Incidentally, it could be more than five years because it could take years just to get to trial and you have to keep records up to two years after final resolution (meaning all appeals, etc.) which might be well after the five-year period after your assignment is over. Second—and this might be first in your decision process—what evidence is meaningful, necessary and useful? This is your duty to determine under §4.1(C-D) and don't forget §3.1 and §3.2. You cannot avoid gathering data to escape a possible duty to retain it. But you could technically find it "unreasonable to gather or make available" if not compensated for it, and disclose that limitation under §4.1(D)(i). You really need to discuss the costs of any investigation, relative to the potential merit of those costs, with your client or counsel when defining (or re-defining) the assignment (see §4.3(F)(ii)). Even if you determine these bulky samples are useful, you have no duty to gather and warehouse them if your are not adequately paid for that (see §4.3(A)) and you and your client both need to know those warehousing costs are a future unknown. Also, consider if the evidence requires climate-controlled or at least dry storage. A rotted stump section out behind the barn may be of little use. This all adds to cost. Third—and this might be a subset of the second—would photos, sketches, scans, narrative descriptions and so forth be an acceptable substitute for the bulky evidence, at least after trial? Let counsel decide. Fourth, consider the "chain of custody," particularly if this is or becomes a criminal case. Counsel may think it's easier to have you deal with the bulky, dirty junk but what's best for the case?

—Scott Cullen, RCA #348

I would suggest you consult with the attorney handling the case as to whether there is value in retaining the actual pieces. It may be adequate to photograph and document the information with measurements and details rather than retain the actual pieces. If having the actual pieces is vital to the case and he thinks there is value, then charge whatever it costs to secure the pieces, store them, and transport them to court. It may be very unlikely that you can present these items to a judge and jury if you do keep them. The logistics of bringing an exhibit of this type to court could be overwhelming and something the court just doesn't want to contend with. By the way, it has been my experience that once you tag something as an exhibit, it becomes the property of the court. I am not sure they are going to want to handle something like that. It will likely depend on the amount of money involved as to whether it is worth it.

—Don Zimar, RCA #446

Consider contractually binding your client(s) to store and preserve said samples, and then consult an attorney regarding the appropriate current standard for evidence maintenance. Remember the law of our land is a living document, subject to interpretation and change as needed; this is one time when your attorney's fees may be money well spent.

—Charlie Drechsler

The easiest approach is to show the costs of storage in your contract for the five years minimum time and get paid that cost in your first invoice. Another, could be to ask the attorney

involved how they store case documents and exhibits, and ask them to do the storage with their items. Another that was discussed at the ASCA Academy is to take good pictures and/or a video of the samples for long-term records, and put in your contract that it is cost prohibitive to store these samples, so you will not be responsible for the storage.

These types of issues are always scary when I think of having to get a client to agree to the additional costs, but if they are professional about doing litigation, then they know what reasonable costs are involved and the actual client, or party in the case, should be informed by the attorney(s) about these costs up front. I don't like to be left asking for more money for costs like these at the end of a litigation, so I negotiate them once I have done an initial site inspection/visit.

—John Harris

It is unlikely that the forensic value of the lower trunk and stump would remain constant over time since the decay that is in them would be ongoing. The samples would have to be frozen or treated chemically to preserve them and the cost would certainly be high. Since the pieces are big, they would make for clumsy exhibits in a court case. If you are charged with preservation of the samples, get paid up front. A better approach may be to do a thorough examination and analysis of the samples with lots of documentation (i.e. pictures, lab tests, soundness tests, etc.) and package the information into a formal report. These can be blown up as exhibits, they will retain forensic integrity, and they are much easier to move around and easier to store.

—Marty Shaw

I have a very simple solution: Why not place this burden where it belongs—onto the client/attorney??? Why do we consultants feel that we should shoulder all responsibilities, research, documentation, etc. when much of it should be the attorney's job???

The consultant should recommend a tree contractor service that can transport, under the consultant's supervision and with photographs of the process, the large pieces of evidence to a storage facility the attorney will rent for as long as he or she deems necessary. There are numerous such mini-warehouses in most cities that are reasonable, and the pieces will be out of the weather and protected.

—Lew Bloch RCA #297

This should be discussed with your client or client-attorney. Make the long-term storage of the evidence their problem. Indicate that if you have to store the wood for a long time that you expect to be paid now for future costs. If you have to rent storage space, this can be determined easily. One issue to keep in mind is the possible deterioration of the evidence. The decay won't stop, even in a dry storage shed, so be sure all the important information is recorded, including photographs.

—Russ Carlson, RCA #354

You are working for the law firm. Explain to them what you would like to do and see if they want you to do that. It's their responsibility to decide if this is practical and/or feasible. If they decide they wish to go this route, it is also their responsibility to store the evidence.

—Robert Walton, RCA #394

Several options. Hire a contractor to separate the minimum pieces necessary. Hire somebody to load the identified pieces, or rent a truck with a lift gate, and move to a storage locker. There are also services that provide evidence storage for a fee. In all cases, thorough documentation of the entire process is critical. Also, make sure you cover yourself as far as payment and specifics of responsibility. It would not be inappropriate to be paid in advance for the estimated storage period.

—Torrey Young, RCA #282

Regarding storage: cut smaller cross sections. Use photographs and video before cross-sectioning. A rotting piece of wood will need to be sealed in shrink wrap to preserve. The fees for storage and handling are part of costs in the case. These are billable expenses. It sounds clear that selecting the array of intelligence gathering biases the findings. These are my thoughts.

—Wayne Shannon

I have been consulting for several years and am still unsure of how much information I should be gathering during the investigation portion of an assignment. I have investigated what I consider smaller issues, yet as I near the reporting phase, I find myself wishing I had collected more extensive data. Conversely, on what I feel should be a major investigation, I am supplied with minimum data from the party retaining my services. Is there any rule of thumb on the amount of data that should be collected? Do I have the right to insist on being provided data from a client?

Get as much information as you can, that you feel is important. Second guessing ourselves is just part of the fun of doing investigative work. Take lots of pictures. Create your report as soon after as possible in case you want to go back to the site. Talk to the attorney about the extent of your investigation. I don't know about any rights you have regarding data, but it is in the best interest of the client that they provide you with what they have. If you become frustrated or feel they are holding back pertinent info, then walk away from the assignment.

—Gary Mullane, RCA #241

It is often difficult to know what information will be necessary or useful until after you get into the investigation—perhaps well into the investigation. This may be a function of how experienced you are with the particular type of investigation but is never completely clear. What you can do up front is become as clear as you can on what the real issues are, what questions need to be answered and to what level of certainty or reliability. SPP §4.1(C)(i) is very instructive, read it. In my opinion the same instruction applies to §4.1(D). My initial "scope of services" description often notes that the ultimate scope cannot be clear until after an initial investigation. A senior colleague often provides a "proposal to develop a proposal."

My own rule of thumb is to gather more rather than less information when on a site, if there is any chance that information will not be avail-

able on a future visit or is likely to be changed on a future visit. This also turns out to be efficient in many cases, avoiding an extra field visit to get missing pieces of a puzzle. So, difficulty or risk in gathering more later must be a consideration.

In the end you have to be comfortable with the reliability of your conclusions, opinions or recommendations. So, only you can decide what information you need. You certainly have the right to insist on being given available information. You have a duty to inform a client what information you think you need to gather. If there is not budget to gather it, it is not available, or it is withheld from you, then you need to disclose that (§4.1(D)(i)).

In my experience, it is much better to say when asked (particularly in deposition or cross-examination) that you collected information and found it insignificant than it is to say that you neglected to consider it or ignored it. In one case I was asked—years after the field work—if there was snow on the ground which might have limited my ability to observe conditions. It had been winter, my field notes didn't say anything about snow, but did not say there was no snow, so I had to answer that I could not recall. Better to note explicitly even things that seem insignificant at the time.

There is a flip side to this. At some point you have to stop gathering information and move forward. There is a diminishing return in reliability for the time and effort. There can be "information overload" or "analysis paralysis." But your experience and judgment will tell you when things feel "missing" or start to feel like clutter. If that's unclear, maybe err on the collect more side.

—Scott Cullen, RCA #348

The amount of data depends on the scope of the assignment. You are obligated to collect as much data as necessary to fulfill that scope. If you are writing the report and determine you overlooked something, you may need to return to the site to add the missing data. I know of no rules of thumb, except getting the data necessary to fulfill your role as defined. You have the right to ask for any information you deem necessary to complete your task. A good client is going to want to provide anything that will facilitate your role. If the client is reluctant to provide you with information, they may feel you are going beyond the assignment or they may not be sincere about what they are asking. I have never experienced the latter. I have seen consulting reports that go well beyond what was defined as the assignment in the report. This may cause trouble for the client if he cannot use the report. There is no easy answer to these questions. The consultant must determine, based on each assignment, what is or isn't necessary. He must also be able to defend why he did or didn't collect certain pieces of data. If it is relevant to the assignment, collect it. If you aren't sure, there is generally little risk in taking it anyway, even if you don't use it. Although, in some cases there may be significant exceptions. Ultimately, you must first define exactly what your role is and then act accordingly. A good example is asking the client for a survey of the location of the tree. Without it, you must be careful how you identify the location. We are not typically surveyors, so we can say it appeared to be Mr. Jones' tree. But without a survey, we cannot confirm ownership or precise location. It is reasonable to request it from the client, but we may need to qualify our opinions without it, if the client does not provide for a survey.

—Don Zimar, RCA #446

I suggest reading the available forms and checklists within our industry's published standards, comparing notes with your mentors and peers in ASCA, and ultimately synthesizing a worksheet that will yield the results you can be most proud of. The second concern speaks to prerogative; if clients don't satisfy your minimum criteria (i.e., forthcoming with information, ethical in nature, conduct and appearance) let them know your concerns. If a lack of integrity persists, decide to let them go before you've committed yourself to something you won't be comfortable with. Ultimately, your reputation will precede you...make sure it's one that opens doors, not closes them.

—Charlie Drechsler

For me, the experience of collecting too little or too much has resulted in me collecting too much as a standard. It happens too many times that I never know for sure that I only need so much information. Then, I am caught with not having recorded it later when I am asked about a measurement or the area around the tree, etc. I always budget a project with a client, whether an attorney or the actual party in a lawsuit, once I have gotten the basic scope and situation information from them and have visited the location. Then I have a "feel" for what they thought it would cost to have an Expert versus what I think being an Expert for them will cost. I do make limited inspections or investigations when cost is a major concern, but then I am very specific in my contract about the level of my investigation, what was or was not included on site, and the limits of my analysis and testing (which limits what opinions and recommendations I can provide them).

In many lawsuits or damage inspections, I do have client information that is REQUIRED. A site plan or landscape plan is necessary sometimes, photos of the location before the damage are necessary sometimes, and maintenance contracts for the on site maintenance are necessary sometimes. If a client does not want to provide the minimum documents or information so that I can form a definite opinion, then I don't take the project. I don't want to be held responsible for making an opinion in a case or project without being able to defend what I based it on, if questioned. Not everyone needs the same amount of detail to be comfortable making an opinion, so I would suggest that you need to consider as much about what YOU need to be defensible versus what someone else requires.

—John Harris

Always collect as much information as you need to complete the assignment. I begin to collect information from the first conversation so that I can get a feel for what is needed. If the original scope and limits you establish in your original agreement are inadequate, you can go back to the client and ask for a broader scope. If they do not agree, you can complete the first assignment (which may be inconclusive) and walk away. As far as the client providing you information, I think you have to determine if the client is unwilling or if they are unable to supply information. If a client is unwilling to be transparent in an assignment, I would question their motives for hiring me. If they are just looking for a hired gun to say what they want me to say, then it could hurt my reputation and I could end up looking very silly. If I found out that was the case, I would get them to supply the information they are withholding or withdraw from the assignment. If they are unable

to supply information, I work with what is there. In my experience, it is far better to have more documentation than you will need in the report. Then you can use the best data and samples that support your conclusion. Don't feel like you have to use everything you obtain in the report as long as you remain objective and independent. You must not be paid to reach a certain conclusion.

—Marty Shaw

I have been consulting since the mid 80s and ASCA-registered since 1989 and still find myself checking in with myself on the relevance of the degree to which I investigate. No matter what the contractual arrangement you have with your client, if you accept the engagement, you must do whatever it takes to represent your client's interests. If you quote a job and have a fixed budget, hopefully you've done your homework beforehand, and based on a cost benefit analysis have determined the level of detail required relative to the nature of the case and just where it may end up (hearing, court, etc.). Obviously, if your work will be examined under the stereo-microscope of litigation, then you will want to spend all the investigative time necessary to be confident that no one can find anything pertinent that you haven't, and that no one can find a thin entering wedge in you expert reporting or testimony.

In our firm there are three consulting arborists and an urban forester. Most of the work I do is limited to tree preservation relative to urban development (mostly inner city), tree risk assessment and forensic arboriculture. I decided a long time ago to simply assume that whatever I do is going to end up at a hearing or in court and therefore every scrap of relevant information counts; every word will be looked at as a potential weak thread in the fabric of the case I make. I don't want to be standing defending my report while agonizing over the fact that I know in the back of my mind that I rushed the investigation. As I see it, the amount of investigation is all a matter of dollars and cents...I am not about to run the risk of compromising my professional credibility for the future by not charging enough to do the job well.

If you look at it the other way, if I were a developer who just realized that I'd been denied a multi-million dollar development application with the city because my consulting arborist "cheaped-out" on the investigation, I would probably be looking at a claim against that arborist.

Last word of advice...I know it's a common cliche but it's true....be very careful to limit the scope of your engagement to no more than is absolutely necessary to diligently represent your client's interests, and always control the environment in which you conduct your investigations, research and reporting. On a site, you need time to yourself without someone looking over your shoulder and offering their "expertise", or driving you around the golf course in a golf cart at 40 mph pointing at trees they want you to "tree risk assess".....as you fly by. Furthermore, I am a strong advocate of the KISS principle...keep it simple....

—Ian W. Bruce, RCA #259

Another simple solution: of course you have the right to insist on being provided ALL pertinent data from the client, and some that may seem un-pertinent. There is no need for any rule of thumb here, the more data received, the more complete and better the report will be. If you are uncomfortable with the lack of data or information received, this should be conveyed to the client, and if still unsatisfied, put this lack of proper data in the report or refuse to write it. Quite often, I am sent very large packages of too much stuff like medical records, living expenses, repair bills, etc. and depositions that may not be necessary for me to read. But, you never know when you might glom on to some interesting forensics in them that could help or harm the case. Anyhoo, you get paid (in advance, I hope) for reading or scanning through all that is sent to you.

—Lew Bloch RCA #297

This is not uncommon in larger investigations. The simple answer is to collect all the information and data. Of course, you have to temper this with the assignment, and what you think will really be needed. Experience is probably the best guide, but experience comes from learning from mistakes.

If you think you have not been given all the information by your client, ask for it. Point out that you can't do a thorough job without all the facts, and that not having the information could affect how well you can present your investigation. It could negatively affect the outcome. If they say you don't need it or they won't provide information you know they have, consider withdrawing, or simply be prepared to do the best you can with what you have. You can insist, but they don't have to comply.

—Russ Carlson, RCA #354

The amount of information collected depends on the assignment. The assignment should be spelled out (preferably in writing) by the client beforehand. This dictates the facts you will try to collect to fulfill that assignment. The cost of procedures to collect your information may also be an obstacle to the client who may not want to go to the expense of lab work, root excavation, resistographs, etc. If you feel tests, further time, etc. could provide information that may alter your opinion, this should be noted under limitations in the beginning of your report.

—Robert Walton, RCA #394

The nature of the assignment dictates, primarily, the degree of investigation and collection required. Thereafter, many limitations may occur, such as client direction, budget, availability of evidence, property access, etc. There is no method that can serve as a standard for every situation. You must decide, with input from appropriate project principals, what degree of investigation is both required and allowed. Then, you must decide if you are comfortable taking the project on within that scope. Finally, always be sure to cite the limitations and ramifications of them within your report or opinion.

—Torrey Young, RCA #282

The question comes up as to what the relationship is between the client and the consulting arborist: Expert witness? Consultant? Attorney, in fact? Arborist? It sounds like you are being paid as an expert witness to testify on exactly what they want to argue, and nothing more. This protects and builds their case, although it may not provide all sides to the scenario. Maybe offering them a full consultation with all the data possible would help their case more than they think. Good luck.

—Wayne Shannon