

IAQ & The Law

Do's, Don'ts, Ins and Outs of Microbial Assessment Reporting

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As an attorney, I have had the opportunity to review and analyze countless microbial assessment reports from many different testing companies and testing laboratories. These reports represent a dizzying variety of form, content and methods.

A report is not only evidence of the condition of a particular property but also of the mold assessor's ability to inspect a property and to determine the recommended protocols. It is, therefore, incumbent upon the mold assessor to produce a complete and thorough product based on an understanding of the audience that will read and interpret the information set out in the report.

Before delving into the form of a report itself, I want to stress the importance of one of the most overlooked aspects of the property investigation process.

Discovery of the Report

More often than not, a client on the building management side will come to me with a mold assessment report in hand, usually in a panic as to the terrible level of contamination present in the property. The client has already made mistake No. 1 as the report, warts and all, is generally "discoverable" by the opposing party. Upon receipt of a valid subpoena for such documents, the report would have to be disclosed to the other side. While the risk of disclosure is more often greater on the defense side, disadvantages of disclosure also appear on the plaintiff's side as well.

We generally recommend that our clients engage a mold assessor or other experts through counsel and communicate with the assessor solely through that counsel. Lawyers often engage experts on a client's behalf in order to take the benefit of what is commonly referred to as the "work product doctrine" or "work product rule." While the application of the rule and its various exceptions differ from state to state, the simple principle of the rule is that information obtained by a lawyer in investigation or preparation for litigation is protected from discovery by the opposing party.

It is generally not necessary that litigation actually be filed or even threatened for the benefits of the work product doctrine to apply.

Clearly, the work product doctrine can be of great importance when a mold assessor finds the proverbial smoking gun for the client who pulled the trigger. This report will likely remain in the lawyer's file and that expert may not be called to testify. If the client engaged the mold assessor, the client may have effectively shot himself in the foot with his own smoking gun.

Let the Lawyer Do the Talking

More often than that smoking gun, a client may receive a report that is incomplete or contains either unclear or inaccurate statements that could later harm his or her case or reduce the credibility of an expert. A report omitting critical facts, failing to note evidence discovered or improperly downplaying important data may become a trap for the expert witness.

Lawyers, rather than the expert witness, are better charged with determining how language may be interpreted. This is not to say that a mold assessor should ever alter the facts or his or her professional opinion at the direction of a lawyer. We all know, however, that how something is said is often just as important as what is said. A lawyer may look at a draft report, strike inflammatory hyperbole and let the data speak for themselves.

Reports that recognize the twofold purpose of solving a contamination problem and potentially becoming evidence generally are usually the best crafted. It is incumbent upon mold assessors, particularly given the extent of litigation involving mold and other contaminants, to make sure that their clients understand the role of a skilled mold lawyer and the work product doctrine.

Form of the Report

As to the form of reports themselves, most that I have reviewed include, in one form or another, the following sections:

1. **Background information:** Generally accounts for the historical basis for the water event that led to the mold or other contamination.

2. **Description of the sampling method**

and protocols implemented: This may vary from a general description of specific areas tested and whether air samples, swab samples or other tests were made, but it also may include the reasons for using one test versus another sampling methods.

3. **Data reports:** The mold assessment report usually includes copies of the actual lab reports provided in a tabular format.

4. **Conclusions or executive summary:** This section usually contains the expert's opinion as to the extent of the contamination and an interpretation of the data.

5. **Recommended remediation protocols:** This section may include the procedures for the remediator to follow in cleaning up the contamination.

The background information section and the scope of sampling are often critical elements in settlement negotiations or in litigation. For example, very few reports provided to me include data as to the relative humidity in a building or a unit at the time the tests were taken. The operating function of the air-conditioning system is often ignored, despite the fact that this could be of significant concern in identifying the ultimate source of humidity or moisture in a building. Because the conditions may change from the date of the inspection, and because conditions may later be "corrected," it is important that the conditions existing at the time of testing be preserved.

In addition to indoor conditions, we often see reports that show outside concentrations of spores at levels that seem either extraordinarily elevated or extremely low. Outdoor weather conditions, for example, extensive or significant rainfall, can severely impact the counts. If this information is not reported, the evidence may be artificially skewed in favor of or against the client. If an outside count is elevated due to a weather event, a high interior count may not appear as bad in comparison. This may undercut a plaintiff with a serious problem or cause a decision to forego remediation to be erroneously made. It is very important from a lawyer's perspective that all reasonable information be provided that could affect either the interpretation of a report or the likelihood of whether a building, condominium unit or apartment is significantly contaminated. In my opinion, this is one of the most glaring omissions in most mold assessment reports.

In the testing section of a report, many assessors fail to identify the reasoning behind sampling choices. For example, nonviable air samples are more frequently taken instead of a culture sample, mainly due to cost and timing. A complete report should indicate the effect of the cost savings and time savings or identify that, in the case of a particular condition, the results would not matter. In situations where identifying viable cultures could be important, such as in dealing with healthcare facilities, these tests should often be performed. Most reports do an inadequate job of identifying the reasons in selecting a particular method for a particular context. Of late, there seems to be a push to do more testing for microbial volatile organic compounds without a real benefit from this expensive test.

One problem that is not totally within the preview of a mold assessor is the laboratory data reports. I have noted that the format of reports, the information imparted, and even the consistency between laboratories are all, unfortunately, variable. This presents many concerns to the lawyer as consistency is necessary to argue whether contamination at a serious level exists and whether remediation is required. The data presented often results in an apples-and-oranges problem as reports from different assessors or different labs may not be easily compared. Without being able to determine if a report is faulty or whether a cleanup is successful, disputes may not be readily resolved. The question of lab results and consistency between laboratories is beyond the scope of this particular article.

Making Recommendations

The most important part of the report for most clients – and the riskiest from an assessor's point of view – is often the recommendations and protocols for remediation. These recommendations determine the costs of remediation and, therefore, determine a large part of the recoverable damages. The mold assessor is in a position much like that of an architect. The architect is responsible for the design elements of his plans, the compliance of the plans with applicable building codes, good design practices and the internal integrity of the plans to achieve the owner's goals. A mold assessor is responsible for protocols compliance with recognized guidelines and standards, their completeness in eliminating contamination and for identifying unknown conditions that may warrant further investigation. The mold remediator is generally responsible only to follow the assessor's recommendations. An assessor may therefore become the lightning rod for the failure of his or her protocols and recommendations to cure the problem. This has two-prong liability for the assessor. First, the client may be unhappy at spending more than it expected to solve the contamination problem. Second, the failure of the recommendations may taint the testimony of the assessor as an expert or render the report unreliable as a means to recoup the costs of remediation.

A skilled assessor would include in its recommendations caveats on the success or a particular remediation regime until further testing can be accomplished. There is also a trend in creating "performance-based" protocols, which seek a result rather than a "prescriptive" approach that lays out the procedures in detail. This new trend is of concern to a lawyer defending or instituting litigation on a client's behalf, as the assessor generally makes a better expert than does the remediator. If the assessor, as an expert, cannot describe the details of the procedures to remediate a mold problem, the assessor may not be an acceptable witness. Knowing the goals of a particular report, that is, is the report intended to be primarily evidentiary or primarily a plan for cleanup, is important before testing and reporting is accomplished.

Keep Opinions to Yourself

Atroubling new development has appeared in the conclusion sections of some reports that are being presented to me. Assessors are advising property owners and occupants of what they believe are "safe" levels of spores in an environment. Unfortunately, the assessors' experiences seem to vary wildly based on these reports. I understand that assessors are under increasing pressure from their clients to advise the clients of the potential health risk of a property, particularly in light of the absence of no more than a handful of experienced medical practitioners in the area of mold and human health. Given that the New York City Guidelines recognize the difficulty in creating safe exposure levels, the risk to a mold assessor in delivering erroneous advice in this area is enormous and may, again, undercut the client's ability to recover damages for property that is not "sufficiently" contaminated. Health reporting is best left as references to recognized studies on the effects of mold.

To recap:

1. Do recommend that clients speak with counsel experienced in solving mold problems regarding the work product doctrine.
2. Do make sure that both indoor and exterior conditions are noted in their report as well as their potential impact on the analysis.
3. Do indicate why certain tests were selected and why others may not be necessary.
4. Do not assume that your role is solely as a problem solver; do determine whether your involvement as an expert witness is anticipated.
5. Do not make up thresholds of safe levels of mold exposure.
6. Do not make performance-based recommendations without knowing the client's expectations and his or her counsel's expectations.