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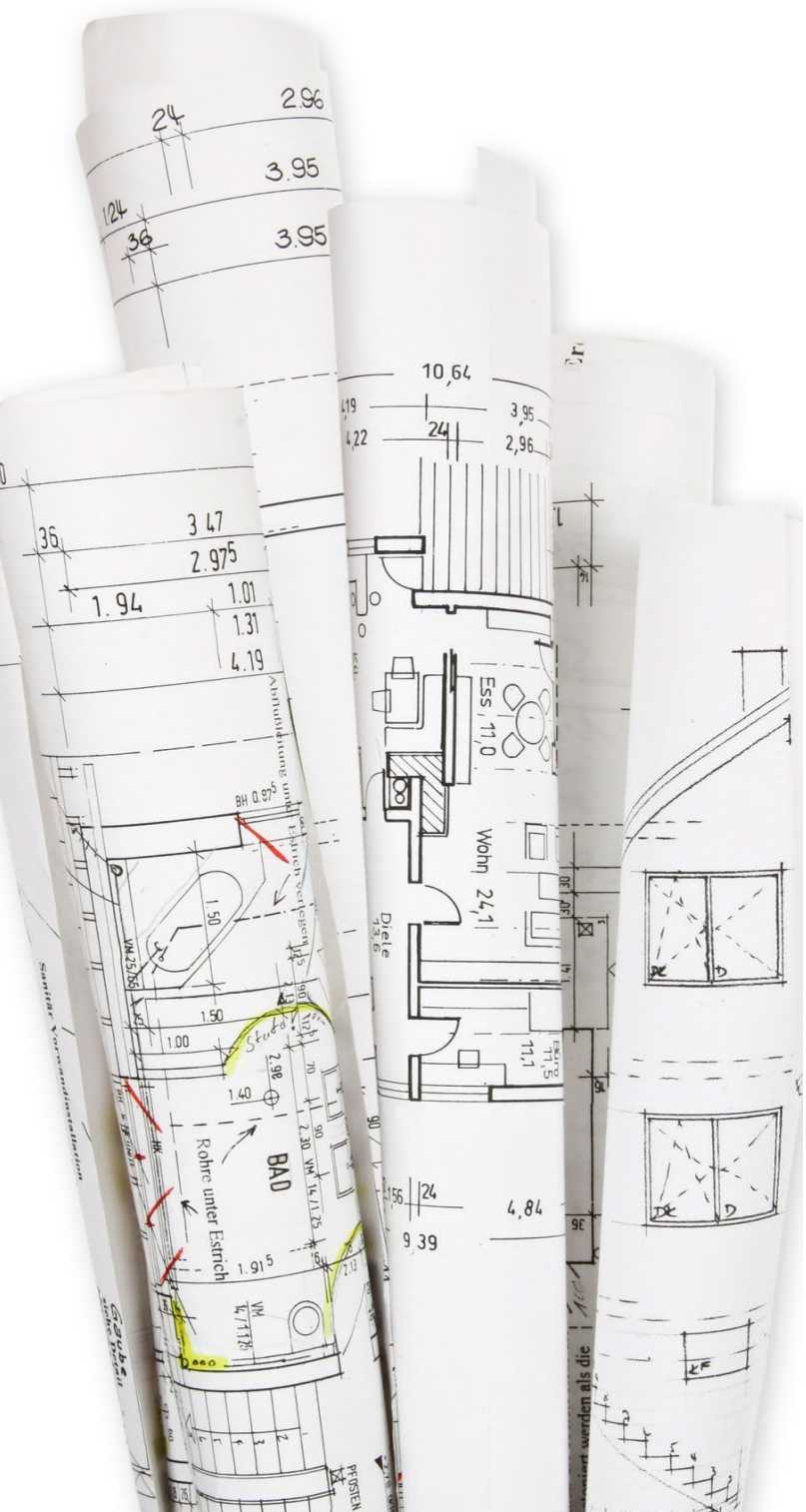

SPOILAGE OF EVIDENCE IN CONSTRUCTION INDUSTRY LITIGATION: A DOCUMENT THAT AN ARCHITECT/ENGINEER WISHED THEY DIDN'T HAVE

By: Eric O. Pempus, FAIA, Esq., NCARB
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In their professional practices, architects and engineers (A/Es) generate a tremendous amount of information in the form of various and numerous types of documents. This information will be in a physical form (paper) and an electronic form (digital files). These documents will include but not limited to drawings, specifications, reports, internal and external memorandums, emails, photographs, letters, etc.

If an A/E is in litigation, the parties in the lawsuit will have engaged legal counsel that have an opportunity to review and copy project documents of opposing parties that may help or harm their case. That opportunity is called the "discovery" phase of litigation. The courts in the United States, through what is called "civil procedure," engage in this open book (files) inquiry/investigation. The intent is not to have any surprises when the case is presented to a jury.

IN THIS ISSUE:

And, if the A/E is already in litigation, or reasonably knows that they will be involved in a lawsuit, they may have a document that indeed may harm their case. The civil procedures of the states require that a party may not destroy (alter or hide) a document that is detrimental to their case, and which may benefit another party in the litigation. This rule applies not only in litigation, but also when a A/E can anticipate a lawsuit. And a judge can certainly impose sever sanctions on a party and their legal counsel if this rule of civil procedure is violated.

SPOILAGE OF DOCUMENT EXAMPLES

The wisdom is not to generate a document in the first place, which you wished that you never created. As an example, an A/E may visit one of their construction project sites. It is routine, that they would take still photographs or videos. Indiscriminately clicking the camera all around the site may generate photos that can come back to incriminate the photographer and their A/E firm. The “One Hundred Foot Rule” states that an architect or engineer should take a photograph of a specific condition at the project site that they want to document, fairly close in distance to show the details involved in the issue. And then step back a hundred feet or so and take a wide view of the site, with no details that they may have missed.

Site Photography
By Eric O. Pempus, FAIA, Esq., NCARB

A Construction Contract Administration “Knowledge Community” white paper, submitted June 6, 2017 to the American of Architects’ and for its “Best Practices.”

3.6.2 EVALUATIONS OF THE WORK

§ 3.6.2. The Architect shall visit the site … to become generally familiar with the progress and quality of the portion of the Work [italics added] completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. — AIA B101 Standard Form of Agreement Between Owner and Architect

As they become “generally familiar with the progress and quality of the Work,” architects customarily, although not required under the standard agreement, use photography (either photos or videos) to document work on the site. You can use this photography to satisfy the contractual requirement to “keep the Owner reasonably informed about the progress and quality of the Work.” The ever-evolving technology of photography is irrelevant to this discussion. We will instead talk about what to photograph and what photographic format to use.

What to Photograph: Appropriate subjects for site photography fall into three categories: (1) deviations from the Contract Documents, (2) specific areas where significant construction progress has been made since the previous visit, and (3) the overall progress of the construction. Each category has its own guidelines.

1. Deviations: You should document deviations, including defective work, with photographs, from as many angles as to make the nature of the deviation clear. Stand close to the defective work so the defects can be readily seen in the photos. If showing scale is important, include in the photo either a scale with visible markings in inches or an object with a commonly known size (say, a pen).

2. Areas Showing Progress: On a typical site visit, you will spend most of your time observing work that has been performed since your previous visit. These areas should be photographed to graphically support your field report descriptions of the work. Frame your photos so only the new work is included.

3. Overall Progress: Indiscriminately snapping numerous shots of the site on each visit may not be the best practice. You'll end up with a lot of photos you will never need, either for your field reports or for your office. However, once these unseen photographs are filed they could be used against you if a dispute arises. For example, if one of these photos shows a defect that you hadn't identified in your field report. The owner and contractor could claim that you were negligent in not identifying the defect, since you had obviously seen it.

Don't include the faces of construction workers or others in your photos unless it's unavoidable. If the photos are used for any reason other than your field report, you may consider blurring people's faces. If you see a condition that you believe is unsafe, don't photograph it. Instead, report the condition immediately to the contractor's superintendent.

Photographic Formats. All you need for site photography is a smart phone or a small pocket camera; you're an architect, not a professional photographer. These tools can give you still and video records, as well as a flash when needed. Time-lapse photography of the site over a long period of time is usually outside the architect's scope.

In Conclusion. Each photo should be short for a specific purpose, usually to visually support your field report narratives. When used with your professional judgment, photographs can be an effective tool in documenting the construction progress and in helping you produce effective field reports.

Disclaimer: The viewpoints expressed in this article are those of the author(s) and are not necessarily approved by, reflective of or edited by other individual, group, or institution. This article is an expression by the author(s) to generate discussion and interest in this topic.

This white paper is also available as a download at https://network.aia.org/constructioncontractadministration/viewdocument/site-photography

Another example: Do not create drafts of documents such as construction project site reports with hand written notes that may incriminate the A/E firm. In the draft of a site visit report, an A/E created language in a draft that ended up underneath his desk in a cardboard box. During the discovery phase of the litigation, all of the attorneys in the litigation obtained all available documents and sifted through all of the project records, and this found this document. The draft site report which was found to be highly prejudicial to the A/E firm in the case. This "smoking gun" should not have been created with the damning editorial comment in the left margin.

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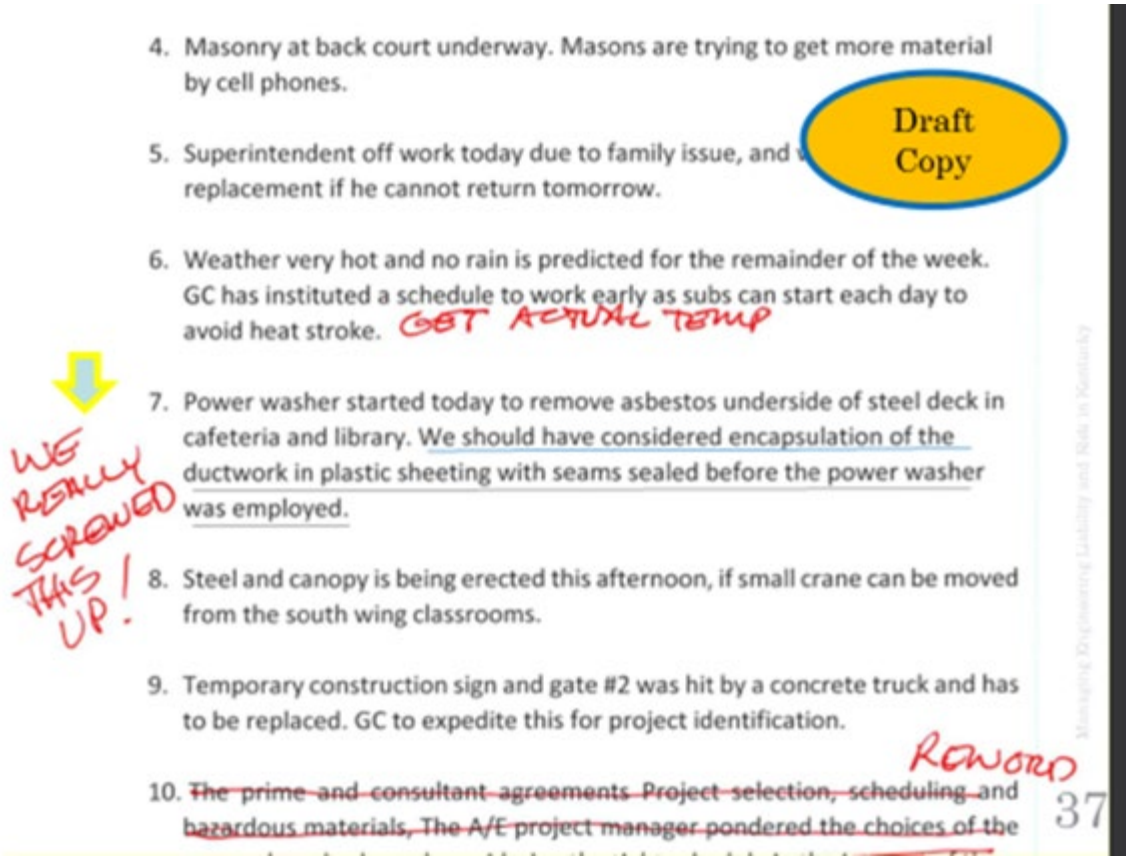

CONCLUSION

An excellent legal analysis in litigation is as follows:

By Michael W. Mitchell and Edward Roche, Smith Anderson
https://www.smithlaw.com/

Lessons Learned: Destroying Relevant Evidence Can Be Catastrophic in Litigation
The Fourth Circuit upholds severe sanctions against a party who fails to preserve evidence in litigation.

A recent decision of the U.S. Court of Appeals for the Fourth Circuit emphasizes the importance of preserving electronically stored information and complying with discovery requests in litigation. In QueTel Corporation v. Abbas, the plaintiff fought to hold the defendants responsible for evading their evidence preservation obligations. The Fourth Circuit showed its willingness to uphold harsh sanctions for failing to preserve evidence.

Background on 'Spoliation' of Evidence

A party's duty to preserve evidence often begins even before litigation, whenever the party knew or should have reasonably known that the information may be relevant to anticipated litigation. Upon anticipating litigation, parties must institute a "litigation hold," suspending routine document retention and destruction policies and ensuring that its individual employees, IT department, and data storage vendors preserve all potentially relevant documents.
The failure to preserve potentially relevant evidence for an ongoing or reasonably foreseeable litigation is known as spoliation. Courts can sanction parties for spoliation, and generally impose sanctions when:

1. The party having control over the evidence had an obligation to preserve it when it was destroyed or altered; and

2. The party destroying the evidence was at least somewhat at fault; and
3. The evidence that was destroyed or altered was relevant to the claims or defenses of the opposing party.

District courts have broad discretion in granting a motion for sanctions for spoliation of evidence. Typically, negligent destruction of evidence is enough to warrant sanctions for spoliation, but courts within the Fourth Circuit are split on this issue. Some require a higher level of culpability, such as gross negligence or willfulness.

Sanctions for spoliation may include the following:

- Imposition of monetary sanctions, sometimes including payment of the opposing party's expenses and attorney fees;
- Limitations on the amount of damages recoverable based on lost evidence;
- Instructions to the jury to draw an adverse inference against the party responsible for losing the evidence;
- Striking pleadings in whole or in part;
- Precluding a party from introducing other evidence;
- Preventing the culpable party from proceeding with certain claims or defenses; or
- Dismissing the case or awarding default judgment against the spoliator.

In deciding which sanctions to impose, courts analyze the culpability of the party accused of spoliation and the degree of prejudice the spoliation caused the opposing party when deciding which sanctions to apply. More egregious culpability or stronger prejudice will result in harsher sanctions. Spoliation arising out of ordinary negligence or that causes little prejudice will generally result in lighter sanctions. Ultimately, courts use these sanctions to deter spoliation of evidence and preserve the integrity of the judicial process.

'QueTel Corporation v. Abbas'

QueTel Corporation v. Abbas arose out of a copyright dispute, where the plaintiff alleged that the defendants misappropriated its intellectual property when developing a competing software product. The plaintiff believed Abbas, the plaintiff's former employee, misappropriated their copyrighted source code and used it to develop a nearly identical, competing product under his own company.

The plaintiff sent a cease and desist letter to the defendants—Abbas, Mansour (his co-founder and spouse), and Finalcover, LLC (the business co-owned by Abbas and Mansour)—stating the defendants' responsibility to preserve all potentially relevant evidence including documents, electronic devices, computer files, and emails.

On three separate occasions after receiving plaintiff's preservation letter, the defendants failed to preserve or intentionally destroyed relevant evidence. Four months after receiving the letter, Abbas purchased a new computer and disposed of the computer he had used to create his product by wiping its data and disposing of it in a commercial trash can. Later, the plaintiff filed a motion to compel documents including previous versions of the defendants' source code, forensic images of all computers used to create the software, and their source code control system (a software program that tracks changes in code over the course of a software development project that is commonly used by developers).

The defendants lied, stating they had not used a source code control system to develop the software, and failed to disclose that the computer had been destroyed. However, during development of the software, Abbas had accidentally sent a screenshot of his work to a QueTel employee, proving his use of a source code control system and displaying code that looked "substantially the same" as the plaintiff's code. The defendants only admitted the destruction of the computer at a later deposition. Forensic imaging of remaining devices and further depositions revealed that the defendants deleted "thousands" of likely relevant files just days before the forensic imaging took place.

The parties could not replace or restore the information lost through additional discovery. The loss of the evidence compromised the plaintiff's ability to prove essential elements of its claims.

The district court found that the defendants destroyed material evidence intentionally and in bad faith. In doing so, the defendant eliminated the most probative evidence and "effectively deprived the Plaintiff of its ability to pursue its claims of copyright infringement and misappropriation of trade secrets." The district court ultimately entered a default judgment against the defendants as a sanction for their spoliation of evidence.

The Fourth Circuit upheld the decision to impose a default judgment as a sanction. The Fourth Circuit based its decision in large part on the district court's finding that the defendants destroyed the evidence in bad faith and that "no less drastic sanction would adequately address the prejudice suffered by QueTel or adequately deter the type of spoliation that occurred in this case."

Takeaways

QueTel confirms the Fourth Circuit's unequivocal disapproval of bad faith during discovery, and underscores the court's keen interest in deterring similar behavior in the future.

In this case, the district court found that the defendants destroyed evidence with the intent of depriving the plaintiff of relevant evidence in the litigation. Such bad faith likely doomed the defendants. But courts may impose severe sanctions even for accidental or negligent destruction of relevant evidence if it is irreplaceable and its loss is prejudicial to the opposing party. Where ordinary negligence has caused the spoliation, courts in the Fourth Circuit have generally resorted to monetary sanctions, including costs and attorney fees, or limited the amount of damages recoverable by the spoliator. Even where the responsible party still has the opportunity to prevail in the litigation, these sanctions can still be extremely costly.

Businesses must take reasonable steps to preserve relevant evidence once they are on notice of a potential claim. This may involve the preservation of a broad range of potentially relevant documents. Businesses also must ensure that all individuals who may have custody of relevant documents are aware of their preservation responsibilities. And IT and data professionals must take reasonable steps to preserve the company's electronically stored information.

Special thanks to contributing author, Dani Dobosz.

And special thanks for Smith Anderson to allow Eric Pempus to include this article in this DesignPro Insurance Group November, 2022 Building Blocks risk management article.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 17 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. Prior to risk management, he has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 35 years. As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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AIA Colorado

"Avoiding Risky Business: How's to Control Claims & Understand the Insurance Process"
Co-Presenters: Brad Bush, CPCU, AU and Eric. O. Pempus, FAIA, Esq., NCARB
Live Program, Keystone Conference Center, Dillon, Colorado
12:30 – 1:30 pm, MST
November 4, 2022

Half Moon Education Inc.

"Federal Construction Project Administration and Management" Handling Ethical Issues in Government Construction Law
Webinar 4:00 – 5:00 pm, CDT
December 16, 2022, National Program

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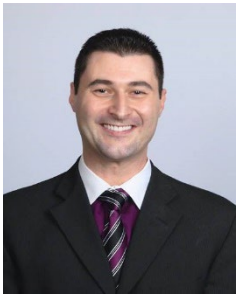

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