Spoliation Issues When Representing the Design Professional

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Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.[1] In the representation of architects and engineers (A/E), it has become increasingly important to be aware of the need to preserve all types of evidence that may eventually be required in order to properly defend a claim or potential claim. Failure to preserve critical project records or materials by the A/E professional can lead to the imposition of spoliation sanctions putting the client at a severe disadvantage in the litigation.

All types of evidence should be preserved in order to avoid possible spoliation sanctions. Beyond the obvious need for the client to preserve its entire project file, the client may come into possession of other materials that could become critical pieces of evidence in any litigation that arises such as boring samples; allegedly defective sprinkler heads, pipe fittings or valves; defective construction materials removed from a project site; or photographs taken at a site visit which depicted a temporary condition that no longer exists.

Preserving Evidence

When counsel is first retained to represent an A/E professional, a top priority should be ensuring that the client preserves its entire project file, both hard copies and electronically stored information (ESI). One New York court has determined that the duty to preserve evidence attaches when litigation was reasonably anticipated.[2] Specifically, courts have held that the obligation to preserve evidence arises once the party has notice that the evidence is relevant to litigation but also where a party should have known that the evidence may be relevant to future litigation.[3] The retention of counsel may be sufficient to place on a party a notice of the duty to preserve all relevant evidence.[4]

So how does the practitioner protect both his client and himself from possible spoliation sanctions? When first contacting a client, the lawyer should advise the client of the need to maintain all project records as they exist at the time of the communication, including hard copies and ESI. It is further advisable to recommend to the client that all ESI be backed up on DVDs with copies provided to his attorney. This is especially important when dealing with smaller A/E firms that might not have a system backup and where key project information, including plans, specifications and project e-mails may be stored on a single computer subject to crashing or computer viruses which could render the ESI unavailable for litigation purposes. While it may be difficult to prove that the inadvertent loss of ESI constitutes spoliation of evidence, the fact that it may have been reasonably foreseeable that the electronic data could have been used as evidence in a potential litigation may be sufficient to establish that the evidence was spoliated.[5]

Is there any obligation to retain possession of a "crashed" computer hard drive that contained project files? At least one court has recently

held that a party had a duty to preserve the computer after its alleged crash, and to make reasonable efforts to recover the data it contained.[6] As a result of its failure to do so, the party that discarded the computer was subjected to sanctions for spoliation of evidence. Other courts have also routinely ordered forensic examinations of failed hard drives during discovery to determine if data could be retrieved.[7]

The design professional client should also be reminded of the need to preserve all relevant potential evidence in the retention letter, which should contain “litigation hold” language. The letter should emphasize the need to preserve all relevant materials and the possible implications of the failure to do so.

In certain circumstances, the attorney may want to take possession of tangible evidence that comes into his client’s possession in order to ensure its preservation. While this imposes an additional obligation on the attorney to ensure the preservation of the evidence, it hopefully ensures that the evidence will be available when needed. It also gives the attorney greater control over who has access to the evidence (i.e., party experts) and ensures that no destructive testing is performed without the attorney’s knowledge. If any destructive testing is performed while the evidence is in the attorney’s possession, the attorney can provide notice to all parties of the intended testing and document the testing via videotaping and photography to protect against a spoliation of evidence claim later on.

In many circumstances, the critical evidence needed to defend a design professional client may be in the possession of others, such as the project owner, contractor or manufacturer/distributor of the product or material. Upon counsel’s retention, it is important to place the possessor of the evidence on notice of the need to preserve the evidence in its original condition. This becomes especially critical if the possessor has not yet retained counsel and therefore may be unaware of the potential consequences of failing to preserve the evidence.

A letter should be sent to the party or its counsel requesting that the evidence be preserved. If the claim is already in litigation, counsel for the party in possession of the evidence should be served with a notice to preserve the evidence and, where appropriate, a demand to inspect the evidence. Both the notice to preserve and the demand to inspect place the opposing party and its counsel on notice of the need to protect the critical evidence and subjects them to potential spoliation sanctions should the evidence disappear or be altered before it can be inspected by the client and expert.

If the case is already in litigation, efforts should also be made to have the court issue an order directing that the evidence be preserved or made available for inspection. If the evidence later becomes unavailable for some reason, a motion for spoliation sanctions will be strengthened by the fact that the spoliator violated a court order by allowing the evidence to disappear.

In other situations, the potential critical evidence may consist of conditions at the site itself, which may only exist for a limited time. These circumstances can include the following: where certain work at the site may be removed and new materials installed; where a piece of equipment at the site, such as the scaffolding, may have been involved in an accident but may be removed from the site; or where an adjacent building has sustained property damage during excavation or underpinning and the owner wants to commence repairs before the existing conditions are documented.

In these circumstances, where the design professional is likely to be made a party to the claim, the person in control of the premises should be contacted in writing with a request that access be provided to the site in order to

document existing conditions and before any changes or repairs are made. By placing the party and/or its counsel on notice, spoliation sanctions may be available if it can be established that the client has been placed at a distinct disadvantage by his or her inability to inspect the conditions that existed at the time that the claim arose.

Assuming that critical evidence has disappeared, the possible sanctions range from dismissal/striking of the pleadings to preclusion of trial testimony or a negative inference jury charge. The extent of the spoliation sanction depends upon a number of factors, including the extent of the prejudice to the innocent party, how critical the evidence was to the prosecution/defense of the case and whether the spoliation was the result of intentional or merely negligent conduct.

Court Decisions

In *Aktas v. JMC Development Co.,*[8] the plaintiffs commenced an action against the contractor, architect and engineer alleging design defects and construction errors. The plaintiffs/owners were dissatisfied with how the project was progressing and, after discussions with the contractor's counsel were unproductive, locked the contractor out of the site and notified the defendants of their intention to make a claim. After retaining experts who inspected the site, documented the alleged deficiencies and issued reports, plaintiffs began remedial work at the site with a replacement contractor.

The defendants claimed that they were prejudiced by plaintiffs' spoliation of critical evidence, namely, the defendants' work product. The Northern District of New York held that the plaintiffs were aware that litigation was imminent, as established by their experts documenting the claimed defects, and that plaintiffs had an obligation to preserve the evidence since it was solely within their control. In addition to finding that the plaintiffs had an obligation to preserve the evidence, the court further held that they were grossly negligent in destroying the evidence. The court also rejected the plaintiffs' defense that the defendants' work was properly documented by their experts, photographs and reports which were provided to the defendants.

In finding that the appropriate spoliation sanction was an adverse inference charge at the time of trial that permitted the jury to infer that the missing evidence was favorable to the defendants, the court rejected the defendants' request for the dismissal of the plaintiffs' complaint. The court noted that one of the factors mitigating against the striking of the complaint was the defendants' failure to timely request an inspection of the site after they were locked out but before the remedial work commenced.

In *Genon Mid-Atlantic v. Stone & Webster*,[9] the plaintiff sought a determination that it was not obligated to pay the defendant which was retained to design and build certain air quality control systems for three of the plaintiff's power plants. The defendant Stone & Webster moved for spoliation sanctions arising out of the alleged spoliation of ESI by the third-party consultant retained by the plaintiff Genon to assist it with audits of Stone & Webster's project costs and which was expected to provide expert testimony at the time of trial. The ESI at issue involved missing emails from the third-party consultant which were never produced despite having been subpoenaed.

In determining whether spoliation sanctions should be assessed, the Southern District of New York held Genon had a duty to ensure that the emails were adequately preserved by its consultant and that it acted with a degree of culpability sufficient to permit the imposition of sanctions. However, in declining to impose spoliation sanctions, the court found that Stone & Webster had not established that relevant evidence was spoliated or that it had been prejudiced as a result of the missing emails.

The Genon case is nonetheless relevant because it highlights the potential for a party to be sanctioned for spoliation of evidence by its consultant or expert. In other cases, the party has not been as fortunate. For example, in *Behrbom v. Healthco International*,[10] the Second Department held that the trial court properly dismissed plaintiffs' complaint against one defendant due to the negligent loss of evidence by the plaintiffs' expert. The court held that the plaintiffs were aware that the evidence was crucial and that the defendant would want to inspect it and, further, that plaintiffs' expert report and the videotape of the tests were not an adequate substitute for an inspection of the evidence itself. Accordingly, as a matter of elementary fairness, the court held that the complaint against the defendant was properly dismissed.

In summary, courts are increasingly willing to sanction the party responsible for destroying evidence in the interests of fundamental fairness to the innocent party which has been prejudiced by the spoliation. In order to avoid possible spoliation sanctions, steps should be taken to preserve all relevant evidence as soon as counsel is retained. On the other hand, where the A/E professional has been harmed by the spoliation of evidence, a motion for spoliation sanctions can be an effective tool to level the playing field.

Endnotes:

1. *West v. Goodyear Tire & Rubber Co*., 167 F.3d 776 (2d Cir. 1999).
2. *Zubulake v. UBS Warburg*, UBS Warburg, and UBS AG, 220 F.R.D. 212 (S.D.N.Y. 2003).
3. *Kronisch v. United States of America*, 150 F.3d 112 (2d Cir. 1998).
4. See, e.g., *Innis Arden Golf Club v. Pitney Bowes*, 257 F.R.D. 334 (Conn. 2009).
5. *Osberg v. Foot Locker*, 2014 WL 3767033 (S.D.N.Y. 2014).
6. *Dorchester Financial Holdings Corp. v. Banco BRJ*, 2014 WL 7051380 (S.D.N.Y. 2014).
7. See, e.g., *Treppel v. Biovail Corp*., 249 F.R.D. 111 (S.D.N.Y. 2008).
8. *Aktas v. JMC Development Co*., 877 F.Supp.2d 1 (N.D.N.Y. 2012).
9. *Genon Mid-Atlantic v. Stone & Webster*, 282 F.R.D. 346 (S.D.N.Y. 2012).
10. *Behrbom v. Healthco International*, 285 A.D.2d 573, 728 N.Y.S.2d 96 (2d Dept. 2001).

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