



Preserving Evidence On the Jobsite

Many issues can stem from a construction defect, such as a flood, fire, structural failure or hazardous material spill. Delaying repair may impede the critical path of work, result in delays to other contractors and cause the contractor to default on its contract. The contractor may not be able to immediately determine who is at fault for the defect. The subcontractor responsible may already be offsite, or simply can't be trusted to fix the problem.

Before hiring a new subcontractor to fix the problem, consult an attorney about "spoliation"—the destruction of evidence needed to assign blame for the construction defect and the measure of damages.

When litigation due to a construction failure is reasonably foreseen, the party with control over the failed element must notify all parties that are potentially responsible for the defect, provide a reasonable opportunity to photograph and inspect the failed elements, and obtain an expert inspection before repair. Strict, prompt compliance with a duty to notify prior to repair can be difficult, if not impossible, because of the number of contracting parties involved in a project.

No easy way exists to resolve tension between the need to repair immediately and the need to preserve evidence of fault. When critical evidence is destroyed, the courts will balance the need to provide access to tangible evidence on the jobsite with the practical problems and difficulties in fulfilling the duty to preserve evidence, even if acting in good faith. The court must determine if spoliation has occurred, as well as the sanctions and remedies that will follow.

Developing law of spoliation restores the parties to a level playing field, as if the destruction of evidence had not occurred; punishes the intentional or reckless spoliator; and deters the spoliator and others from future destruction of evidence.

Legal remedies include:

- a permissible or conclusive inference against the spoliator, or taking certain facts as conclusively established;
 - preclusion of evidence, such as an expert report when the adverse party does not have an opportunity to inspect the defective work;
 - dismissal or default; and
 - assessment of damages caused by the destruction of evidence, including additional litigation costs and attorneys' fees.
- The court may consider the following when determining whether to impose a sanction for spoliation.
- **Fault.** Why didn't the foreman consider evidence preservation before making repairs? Was the evidence destroyed fraudulently, with intent to prevent a fair trial? Was it necessary due to an imminent catastrophe or a threat to life?
 - **Notice.** Did the owner make a good faith attempt to allow all potentially responsible parties to inspect and photograph the defect in the time allowed?
 - **Harm.** What harm did the spoliation cause? Could other documents replace the lost evidence? Do sufficient photographs exist that allow for a competent expert report without an actual pre-repair inspection? How critical to the issues in dispute is the missing evidence? In construction cases, numerous parties are usually onsite with voluminous records, such as specifications, sketches, daily jobsite worksheets and photographs. The material's availability

may reduce the prejudice against the adverse party.

- **Contributory fault.** Is the non-spoliator partly at fault for failing to obtain the evidence? Did it quickly respond to an invitation to inspect the premises prior to the repair, or issue a timely "litigation hold" notice to the spoliator?
- **Lesser sanction.** Absent fraud, the least powerful remedy necessary to level the playing field in litigation should be used.
- **Public policy.** How severe was the offense to the court system, as well as the economic management of court dockets?
- **Identity.** Plaintiffs face more severe sanctions than defendants, who are not in court voluntarily.
- **Third party.** Depending on the state, an owner may need to preserve evidence it suspects may be relevant to a claim between two other contractors.
- **Conflict of laws.** Which state's law of spoliation applies? Spoliation has been viewed as both substantive and procedural, and as sounding in both contract and tort.

On the jobsite, safety comes first. Make all repairs as soon as possible. Everyone involved should be immediately notified of a planned repair. A notification plan with email addresses, fax numbers and template letters should be prepared in advance. It's wise to err on the side of good faith notification. If litigation results, enormous fact-sensitive flexibility exists in determining whether a duty to preserve was owed, whether it was breached and which remedy to apply.

William H. Tobolsky is founder of Tobolsky Law, Cherry Hill, N.J. For more information, visit www.tobolskylaw.com.

